Montana Code Annotated

ANNOTATIONS

2024

Property • Mortgages, Pledges & Liens
Estates, Trusts & Fiduciary Relationships • Environmental Protection

VOLUME 12

2024
ANNOTATIONS
to the
MONTANA CODE ANNOTATED

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PREFACE TO VOLUME 12
(Annotations — September 2024)

Annotations to this volume include:

Case notes of applicable court decisions through:
- public domain citation 2023 MT 177
- volume 413 Montana Reports page 356
- volume 535 Pacific Reporter (3rd Series) page 1133

Digests of Montana Attorney General's opinions through:
- volume 59 opinion number 1 of the Report and Official Opinions of Attorney General

Amendment notes listed under compiler's comments are intended to explain only amendments made in the year indicated and may not accurately reflect current statutory language because of subsequent amendment.

The annotations are provided as a convenience to the user and are not intended to be an exhaustive compilation of the law under a given statute or in a given area.

TITLE 70
PROPERTY

CHAPTER 1
PROPERTY IN GENERAL
REAL AND PERSONAL

Part 1
General Provisions

70-1-101. Property defined — ownership.

Case Notes

Determination of Vehicle Ownership — Installment Sales Contract Not Indicative of Ownership for Insurance Purposes: Jordet, an adult, jointly purchased a vehicle for the exclusive use of his minor sister-in-law, who made the downpayment, repaid registration and license fees, made the only installment payment, purchased separate insurance, possessed the only keys, and maintained sole use and control of the vehicle. The District Court decided that the term "owned vehicle" in Jordet's automobile policy included the jointly owned vehicle and that Jordet's signature on the installment sales contract conclusively placed the vehicle under his policy. The Supreme Court reversed, noting that the purchase of property and the insurance of property are distinct transactions and that Jordet's signature on the sales contract did not establish ownership for insurance purposes. Implicit in ownership is the ability to control how, when, where, and by whom the property will be used. Since Jordet never exercised any of the indicia of ownership that would be compatible with his insuring the vehicle, it was not an "owned vehicle" under the terms of his policy. Truck Ins. Exch. v. Nelson, 228 M 233, 743 P2d 572, 44 St. Rep. 1482 (1987).

Tax Sale Provisions Applicable to Improvements on Tax-Exempt Land — Meaning of "Real Property" and "Real Estate": Montana's tax collection laws governing real estate tax sales apply to improvements located on tax-exempt lands. The conveyance by tax deed of appellant's log cabin for nonpayment of taxes was upheld against his assertion that the cabin, situated on Forest Service land, is not an improvement fixed to land for purposes of the Realty Transfer Act and not "real estate" for purposes of the tax sale provisions. The court traced the Legislature's circuitous route to a definition of taxable real property in support of its holding. Brown v. Hart, 213 M 517, 692 P2d 14, 41 St. Rep. 2264 (1984).

Public Office as Property Interest: The incumbent of a public office for a definite term carrying a fixed salary has a "property interest" therein within meaning of this section and 70-1-104 and within constitutional provision that no person shall be deprived of property without due process of law. State ex rel. Ryan v. Norby, 118 M 283, 165 P2d 302 (1946).

Law Review Articles

Montana's Treatment of Community Property Interests, Greenwood, 35 Mont. L. Rev. 126 (1974).

Leasebacks in Commercial and Family Transactions, Thomas, 28 Mont. L. Rev. 25 (1966).

70-1-103. Owner entitled to products and accessions.

Case Notes

Deposit for Benefit of Sureties — Principal Entitled to Accretions or Profits: A deposit in a bank to indemnify sureties on a bond against possible loss being a pledge, title to it, as between the principal and the sureties, is in the former, and the accretions or profits, if any, belong to him and not to the sureties. Leggat v. Palmer, 39 M 302, 102 P 327 (1909).

Owner of Animal Entitled to Offspring: Under this section the jury was properly instructed, in an action of claim and delivery to recover possession of a mare and colt, that if the mare had been given to defendant, verdict should be for her for the possession of the animal "and for any increase or offspring thereof", even though plaintiff was in the actual possession of dam at the time the colt was foaled and when defendant took both animals. Frank v. Symons, 35 M 56, 88 P 561 (1907).

70-1-104. In what things property interests may exist.

Case Notes

Requirement That Defendant Remove Indoor Pets From County as Sentencing Condition for Public Nuisance Affirmed: As a condition of deferred sentencing for maintaining a public nuisance, Zimmerman was ordered to remove his indoor house pets from a dilapidated house he looked after in Dutton. Each day, Zimmerman drove from Great Falls to Dutton to feed his indoor pets; he had been feeding a clowder of feral cats in and around Dutton as well, and neighbors complained about the proliferation of cats in town. The jury returned a guilty verdict, and Zimmerman was forbidden to feed the feral cats. At sentencing, the state recommended a $500 fine and a 2-year deferred sentence, which included a condition that Zimmerman also remove his house pets from the county. Zimmerman appealed this condition on grounds that his house pets were his personal property, that their removal would cause irreparable harm, and that the condition had no nexus to him or to the crime of maintaining a public nuisance. The Supreme Court disagreed. Even though the pets were not the basis of the charge, they were an integral part of Zimmerman's established feeding routine for more than 3 years. By ordering that the indoor pets be removed, the District Court minimized the likelihood that Zimmerman would bring cat food to Dutton, which in turn reduced the likelihood that Zimmerman would return to feeding feral cats, so it was plausible that removal of the indoor pets was reasonably related to protecting the citizens of Dutton from further nuisances. Further, Zimmerman was not deprived of his personal pets, but only required to remove them from the county. The sentencing requirement had a nexus to the crime and was not so unduly punitive that it amounted to an abuse of the sentencing court's discretion, so the District Court was affirmed. St. v. Zimmerman, 2010 MT 44, 355 Mont. 286, 228 P.3d 1109.

Deed Reserving Mineral Rights: Conveyance of surface estate by deed providing that "all coal and mineral rights are reserved by" the grantors effectively reserved in the grantors a mineral estate in the conveyed land. Lien v. Simons, 522 F. Supp. 712, 38 St. Rep 1644 (D.C. Mont. 1981).

Segregation and Conveyance of Mineral Interests: The title to mineral interests in land, including oil, gas, and coal interests, may be segregated in whole or in part from the rest of the fee simple title, and there is little doubt that such interests may be separately conveyed. Lien v. Simons, 522 F. Supp. 712, 38 St. Rep. 1644 (D.C. Mont. 1981).

Public Office as a Property Interest: The incumbent of a public office for a definite term carrying a fixed salary has a "property interest" therein within meaning of this section and 70-1-101 and within constitutional provision that no person shall be deprived of property without due process of law. State ex rel. Ryan v. Norby, 118 M 283, 165 P2d 302 (1946).

70-1-105. Real or personal.

Case Notes

Tax Sale Provisions Applicable to Improvements on Tax-Exempt Land — Meaning of "Real Property" and "Real Estate": Montana's tax collection laws governing real estate tax sales apply to improvements located on tax-exempt lands. The conveyance by tax deed of appellant's log cabin for nonpayment of taxes was upheld against his assertion that the cabin, situated on Forest Service land, is not an improvement fixed to land for purposes of the Realty Transfer Act and not "real estate" for purposes of the tax sale provisions. The court traced the Legislature's circuitous route to a definition of taxable real property in support of its holding. Brown v. Hart, 213 M 517, 692 P2d 14, 41 St. Rep. 2264 (1984).

Crops — Personal Property: Crops of wheat and oats are emblements and as such are treated as chattels personal, subject to sale or mortgage and levy of attachment or execution, even while still annexed to the soil. Power Mercantile Co. v. Moore Mercantile Co., 55 M 401, 177 P 406 (1918).

Growing Timber — Real Property: Growing timber is realty under Montana law. R. M. Cobban Realty Co. v. Donlan, 51 M 58, 149 P 484 (1915).

Law Review Articles

Montana's Real Property Forfeiture Statute: Will It Pass Constitutional Muster?, Nevin, 54 Mont. L. Rev. 69 (1993).

70-1-106. Real property defined.

Compiler's Comments

2005 Amendment: Chapter 450 in (2) at end after "affixed to land" inserted reference to manufactured home declared to be improvement. Amendment effective October 1, 2005.

Case Notes

Proper Deposit of Leasehold Interest Entitling Leaseholder to Notice and Right to Redeem Property Tax Lien: Section 15-18-212 requires that the purchaser or assignee of a tax sale certificate notify all persons interested in the property, including a person with properly recorded interest in the property, that a tax deed will be issued to the purchaser unless the tax lien is redeemed prior to the expiration date of the redemption period. Under 70-21-209, an acknowledged or certified instrument is considered recorded when it is deposited with the appropriate County Clerk and Recorder. In this case, an instrument reflecting plaintiffs' interest as assignee of a vendor's interest in the contract for sale of a cabin and leasehold, which constituted real property, was properly recorded at the Lewis and Clark County Clerk and Recorder's office, so plaintiffs were entitled as an interested party to notice by certified mail pursuant to 15-18-212; however, no notice was given. Plaintiffs' right to redeem the property tax lien continued indefinitely until proper notice was given; thus, a tax deed subsequently issued by the county was void for failure to comply with the notice provisions of 15-18-212. Ditto v. Kipp, 2000 MT 162, 300 M 278, 3 P3d 647, 57 St. Rep. 679 (2000). See also Kneedler v. League Wide, Inc., 1999 MT 80, 294 M 101, 979 P2d 163 (1999).

School Trust Land Water Rights Owned by State: In a case involving a dispute over ownership of water rights on state school trust lands, the Supreme Court ruled that title to the surface and ground water rights on school trust lands vests in the state and that the lessee, in making appropriations on and for school trust sections, is acting on behalf of the state. It is only through state action that the lessee is on the land, and Montana law expressly provides that the lessee must be reimbursed for all capital expenditures made in putting the water to beneficial use. The state is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land without receiving full compensation for it or from giving up control over the water rights. Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985). However, see Advocates for School Trust Lands v. St., 2022 MT 46, 408 Mont. 39, 505 P.3d 825, holding that 85-2-441, which presumes against a state a ground water right from private property, was not facially unconstitutional.

Tax Sale Provisions Applicable to Improvements on Tax-Exempt Land — Meaning of "Real Property" and "Real Estate": Montana's tax collection laws governing real estate tax sales apply to improvements located on tax-exempt lands. The conveyance by tax deed of appellant's log cabin for nonpayment of taxes was upheld against his assertion that the cabin, situated on Forest Service land, is not an improvement fixed to land for purposes of the Realty Transfer Act and not "real estate" for purposes of the tax sale provisions. The court traced the Legislature's circuitous route to a definition of taxable real property in support of its holding. Brown v. Hart, 213 M 517, 692 P2d 14, 41 St. Rep. 2264 (1984).

Status of Property for Taxation Purposes Not Relevant to Determination of Its Status Under Property Law: The method by which property is assessed for purposes of taxation has no bearing on whether the structure is real or personal property. Pac. Metal Co. v. NW. Bank of Helena, 205 M 323, 667 P2d 958, 40 St. Rep. 1301 (1983).

Oil and Gas in the Ground — Real Property: So long as petroleum and gas remain in the ground they are part of the realty and as such subject to the owner's control. Willard v. Fed. Sur. Co., 91 M 465, 8 P2d 633 (1932).

Shares of Stock in Mutual Irrigation Company — Personal Property: While shares of stock in a mutual irrigation company, organized for the convenience of its members in the distribution to them of water for use upon their lands in proportion to their respective interest, are personal property for the purpose of transfer, they are appurtenant to the lands held by their owners and, unless reserved, pass with the conveyance of the lands though not mentioned therein. Yellowstone Valley Co. v. Assoc. Mtg. Investors, Inc., 88 M 73, 290 P 255, 70 ALR 1002 (1930).

Sale of Land — Growing Crops Included: Annual crops growing upon land are not part of the land under the statutes of this state, but where the owner of the land sells it with the right of immediate possession in the purchaser and without reserving the crops thereon and the purchaser takes possession before severance, title passes to the crops as well, and this principle is applicable where the land is sold at decretal or execution sale. Kester v. Amon, 81 M 1, 261 P 288 (1927).

Annual Crops — Personal Property: Annual crops are usually treated as chattels personal, subject to sale or mortgage and levy of execution as are other chattels, even while still annexed to the soil, and are not included within the definition of real property. Morton v. Union Cent. Life Ins. Co., 80 M 593, 261 P 278 (1927).

Growing Grass — Real Property: Growing grass is a part of the soil of which it is the natural growth, within the meaning of this section and 70-15-103, and destruction thereof by the herding of livestock thereon constitutes a damage to the owner's real property. Kiehl v. Holliday, 77 M 451, 251 P 527 (1926).

Easements — Real Property:

A right-of-way and the right to a ditch, canal, or other structure in which water is conveyed for irrigation or other lawful purposes are easements over the land occupied by the ditch, canal, etc. An "easement" is an appurtenance to land and constitutes an interest in real property. Mannix v. Powell County, 60 M 510, 199 P 914 (1921). See also Rodda v. Best, 68 M 205, 217 P 669 (1923).

An easement for a right-of-way for cutting and hauling timber is realty under Montana law. R. M. Cobban Realty Co. v. Donlan, 51 M 58, 149 P 484 (1915).

Buildings: In the absence of anything to show an intention to the contrary, things affixed to the realty, such as buildings permanently resting upon foundations embedded in the soil, are part of the realty and pass with it. Hence, ownership of such a structure necessarily followed ownership of the land rightfully decreed to plaintiff. Hauf v. School District, 52 M 395, 158 P 315 (1916).

Growing Timber — Real Property: Growing timber is realty under Montana law. R. M. Cobban Realty Co. v. Donlan, 51 M 58, 149 P 484 (1915).

Bridges — Real Property: Where a person enters upon an existing public highway and voluntarily erects a bridge, intending that it should be a part of the same and belong to the public, it becomes of necessity affixed to the land and is real property. State ex rel. Donlan v. Bd. of Comm'rs, 49 M 517, 143 P 984 (1914), followed in Kelly v. Wallace, 1998 MT 307, 292 M 129, 972 P2d 1117, 55 St. Rep. 1271 (1998).

Mining Machinery — Real Property: Mining machinery, being deemed affixed to the mine, is real property. Britannia Min. Co. v. USF&G Co., 43 M 93, 115 P 46 (1911).

Law Review Articles

Montana's Real Property Forfeiture Statute: Will It Pass Constitutional Muster?, Nevin, 54 Mont. L. Rev. 69 (1993).

Landowner Liability in Montana, Nelson, 47 Mont. L. Rev. 109 (1986).

Nature of the Landowner's Interest in Oil and Gas, Walker, 17 Mont. L. Rev. 22 (1955).

70-1-107. Choice of law as to real property.

Case Notes

Choice of Law — Nonbeneficiary Third Party Cannot Assert Defenses and Counterclaims Arising From Contract: The defendant set up Limegrove Corporation for tax purposes, and he informally ran the day-to-day operations. Limegrove's sole shareholder was a trust for the defendant's children. To secure a property loan for a Montana-based property to be held by Limegrove, the defendant signed a promissory note and a term loan agreement, both subject to New York law, and Limegrove and the plaintiff bank signed a trust indenture security agreement subject to Montana law. Because judicial foreclosures must occur where the property is located, the parties correctly agreed that the subsequent foreclosure action on the property was governed by Montana law, but the parties disagreed on which state governed the defendant's defenses and counterclaims. Because the defendant was not a party to the trust indenture, his defenses and counterclaims could not arise from it, and because New York law did not offend Montana public policy, the District Court did not err in concluding that New York law governed the defendant's defenses and counterclaims. HSBC Bank USA, N.A. v. Anderson, 2017 MT 257, 389 Mont. 106, 406 P.3d 416.

70-1-108. Personal property defined.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 5, Ch. 344, L. 2023. Amendment effective May 2, 2023.

Preamble: The preamble attached to Ch. 344, L. 2023, provided: "WHEREAS, digital asset mining provides positive economic value for individuals and companies throughout the United States; and

WHEREAS, digital asset mining has often faced difficulty with regulations at the state and local level; and

WHEREAS, the State of Montana wants to protect the right of individuals and businesses to mine digital assets and create legal certainty for the digital asset mining industry; and

WHEREAS, digital asset mining has the potential to stabilize the grid and provide revenue for infrastructure upgrades statewide."

Case Notes

Rebuttable Presumption That Prison Escapee Abandoned Personal Property: Hawkins escaped from the state prison. Immediately following the escape, officials packed up Hawkins' personal property, sealed it in boxes with security tape and Hawkins' name on each box, and placed it in the prison storage room. After 2 days, Hawkins was apprehended and returned to prison. He was found guilty of escape, but his property was not ordered destroyed. Over the next 30 days, Hawkins requested the return of his personal property several times. Eventually, Hawkins was escorted to the storage room and allowed to remove his legal papers but was informed that, by policy, when a prisoner escapes, all personal property is considered abandoned, so the remainder of his property was destroyed or sold. Hawkins filed an action for the value of the property, alleging that prison officials destroyed his property without affording him due process, which constituted cruel and unusual punishment and violated a gratuitous bailment that Hawkins had formed. The District Court, concluding that Hawkins had abandoned his property by his escape and that the abandonment constituted a complete defense to any action brought by Hawkins that depended on his ownership of the property, dismissed the action based on failure to state a claim for which relief could be granted. On appeal, the Supreme Court cited Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939), for the proposition that in determining whether one has abandoned property or rights, intention is the first and paramount object of inquiry. If there is no expressed intent to abandon, then intent must be inferred from the acts of the property owner. The presumption or inference of intent to abandon one's property based solely on the acts of the owner is a rebuttable presumption. Here, upon returning to prison and requesting the return of his property, Hawkins effectively rebutted the presumption that he intended to abandon it, and when he reclaimed his property by requesting its return, he regained his status as owner of his personal property against all others. The District Court committed reversible error when it found that Hawkins abandoned the property by escape and dismissed the action based on failure to state a claim for which relief could be granted. Hawkins v. Mahoney, 1999 MT 296, 297 M 98, 990 P2d 776, 56 St. Rep. 1185 (1999), distinguishing Herron v. Whiteside, 782 SW 2d 414 (1989). See also 1 C.J.S. Abandonment § 12 (1985).

Status of Property for Taxation Purposes Not Relevant to Determination of Its Status Under Property Law: The method by which property is assessed for purposes of taxation has no bearing on whether the structure is real or personal property. Pac. Metal Co. v. NW. Bank of Helena, 205 M 323, 667 P2d 958, 40 St. Rep. 1301 (1983).

Retail Liquor License: A retail liquor license is salable and is personal property of value and subject to attachment. Stallinger v. Goss, 121 M 437, 193 P2d 810 (1948).

70-1-109. Choice of law as to personal property.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Law Governing Personal Property Decided by Situs of Property and Domicile of Owner — Tenancy by the Entirety Impermissible Mode of Personal Property Ownership in Montana: A Montana District Court determined that personal property jointly owned by Lurie and her husband as tenancy by the entirety in Missouri was owned by them either as joint tenancy property or as tenancy in common property after the couple moved to Montana. The property was subject to execution to satisfy a judgment against the husband on a validly issued writ. Lurie contended that as tenancy by the entirety property, it was not subject to execution to satisfy a judgment against the husband only, because Missouri law followed the personal property and should be applied in Montana. The Supreme Court concluded that the District Court was correct in determining that the law governing personal property is decided by the situs of the property and the domicile of the owner, so Montana law applied. Further, under Clark v. Clark, 143 M 183, 387 P2d 907 (1963), tenancy by the entirety is not a permissible mode of real property ownership in Montana, and the District Court properly extended the reasoning in Clark with equal force to personal property in Lurie's case. Lurie v. Sheriff, 2000 MT 103, 299 M 283, 999 P2d 342, 57 St. Rep. 414 (2000), distinguishing Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121 (1998).

70-1-110. How property acquired.

Case Notes

Doctrine of Agreed Boundary: The standard of proof necessary to invoke the doctrine of agreed boundary is clear and convincing. Where, as here, the evidence does not show more than mere acquiescence by property owners as to placement of a fence and occupancy, petitioner/owner does not adequately establish that he and the other owner agreed to a boundary line. Therefore, the doctrine that adjacent landowners may move the boundary line of their respective parcels by agreement does not apply. Huggans v. Weer, 189 M 334, 615 P2d 922 (1980), following Townsend v. Konkol, 148 M 1, 416 P2d 532 (1966).

Part 2
General Rights of State Over Property

70-1-202. Property of the state — what included.

Case Notes

Lakeside Property Dispute — Presumption That Grantee Takes Land to Low-Water Mark: In a property dispute relating to a subdivided lakeside parcel, the defendant asserted ownership of all land between the high- and low-water marks on the lake. The Army Corps of Engineers previously declared that the lake was a nonnavigable intrastate body and not subject to the Corps' jurisdiction. The District Court held that the plaintiff owned the land between the high- and low-water marks of the lake bordering her property. On appeal, the Supreme Court held that Montana's public trust easement was not at issue, that a conveyance of riparian property by reference to a specific metes and bounds description along the high-water mark is insufficient alone to overcome the presumption of 70-16-201 that the grantee takes at least to the low-water mark, and that the District Court correctly held that the plaintiff's property included the disputed land between the high- and low-water marks of the lake. Ash v. Merlette, 2017 MT 305, 389 Mont. 486, 407 P.3d 304.

Missouri River Islands Connected to Shore by Accretion — Ownership by State: The ownership of two tracts of land that were discernible Missouri River islands prior to attaching to adjoining lands was properly claimed by the state. Migration of the Missouri was not avulsion, which creates an identifiable piece of land through a sudden change in the river channel, but rather accretion, which is the deposit of sediment on one bank along the waterline due to the gradual and imperceptible change in the river course over a period of time. The property boundary line shifts with the waterline. Dept. of State Lands v. Armstrong, 251 M 235, 824 P2d 255, 49 St. Rep. 10 (1992), distinguishing McCafferty v. Young, 144 M 385, 397 P2d 96 (1964).

Public Recreational Use Rights Statute — Constitutionality: Following Curran and Hildreth decisions, which held that the public trust doctrine provides the public with a constitutional right to use the bed and banks of navigable streams up to the high-water mark despite a landowner's fee title, the Legislature enacted a statute providing public recreational use of streams. Plaintiff filed suit requesting the court to declare the recreational use statute an unconstitutional taking of private property without just compensation. Plaintiff then appealed after the trial court upheld the statute's constitutionality and awarded the state summary judgment. The Supreme Court ruled unconstitutional 23-2-302(2)(d), (2)(e), and (2)(f), which provided the public a right to hunt big game, build duck blinds and boat moorages, and camp overnight so long as not within sight of an occupied dwelling or within 500 yards of an occupied dwelling, whichever is less. The court further held as unconstitutional 23-2-311(3)(e), which required a landowner to pay costs of constructing a portage route around artificial barriers. The public has a right of use of the bed and banks up to the high-water mark but only such use as is necessary to utilization of the water itself. Any use of the bed and banks must be of minimal impact. Galt v. St., 225 M 142, 731 P2d 912, 44 St. Rep. 103 (1987), followed in Bitterroot River Protective Assoc., Inc. v. Bitterroot Conserv. Dist., 2008 MT 377, 346 M 507, 198 P3d 219 (2008). See also Pub. Lands Access Ass'n, Inc. v. Madison County Bd. of Comm'rs, 2014 MT 10, 373 Mont. 277, 321 P.3d 38.

Public Right to Use Beaverhead River for Recreational Purposes: Following the decision in Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984), the Supreme Court held that: (1) the Beaverhead River is navigable for recreational purposes and the public has a right to use its bed and banks up to the ordinary high-water mark with limited right to portage across private property in order to bypass barriers in the water; (2) determination of navigability for title is not necessary; (3) the public does not have the right to trespass over private property in order to reach the state-owned waters; and (4) plaintiff's action did not constitute inverse condemnation because public use of waters, rather than title, was determined. Mont. Coalition for Stream Access, Inc. v. Hildreth, 211 M 29, 684 P2d 1088, 41 St. Rep. 1192 (1984).

Determining Public's Right to Use Dearborn River — Indispensable Parties: Stream access coalition, the Department of State Lands (now Department of Natural Resources and Conservation), and the Department of Fish, Wildlife, and Parks sued landowner along the Dearborn River, seeking a determination of the public's right to use the river. The District Court did not err for failure to dismiss the plaintiffs' claims for failure to join indispensable parties. When litigation seeks vindication of a public right, those who may be adversely affected by a decision do not thereby become indispensable parties. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Determination of Public's Right to Use Dearborn River — Standing of Coalition of Citizens: In action for determination of the public's right to use the Dearborn River, whether the Montana Coalition for Stream Access, Inc., had standing to bring suit was immaterial because the Department of State Lands (now Department of Natural Resources and Conservation) and the Department of Fish, Wildlife, and Parks were also plaintiffs. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Navigability for Title Purposes — Federal Test — Dearborn River Navigable: Federal law controlled the issue of whether the Dearborn River was, at the time Montana became a state, navigable for the purpose of determining title to its bed. Under federal law, rivers are navigable in law if they are navigable in fact, and they are navigable in fact if they were used or capable of being used, in their ordinary condition, as highways for commerce over which trade and travel were or could be conducted in the customary modes of trade and travel on the water at the time of the state's admission to the Union. Navigability in fact can be determined by using the log-floating test. That test was satisfied by evidence that in 1887, 2 years before Montana became a state, the Dearborn was used to float about 100,000 railroad ties and that in 1888 or 1889, one or two log drives a year were floated down the river, one of them containing 700,000 board feet. Title to the riverbed was thus in the federal government when Montana became a state in 1889 and was transferred to the State upon its admission to the Union. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Navigability for Title Purposes — Summary Judgment — Dearborn River: The District Court properly granted the coalition for stream access and two state departments summary judgment on the issue of navigability of the Dearborn River in 1889 for title purposes. The affidavits and depositions of plaintiffs' two competent historians were admissible because the historians were qualified experts who provided evidence of the history of the river, their affidavits and depositions disclosed circumstantial guaranties of trustworthiness, and the facts and data they relied on were of a type reasonably relied on by experts in their field; the facts and data did not themselves have to be admissible. The affidavits of defendant landowner's witnesses were worthless, were not admissible, and did not create any genuine issue of material fact concerning the navigability of the river at the time Montana became a state in 1889. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Public Recreational Use of Dearborn River — No Inverse Condemnation: Landowner along Dearborn River was sued by parties seeking a determination of the public's right to use the river for recreational uses. Landowner counterclaimed for inverse condemnation, basing the counterclaim on his claim to ownership of the riverbed. The Supreme Court held that the question of title to the bed was irrelevant to determining navigability for use by the public; that landowner had no claim to the waters; that since there was no claim to the waters, nothing was taken and thus there was no ground for an inverse condemnation claim; and that, consequently, the District Court did not err in dismissing the counterclaim. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Public Recreational Use Rights on Dearborn River — Limits: Navigability for public use is governed by state law and is separate from the question of navigability under federal law for title purposes. The question is whether waters owned by the State under Art. IX, sec. 3(3), Mont. Const., are susceptible to recreational use by the public. The capability of use of the waters for recreational purposes determines the availability of the waters for recreational use by the public. Whether or not a private party owns the bed beneath the waters is irrelevant. The constitution and the Public Trust Doctrine bar a private party from interfering with the public's right to use of the surface of the waters owned by the State, and any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes. The public's recreational use right extends to the point of the high-water marks. The public does not have the right to cross over private property to reach waters upon which they have a recreational use right, though they may portage around barriers in the water in the least intrusive way possible, avoiding damage to any private property holder's rights. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Title to and Public Recreation on Dearborn River — Ex Post Facto, Contract Clause, and Irrevocable Privileged Considerations: The Supreme Court held that the State, not the landowner along the Dearborn River, held title to the bed of the river under the federal test of navigability (at the time Montana became a state) for purposes of determining title to the riverbed. The court also held that landowner had no right to exclude the public from recreational use of the waters of the Dearborn. Because of these holdings, landowner's questions relating to ex post facto laws, violation of the contract clause of the constitution, and irrevocable rights and privileges were not germane to the case. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Title to and Public Use of Dearborn River — Federal Commerce Clause Navigability Immaterial: In action for determination of the public's right to use the Dearborn River, whether Montana has adopted the log-floating test of commercial navigability and whether the Dearborn is navigable under the federal commercial use test were immaterial because the question was one of recreational use or navigability, not commercial navigability. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Title to and Public Use of Dearborn River — Subject Matter Jurisdiction Found: Landowner along the Dearborn River claimed the District Court lacked subject matter jurisdiction over action for determination of the public's right to use the river, basing his claim on the presumption that he held title to the riverbed and that the State had no power to strip him of that title under the guise of determining navigability of the waters over the riverbed. The claim lacked merit because the State holds title to the riverbed and the water flowing over it, so that there was no question of the District Court's subject matter jurisdiction. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Severed Mineral Estate — Subject to Accretion and Erosion: The mineral interests in land bordering the Yellowstone River on the east were severed from the surface estate in 1938. The original survey of the area was done in 1884. Since the time of the original survey, the Yellowstone River has gradually moved eastward. In a quiet title action, a question of first impression was presented, viz., whether a severed mineral estate bordering a navigable waterway is subject to the doctrines of accretion and erosion. On appeal, the Supreme Court upheld the District Court's reliance on Nilson v. Tenneco Oil Co., 614 P2d 36 (Okla. 1980). The court held that a severed mineral estate is subject to the doctrines of accretion and erosion, and that prior exception by a riparian owner on one side of a navigable waterway will not work to divest the state (owner of the land underlying the waterway) or another riparian owner of ownership in lands underlying navigable waterways or minerals situated in accreted lands. Jackson v. Burlington N., Inc., 201 M 123, 652 P2d 223, 40 St. Rep. 1214 (1983).

Abandoned Bed of Missouri River — Property of State: When the Missouri River changed its channel, the abandoned bed occupied by the river at time of the avulsion, extending to the ordinary low watermark, belonged to the state, since under this section the state became the owner of the riverbed, subject to federal navigation rights. Since the Missouri is a navigable stream, the riparian owner, under 70-16-201, owns land to the low watermark. U.S. v. Eldredge, 33 F. Supp. 337 (D.C. Mont. 1940).

Owner of Land Below Water of a Navigable Stream: The state owns all land below the water of a navigable stream, and therefore the waters above the bed or channel of such a stream at low watermark are public waters in which the people have a right to fish, except as restrained by general law, and to shoot wildfowl upon the surface of the stream or flying thereover so long as they do not trespass upon the land of an adjacent owner. Herrin v. Sutherland, 74 M 587, 241 P 328, 42 ALR 937 (1925).

Attorney General's Opinions

Access to Rivers and Streams Via County Road Right-of-Way and Bridges: Given that the public has the right to use public highways in any manner and for any purpose consistent with or reasonably incidental to public travel, this right includes the use of public rights-of-way created by county roads to gain access to rivers and streams. Using a county road right-of-way as an access point to a river or stream right-of-way is consistent with and reasonably incidental to the public's right to travel on county roads. Further, a bridge and its abutments, as part of a public highway, offer the same access to rivers and streams for recreational use as the highway to which they are attached. However, the public's right of access is not unlimited and is subject to the following limitations: (1) the recreating public must stay within the county road and bridge right-of-way, which is assumed to be 60 feet unless otherwise stated by petition or dedication; (2) access may be limited by the reasonable exercise of a governing body's police power to control the use of roads for purposes such as safety and parking; and (3) use of a public highway may be limited by the manner in which it was created, such as a road created by prescriptive easement, which is limited both in size and usage to the original use during the prescriptive period and may include access for hunting, fishing, and recreation. 48 A.G. Op. 13 (2000).

70-1-204. Acquisition by taxation.

Case Notes

Implied Power as to Tax-Acquired Land: County which acquired land by tax deed had implied power to reserve right to take sand, gravel, rock, and earth for highway purposes in deed to its grantee. Helena Gun Club v. Lewis & Clark County, 141 M 490, 379 P2d 436 (1963).

70-1-205. Eminent domain.

Case Notes

Public Recreational Use of Dearborn River — No Inverse Condemnation: Landowner along Dearborn River was sued by parties seeking a determination of the public's right to use the river for recreational uses. Landowner counterclaimed for inverse condemnation, basing the counterclaim on his claim to ownership of the riverbed. The Supreme Court held that the question of title to the bed was irrelevant to determining navigability for use by the public; that landowner had no claim to the waters; that since there was no claim to the waters, nothing was taken and thus there was no ground for an inverse condemnation claim; and that, consequently, the District Court did not err in dismissing the counterclaim. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Part 3
Kinds of Ownership Interests

70-1-301. Interests in real property specially named elsewhere.

Compiler's Comments

Code Commissioner Correction: Pursuant to sec. 28, Ch. 123, L. 2013, the Code Commissioner substituted "Title 72, chapter 38, part 8" for "Title 72, chapter 34, part 3" to correct reference rendered erroneous when Title 72, chapter 34, part 3, was repealed and replaced as part of the Montana Uniform Trust Code enacted by Ch. 264, L. 2013.

1999 Amendment: Chapter 51 near middle after "through" inserted "70-15-216, in Title 70, chapter 15, part 3, in Title 70, chapter 16, in 70-17-101 through"; and made minor changes in style. Amendment effective March 15, 1999.

Case Notes

Tax Sale Provisions Applicable to Improvements on Tax-Exempt Land — Meaning of "Real Property" and "Real Estate": Montana's tax collection laws governing real estate tax sales apply to improvements located on tax-exempt lands. The conveyance by tax deed of appellant's log cabin for nonpayment of taxes was upheld against his assertion that the cabin, situated on Forest Service land, is not an improvement fixed to land for purposes of the Realty Transfer Act and not "real estate" for purposes of the tax sale provisions. The court traced the Legislature's circuitous route to a definition of taxable real property in support of its holding. Brown v. Hart, 213 M 517, 692 P2d 14, 41 St. Rep. 2264 (1984).

70-1-303. When ownership absolute.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

70-1-304. When ownership qualified.

Case Notes

Process for Amending Restrictive Covenant to Be Strictly Followed: Myers contended that a subdivision corporation did not follow the proper method for amending a restrictive covenant disallowing the rental of subdivision property for less than 30 days. The District Court disagreed, holding that the amendment was properly adopted and restrained Myers from renting the property for less than 30 days. Myers appealed. The Supreme Court held that because restrictive covenants must be strictly construed, when a covenant is amended to impose an impediment on use of the property, the method prescribed for amending the covenant must also be strictly followed. In this case, Myers established that the prescribed amendment method was not used, so the Supreme Court reversed the judgment. Point Serv. Corp. v. Myers, 2005 MT 322, 329 M 502, 125 P3d 1107 (2005).

Rules for Interpretation of Restrictive Covenants: Restrictive covenants are construed under the same rules of construction as other contracts. Declarations of covenants are read on their four corners as a whole, and terms are construed in their ordinary or popular sense. Bordas v. Virginia City Ranches Ass'n, 2004 MT 342, 324 M 263, 102 P3d 1219 (2004), following Windemere Homeowners Ass'n, Inc. v. McCue, 1999 MT 292, 297 M 77, 990 P2d 769 (1999), and followed in Point Serv. Corp. v. Myers, 2005 MT 322, 329 M 502, 125 P3d 1107 (2005).

Lack of Legal Description of Tracts in Covenant Amendment Not Fatal When Landowners Provided Actual Notice of Amendment: A supermajority of subdivision property owners authorized an amendment creating new and unexpected restrictions not contained or contemplated in the original declaration of restrictive covenants. Some landowners who disagreed with the amendment appealed, contending that it was invalid because it did not contain a legal description of the affected property. The District Court found the argument unpersuasive because the amendment referred to a previous amendment that did contain a legal description. The Supreme Court agreed, noting further that none of the appellants denied that they had actual notice of the amendment, so their claims of inadequate notice failed. Windemere Homeowners Ass'n, Inc. v. McCue, 1999 MT 292, 297 M 77, 990 P2d 769, 56 St. Rep. 1173 (1999). See also Poncelet v. English, 243 M 481, 795 P2d 436, 47 St. Rep. 1342 (1990).

Original Declaration of Restrictive Covenants Broad Enough to Authorize New or Unexpected Restrictions: A supermajority of subdivision property owners authorized an amendment creating new and unexpected restrictions not contained or contemplated in the original declaration of restrictive covenants, resulting in assessment against subdivision landowners of the costs of paving a common road. Strictly construing the original amendment language, the District Court ruled that the clause in the covenants allowing amendment was broad enough to authorize new or unexpected restrictions. The Supreme Court agreed. Under the rule of strict construction, covenants should not be extended by implication or enlarged by construction. In this case, the drafters of the original covenants used universal language to describe the kinds of changes that could be made, clearly providing that each aspect of the covenants, conditions, restrictions, and uses was subject to amendment by a supermajority. Further, under the universal language, it was unnecessary that amendments to the restrictive covenants be connected to a provision in the original covenants. Windemere Homeowners Ass'n, Inc. v. McCue, 1999 MT 292, 297 M 77, 990 P2d 769, 56 St. Rep. 1173 (1999), following Sunday Canyon Property Owners Ass'n v. Annett, 978 SW 2d 654 (Tex. App. 1998), and distinguishing Lakeland Property Owners Ass'n v. Larson, 459 NE 2d 1164 (Ill. App. 1984), Caughlin Ranch Homeowners Ass'n v. Caughlin Club, 849 P2d 310 (Nev. 1993), and Boyles v. Hausmann, 517 NW 2d 610 (Nebr. 1994).

Restrictive Covenant Allowing Disapproval of House Plans Based on "Harmony of External Design" — Specific Objective Standards Required: A restrictive covenant that allowed a design review committee to disapprove house plans and prevent construction based on "harmony of external design" was held to be too vague to be enforceable absent some general plan or scheme defining the standard of approval or an objective standard of design. Town & Country Estates Ass'n v. Slater, 227 M 489, 740 P2d 668, 44 St. Rep. 1257 (1987), contrasted in Jarrett v. Valley Park, Inc., 277 M 333, 922 P2d 485, 53 St. Rep. 671 (1996).

Construction of Restrictive Covenants: There are three basic rules regarding restrictive covenants: (1) that restrictive covenants are to be strictly construed; (2) that ambiguities are to be resolved in favor of free use of property; and (3) that the court should not broadly interpret and impose restrictive covenants in terms of what the parties would have desired. Higdem v. Whitham, 167 M 201, 536 P2d 1185 (1975), followed in Jarrett v. Valley Park, Inc., 277 M 333, 922 P2d 485, 53 St. Rep. 671 (1996). See also Windemere Homeowners Ass'n, Inc. v. McCue, 1999 MT 292, 297 M 77, 990 P2d 769, 56 St. Rep. 1173 (1999), in which the universal language of an original declaration of restrictive covenants was found to be broad enough to authorize subsequent amendment, by a supermajority of affected property owners, authorizing creation of new or unexpected restrictions not contained or contemplated in the original covenants.

Definition of "Necessary Outbuilding": A "necessary outbuilding" for the purpose of a restrictive covenant is one convenient to a dwelling. Higdem v. Whitham, 167 M 201, 536 P2d 1185 (1975).

Strict Construction of Restrictions on Land Use: The overriding policy of individual expression in free and reasonable land use dictates that restrictions should not be aided or extended by implication or enlarged by construction. Higdem v. Whitham, 167 M 201, 536 P2d 1185 (1975), followed in Town & Country Estates Ass'n v. Slater, 227 M 489, 740 P2d 668, 44 St. Rep. 1257 (1987), and Jarrett v. Valley Park, Inc., 277 M 333, 922 P2d 485, 53 St. Rep. 671 (1996). See also Windemere Homeowners Ass'n, Inc. v. McCue, 1999 MT 292, 297 M 77, 990 P2d 769, 56 St. Rep. 1173 (1999), in which the universal language of an original declaration of restrictive covenants was found to be broad enough to authorize subsequent amendment, by a supermajority of affected property owners, authorizing creation of new or unexpected restrictions not contained or contemplated in the original covenants.

Acquisition of Property: Where family-owned dairy farm corporation sold its lessors' interest in half of its herd to third party who then leased cattle back to corporation, the corporation, to the extent of the lease agreement, continued to own the cattle and, as long as operation of dairy farm was uninterrupted and not abandoned, there was no "acquisition" of the farm under Milk Control Board regulations. Medo-Land Dairies v. Mont. Milk Control Bd., 157 M 215, 483 P2d 705 (1971).

70-1-305. Ownership by single person.

Case Notes

Lease of Land Held in Common: It is a well-settled principle of law that to make a binding lease of the whole of a piece of property held in common, all the tenants in common must join in the lease. Neither the entire property nor any specific part of it can be leased by one tenant unless he is authorized by all the other tenants to do so. Jarrett v. Jarrett, 202 M 471, 659 P2d 839, 40 St. Rep. 222 (1983).

70-1-306. Ownership by several persons — types.

Case Notes

Death of Partner — Disposition of Property Held Jointly by Partners: Robert and William, brothers, opened a joint checking account in 1947, paid all ranch expenses through the account, put all ranch income in the account, and equally split net profits. All cattle were branded with either of two brands, each of which was registered in the name of "William Palmer or Robert Palmer". The brothers were also joint tenants in a commodity brokerage account. The Supreme Court held that the cattle and both accounts were partnership property not held in joint tenancy and remained so upon Robert's death. Thus, they did not pass to William as the surviving joint tenant; rather, they remained in the partnership for the purpose of winding up the partnership and paying its liabilities, after which William must account to Robert's survivor, his widow, for Robert's share of the partnership. By its very nature, partnership property must be treated differently than property of individuals, including property held by individuals as joint tenants but who are not in partnership. This rule applies regardless of the formal legal manner in which the property is held. This is a rule of equity developed over hundreds of years and codified in the Uniform Partnership Act. In re Estate of Palmer, 218 M 285, 708 P2d 242, 42 St. Rep. 1585 (1985), followed in Fiedler v. Fiedler, 266 M 133, 879 P2d 675, 51 St. Rep. 691 (1994).

Creation of Tenancy in Common in Bank Account — Rights of Creditor: When the signature card for a bank account did not specify that the two account holders had rights of survivorship, the estate created was that of a tenancy in common rather than a joint tenancy. Therefore, the creditor of one account holder was entitled to only one-half of the total amount of funds in the account. Univ. of Mont. v. Coe, 217 M 234, 704 P2d 1029, 42 St. Rep. 1160 (1985), distinguished in Seman v. Lewis, 252 M 508, 830 P2d 1294, 49 St. Rep. 206 (1992).

Cotenants' Equal Access and Use Rights: Cotenants have a right of equal access and use of property held in common. Jarrett v. Jarrett, 202 M 471, 659 P2d 839, 40 St. Rep. 222 (1983).

Lease of Land Held in Common: It is a well-settled principle of law that to make a binding lease of the whole of a piece of property held in common, all the tenants in common must join in the lease. Neither the entire property nor any specific part of it can be leased by one tenant unless he is authorized by all the other tenants to do so. Jarrett v. Jarrett, 202 M 471, 659 P2d 839, 40 St. Rep. 222 (1983).

Unlawful Detainer by Tenant in Common — Amendment of Pleading Properly Denied: Where the plaintiff and her sister leased farmland they owned as tenants in common to the defendant for a 6-year period and the sister conveyed her interest in the property to the defendant shortly before the expiration of the lease, the court did not err, in an action by the plaintiff brought in 1974 for an accounting of rents and profits from the defendant, in refusing to allow the plaintiff to plead and prove an unlawful detainer against the defendant. Leave of court should not be granted to allow amendments that present theories totally inapplicable to the case. As a tenant in common is an owner of an undivided interest in the property, a claim of unlawful detainer may not be asserted against a cotenant, but only against a tenant for a term less than life. A cotenant is allowed to possess and use commonly held property, and an action will lie for waste but not unpermitted use. Fry v. Heble, 191 M 272, 623 P2d 963, 38 St. Rep. 228 (1981).

"And/Or" — Joint Tenancy: In Montana an ownership document showing title in two or more persons "and/or" has the effect of creating a joint tenancy estate with right of survivorship. This applies to personal property, not real estate. First Westside Nat'l Bank v. Llera, 176 M 481, 580 P2d 100 (1978).

Joint Tenancy and Right of Survivorship: A conveyance to persons in joint tenancy carries with it the common-law right of survivorship since Legislature did not abrogate that right as an incidence of joint tenancy. Hennigh v. Hennigh, 131 M 372, 309 P2d 1022 (1957).

Law Review Articles

Real Property—Co-Tenancies—Creation of Joint Tenancies, O'Brien, 19 Mont. L. Rev. 69 (1957).

70-1-307. Joint interest defined.

Case Notes

Division of Property of Tenants in Common — Presumptions and Intent: Assets held by tenants in common are presumed to be divided equally because the assets are presumed to be owned equally, but that presumption shifts when there is evidence of unequal contribution. When the preponderance of evidence establishes that the cotenants contributed unequally to the value of the property, it is presumed that the property will be divided in proportion to each cotenant's contribution. When there is an indication that one party intended to gift property to the other, the party who seeks to establish a disproportionate distribution based on gifted property has the burden of demonstrating that intent, and all relevant evidence of the parties' intent is admissible to sustain or rebut the presumptions. Intent of the parties may be demonstrated by conduct over the course of time, sharing of other expenses, labor, or other admissible means. In this case, the District Court's finding that the parties intended to split their assets equally was supported by substantial evidence and affirmed. However, the court erroneously adjusted a previous settlement of the parties regarding the distribution of the proceeds of a money market account when that asset was not in dispute and erred in awarding rent payments to one cotenant in contravention of the general rule that a tenant in common is not liable for the use and occupation of the premises until a tenant out of possession brings an action demanding the equivalent of joint possession. Thus, the case was remanded for entry of proper judgment on those issues. Flood v. Kalinyaprak, 2004 MT 15, 319 M 280, 84 P3d 27 (2004), following In re Estate of Dern, 279 M 138, 928 P2d 123 (1996), and followed in Anderson v. Woodward, 2009 MT 144, 350 M 343, 207 P3d 329 (2009), and LeFeber v. Johnson, 2009 MT 188, 351 M 75, 209 P3d 254 (2009). See also Lawrence v. Harvey, 186 M 314, 607 P2d 551 (1980).

Collateral Estoppel Applied to Preclude Reopening Settlement Agreement Regarding Disposition of Jointly Owned Marital Property — Property Interest Not Altered by Filing of Partition Action: When the husband and wife separated, they entered a property settlement agreement dividing all their real and personal property, agreeing that they would continue to jointly own their residence, with the right of survivorship. In the decree of dissolution, the District Court affirmed that the property settlement agreement was fair and equitable. Several years after the divorce, seeking to wrap up financial affairs with her former husband, the wife moved to partition the residence and obtain an equal division of the value of the property. At trial, the husband argued that the property settlement agreement was unfair and that the wife should be denied any recovery for her interest in the residence because it was purchased prior to the marriage and because she did not contribute to the marriage financially. The wife moved in limine to preclude the husband from reopening matters that should have been raised in the divorce proceedings. The court denied her motion, reasoning that the property was not divided in the divorce and that because the partition action was an action at equity, surrounding circumstances could be considered. The court found that the filing of the partition action severed the joint tenancy, and the husband was then allowed to introduce evidence regarding the marital equities. The court ultimately concluded that the wife's interest in the residence was not compensable because she had not contributed significantly to the acquisition or improvement of the property or contributed to the parties' assets during the marriage. The wife appealed. The Supreme Court found that res judicata and equitable estoppel barred relitigation of the fairness of the joint ownership issue, which was considered and approved in the decree of dissolution. Further, the mere filing of the partition action does not sever one's interest in property. Rather, the parties' respective interests remain intact until the judgment severing the tenancy is entered. The rebuttable presumption that underlies a joint tenancy in property is equal shares, and there was nothing in the evidence to rebut that presumption and no evidence of postdecree events that would justify a different result. The husband failed to carry the burden of rebutting the presumption of equal shares, and the Supreme Court remanded for a 50-50 partition of the value of the residence. Rausch v. Hogan, 2001 MT 123, 305 M 382, 28 P3d 460 (2001).

Contents of Safe Deposit Box Not Considered Jointly Held Asset: Silver directed his son to lease a safe deposit box for Silver's cash and signed a statement authorizing his son's access to the box. The lease form was prepared by a bank employee, who indicated that it was a joint agreement. Without Silver's direction, consent, or knowledge, the son subsequently removed the cash and placed it in his own safe deposit box in the same bank. Silver died 8 days later, and the personal representative sought to recover the cash, a substantial portion of which Silver had bequeathed to a charitable foundation. The District Court allowed the personal representative and a family friend to testify regarding statements that Silver made to them about the cash and its disposition. The court also admitted extrinsic evidence regarding the safe deposit box lease, holding that the fact that the lease form was prepared by a bank employee was relevant to interpretation of the document. The son alleged error on both issues, contending that the cash was a jointly held asset. The Supreme Court, citing Thompson v. Steinkamp, 120 M 475, 187 P2d 1018 (1947), and Anderson v. Baker, 196 M 494, 641 P2d 1035 (1982), found that the contested testimony put into context Silver's lease of the box and constituted evidence of Silver's intent to retain ownership of the cash. The fact that Silver did not select the form of lease or check the box on the lease form was supported by substantial credible evidence and was not clearly erroneous. Nevertheless, the son cited 70-1-308 for the contention that the cash was a jointly held asset. However, both the lease agreement and the statute provided for joint access to and possession of the safe deposit box and its contents, but not for joint ownership of the contents. Moreover, the language regarding the rights of surviving joint tenants did not apply here because Silver was still alive when the cash was removed. Thus, the District Court correctly concluded that the cash was not a jointly held asset by virtue of the agreement or the statute. The son could cite no contract theory under which he could be declared the owner of the cash, so the District Court did not err in applying gift theory rather than contract theory in determining ownership of the contents of the box or in concluding that the cash was not a gift to the son, based on the fact that Silver retained ownership. The District Court properly awarded the contents of the box to the estate. In re Estate of Silver, 2000 MT 127, 299 M 506, 1 P3d 358, 57 St. Rep. 526 (2000), distinguishing Malek v. Patten, 208 M 237, 678 P2d 201 (1984).

Law Governing Personal Property Decided by Situs of Property and Domicile of Owner — Tenancy by the Entirety Impermissible Mode of Personal Property Ownership in Montana: A Montana District Court determined that personal property jointly owned by Lurie and her husband as tenancy by the entirety in Missouri was owned by them either as joint tenancy property or as tenancy in common property after the couple moved to Montana. The property was subject to execution to satisfy a judgment against the husband on a validly issued writ. Lurie contended that as tenancy by the entirety property, it was not subject to execution to satisfy a judgment against the husband only, because Missouri law followed the personal property and should be applied in Montana. The Supreme Court concluded that the District Court was correct in determining that the law governing personal property is decided by the situs of the property and the domicile of the owner, so Montana law applied. Further, under Clark v. Clark, 143 M 183, 387 P2d 907 (1963), tenancy by the entirety is not a permissible mode of real property ownership in Montana, and the District Court properly extended the reasoning in Clark with equal force to personal property in Lurie's case. Lurie v. Sheriff, 2000 MT 103, 299 M 283, 999 P2d 342, 57 St. Rep. 414 (2000), distinguishing Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121 (1998).

Interest Created in Bank Accounts Determined by Language on Signature Cards: The lower court ruled that an ambiguity existed as to whether two of the deceased's bank accounts were created as joint tenancies or tenancies in common. The Supreme Court held that no ambiguity existed because the language on the account signature cards clearly showed that one was a joint tenancy and the other was a tenancy in common. The Supreme Court stated that on one signature card, it was expressly stated that the account was a joint tenancy and the parties' signing of the card had to be interpreted as manifesting the intent to create a joint tenancy. The Supreme Court also noted that the other card described the account as a "joint" account but that such language did not show an express intent to create a joint tenancy. Therefore, the parties were tenants in common with respect to the second account. In re Estate of Hill, 281 M 142, 931 P2d 1320, 54 St. Rep. 101 (1997).

Living Trust — Judicial Construction of Trust Documents — Determination of Share in Cotenancy: Clifford and his wife Mary established a living trust for the benefit of their family. The trust documents established a family bypass trust to be funded by the remainder of Clifford's separate trust and the remainder of Clifford's interest in the marital trust estate. All of the property in Clifford's separate trust had been bequeathed, so it was necessary to determine Clifford's interest in the marital trust estate in order to determine the amount in the family bypass trust. Expenses for Clifford's funeral were to be paid from the "trust estate", and because the only money in the "trust estate" was in the marital trust estate, the Supreme Court concluded that the funeral expenses had to be deducted from the marital trust estate. The District Court determined and the Supreme Court agreed that Clifford's interest as a cotenant in the remaining money in the marital trust estate was the interest of a joint tenant entitled under this section to an equal share in certain accounts in a bank because there was no proof to the contrary. The Supreme Court concluded that Clifford was a joint tenant in an account at the credit union and, although there is a presumption that the shares of either a joint tenant or tenant in common are equal, Clifford's children had presented sufficient proof, through proof of unequal contributions by Clifford and Mary to the account, to rebut the presumption. The Supreme Court held that Clifford did not intend to give his unequal contribution to the credit union account to Mary as a gift but intended that his unequal contribution to the credit union account be used to fund the marital trust estate and that the marital trust estate, minus funeral expenses, costs, and attorney fees, be used as the principal of the family bypass trust for the benefit of Clifford's children. In re Estate of Dern, 279 M 138, 928 P2d 123, 53 St. Rep. 1087 (1996), followed in Tipp v. Skjelset, 285 M 274, 947 P2d 480, 54 St. Rep. 1147 (1997), and Flood v. Kalinyaprak, 2004 MT 15, 319 M 280, 84 P3d 27 (2004).

"Payable on Death" Designation Negates Joint Tenancy Language on CD Form: The deceased's personal representative was his granddaughter, who was also the person named as the payable on death (POD) beneficiary of the deceased on several certificates of deposit (CDs). The granddaughter obtained a ruling from the District Court that she was a joint tenant with the right of survivorship with respect to the CDs, based upon the language on the CD forms specifically stating that the persons named on the CD were joint tenants. The Supreme Court held that a joint tenancy must be created by specific unambiguous language and that the POD designation on the CDs created an ambiguity negating the joint tenancy language. The Supreme Court further held that the POD language meant that the granddaughter could not have a present interest in the CDs at the time that the CDs were obtained by the deceased and that they could not pass to her under the principles of joint tenancy. The Supreme Court ruled that the POD designation acted to transfer the CDs to the granddaughter outside of the probate estate as a nontestamentary transfer. In re Estate of Lahren, 268 M 284, 886 P2d 412, 51 St. Rep. 1311 (1994), following In re Estate of Shaw, 259 M 117, 855 P2d 105 (1993). See also In re Estate of Hill, 281 M 142, 931 P2d 1320, 54 St. Rep. 101 (1997).

Placing Person's Name on Brand Certificate Not Evidence of Joint Tenancy: Ron Shaw claimed that cattle owned by his deceased parents were his property as a joint tenant because his name was on the brand certificate. The Supreme Court held that although a person's name on the certificate was prima facie evidence of ownership, it did not address the nature of that ownership and that a joint tenancy could only be created by an express declaration that the parties are creating a joint tenancy. In re Estate of Shaw, 259 M 117, 855 P2d 105, 50 St. Rep. 709 (1993).

Joint Tenancy Not Terminated by Violation of Four Unities or by Divorce: The decedent and his first wife sold certain real property on a contract while they were still married. The contract specifically referred to them as joint tenants. The decedent's second wife was the executor of his estate and listed one-half of the contract proceeds as property of the estate. The second wife argued that when the decedent and his first wife split the proceeds after their divorce, the joint tenancy was destroyed because one of the four unities (the unity of interest) was violated. The Supreme Court held that rigid requirements of the common-law doctrine of the four unities were not part of Montana's statutory law on property. The court also held that divorce does not terminate a joint tenancy. In re Estate of Sander, 247 M 328, 806 P2d 545, 48 St. Rep. 221 (1991).

Interest in Negotiable Instruments Not Joint Tenancy Interest: To create a joint tenancy interest in a negotiable instrument, there must be an express declaration in the instrument declaring the ownership to be a joint tenancy in order to comply with 70-1-307. In this case, the Supreme Court affirmed a District Court decision, on remand, that the Uniform Commercial Code (Title 30, ch. 1 through 9) does not provide for joint tenancy interests in negotiable instruments made payable to more than one person and that the use of the term "joint payee" does not create

a joint tenancy interest. Stapleton v. First Sec. Bank, 219 M 323, 711 P2d 1364, 42 St. Rep. 2056 (1985), modifying Stapleton v. First Sec. Bank, 207 M 248, 675 P2d 83, 40 St. Rep. 2015 (1983).

Death of Partner — Disposition of Property Held Jointly by Partners: Robert and William, brothers, opened a joint checking account in 1947, paid all ranch expenses through the account, put all ranch income in the account, and equally split net profits. All cattle were branded with either of two brands, each of which was registered in the name of "William Palmer or Robert Palmer". The brothers were also joint tenants in a commodity brokerage account. The Supreme Court held that the cattle and both accounts were partnership property not held in joint tenancy and remained so upon Robert's death. Thus, they did not pass to William as the surviving joint tenant; rather, they remained in the partnership for the purpose of winding up the partnership and paying its liabilities, after which William must account to Robert's survivor, his widow, for Robert's share of the partnership. By its very nature, partnership property must be treated differently than property of individuals, including property held by individuals as joint tenants but who are not in partnership. This rule applies regardless of the formal legal manner in which the property is held. This is a rule of equity developed over hundreds of years and codified in the Uniform Partnership Act. In re Estate of Palmer, 218 M 285, 708 P2d 242, 42 St. Rep. 1585 (1985), followed in Fiedler v. Fiedler, 266 M 133, 879 P2d 675, 51 St. Rep. 691 (1994).

Extrinsic Evidence of Ownership of Joint Bank Account Inadmissible When Third-Party Rights Involved: Evidence of the intent of the parties with respect to ownership of funds in a joint bank account is admissible only in a dispute between those parties and not when the dispute involves the rights of a third party. Univ. of Mont. v. Coe, 217 M 234, 704 P2d 1029, 42 St. Rep. 1160 (1985), distinguished in Seman v. Lewis, 252 M 508, 830 P2d 1294, 49 St. Rep. 206 (1992), in which extrinsic evidence regarding intent was held admissible because it was submitted to supplement rather than contradict the uncertain terms of the signature card. See also In re Estate of Hill, 281 M 142, 931 P2d 1320, 54 St. Rep. 101 (1997), partially overruling Seman v. Lewis respecting use of extrinsic evidence in contradiction to 70-1-314.

Language on Savings Account Signature Card Not Conclusive: A son was added as a joint tenant on his mother's savings accounts by signing the savings institution's signature card. The card contained language declaring one-half the deposit a gift to the joint tenant. The mother later brought an action against her son, asserting that she never intended to gift any portion of the accounts to her son but merely to allow him to withdraw money for her expenses if needed. Because the mother raised the issue of ownership of funds in a joint tenancy account during her lifetime, the language on the signature card was not conclusive. Additional evidence could be examined to ascertain the true intent of the parties. Anderson v. Baker, 196 M 494, 641 P2d 1035, 39 St. Rep. 273 (1982).

Elements of Joint Tenancy: The essential characteristic of a joint tenancy is the right of survivorship. Casagranda v. Donahue, 178 M 479, 585 P2d 1286 (1978), followed in Vogele v. Estate of Schock, 229 M 259, 745 P2d 1138, 44 St. Rep. 1950 (1987).

Joint Bank Accounts: A joint bank account has the special attribute which allows either joint owner, by virtue of the contract with the bank, to acquire dominion over the entire account by drawing a proper order on the bank. Nevertheless, a joint bank account is otherwise subject to the same rules as other joint tenancies. The joint account signature card settles the question of the parties' intent as to ownership, and evidence as to contrary oral agreements may not be considered. Casagranda v. Donahue, 178 M 479, 585 P2d 1286 (1978), distinguished in Seman v. Lewis, 252 M 508, 830 P2d 1294, 49 St. Rep. 206 (1992), and followed in In re Estate of Dern, 279 M 138, 928 P2d 123, 53 St. Rep. 1087 (1996).

"And/Or" — Joint Tenancy: In Montana an ownership document showing title in two or more persons "and/or" has the effect of creating a joint tenancy estate with right of survivorship. This applies to personal property, not real estate. First Westside Nat'l Bank v. Llera, 176 M 481, 580 P2d 100 (1978).

Joint Tenancy Auto Title — Effect on Default: When defendant borrowed from plaintiff on auto collateral registered in his "and/or" another's name, the plaintiff bank was entitled to sell the auto upon defendant's default and receive one-half of the proceeds even though the bank's security interest was unperfected at the time of defendant's fraudulent assignment of his interest to his sister without value. The joint tenancy interest of the defendant was severed upon his default, and the bank became tenant in common with the holder of the remaining interest in the auto. First Westside Nat'l Bank v. Llera, 176 M 481, 580 P2d 100 (1978).

Ownership of Cattle:

Although under this section and 81-3-105 prima facie owners of recorded brand have the same interest in the cattle bearing their brand as shown in brand record, joint ownership of the cattle may be contradicted and overcome by other evidence under 26-1-102(5). Marshall v. Minlschmidt, 148 M 263, 419 P2d 486 (1966).

Prima facie showing of one-third interest in partnership cattle arising from recording of brand in name of three persons was overcome, in action by administrator of estate of deceased partner against surviving partners to recover assets transferred by deceased during his last illness, by evidence that deceased had a half interest in partnership cattle and failure of defendants to produce any of the partnership records. Marshall v. Minlschmidt, 148 M 263, 419 P2d 486 (1966).

Proceeds From Contract for Sale of Real Estate Deposited in Joint Bank Account: Provision in testatrix's real estate sales contract whereby payments were to be deposited in a certain bank account subject to draft by testatrix and her husband or either of them or their survivor did not create a joint tenancy in the interest of the property being conveyed. The contract containing no express declaration establishing a joint tenancy in the property being sold thereunder as required by this section, the vendor's interest in the contract passed into testatrix's estate under 70-1-314. Moxley v. Vaughn, 148 M 30, 416 P2d 536 (1966).

Estates by Entirety: While a joint tenancy is a joint interest, a joint interest is not limited to the estate of joint tenancy but may include estates by entirety. However, estates by the entirety are no longer a permissible mode of property ownership in this state, and where husband and wife took under a deed to them "as joint tenants with right of survivorship and not as tenants in common", the property was held in a joint tenancy and this was not converted by divorce into a tenancy in common. Clark v. Clark, 143 M 183, 387 P2d 907 (1963), followed in Lurie v. Sheriff, 2000 MT 103, 299 M 283, 999 P2d 342, 57 St. Rep. 414 (2000), in which tenancy by the entirety as applied to personal property was held an impermissible mode of ownership in Montana in the same way that tenancy by the entirety as applied to real property was held impermissible in Clark.

Shares of Stock Held in Joint Tenancy — Not Included in Estate of Deceased: Stocks issued in names of deceased and his children as joint tenants with right of survivorship and not as tenants in common and deposited in safety deposit boxes rented in the names of the owners who had inspected the stock in the safety deposit boxes and included dividends from stocks in individual income tax returns were delivered by the donor to the donees and did not belong to deceased at the time of his death so as to be a part of his estate. Marans v. Newland, 141 M 32, 374 P2d 721 (1962).

Joint Tenancy and Right of Survivorship: A conveyance to persons in joint tenancy carries with it the common-law right of survivorship since Legislature did not abrogate that right as an incidence of joint tenancy. Hennigh v. Hennigh, 131 M 372, 309 P2d 1022 (1957).

Law Review Articles

The Estate of Tenancy by the Entirety Is Not a Recognized Mode of Ownership in Montana, 25 Mont. L. Rev. 257 (1964).

70-1-308. Safe deposit box — joint tenancy.

Case Notes

Contents of Safe Deposit Box Not Considered Jointly Held Asset: Silver directed his son to lease a safe deposit box for Silver's cash and signed a statement authorizing his son's access to the box. The lease form was prepared by a bank employee, who indicated that it was a joint agreement. Without Silver's direction, consent, or knowledge, the son subsequently removed the cash and placed it in his own safe deposit box in the same bank. Silver died 8 days later, and the personal representative sought to recover the cash, a substantial portion of which Silver had bequeathed to a charitable foundation. The District Court allowed the personal representative and a family friend to testify regarding statements that Silver made to them about the cash and its disposition. The court also admitted extrinsic evidence regarding the safe deposit box lease, holding that the fact that the lease form was prepared by a bank employee was relevant to interpretation of the document. The son alleged error on both issues, contending that the cash was a jointly held asset. The Supreme Court, citing Thompson v. Steinkamp, 120 M 475, 187 P2d 1018 (1947), and Anderson v. Baker, 196 M 494, 641 P2d 1035 (1982), found that the contested testimony put into context Silver's lease of the box and constituted evidence of Silver's intent to retain ownership of the cash. The fact that Silver did not select the form of lease or check the box on the lease form was supported by substantial credible evidence and was not clearly erroneous. Nevertheless, the son cited this section for the contention that the cash was a jointly held asset. However, both the lease agreement and the statute provided for joint access to and possession of the safe deposit box and its contents, but not for joint ownership of the contents. Moreover, the language regarding the rights of surviving joint tenants did not apply here because Silver was still alive when the cash was removed. Thus, the District Court correctly concluded that the cash was not a jointly held asset by virtue of the agreement or the statute. The son could cite no contract theory under which he could be declared the owner of the cash, so the District Court did not err in applying gift theory rather than contract theory in determining ownership of the contents of the box or in concluding that the cash was not a gift to the son, based on the fact that Silver retained ownership. The District Court properly awarded the contents of the box to the estate. In re Estate of Silver, 2000 MT 127, 299 M 506, 1 P3d 358, 57 St. Rep. 526 (2000), distinguishing Malek v. Patten, 208 M 237, 678 P2d 201 (1984).

Joint Tenancy in Certificates Held in Joint Safe Deposit Box Upheld — Single Signature on Bank Card and Possession of Key Held Immaterial: The decedent sister of the plaintiff had purchased certificates of deposit made payable to the decedent or her defendant husband, but only the decedent signed the bank card for the certificates, which were placed in a jointly held safe deposit box to which only the decedent held a key. In an action brought by the decedent's brother for the value of the certificates, the Supreme Court held that the placement of the certificates in a jointly held safe deposit box, together with the fact that the certificates were issued in the name of the decedent or the defendant, established the husband's ownership of the certificates. The court held it was immaterial that only the decedent held a key to the box and had signed the bank card of deposit. Malek v. Patten, 208 M 237, 678 P2d 201, 41 St. Rep. 305 (1984).

70-1-310. Action by or against joint tenants or tenants in common.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

No Authority for One Cotenant to Sue for Entire Amount of Damages: A tenant in common may bring or defend an action in vindication of the tenant's own rights without enjoining other cotenants as necessary parties. However, absent an authorized agency relationship between cotenants, there is no authority for one cotenant to sue for the entire amount of tort damages to both himself and another cotenant in a personal action arising out of the tenancy. Therefore, it was error to dismiss one cotenant from a fraud case and then award the entire amount of damages to the other cotenant, because the effect of the award was to grant damages to a person who was not a plaintiff at the time of judgment. Dew v. Dower, 258 M 114, 852 P2d 549, 50 St. Rep. 454 (1993). Because the underlying action was for personal damages, not property damages, the District Court properly determined on remand that plaintiff was entitled to only 50% of the personal damages arising from defendant's fraud, even though the cotenant quitclaimed all property interests to plaintiff. However, the court miscalculated the amount of accrued interest owing, so the case was remanded for a recalculation of damages. Dew v. Dower, 269 M 286, 888 P2d 421, 51 St. Rep. 1388 (1994).

Breach of Joint Venture Fiduciary Trust — Award of Investment Plus Interest Affirmed: Kelly and Rust agreed to purchase land, subdivide it, and sell it at a profit. Rust advanced Kelly $4,000 as one-half the purchase price. Kelly paid the $4,000 balance and recorded the deed, but did not include Rust on the recorded deed. Rust moved from the area and later attempted, through his agent, to purchase Kelly's interest in the land. The agent was told the land was already sold, so Rust brought an action to recover his investment plus interest. The trial court properly held that: (1) the parties had entered into a joint venture; (2) Kelly was required in equity to hold the property in a constructive trust; (3) Kelly breached the joint venture fiduciary duty and attempted to deprive Rust of his interest in the property; and (4) Rust was entitled to return of his $4,000 investment plus interest. Rust v. Kelly, 228 M 220, 741 P2d 786, 44 St. Rep. 1471 (1987).

Unlawful Detainer by Tenant in Common — Amendment of Pleading Properly Denied: Where the plaintiff and her sister leased farmland they owned as tenants in common to the defendant for a 6-year period and the sister conveyed her interest in the property to the defendant shortly before the expiration of the lease, the court did not err, in an action by the plaintiff brought in 1974 for an accounting of rents and profits from the defendant, in refusing to allow the plaintiff to plead and prove an unlawful detainer against the defendant. Leave of court should not be granted to allow amendments that present theories totally inapplicable to the case. As a tenant in common is an owner of an undivided interest in the property, a claim of unlawful detainer may not be asserted against a cotenant, but only against a tenant for a term less than life. A cotenant is allowed to possess and use commonly held property, and an action will lie for waste but not unpermitted use. Fry v. Heble, 191 M 272, 623 P2d 963, 38 St. Rep. 228 (1981).

Assignor Bringing Action: Assignee of one-half interest of an overriding royalty agreement with plaintiff-assignor and defendant could not be joined as a party plaintiff in a suit to compel defendant to pay the other half interest to plaintiff whether assignor was a trustee for the assignee or they were tenants in common. Lowe & Lynn v. Flank Oil Co., 144 M 499, 398 P2d 608 (1965).

Purchaser Under Contract: Where plaintiff in action to quiet title claimed to be the owner of an entire leasehold in oil lands but proof showed he entered into an agreement with another to convey an undivided one-half interest to him, unexecuted, the latter became a tenant in common with plaintiff in the ownership of the leasehold and as such could, in prosecuting or defending actions concerning the common property, treat it as his own against everyone except his cotenant. Nadeau v. Texas Co., 104 M 558, 69 P2d 586 (1937), distinguished in Stumps v. Fidelity Gas Co., 294 F2d 886 (9th Cir. 1961).

70-1-312. Partnership interest defined.

Case Notes

Death of Partner — Disposition of Property Held Jointly by Partners: Robert and William, brothers, opened a joint checking account in 1947, paid all ranch expenses through the account, put all ranch income in the account, and equally split net profits. All cattle were branded with either of two brands, each of which was registered in the name of "William Palmer or Robert Palmer". The brothers were also joint tenants in a commodity brokerage account. The Supreme Court held that the cattle and both accounts were partnership property not held in joint tenancy and remained so upon Robert's death. Thus, they did not pass to William as the surviving joint tenant; rather, they remained in the partnership for the purpose of winding up the partnership and paying its liabilities, after which William must account to Robert's survivor, his widow, for Robert's share of the partnership. By its very nature, partnership property must be treated differently than property of individuals, including property held by individuals as joint tenants but who are not in partnership. This rule applies regardless of the formal legal manner in which the property is held. This is a rule of equity developed over hundreds of years and codified in the Uniform Partnership Act. In re Estate of Palmer, 218 M 285, 708 P2d 242, 42 St. Rep. 1585 (1985), followed in Fiedler v. Fiedler, 266 M 133, 879 P2d 675, 51 St. Rep. 691 (1994).

Property Shown to Be Partnership Property: Although parties individually acquired property by deed from corporation without any mention that it was partnership property, it will be considered partnership property where the partnership agreement clearly shows that it was intended to be partnership property. In re Perry's Estate, 121 M 280, 192 P2d 532 (1948).

70-1-313. Interest in common defined.

Case Notes

Cotenants' Equal Access and Use Rights: Cotenants have a right of equal access and use of property held in common. Jarrett v. Jarrett, 202 M 471, 659 P2d 839, 40 St. Rep. 222 (1983).

Lease of Land Held in Common: It is a well-settled principle of law that to make a binding lease of the whole of a piece of property held in common, all the tenants in common must join in the lease. Neither the entire property nor any specific part of it can be leased by one tenant unless he is authorized by all the other tenants to do so. Jarrett v. Jarrett, 202 M 471, 659 P2d 839, 40 St. Rep. 222 (1983).

Tenancy in Common Created: A "tenancy in common" is created whenever the instrument bringing an estate in two or more persons into existence does not specifically state that the estate created is other than a tenancy in common. Ivins v. Hardy, 120 M 35, 179 P2d 745 (1947).

Mineral Rights — Ingress and Egress Implied: Where decree in quiet title action in effect declared defendant a tenant in common with plaintiff under an assignment of a certain percent of the minerals in the land but failed to adjudge in him a right of ingress and egress for the purpose of exploration, his right in that respect would be implied in the decree, since necessary implication is as much a part of an instrument as if it were plainly expressed. Hochsprung v. Stevenson, 82 M 222, 266 P 406 (1928).

Irrigation Ditch: Where plaintiff in an action to enjoin another from using an irrigation ditch owned only an undivided interest therein and defendant over whose land it ran owned the remaining interest, they were tenants in common and each was entitled to use the ditch, being bound to exercise his right so as not to interfere with the other's right. Rodda v. Best, 68 M 205, 217 P 669 (1923). See also Isom v. Larson, 78 M 395, 255 P 1049 (1927).

70-1-314. Interest in common — how created.

Case Notes

Initialing Estate Inventory Not Judicial Admission That Bank Accounts Estate Property: The lower court ruled that an ambiguity existed as to whether two of the deceased's bank accounts were created as joint tenancies or tenancies in common. The Supreme Court held that no ambiguity existed because the language on the account signature cards clearly showed that one was a joint tenancy and the other was a tenancy in common. The Supreme Court also ruled that the fact that one of the parties had initialed the estate inventory was not an acquiescence to having the joint tenancy treated as property of the estate. The Supreme Court held that the lower court erred in holding that initialing the document in a probate action constituted a judicial admission barring that party from arguing that the property was not part of the estate because a judicial admission must be made during the litigation in which it is sought to be enforced as an admission. In re Estate of Hill, 281 M 142, 931 P2d 1320, 54 St. Rep. 101 (1997).

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"And/Or" — Joint Tenancy: In Montana an ownership document showing title in two or more persons "and/or" has the effect of creating a joint tenancy estate with right of survivorship. This applies to personal property, not real estate. First Westside Nat'l Bank v. Llera, 176 M 481, 580 P2d 100 (1978).

Proceeds of Contract for Sale of Real Estate Deposited in Joint Account — Joint Tenancy Not Created: Provision in testatrix's real estate sales contract whereby payments were to be deposited in a certain bank account subject to draft by testatrix and her husband or either of them or their survivor did not create a joint tenancy in the interest in the property being conveyed. The contract containing no express declaration establishing a joint tenancy in the property as required by 70-1-309 (now repealed), the vendor's interest in the contract of sale passed into the testatrix's estate. Moxley v. Vaughn, 148 M 30, 416 P2d 536 (1966).

Joint Tenancy and Right to Survivorship: By this section the Legislature recognized the difference between joint interests and interests in common and left people free to contract in either manner. A joint tenancy is a joint interest, and the Legislature did not abrogate the common-law right of survivorship incident to a joint tenancy. Hennigh v. Hennigh, 131 M 372, 309 P2d 1022 (1957).

Tenants in Common When No Evidence of Purchase as Copartners: Where there was no indication in contract of purchase of ranch property that purchasers were buying as copartners, their relationship, so far as ownership of realty was concerned, became prima facie that of "tenants in common" rather than that of "partnership". Ivins v. Hardy, 120 M 35, 179 P2d 745 (1947).

Tenants in Common: Husband and wife who admittedly owned realty at time they executed a deed were, under this section, tenants in common, each owning an undivided one-half interest therein. Isom v. Larson, 78 M 395, 255 P 1049 (1927).

70-1-319. Mere possibility not an interest.

Case Notes

Enacting Common Law — Power of Court of Equity Not Changed: This section and 70-1-505 are simply declaratory of the common law, under which such intangible rights or interests as those mentioned in these sections cannot be transferred; but it was not the intention of the Legislature in enacting those sections to make any change in the rule by which courts of equity were theretofore governed in dealing with this class of contracts. Winslow v. Dundom, 46 M 71, 125 P 136 (1912).

Montana to Use California Construction: Since this section is identical in terms with a section of the California Civil Code, the presumption must be indulged that in adopting it the Legislature intended that the same construction should prevail in this jurisdiction as prevailed in California. Winslow v. Dundom, 46 M 71, 125 P 136 (1912).

Part 4

Conditions and Limitations of Ownership

Part Law Review Articles

The Improvement of Conveyancing in Montana by Legislation—A Proposal, Cromwell, 22 Mont. L. Rev. 26 (1960).

Montana Perpetuities Legislation—A Plea for Reform, Waterbury, 16 Mont. L. Rev. 17 (1955).

70-1-401. Fixing time of enjoyment — computation — condition.

Case Notes

Reversionary Interest or Possibility of Reverter: The reversionary interest an owner of oil land has on termination of a lease, or the possibility of reverter, is a vested interest which may be conveyed, and the time when the enjoyment shall begin may be made to depend upon a future event. Krutzfeld v. Stevenson, 86 M 463, 284 P 553 (1930).

70-1-405. Conditions restraining alienation void.

Case Notes

Summary Judgment and Injunction Granted Prohibiting Use of Water and Distribution Properties — Unreasonable Restraint of Water Right: The plaintiff subdivision sought to enjoin the defendant water district from using water from wells located within the subdivision on any property outside of its borders pursuant to the subdivision's covenants. The District Court granted the injunction and the water district appealed, arguing that the restraint on the use of water, which included the use of all "water distribution properties", was not a reasonable restraint. The Supreme Court reversed and remanded, holding that the District Court had erred in concluding that the restraint on the use of water was reasonable, and granted summary judgment in favor of the defendants. Elk Grove Dev. Co. v. Four Corners County Water & Sewer District, 2020 MT 195, 400 Mont. 515, 469 P.3d 153, distinguished in Estate of Mandich v. French, 2022 MT 88, 408 Mont. 296, 509 P.3d 6.

Right of First Refusal — Unreasonable Restraint on Alienation: A right of first refusal that fixed the sale value and required the personal representatives or heirs of the property sellers to give buyers notice within 6 months of the seller's death was reasonable. However, the right could be interpreted to go on in perpetuity if notice was not given, which constituted an unreasonable restraint on alienation, repugnant to the interests of the buyers, and thus was void. A restraint that tends to increase the value of the property or that is imposed on property that is otherwise unmarketable is considered more reasonable, but in this case, the restraint decreased the property value by fixing the price at a greatly depreciated value in an area where the property would be highly marketable without the fixed price restraint. Urquhart v. Teller, 1998 MT 119, 288 M 497, 958 P2d 714, 55 St. Rep. 461 (1998).

Restraints on Alienation Valid When Reasonable: The District Court erroneously held that a repurchase option granted to sellers was void as a matter of law. The court erred in interpreting 70-1-405 as an absolute prohibition against any restraint on the alienation of real property. The provision is a statement of the common-law rule that restraints on alienation, when reasonable, are valid. Among factors to be considered when determining the reasonableness of any restraint are price and the intent of the parties contracting for the preemptive right. The Restatement of Property, section 406, comment "i", sets forth various factors that may be considered when determining the reasonableness of any restraint. Edgar v. Hunt, 218 M 30, 706 P2d 120, 42 St. Rep. 1372 (1985), followed in Baker v. Berger, 265 M 21, 873 P2d 940, 51 St. Rep. 389 (1994), and Urquhart v. Teller, 1998 MT 119, 288 M 497, 958 P2d 714, 55 St. Rep. 461 (1998).

Meaning of "Property of Another" — Arson Statute: Property which defendant had conveyed to his son by quitclaim deed with the conditions that the property would revert to the defendant if the son died before him and that the property could not be sold by the son during the defendant's lifetime is "property of another" for the purposes of a criminal prosecution under 45-6-103. St. v. Berklund, 217 M 218, 704 P2d 59, 42 St. Rep. 1147 (1985).

Justiciable Controversy Required: The parties were all heirs of Robert Hardy. He created trusts that became operative upon his death. The trusts were terminated, and the heirs entered negotiations for the division of a ranch making up the corpus of the trust. An agreement was entered dividing the ranch into seven tracts. The agreement provided that prior to the sale of any tract the other six heirs were to be given the right of first refusal. If all declined and a contract was entered into with a third party, all six had the right to meet the offer, with the first to accept to be given priority. The plaintiffs filed a complaint for declaratory relief seeking to have the provisions on first refusal declared an unreasonable restraint on alienation. The District Court granted summary judgment to defendants. On appeal, the Supreme Court remanded with instructions to dismiss. The court held that there was no justiciable controversy as no attempts had been made to sell any of the tracts. The court held that the Uniform Declaratory Judgments Act could not be used as a platform for the courts in Montana to plunge into indefinite, amorphous ponds of contract interpretation. Hardy v. Krutzfeldt, 206 M 521, 672 P2d 274, 40 St. Rep. 1823 (1983).

Provision Against Transfer Without Consent: Provision in contract for deed prohibiting transfer without seller's consent was not repugnant to this section. Dobitz v. Oakland, 172 M 126, 561 P2d 441 (1977).

Agreement Not to Sell Except to Grantor — Void: Typewritten statement, added to a printed warranty deed, that grantees agreed not to sell or dispose of land except to grantors or their heirs violated this section and did not limit the interest conveyed to a life estate. In re Vincent's Estate, 133 M 424, 324 P2d 403 (1958).

Part 5
Transfer of Property
Grants and Their Interpretation

Part Case Notes

Legal Delivery of Deed as Disputed Issue of Material Fact — Summary Judgment Improper: In a case concerning the disputed validity of a quitclaim deed, in which the parties agreed the facts were undisputed but disagreed on whether the deed was legally delivered, the District Court granted summary judgment to the defendant, concluding that the deed was legally delivered. On appeal, the Supreme Court reversed and remanded, concluding that substantial evidence in the record supported the conclusion that delivery had occurred but also that substantial evidence in the record also supported the opposite conclusion that delivery had not occurred. Because the issue of delivery was material to the resolution of the case and because substantial evidence supported either conclusion, the existence of the issue precluded the District Court from granting summary judgment for either party. Sparks v. Emmert, 2016 MT 43, 382 Mont. 249, 369 P.3d 994.

Reservation of Easement Held Sufficient — Wild Rivers and Ruana Distinguished: The Andersons, as the buyers, entered into a buy-sell agreement with the Rankins, as the sellers, that stated that the Rankins were "keeping an easement 30' Wide" across the property sold to the Andersons. Later, the Andersons entered into a contract for deed with the Rankins that attached an Exhibit "A". Exhibit "A" stated that the property was purchased "[s]ubject however, to reservation of an easement of right of way with ingress and egress" by the Rankins and then described the easement. A notice of purchasers' interest was later signed by both parties and recorded with the county with the same Exhibit "A" attached. Still later, a warranty deed was filed that stated that the property acquired by the Andersons was subject to the easement reserved by the Rankins. At the same time, the Andersons recorded a homestead exemption that reserved the 30-foot easement for the Rankins. Subsequently, the Rankins sold property to the Reichles through a buy-sell agreement and warranty deed, both of which noted that the Reichles would be able to use the Anderson-Rankin 30-foot easement as a public road for access to the Reichles' property. After the Reichles notified the Andersons that the Reichles intended to fence off the easement and graze llamas, the Rankins notified the Reichles' attorney that the Reichles would not be allowed any further use of the easement. The Reichles brought a declaratory judgment action against the Andersons and the Rankins for enforcement of the right-of-way easement. The Supreme Court, distinguishing the "subject to" language at issue in Wild Rivers Adventures, Inc. v. Bd. of Trustees, 248 M 397, 812 P2d 344 (1991), and Ruana v. Grigonis, 275 M 441, 913 P2d 1247 (1996), held that the language of Exhibit "A" with its "reservation" of an easement was sufficient to reserve that easement when the Rankins' property was conveyed to the Andersons and that the Rankins could later convey that easement to the Reichles. Reichle v. Anderson, 284 M 384, 943 P2d 1324, 54 St. Rep. 930 (1997).

Creation of Negative Easement Notwithstanding Absence of Conveyance: A written agreement in the form of a court settlement not to use property as a restaurant and bar creates a valid and enforceable covenant which runs with the land and which is binding on each of the parties and their successors in interest notwithstanding absence of a conveyance of the estate to which the covenant pertains or words to that effect in the settlement agreement. The agreement was expressly intended to constitute a covenant running with the land and to bind the present owners, heirs, and assigns and was entered into voluntarily. A negative easement, as was created here, can be created by a grant (conveyance) or agreement; the agreement being construed as a grant is binding upon purchasers of the servient tenement who have actual or constructive notice of it. Reichert v. Weeden, 190 M 95, 618 P2d 1216, 37 St. Rep. 1788 (1980).

70-1-501. Transfer defined.

Case Notes

Lakeside Property Dispute — Presumption That Grantee Takes Land to Low-Water Mark: In a property dispute relating to a subdivided lakeside parcel, the defendant asserted ownership of all land between the high- and low-water marks on the lake. The Army Corps of Engineers previously declared that the lake was a nonnavigable intrastate body and not subject to the Corps' jurisdiction. The District Court held that the plaintiff owned the land between the high- and low-water marks of the lake bordering her property. On appeal, the Supreme Court held that Montana's public trust easement was not at issue, that a conveyance of riparian property by reference to a specific metes and bounds description along the high-water mark is insufficient alone to overcome the presumption of 70-16-201 that the grantee takes at least to the low-water mark, and that the District Court correctly held that the plaintiff's property included the disputed land between the high- and low-water marks of the lake. Ash v. Merlette, 2017 MT 305, 389 Mont. 486, 407 P.3d 304.

Recording of Document Not Proof of Validity: The act of recording a document such as a deed or condominium declaration does not establish the document's validity simply because the County Clerk and Recorder's office accepted and recorded it. Etzler v. Flathead County, 2009 MT 367, 353 M 252, 220 P3d 395 (2009), following Elk Park Ranch, Inc. v. Park County, 282 M 154, 935 P2d 1131 (1997).

Division of Land by Deed in Which Grantor and Grantee Same Party — No Transfer of Title: A transfer of land requires a conveyance of title from one person to another. If the persons are the same, no transfer occurs. If there is no transfer, there is no division of land. Therefore, a landowner cannot divide a large parcel of land into smaller parcels by executing a deed in which the grantor and the grantee are the same party. Rocky Mtn. Timberlands, Inc. v. Lund, 265 M 463, 877 P2d 1018, 51 St. Rep. 653 (1994), followed in Elk Park Ranch, Inc. v. Park County, 282 M 154, 935 P2d 1131, 54 St. Rep. 293 (1997).

70-1-502. Voluntary transfer — applicability of contract rules.

Case Notes

Validity of Voluntary Easement Affirmed: The Permanns requested that Urick grant an easement across Urick's property for the Permanns to go camping and move cattle, and Urick agreed. When Urick's sons discovered that the voluntary easement had been granted, they persuaded Urick to rescind the easement. Urick requested that the Permanns convey the easement back to her. They refused. Urick filed suit and then subsequently died. Urick's son Gliko, as trustee of Urick's estate, brought an action against the Permanns seeking to have the easement rescinded, citing mutual mistake, constructive fraud, undue influence, and lack of consideration. The District Court held that the easement was valid, and Gliko appealed. The Supreme Court considered each of Gliko's rescission arguments in turn. The language of the easement was simple and unambiguous, so there was no mutual mistake. Urick had testified by deposition that no misleading statements were made relating to the easement, so there was no constructive fraud. There was no confidential relationship between Urick and the Permanns, Urick was not possessed of weakness of mind, and no advantage was taken of Urick's necessities or distress, so there was no undue influence. Last, there was no evidence that consideration was meant to be given, so lack of consideration was not a valid ground for rescission. The District Court was affirmed. Gliko v. Permann, 2006 MT 30, 331 M 112, 130 P3d 155 (2006).

Assignment Not Prohibited by Contract — Mineral Development Contract Not So Personal or Unique as to Preclude Assignment: A contract for the development of a mineral interest did not prohibit assignment or delegation. Despite this fact, appellants argued out that an exception to the general rule (that rights arising under a contract are generally assignable unless prohibited by the contract) exists when the contract is personal in nature and an assignment would deprive a party of the benefit of his bargain. The Supreme Court acknowledged this exception but found that the duties imposed by the agreement were not so unique in the industry as to involve a degree of trust and confidence singularly personal to the contracting parties. Somont Oil, Inc. v. Nutter, 228 M 467, 743 P2d 1016, 44 St. Rep. 1685 (1987).

Consent to Contractual Assignment Refused — Breach of Contract: A contract for sale of real property provided that assignment could be accomplished only with written consent of the seller and that such consent could not be unreasonably withheld. The District Court properly found that the contract was breached by the seller's failure to provide a sufficient reason for refusing to consent to an assignment and that seller was therefore responsible for damages. Erban v. Monforton, 227 M 531, 740 P2d 677, 44 St. Rep. 1290 (1987).

Contract for Deed — Notifying Escrow Agent of Default: Seller under contract for deed did not have to notify the escrow agent as well as the buyers that payments were in default and the contract was terminated, because the contract only provided for notice to buyers and did not require notice to the escrow agent. More important, the contract gave buyers the right to pay the accelerated balance due within 90 days of receipt of the notice of default, the deed and other documents were held by and the payments were made to the escrow agent, and notice of default to the escrow agent would have prematurely closed the escrow account and denied the buyers the opportunity to pay off the contract within 90 days. Boles v. Ler, 222 M 28, 719 P2d 793, 43 St. Rep. 1035 (1986).

Contract for Deed — Seller's Right to Cancel After Accepting Late Payments to Escrow Agent: Buyers under contract for deed made three late payments to the escrow agent. The escrow agent's acceptance of the three checks was not acceptance by the seller under the theory that the escrow agent was the seller's agent and acceptance by the agent was acceptance by the principal, nor did seller's acceptance of the payments from the escrow agent ratify the agent's acceptance. Failure to promptly return the payments did not waive seller's right to cancel the contract. The contract gave buyers 90 days from notice of default to pay the balance due under the contract, and they could do so in more than one installment. Seller decided the three payments might be installments in an attempt to pay the balance due and decided to hold the checks until it became apparent that the buyers were either going to pay off the balance due or were attempting to induce seller to waive her right to cancel the contract. Seller returned the checks when she realized the latter was the motive. In addition, seller sent a second cancellation notice, making it clear what her intent was. Boles v. Ler, 222 M 28, 719 P2d 793, 43 St. Rep. 1035 (1986).

Execution and Delivery of Quitclaim Deed Supported in Evidence — Effect: The District Court found that a quitclaim deed was executed and delivered by the Morins to the Mapstons before a typewritten note was signed by Mapstons to convey the subject property to Morins. This central finding of fact was held to be clearly supported in the evidence. The legal effect of the finding is that the quitclaim deed constituted a gift to Mapstons, no consideration being necessary. The transfer vested all actual title which Morins then had, since no different intention was expressed or necessarily implied. The typewritten note cannot be specifically enforced by Morins because they had not received an adequate consideration for the contract and because the contract lacks mutuality. Moreover, no involuntary trust was created. Morin v. Mapston, 217 M 403, 705 P2d 118, 42 St. Rep. 1283 (1985).

Action to Set Aside Quitclaim Deed — No Failure of Consideration Proved: The plaintiff, son of a deceased rancher, received 24½% of the surface rights to his father's ranch in accordance with the terms of an estate plan established for the benefit of the plaintiff and his brothers, the defendants. Upon leaving the ranch, plaintiff executed one quitclaim deed to his mineral interest in 1977 and one quitclaim deed to his surface interest in 1968 in exchange for a promise that the defendants would hold him harmless on a promissory note. The District Court did not err (in a subsequent challenge by the plaintiff to the validity of the quitclaim deeds) in declaring both deeds to be valid and denying the plaintiff any interest in the ranch. The facts and law do not support the plaintiff's contention that there was a failure of consideration for his signing the two quitclaim deeds. First, 28-2-1711 is not applicable, because under 70-1-502 consideration for the transfer of real property is not required. Second, the facts of the case show that the plaintiff was indemnified for signing the two deeds by the defendants' agreement to hold the plaintiff harmless on the promissory note. That is sufficient consideration. Turley v. Turley, 199 M 265, 649 P2d 434, 39 St. Rep. 1336 (1982).

70-1-503. What may be transferred.

Case Notes

Enforcement of Agricultural Lien Following Sale or Transfer of Farm Products — Assignment of Inchoate or Unperfected Lien Interests Allowed: A crop of sugar beets was sold, and a pesticide sprayer that held an agricultural lien sought to enforce the lien after the sale. Plaintiff bank also held a secured interest on the proceeds of the crop. The buyer issued checks made payable jointly to the bank and the sprayer, honoring the agricultural lien, and the lienholder's unconditioned negotiation of the check acknowledged satisfaction and release of its lien. The bank asserted that, not being an agricultural supplier, the sprayer had no right to file the lien and further contended that because inchoate or unperfected liens are not assignable, any argument that the supplier had assigned its lien right to the sprayer must fail as a matter of law. The sprayer argued that the supplier was clearly eligible to file an agricultural lien and that all actions taken by the sprayer were taken in an agency capacity for the supplier, as indicated in the lien filing, so the payment was not an assignment. Alternatively, the sprayer contended that the transaction was a pass-through between related entities constituting a limited assignment for collection purposes only and that even if the bank's evidence was sufficient to demonstrate that the transaction was a full assignment supported by consideration, inchoate lien interests are nonetheless assignable. The Supreme Court concluded that the dispute was best resolved on the issue of the assignability of inchoate lien interests, noting that generally property of any kind may be transferred, that a right arising out of an obligation is the property of the person to whom it is due and may be transferred, and that Montana's general policy supports the free assignability of rights and obligations stemming from contractual obligations. An agricultural lien is a security and ought to follow the debt or contract to which it pertains, and the free assignability of the right to perfect an agricultural lien comports with lien statutes as well as modern business practices. Thus, even though the supplier's lien was not yet perfected when transferred to the sprayer, it was assignable, and the sprayer validly proceeded to perfect and enforce the lien and was entitled to funds in the amount stipulated by the parties as payment for the chemicals sold by the supplier to the farm and applied by the sprayer and was entitled to the interest on the funds to be credited on that sum. Stockman Bank of Mont. v. Mon-Kota, Inc., 2008 MT 74, 342 M 115, 180 P3d 1125 (2008).

Mineral Development Contract Not So Personal or Unique as to Preclude Assignment: A contract for the development of a mineral interest did not prohibit assignment or delegation.

Despite this fact, appellants pointed out that an exception to the general rule (that rights arising under a contract are generally assignable unless prohibited by the contract) exists when the contract is personal in nature and an assignment would deprive a party of the benefit of his bargain. The Supreme Court acknowledged this exception but found that the duties imposed by the agreement were not so unique in the industry as to involve a degree of trust and confidence singularly personal to the contracting parties. Somont Oil, Inc. v. Nutter, 228 M 467, 743 P2d 1016, 44 St. Rep. 1685 (1987).

Deed Reserving Mineral Rights: Conveyance of surface estate by deed providing that "all coal and mineral rights are reserved by" the grantors effectively reserved in the grantors a mineral estate in the conveyed land. Lien v. Simons, 522 F. Supp. 712, 38 St. Rep 1644 (D.C. Mont. 1981).

Segregation and Conveyance of Mineral Interests: The title to mineral interests in land, including oil, gas, and coal interests, may be segregated in whole or in part from the rest of the fee simple title, and there is little doubt that such interests may be separately conveyed. Lien v. Simons, 522 F. Supp. 712, 38 St. Rep. 1644 (D.C. Mont. 1981).

Judgments Assignable: A judgment is assignable, and a banking corporation may transfer one owned by it just as it may sell bonds or other securities of which it has become the owner in the ordinary course of business. Genzberger v. Adams, 62 M 430, 205 P 658 (1922).

70-1-504. Possibility not transferable.

Case Notes

Montana to Use California Construction: Since this section is identical with a section of the California Civil Code, the presumption must be indulged that in adopting it the Legislature intended that the same construction should prevail in this jurisdiction as prevailed in California. Winslow v. Dundom, 46 M 71, 125 P 136 (1912).

Option to Purchase Realty: Right under option contract for sale of real property was assignable and enforceable in equity where contract was silent upon question of its assignability, intention of parties was not shown to have been that the right created should be personal to the option holder, and the agreement involved simply the cash payment of the purchase price. Winslow v. Dundom, 46 M 71, 125 P 136 (1912).

70-1-505. Right of reentry or repossession transferable.

Case Notes

Common-Law Rule: While under the common law a right of reentry upon land after breach of a condition subsequent incorporated in a deed does not constitute an interest in real property and is therefore not susceptible of conveyance, under this section such a right may be transferred. Waddell v. School District, 79 M 432, 257 P 278 (1927).

70-1-506. Oral transfer permitted.

Case Notes

Transfer to Third Person for Benefit of Transferee: Where oral transfer of personal property to third person for benefit of transferee is called in question, assent of the latter to the transfer must be shown. Dept. of Agriculture, Labor, & Industry v. DeVore, 91 M 47, 6 P2d 125 (1931).

Transfer of a Judgment — No Writing Necessary: The transfer of a judgment need not be in writing; hence even though it may have been error to admit a written assignment, the error was harmless, plaintiff having made no effort to show that a transfer had not been made. Genzberger v. Adams, 62 M 430, 205 P 658 (1922).

70-1-507. Grant defined.

Case Notes

Assignment of Oil and Gas Lease Working Interest to Trust Valid Grant: In 1954, Fitzpatrick and three other parties entered into an operating agreement concerning the working interest in an oil and gas lease. The agreement included a clause giving each party a preferential right to purchase the working interest of any other party. In 1969, Fitzpatrick divided his interest into three parts. He assigned one-third to his wife, reserved one-third in himself, and assigned one-third in four equal parts to four trusts which he had created for his four children. In 1972, Fitzpatrick signed a quitclaim assignment of whatever working interest he had to Youngblood, successor in interest to one of the four parties to the 1954 agreement. Youngblood had acquired similar quitclaim assignments from the other two parties to the original agreement. Believing that he owned 100% of the working interest in the lease, Youngblood began development of oil and gas wells on the land. The land became productive in 1972. In 1975, Youngblood, concerned about whether or not he had acquired all of Fitzpatrick's interest, had Fitzpatrick and his wife sign letters to ratify that Youngblood had acquired all their working interest in 1972. The Fitzpatrick children, as beneficiaries of the trusts, refused to sign similar letters. Youngblood then filed an action to quiet title to the working interest in him. The District Court found for Youngblood, ruling that the 1969 assignment was invalid for failure of delivery, failure of acceptance, and for retention of dominion and control over the working interest by Fitzpatrick. The Supreme Court reversed. The court ruled that Fitzpatrick's intent in making the 1969 assignment was to transfer income from oil and gas production to his wife and four children and that delivery was therefore complete. Acceptance of the assignment may be presumed because the net effect of the assignment was beneficial to the trusts. The court further ruled that there was not sufficient evidence that Fitzpatrick retained dominion and control over the working interests after the 1969 assignment. Finally the court ruled that the parties did not intend the preferential purchase clause to apply to a transfer without consideration between family members, so Youngblood was not entitled to enforce that clause. Exeter Exploration Co. v. Fitzpatrick, 202 M 209, 661 P2d 1255, 40 St. Rep. 38 (1983).

70-1-508. Delivery of grant necessary.

Case Notes

Loss of Repossession Rights Upon Delivery of Warranty Deed: A grant of property cannot be delivered conditionally; rather, delivery to a grantee is considered to be absolute, and the instrument takes effect upon its delivery. Any prior conditions are discharged at the time of delivery. Upon transfer of property, the transferee obtains all title held by the transferor unless a different intention is expressed or is necessarily implied. The fact that a warranty deed contained language stating that it was "subject to" a prior mortgage did not render inoperative the presumption of intention to convey the entire interest. An unambiguous provision in a deed prevails over an inconsistent provision in a sales contract pursuant to which the deed was given. Romain v. Earl Schwartz Co., 238 M 500, 779 P2d 54, 46 St. Rep. 1450 (1989).

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Placing in Joint Safe Deposit Box — No Delivery: Where deed from mother to daughter was executed but not recorded and was placed in mother's safe deposit box and mother later destroyed the deed, there was no delivery so as to give title to daughter although daughter testified that she had access to safe deposit box. Cleveland-Arvin v. Cleveland, 123 M 463, 215 P2d 963 (1950).

Death of Grantor — Delivery Not Possible: There can be no delivery of a deed after death of grantor, since a dead man is not capable of any activity. Direction by a grantor in a deed which he had signed, sealed, and acknowledged that it be delivered after his death did not amount to constructive delivery. Where a deed remains in possession of grantor, to be delivered and to take effect after his death, it is void for want of delivery during his lifetime, i.e., to be made operative it must have been made effectual during the grantor's lifetime. Miller v. Talbott, 115 M 1, 139 P2d 502 (1943).

What Does Not Constitute Delivery: In absence of evidence of intent of grantor to part with control over deed and title to realty other than mere fact of delivery of deed to depositary, transfer of mere possession of deed does not constitute delivery where deed is placed in hands of third person for safekeeping only and not for delivery to grantee or where the fact that the instrument is a deed is not made known to depositary at any time before death of grantor or name of the grantee is not given. Delivery is not complete until grantor has so dealt with the instrument as a means of divesting his title as to lose control over it and place it beyond his right of recall. Miller v. Talbott, 115 M 1, 139 P2d 502 (1943).

Presumption of Nondelivery:

Presumption of nondelivery flowing from testimony by defendant that he saw the deed upon which plaintiff based his claim of title in the possession of the grantor several months after its recordation was overcome by proof that the deed was mailed to plaintiff immediately after recording, that possession was in plaintiff through a tenant, that defendant's own conduct thereafter recognized plaintiff's ownership, and that defendant's husband, an attorney, several years after the transfer attached it as belonging to plaintiff in suits for himself and clients. Cook v. Rigney, 113 M 198, 126 P2d 325 (1941).

Delivery is the final act which consummates a deed. Possession of deed by grantor long subsequent to its date and before recordation raises presumption that deed has not been delivered. Springhorn v. Springer, 75 M 294, 243 P 803 (1926).

Incomplete Instrument: Delivery of an incompleted instrument is ineffective. Hence, where at the time a lessee signed a receipt for a copy of a lease the instrument was incomplete in that one of the lessors had not signed it, the court properly found that it was ineffective for failure of delivery, the fact that later in the day the missing signature was appended not changing the result in absence of evidence that the instrument was delivered thereafter. Nelson v. Davenport, 86 M 1, 281 P 537 (1929).

Escrow Deposits — Option to Purchase: Delivery being a necessity, if a husband and wife give an option to purchase land and deposit a deed in escrow to be delivered when the option is exercised but the husband dies before its delivery, his widow is entitled to dower in the land of which her husband died seized, though the deed was delivered after his death by the depositary. Tyler v. Tyler, 50 M 65, 144 P 1090 (1914).

70-1-509. Presumption of delivery.

Case Notes

Deeding of Property for Purpose of Controlling Distribution — Revocation of Qualified Gift: Intending to avoid probate, the Gilroys added their son's name to the title on their home and four vehicles for the purpose of controlling distribution upon the Gilroys' deaths. When the father died, the mother was placed in an extended care facility and an independent guardian was appointed to manage her affairs. The guardian determined that the mother's estate was running short of funds to defray the cost of extended care and sought return of the property in possession of the son. The son refused to return the property on grounds that following the father's death, interest in the vehicles passed equally to the mother and son, that the gift was complete, and that the son's interest was vested. The District Court held that placing the son's name on the titles was a qualified gift that could be revoked by the mother or the guardian. The Supreme Court affirmed. Because the addition of the son's name to the titles was an estate planning mechanism and the property was to be available for the use and benefit of the parents as long as they desired, the transfer was considered a revocable qualified transfer. Under 70-3-203, conditional transfers made in view of death are qualified and may be revoked by the giver at any time. Further, the son had agreed to transfer interest in the parents' home back to the mother at her request, so this section did not apply. In re Guardianship & Conservatorship of Gilroy, 2004 MT 267, 323 M 149, 99 P3d 205 (2004), distinguishing Gross v. Gross, 239 M 480, 781 P2d 284 (1989).

Loan of Title Based Upon Exchange of Deeds Upheld — Oral Extrinsic Evidence Controlling: Johnson agreed to loan Anderson the title to several lots that Johnson owned on Flathead Lake so that Anderson could mortgage the lots and use the proceeds for a business venture. Johnson and Anderson both executed deeds to the property, and Anderson occupied the property pursuant to a lease agreement. Later, the agreement was breached when Anderson conveyed his interest to a third party and cut trees from the property. Both parties sought a declaration of ownership in a quiet title action. The District Court admitted oral evidence showing that nothing more than a loan of title evidenced by an exchange of deeds was intended. The Supreme Court held that the timing of the execution and delivery of the two deeds was not controlling and that the deed conveying the property back to Johnson, even though it may have been signed and delivered first, was controlling in light of the circumstances of the transaction. The Supreme Court held that the deed conveying the property back to Johnson was valid as between the parties even though it was not recorded until later. Anderson v. Johnson, 264 M 66, 870 P2d 59, 51 St. Rep. 149 (1994).

Assignment of Oil and Gas Lease Working Interest to Trust Valid Grant: In 1954, Fitzpatrick and three other parties entered into an operating agreement concerning the working interest in an oil and gas lease. The agreement included a clause giving each party a preferential right to purchase the working interest of any other party. In 1969, Fitzpatrick divided his interest into three parts. He assigned one-third to his wife, reserved one-third in himself, and assigned one-third in four equal parts to four trusts which he had created for his four children. In 1972, Fitzpatrick signed a quitclaim assignment of whatever working interest he had to Youngblood, successor in interest to one of the four parties to the 1954 agreement. Youngblood had acquired similar quitclaim assignments from the other two parties to the original agreement. Believing that he owned 100% of the working interest in the lease, Youngblood began development of oil and gas wells on the land. The land became productive in 1972. In 1975, Youngblood, concerned about whether or not he had acquired all of Fitzpatrick's interest, had Fitzpatrick and his wife sign letters to ratify that Youngblood had acquired all their working interest in 1972. The Fitzpatrick children, as beneficiaries of the trusts, refused to sign similar letters. Youngblood then filed an action to quiet title to the working interest in him. The District Court found for Youngblood, ruling that the 1969 assignment was invalid for failure of delivery, failure of acceptance, and for retention of dominion and control over the working interest by Fitzpatrick. The Supreme Court reversed. The court ruled that Fitzpatrick's intent in making the 1969 assignment was to transfer income from oil and gas production to his wife and four children and that delivery was therefore complete. Acceptance of the assignment may be presumed because the net effect of the assignment was beneficial to the trusts. The court further ruled that there was not sufficient evidence that Fitzpatrick retained dominion and control over the working interests after the 1969 assignment. Finally the court ruled that the parties did not intend the preferential purchase clause to apply to a transfer without consideration between family members, so Youngblood was not entitled to enforce that clause. Exeter Exploration Co. v. Fitzpatrick, 202 M 209, 661 P2d 1255, 40 St. Rep. 38 (1983).

Effect of Continued Control of Property by Grantor: Where grantor and grantee are husband and wife, fact that grantor continues in control and management of property conveyed during his lifetime does not destroy presumption of delivery arising from due execution and recordation of the deed. Roth v. Palutzke, 137 M 77, 350 P2d 358 (1960), followed in Gross v. Gross, 239 M 480, 781 P2d 284, 46 St. Rep. 1848 (1989).

Effect of Recording Deed: Fact that deed has been recorded strengthens presumption that deed which is duly executed and acknowledged has been delivered. Roth v. Palutzke, 137 M 77, 350 P2d 358 (1960), followed in Gross v. Gross, 239 M 480, 781 P2d 284, 46 St. Rep. 1848 (1989).

Prima Facie Case: Deed in the ordinary form conveying title to plaintiff dated, acknowledged, and recorded on the same day made out a prima facie case, since such a showing gave rise to the statutory presumption of delivery under this section. The burden then rested upon defendant to prove a superior title under 70-19-404. Cook v. Rigney, 113 M 198, 126 P2d 325 (1941).

Presumption of Delivery Rebuttable:

While the presumption under this section is that a deed duly executed was delivered at its date, such presumption is not conclusive but may be rebutted, and where the facts conclusively show that it was not delivered, the presumption disappears. Carnahan v. Gupton, 109 M 244, 96 P2d 513 (1939).

The presumption declared by this section that a grant duly executed is presumed to have been delivered at its date, arising from the certificate of acknowledgment, is not conclusive but may be overcome by other facts and circumstances, such as that the grantor remained in possession and control of the property for many years and up to the time of its recordation, that after recordation it was returned to him, etc. Springhorn v. Springer, 75 M 294, 243 P 803 (1926).

70-1-510. Delivery to grantee necessarily absolute.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Loss of Repossession Rights Upon Delivery of Warranty Deed: A grant of property cannot be delivered conditionally; rather, delivery to a grantee is considered to be absolute, and the instrument takes effect upon its delivery. Any prior conditions are discharged at the time of delivery. Upon transfer of property, the transferee obtains all title held by the transferor unless a different intention is expressed or is necessarily implied. The fact that a warranty deed contained language stating that it was "subject to" a prior mortgage did not render inoperative the presumption of intention to convey the entire interest. An unambiguous provision in a deed prevails over an inconsistent provision in a sales contract pursuant to which the deed was given. Romain v. Earl Schwartz Co., 238 M 500, 779 P2d 54, 46 St. Rep. 1450 (1989).

Lease With Option to Purchase — Landlord Responsibility for Taxes: The city entered into an agreement with Pollard for construction and lease of a vehicle storage building, with an option to purchase throughout the term of the lease. After the city occupied the building, Pollard received notice that taxes had been assessed and were owing. Pollard maintained that the city had, by terms of the lease agreement, purchased the building and that he was not responsible for the taxes. He relied on the holding in Hunter v. Bozeman, 216 M 251, 700 P2d 184, 42 St. Rep. 784 (1985), that the lease was in fact a sale to the city and that the building was in effect a public works project. The Supreme Court found that the option to buy was not a sale and imposed no obligation to purchase. Rather, it found that the agreement fit the definition of a retail installment contract. Title bestowing ownership had not transferred to the city, so owner Pollard was responsible for the taxes on the building. Pollard v. Bozeman, 228 M 176, 741 P2d 776, 44 St. Rep. 1436 (1987).

Unconditional Delivery and Acceptance: Informal written instrument, indicating that donor wished to pay money on demand but that it could be collected against his estate if not demanded or paid sooner, was unconditionally delivered and accepted when accepted by donee, even though no demand for payment was made during donor's lifetime. Faith Lutheran Retirement Home v. Veis, 156 M 38, 473 P2d 503 (1970).

Delayed Payment: Fact that drafts indicated that balance of purchase price did not have to be paid for 30 days after sight "subject to approval of title" could not defeat effect of delivery of deeds which was to deprive grantor of interests conveyed thereby. In re Hume's Estate, 128 M 223, 272 P2d 999 (1954).

Placing in Joint Safe Deposit Box: Where deed from mother to daughter was executed but not recorded and was placed in mother's safe deposit box and mother later destroyed the deed, there was no effective delivery although daughter testified that she had access to safe deposit box. Cleveland-Arvin v. Cleveland, 123 M 463, 215 P2d 963 (1950).

Grantor's Continued Occupancy: A grant of real property takes effect upon its delivery by the grantor. A grant cannot be delivered to a grantee conditionally but is necessarily absolute, and the instrument takes effect thereon discharged of any condition upon which delivery is made. The transfer of actual possession of real property is not a necessary element of conveyance thereof, and the grantor's continued occupancy is not inconsistent with the alienation thereof by the owner. Walsh v. Kennedy, 115 M 551, 147 P2d 425 (1944).

Dispossession of Tenant: Where real property is conveyed by warranty deed, the grantee is entitled to immediate possession of the premises, and where at the time of the conveyances they are in the possession of a tenant, no duty rests upon the grantee to dispossess the latter, it being incumbent upon the grantor to deliver possession in accordance with the deed. Adams v. Durfee, 67 M 315, 215 P 664 (1923).

Law Review Articles

Constructive Delivery of Deeds Dependent Upon Death of Grantor, 1 Mont. L. Rev. 78 (1940).

70-1-511. Delivery in escrow.

Case Notes

Contract for Deed — Notifying Escrow Agent of Default: Seller under contract for deed did not have to notify the escrow agent as well as the buyers that payments were in default and the contract was terminated, because the contract only provided for notice to buyers and did not require notice to the escrow agent. More important, the contract gave buyers the right to pay the accelerated balance due within 90 days of receipt of the notice of default, the deed and other documents were held by and the payments were made to the escrow agent, and notice of default to the escrow agent would have prematurely closed the escrow account and denied the buyers the opportunity to pay off the contract within 90 days. Boles v. Ler, 222 M 28, 719 P2d 793, 43 St. Rep. 1035 (1986).

Contract for Deed — Seller's Right to Cancel After Accepting Late Payments to Escrow Agent: Buyers under contract for deed made three late payments to the escrow agent. The escrow agent's acceptance of the three checks was not acceptance by the seller under the theory that the escrow agent was the seller's agent and acceptance by the agent was acceptance by the principal, nor did seller's acceptance of the payments from the escrow agent ratify the agent's acceptance. Failure to promptly return the payments did not waive seller's right to cancel the contract. The contract gave buyers 90 days from notice of default to pay the balance due under the contract, and they could do so in more than one installment. Seller decided the three payments might be installments in an attempt to pay the balance due and decided to hold the checks until it became apparent that the buyers were either going to pay off the balance due or were attempting to induce seller to waive her right to cancel the contract. Seller returned the checks when she realized the latter was the motive. In addition, seller sent a second cancellation notice, making it clear what her intent was. Boles v. Ler, 222 M 28, 719 P2d 793, 43 St. Rep. 1035 (1986).

Delivery to Be Made Upon Death of Grantor: Where deeds had been delivered to grantor's attorney with written instructions for delivery to grantee after death of grantor and the instructions contained an acknowledgment signed by the grantor that such delivery placed the deeds out of the possession and control of the grantor, such delivery was sufficient to establish delivery in escrow. Blackmer v. Blackmer, 165 M 69, 525 P2d 559 (1974).

Oral Escrow Agreement With Deed and Check Sufficient: No precise form of words is necessary, and the agreement to deposit an instrument in escrow may be made orally. Where vendor deposited deed and vendee deposited check to be given in payment in an attorney's office, pending release of a mortgage, the deed and check constituted the escrow. Contract was not invalid under Statute of Frauds for absence of a formal, written instrument accompanying the escrow. Conner v. Helvik, 105 M 437, 73 P2d 541 (1937).

Instrument in Escrow Not Effective Until Delivered: An instrument delivered into escrow to be delivered on performance of certain conditions does not become effective until delivery by the depositary (subject to certain exceptions not involved in the case). Nadeau v. Texas Co., 104 M 558, 69 P2d 586, 111 ALR 874 (1937).

When Title Passes:

Under a contract of sale of real property on deferred payments, as distinguished from one where execution and performance involve but a single transaction, containing a provision that time shall be of the essence, deposit of deed in escrow not conveying a marketable title does not justify the vendee in suspending payments, the effective date of delivery of title by deed in escrow being the date of delivery by the depositary. Silfvast v. Asplund, 93 M 584, 20 P2d 631 (1933).

Where an owner sells his land on the installment plan and places the contract and deed in escrow, to be delivered to purchaser upon completion of payments, the latter does not obtain title until all of the payments are made; until then, title is in the vendor. Knapp v. Andrus, 56 M 37, 180 P 908 (1919).

Where Contract for Deed and Deed Placed in Escrow Vary:

Where contract for deed was complete in itself and called for execution of deed in compliance with description of property contained therein, the deed to be placed in escrow, but the description in the deed did not conform to that contained in the contract and vendees had not agreed to accept the deed as drawn, the contract could not be held to have been modified by or merged in the deed. Hollensteiner v. Anderson, 78 M 122, 252 P 796 (1927).

While a deed to land is an "agreement" which, when delivered, may modify a contract for the deed, a deed deposited in escrow is but an escrow, does not pass title, and can modify the contract only on a clear showing that the opposing party knew of the recitals in the deed and acceded thereto and that the deed and contract were parts of the same transaction. Hollensteiner v. Anderson, 78 M 122, 252 P 796 (1927).

Effect of Delivery on Performance of Condition After Death: The deposit of a deed to be delivered on performance of a condition after death of grantor, such as payment of funeral expenses, stands on the same footing as a deposit for delivery unconditionally after death, and the grantee may after the grantor's death perform the condition and take title as of the date when the deed was deposited. Plymale v. Keene, 76 M 403, 247 P 554 (1926), distinguished in Carnahan v. Gupton, 109 M 244, 96 P2d 513 (1939).

When Delivery Deemed Complete:

Fact that officer of bank, with which deed was deposited by grantor with instructions to deliver it to grantee, his son, after grantor's death, testified that if grantor had demanded return of deed his request would have been complied with was properly disregarded by trial court in concluding that grantor did not intend to retain any control or dominion over deed when it was deposited. Plymale v. Keene, 76 M 403, 247 P 554 (1926), distinguished in Carnahan v. Gupton, 109 M 244, 96 P2d 513 (1939).

If a deed, fully executed and so drawn as to convey a present title, is deposited by grantor with a third person with directions to deliver it to grantee after grantor's death, and grantor, in making such deposit, reserves no power to recall or modify it or thereafter to control in any manner its disposition, the delivery will be deemed complete as of the date when the deed was deposited, grantor's intention at time of passing deed to third person being the controlling factor in determining the question of delivery or nondelivery. Plymale v. Keene, 76 M 403, 247 P 554 (1926).

Definition of an Escrow: An "escrow" is a written instrument delivered to a third person to take effect upon the happening of a contingency and delivery of it to the person entitled to it. Under this definition, neither money nor a receipted bill, deposited in bank under an agreement between the parties to a proposed lease of coal land, could properly become the subject of an escrow, neither being a written contract. Glendenning v. Slayton, 55 M 586, 179 P 817 (1919).

70-1-512. Constructive delivery.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Recording of Revocation of Trust Agreement as Constructive Delivery: Section 70-21-302 imparts constructive delivery of the contents of the revocation instrument. The recording statutes import notice to all interested parties in matters affecting title to real property. Therefore, all cotrustees received constructive delivery when a revocation of trust was recorded with the County Clerk and Recorder. Hauseman v. Koski, 259 M 498, 857 P2d 715, 50 St. Rep. 898 (1993).

Circumstances Under Which Constructive Delivery Not Maintainable: Constructive delivery of deeds was not established in absence of any evidence warranting conclusion that grantee was entitled to immediate possession of lands deeded and in view of fact that until his death the grantor, after executing the deeds, dealt with the lands as his own. Delivery must be with intent in grantor to divest himself of title, a question of fact ascertainable from all of the evidence bearing thereon. Carnahan v. Gupton, 109 M 244, 96 P2d 513 (1939).

Dead Person — Cannot Deliver Deed: Since a dead person is incapable of any activity, there can be no delivery of a deed, executed by him in his lifetime, after death. Reservation of a life estate in grantor of real property presupposes a conveyance of property in which life estate is reserved. Hence, where there was no such conveyance because the deeds, executed during grantor's lifetime, were not delivered until after his death, there could not have been any such reservation. Carnahan v. Gupton, 109 M 244, 96 P2d 513 (1939).

Delivery Neither Actual Nor Constructive Where Deed Left in Safety Deposit Box With Advice for Delivery After Grantor's Death: Deeds turned over to grantee upon grantor's death failed to convey title where grantor had inserted them in sealed envelope addressed to grantee, his nephew, and placed it in his safety deposit box over which he alone had control, had written grantee that deeds would be delivered to him by bank upon his, grantor's, death, and for 3 years had dealt with the lands, which were assessed to him, as his own. Carnahan v. Gupton, 109 M 244, 96 P2d 513 (1939).

When Delivery Complete: While delivery of a deed may be either by words or acts or both combined and actual manual handing over thereof by grantor to grantee is not required, delivery is not complete until grantor has so dealt with the instrument as a means of divesting his title as to lose all control over it and place it beyond the right of recall. The grantor shall unequivocally indicate it to be his intention that the instrument take effect as a conveyance of property. Carnahan v. Gupton, 109 M 244, 96 P2d 513 (1939), followed in Hauseman v. Koski, 259 M 498, 857 P2d 715, 50 St. Rep. 898 (1993), citing Hackley Union Nat'l Bank v. Farmer, 234 NW 135 (Mich. 1931).

Delivery Essential: Delivery of a deed to real property, either actual or constructive, by which the grantor is divested of title and loses control over the property beyond the right of recall is essential to a vestiture of title in the grantee. Springhorn v. Springer, 75 M 294, 243 P 803 (1926).

70-1-513. Grants — how interpreted generally.

Case Notes

Certificate of Survey and Deed Together Established Tract as Servient Estate for Depicted Easement — District Court Did Not Improperly Use Extrinsic Evidence. Mary Ellen Duke Trust v. Lee Lou, LLC, 2023 MT 177, 413 Mont. 356, 535 P.3d 1133, following Blazer v. Wall, 2008 MT 145, 343 Mont. 173, 183 P.3d 84.

Third-Party Assignee to Agreement — Not Successor to Easement: The plaintiff's and defendants' predecessors in interest had entered into an agreement for the plaintiff's predecessor to secure an easement across the defendants' property for laying irrigation pipe. The agreement provided that the rights in the agreement belonged to heirs and successors of the agreement; however, they were not assignable without the written permission of the defendants. After the plaintiff purchased the easement, the defendants denied permission to assign the easement to the plaintiff. The plaintiff sued the defendants, claiming it was a successor under the agreement. The District Court ruled the plaintiff was a third-party assignee and not a successor. On appeal, the Supreme Court affirmed, agreeing with the District Court's interpretation of the terms "heirs" and "successors" in the agreement. Bos Terra, LP v. Beers, 2015 MT 201, 380 Mont. 109, 354 P.3d 572.

Genuine Issue of Material Fact Whether Dam Operation Damaged Lakeshore Properties — Summary Judgment Improper — Class Action Vacated: Flathead Lake landowners brought a class action suit against defendant operators of Kerr Dam for operating outside the scope of their easements in a manner that continuously eroded and damaged plaintiffs' lakeshore properties. The District Court rejected plaintiffs' argument that the dam operator was not allowed to affect plaintiffs' properties above an elevation of 2,893 feet, concluding instead that defendants' easements covered entire parcels. The court concluded that erosion, including wave action erosion, was within the scope of the easements and held that any duty defendants had to not cause unreasonable damage to plaintiffs' properties applied only to damage unrelated to use of the easement. Therefore, summary judgment was granted to defendants, and plaintiffs appealed. The Supreme Court first agreed that the District Court's contour line theory was correct. The "2,893 feet" clause did not establish the vertical limit argued by plaintiffs because although the dam operators' right to flood, subirrigate, drain, or otherwise affect the shoreline was not unlimited, it was not restricted to a maximum elevation of 2,893 feet at each parcel, but rather extended to whatever part of each parcel was affected when the lake was held at 2,893 feet above mean sea level as measured at the dam. The court also agreed that the right to cause some erosion was necessary to the enjoyment of the right to perpetually flood, subirrigate, and drain and was thus included by implication in the easements. However, further factual development and trial were necessary to address the question of whether the erosion was reasonable, necessary, and within the scope of the easements, which could not be resolved by summary judgment. Additionally, the question of whether defendants breached their obligation to not cause unreasonable damage to the shoreline properties and to not unreasonably interfere with plaintiffs' enjoyment also required further factual development and possibly trial. Therefore, the order certifying the case as a class action was vacated and the case was remanded for further consideration. Mattson v. Mont. Power Co., 2009 MT 286, 352 M 212, 215 P3d 675 (2009).

On remand, the District Court decertified the class as to one defendant and denied the plaintiffs' motion for certification as to another defendant on the basis that the question of whether the erosion caused unreasonable damage to or unreasonably interfered with the plaintiffs' properties required an individual, property-by-property analysis that was improper for class certification. On appeal, the Supreme Court reversed, concluding that class certification to both defendants was proper because the reasonableness of the erosion presents a common question that is incapable of being resolved on a property-by-property basis since an aggregate of the benefits and burdens imposed on all of the shoreline properties must be considered together to determine reasonableness. Mattson v. Mont. Power Co., 2012 MT 318, 368 Mont. 1, 291 P.3d 1209.

Express Lease Provision Required for Survival of Overriding Royalty: An overriding royalty applies only to the lease out of which it was created. In the case of an oil or gas lease or sublease, if a party wishes an overriding royalty to survive the expiration of the lease or sublease, an express provision must be included in the lease or sublease to accomplish survival of the overriding royalty. Ritter v. Bill Barrett Corp., 2009 MT 210, 351 M 278, 210 P3d 688 (2009), following Edward v. Prince, 221 M 272, 719 P2d 422 (1986).

Terms of Attempted Easement Too Vague to Enforce — Deed Insufficient to Constitute Easement by Reservation: The founders of plaintiff homeowners' association recorded a declaration of conditions in 1973 that set aside certain undescribed property for parking and that provided that the homeowners' association would be formed after 75% of subdivision lots were sold and if 75% of lot owners voted to form an association. The homeowners' association was finally formed about 33 years later, but the property set aside for parking was never used and was ultimately sold in 1992. When the association eventually required more room for parking, they sought to enforce the declaration, but access to the property was denied by the current owner. The association filed an action to quiet title, but the District Court granted summary judgment for the landowner, so the association appealed. The Supreme Court held that the 1973 declaration and the 1992 deed did not result in an enforceable easement allowing the association to use the property, noting that a grant of an easement may be subject to conditions precedent, but if the uncertain event upon which the obligation hinges does not take place, the obligation does not materialize. The association never used the property for parking, so an easement never materialized. An agreement that requires parties to agree to material terms in the future is not an enforceable agreement. The court also found that the scope and terms of the attempted easement were too vague to be specifically enforced, and the 1992 deed was insufficient to constitute an easement by reservation. Therefore, summary judgment for the landowner was proper and the District Court was affirmed. Holter Lakeshores Homeowners Ass'n, Inc v. Thurston, 2009 MT 146, 350 M 362, 207 P3d 334 (2009).

Easement Limited to Historical Size and Location of Grant: In 1949, plaintiffs' predecessor in interest granted an easement to defendant's predecessor in interest to allow the construction of radio towers on a portion of a 160-acre parcel, conditioned on location and maintenance of the property. Defendant subsequently notified plaintiffs that he intended to expand the radio facilities beyond the original construction site. Plaintiffs sued, asserting that the expansion would encompass property not included in the original grant, while defendant contended that the easement encompassed the entire 160 acres described in the grant, so the facilities could be expanded onto other portions of the parcel or relocated elsewhere within the parcel. The District Court found for plaintiffs, and on appeal, the Supreme Court affirmed. Under the rules of contract construction, the grant language clearly limited placement of the radio facilities on a portion of the 160-acre parcel to be chosen by defendant's predecessor in interest. Thus, the easement did not encumber the full 160-acre parcel, but rather was limited in size and location to the historical location of the radio facilities. The original grant also required that wires, ground radial antennas, conduits, and transmission lines be buried to a minimum depth of 12 inches, and the District Court did not err in ordering defendant to bury the equipment pursuant to the maintenance portion of the grant. Anderson v. Stokes, 2007 MT 166, 338 M 118, 163 P3d 1273 (2007).

Proper Determination of Legal Access for Subdivision Parcels: Plaintiffs asserted that language in a declaration of a subdivision easement permitting all subdivision owners to use subdivision roads should limit access only to owners of lots that existed at the time that the declaration was executed. The District Court disagreed, and based on the clear and unambiguous language of the declaration, the Supreme Court concurred. Although not all of the subdivision parcels were established at the time that the declaration was executed, the declaration was clear that use of the roads extended to all lot owners, including the parcels yet to be divided. The Board of County Commissioners did not act arbitrarily in finding that legal access existed for the entire subdivision. Fielder v. Bd. of County Comm'rs, 2007 MT 118, 337 M 256, 162 P3d 67 (2007).

Improper Version of Subdivision Law Applied to Survey Exemption Question — Remand: The parents divided a parcel of land on Flathead Lake into two parcels and transferred one parcel to their daughter and her husband in 1973. The parents' adjoining parcel was transferred to other family members and ultimately transferred to plaintiff. Plaintiff sought to adjudicate the boundary between the properties. The District Court apparently applied the 2003 subdivision and platting law and found that the property division qualified for a family exemption and would not be considered as a subdivision under 76-3-207, but the court was unclear about the surveying criteria that it applied to the property division, apparently applying the subdivision law after finding that the subdivision law did not apply. The Supreme Court held that the District Court order was flawed because of the internal inconsistencies and because the District Court applied the 2003 law when it should have applied the law in effect when the property division was made in 1973. The case was therefore remanded for the District Court to determine whether additional factfinding or evidence was necessary in order to establish the proper survey criteria and resolve the boundary issue in accordance with the 1973 law. Karlson v. Rosich, 2006 MT 290, 334 M 370, 147 P3d 196 (2006).

Clear and Unambiguous Easement Language — Contract Principles Applied to Interpretation of Easement: After an initial conveyance of property, Tract A-1 was burdened by three easements:

(1) an existing driveway; (2) an alternative drainfield easement; and (3) a trapezoid-shaped parcel called the trapezoid easement, which was designated as an easement for access to a seepage pit and alternative drainfield for an adjoining tract entitled "Tract 1". Following the subdivision of Tract 1 into Tract 1-A and Tract 1-B, the Linfords conveyed Tract 1-B to the Bings, but still continued to possess Tract 1-A and continued to benefit from the access easement. When Tract 1-A was later conveyed to the Bings, they acquired the same right to use easements appurtenant to the dominant estate that the Linfords previously enjoyed. A dispute then arose with the Mularonis, the owners of Tract 1-A, who contested the validity of the trapezoid easement, arguing that when the Bings took title to Tract A-1 from the Linfords, a merger of titles occurred that extinguished the easements. The District Court impliedly rejected the merger argument by holding that the easement burdening Tract A-1 benefited both Tract 1-A and Tract 1-B, and the Supreme Court concurred. In order to extinguish an easement by merger, there must be unity of title or ownership, coextensive in validity, quality, and all other circumstances of right. The language describing the trapezoid easement as an easement for access was clear and unambiguous and created a general access easement. Applying principles of contract interpretation to the transfer of property, the Supreme Court held that the incorporation of the certificate of survey into the deeds conveying the tracts to the Bings clearly and effectively described the easements in question and that the District Court did not err in finding that the Bings were entitled to general access across the trapezoid easement. Mularoni v. Bing, 2001 MT 215, 306 M 405, 34 P3d 497 (2001).

Reservation of Single Right-of-Way Over Existing Private Road — No Ambiguity or Conflict With Intended Access: The District Court determined that a reservation of rights in a 1965 deed was ambiguous because the reservation of rights over a single roadway conflicted with the grantors' intent to reserve as many means as possible to their remaining property in a mountainous area. Ambiguities in a reservation of rights in any grant of property are to be construed in favor of the grantor; however, the breadth and scope of an easement are determined upon the actual terms of the contract. The easement in this case was described as "a right of way" over "an existing private road which extends across" the servient tenement "for the use and benefit of Section 3 and [parts] of Section 34". That language indicated the use to which the easement would be put, not the scope of the easement itself. The Supreme Court found that the reservation of rights was not ambiguous; rather, the language restricting the easement to a single right-of-way over an existing private road did not conflict with the intended use of the easement to benefit the grantors' remaining properties, nor did the grantors' intent override any limitation of the singular use of the word "road" in the reservation. Van Hook v. Jennings, 1999 MT 198, 295 M 409, 983 P2d 995, 56 St. Rep. 767 (1999).

Assignment of Estate Rights — Certificate of Deposit Held by Surviving Joint Tenant Not Transferred: A $10,000 certificate of deposit (C.D.) held by a surviving joint tenant was properly not included as an asset of the estate; therefore, a transfer and assignment of the tenant's right, title, and interest in the estate did not affect the C.D., of which tenant was sole owner upon the death of the nonsurviving joint tenant. Yellowstone Bank of Absarokee v. Morse, 226 M 126, 733 P2d 1310, 44 St. Rep. 524 (1987).

Termination of Lease and Royalty Interest — No Error in Summary Judgment: The District Court did not err in granting a summary judgment when several contracts relating to the same matter and made as substantially one transaction clearly showed that a lease assignment incorporating by reference the exhibit which created an overriding royalty interest in defendant included language that the assignors were owners of the overriding royalty interest of which the defendant received a one-fourth interest and which terminated with the lease. Edward v. Prince, 221 M 272, 719 P2d 422, 43 St. Rep. 805 (1986).

Sufficiency of Default Notice — Mandatory Finding: Michunovich purchased a tract of land under contract for deed from the Brangers. Michunovich entered a contract for deed to sell a portion of that tract to Owen. Owen fulfilled his part of the contract. Michunovich defaulted on the Branger contract. Brangers filed a breach of contract suit against Michunovich. Michunovich served Owen a notice of termination since he was unable to secure a deed release from Brangers. Michunovich did not refund Owen's downpayment as required by the contract. Owen refused to vacate the property. Michunovich assigned all his interest in the Branger contract to Stevenson with the Brangers' consent. Since Stevenson was able to bring the Branger contract current, the Brangers stipulated to the dismissal of their suit against Michunovich. Owen filed a purchaser's lien on the property under his contract from Michunovich. Stevenson then filed a quiet title action. The trial court found for Stevenson, finding that the notice from Michunovich to Owen terminated that contract so that Owen had no interest in the land. The Supreme Court remanded because according to the terms of the contract the refund of Owen's downpayment was a condition precedent to the contract being declared void. The trial court was instructed to determine whether Stevenson's default notice terminated the Owen contract and to resolve issues regarding rental value and improvements. Stevenson v. Owen, 212 M 287, 687 P2d 1010, 41 St. Rep. 1743 (1984).

70-1-514. Clear limitation not controlled by other words.

Case Notes

Granting Clause — Easement Conveyed: Granting clause which referred specifically to grantee's right to use the land as a public park constituted a clear and distinct limitation; interest conveyed was an easement. Park County Rod & Gun Club v. Dept. of Highways, 163 M 372, 517 P2d 352 (1973).

70-1-516. Interpretation against grantor — exception.

Case Notes

Warranty Deed Reserving Two-Thirds Interest in All Mineral Rights Concerning Tracts 1, 2, and 3 — Effectively Reserved All Mineral Rights, Including Tract 1, When Only One-Half Mineral Estate Owned — Reservations in Grant Interpreted in Favor of Grantor — Summary Judgment Upheld. Dellit v. Schleder, 2022 MT 196, 410 Mont. 275, 518 P.3d 830.

Reservation of Grant to Be Construed in Favor of Grantor: Because of extrinsic evidence showing the grantee's failure to object to the grantor's receipt of three-fifths of the mineral rights in a landowner's royalty reservation and under the clear guidance of this section, the District Court erred in resolving ambiguity concerning a reservation of mineral rights in favor of the grantee. Wicklund v. Sundheim, 2016 MT 62, 383 Mont. 1, 367 P.3d 403. See also Little Big Warm Ranch, LLC v. Doll, 2020 MT 198, 400 Mont. 536, 469 P.3d 689.

Easement by Grant Interpreted in Favor of Grantee — Access Provided by Initial Easement Affirmed: When Watson, in conjunction with her former husband Roger, purchased a parcel of property from defendants, Roger's parents, Watson and Roger received a permanent easement across defendants' property to access the parcel, as evidenced by defendants' representation in a loan agreement that allowed the purchase of the parcel. When Watson and Roger later divorced, Watson was granted full title to the parcel, but defendants then redefined the easement and informed Watson that only part of their property could be accessed through defendants' property, so Watson sued to enforce the terms of the initial easement. The District Court granted defendants summary judgment, but on appeal, the Supreme Court reversed. Applying general principles of contract law and interpreting the easement in favor of grantee Watson, the court noted that under 1-3-213, one who grants a thing is presumed to also grant whatever is essential to its use. Further, the granting document, written by and thus construed against defendants, contained a significant ambiguity by providing Watson and Roger a permanent easement across all of defendants' remaining lands while contradictorily limiting the easement to cover only part of defendants' property. Interpreting the document as a whole and considering the acceptable intrinsic evidence, the Supreme Court concluded that Watson was entitled to a permanent easement across defendants' remaining property as necessary and essential to the complete use and enjoyment of the landlocked parcel sold by defendants. Watson v. Dundas, 2006 MT 104, 332 M 164, 136 P3d 973 (2006), following Erker v. Kester, 1999 MT 231, 296 M 123, 988 P2d 1221 (1999).

Reservation of Single Right-of-Way Over Existing Private Road — No Ambiguity or Conflict With Intended Access: The District Court determined that a reservation of rights in a 1965 deed was ambiguous because the reservation of rights over a single roadway conflicted with the grantors' intent to reserve as many means as possible to their remaining property in a mountainous area. Ambiguities in a reservation of rights in any grant of property are to be construed in favor of the grantor; however, the breadth and scope of an easement are determined upon the actual terms of the contract. The easement in this case was described as "a right of way" over "an existing private road which extends across" the servient tenement "for the use and benefit of Section 3 and [parts] of Section 34". That language indicated the use to which the easement would be put, not the scope of the easement itself. The Supreme Court found that the reservation of rights was not ambiguous; rather, the language restricting the easement to a single right-of-way over an existing private road did not conflict with the intended use of the easement to benefit the grantors' remaining properties, nor did the grantors' intent override any limitation of the singular use of the word "road" in the reservation. Van Hook v. Jennings, 1999 MT 198, 295 M 409, 983 P2d 995, 56 St. Rep. 767 (1999).

Easement Not Created by Wording "Subject To": The plaintiff argued that the language in a deed stating "subject to and together with a 40 foot private road easement" created an easement in the plaintiff's favor. The Supreme Court held that the words "subject to" are commonly used to refer to existing liens and do not connote a reservation or retention of property rights. The court further held that the original grantor had no dominant estate to be served by the alleged easement and therefore could not have created an easement. Wild River Adventures, Inc. v. Bd. of Trustees, 248 M 397, 812 P2d 344, 48 St. Rep. 478 (1991), followed in Ruana v. Grigonis, 275 M 441, 913 P2d 1247, 53 St. Rep. 216 (1996), and contrasted in Reichle v. Anderson, 284 M 384, 943 P2d 1324, 54 St. Rep. 930 (1997).

Ambiguous Conditional Deed Interpreted as Estate Subject to Condition Subsequent: A grant is to be interpreted in favor of the grantee. Therefore, a quitclaim deed that conveyed property from a father to a son with the conditions that the property would revert to the father if the son died before the father and that the property could not be sold by the son during the father's lifetime was interpreted as creating an estate subject to a condition subsequent rather than an estate determinable. St. v. Berklund, 217 M 218, 704 P2d 59, 42 St. Rep. 1147 (1985).

Meaning of "Property of Another" — Arson Statute: Property which defendant had conveyed to his son by quitclaim deed with the conditions that the property would revert to the defendant if the son died before him and that the property could not be sold by the son during the defendant's lifetime is "property of another" for the purposes of a criminal prosecution under 45-6-103. St. v. Berklund, 217 M 218, 704 P2d 59, 42 St. Rep. 1147 (1985).

Improperly Drafted Provision in Deed — No Interest Conveyed: Provision in deed purported to convey a one-half interest in all of a quarter section except a particular subdivision. The filed plat showed that the subdivision consisted of the entire quarter section. The District Court found that this provision was incapable of conveying anything, and the Supreme Court affirmed even though under this section a deed is to be interpreted in favor of the grantee. Tillotsen v. Frazer, 199 M 342, 649 P2d 744, 39 St. Rep. 1442 (1982).

Reserved Easement — No Grantee Rights in Easement: Plaintiff conveyed land to defendant's predecessor in interest. Plaintiff reserved two easements out of the conveyed premises, which did not expressly provide anyone with a right-of-way over the land retained by the plaintiff. The easement reservations in effect provided that defendants needed plaintiff's permission to travel on the access road to the property after the point where the road first entered plaintiff's property. The area was reserved for a private driveway for plaintiff's exclusive use. A reservation out of the grant of properties is to be interpreted in favor of the grantor. Defendants had no easement to use the reserved access road beyond the point where the road first entered plaintiff's property. Macpherson v. Smoyer, 191 M 53, 622 P2d 188, 37 St. Rep. 2079 (1980).

Interest Conveyed: Although granting clause of deed read "remise, release and forever quitclaim", deed was more than a quitclaim deed and passed after-acquired title where habendum clause read "To have and to hold all and singular the said premises together with the appurtenances unto the said party of the second part, and to his heirs and assigns forever" and certain surface tracts were excepted from the conveyance. Henningsen v. Stromberg, 124 M 185, 221 P2d 438 (1950).

Modification of Easement by City: Where grantor reserved an easement in land conveyed, city purchasing land from grantee could not obtain modification of easement based on need. Missoula v. Mix, 123 M 365, 214 P2d 212 (1950), followed in Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 M 52, 993 P2d 688, 57 St. Rep. 65 (2000).

Interpretation of Grants: Generally, a public grant is to be interpreted in favor of grantor, while one between private parties is to be interpreted in favor of grantee; lands in place when a survey was made and adjoining lands were homesteaded, lying between the meander line and the low watermark of the Missouri River, which subsequently changed its channel, continued to be the property of the United States, except the abandoned bed of the river, which belonged to the state (citing 70-1-202, 70-16-201, and 70-18-201). U.S. v. Eldredge, 33 F. Supp. 337 (D.C. Mont. 1940).

70-1-517. Irreconcilable provisions.

Case Notes

No Application if Document Not a Grant: This statute has no application where document, purporting to be a grant, cannot be construed as such because of its wording. Norwegian Lutheran Church of Am. v. Armstrong, 112 M 528, 118 P2d 380 (1941).

70-1-518. Meaning of heirs and issue in certain remainders.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-1-519. Transfer vests title.

Case Notes

Lakeside Property Dispute — Presumption That Grantee Takes Land to Low-Water Mark: In a property dispute relating to a subdivided lakeside parcel, the defendant asserted ownership of all land between the high- and low-water marks on the lake. The Army Corps of Engineers previously declared that the lake was a nonnavigable intrastate body and not subject to the Corps' jurisdiction. The District Court held that the plaintiff owned the land between the high- and low-water marks of the lake bordering her property. On appeal, the Supreme Court held that Montana's public trust easement was not at issue, that a conveyance of riparian property by reference to a specific metes and bounds description along the high-water mark is insufficient alone to overcome the presumption of 70-16-201 that the grantee takes at least to the low-water mark, and that the District Court correctly held that the plaintiff's property included the disputed land between the high- and low-water marks of the lake. Ash v. Merlette, 2017 MT 305, 389 Mont. 486, 407 P.3d 304.

No Retention of Personal Interest in Property Following Corporate Settlement: A settlement agreement provided that certain farm equipment would be divided solely between two family farming groups through mutual bills of sale, but the bills of sale did not specify how the equipment would be divided between the individuals, corporations, and partnerships that made up each group. One of the group partners contended that he owned the disputed equipment individually and as a partner. The District Court held that the partner had no personal interest in the property, and on appeal, the Supreme Court agreed. The settlement agreement divided the equipment solely between the farming groups, and one of the groups insured and paid taxes on the disputed equipment. Thus, substantial evidence supported the District Court's conclusion that the partner retained no personal interest in the equipment following the settlement agreement. Hjartarson v. Hjartarson, 2006 MT 273, 334 M 212, 147 P3d 164 (2006).

Loss of Repossession Rights Upon Delivery of Warranty Deed: A grant of property cannot be delivered conditionally; rather, delivery to a grantee is considered to be absolute, and the instrument takes effect upon its delivery. Any prior conditions are discharged at the time of delivery. Upon transfer of property, the transferee obtains all title held by the transferor unless a different intention is expressed or is necessarily implied. The fact that a warranty deed contained language stating that it was "subject to" a prior mortgage did not render inoperative the presumption of intention to convey the entire interest. An unambiguous provision in a deed prevails over an inconsistent provision in a sales contract pursuant to which the deed was given. Romain v. Earl Schwartz Co., 238 M 500, 779 P2d 54, 46 St. Rep. 1450 (1989).

Execution and Delivery of Quitclaim Deed Supported in Evidence — Effect: The District Court found that a quitclaim deed was executed and delivered by the Morins to the Mapstons before a typewritten note was signed by Mapstons to convey the subject property to Morins. This central finding of fact was held to be clearly supported in the evidence. The legal effect of the finding is that the quitclaim deed constituted a gift to Mapstons, no consideration being necessary. The transfer vested all actual title which Morins then had, since no different intention was expressed or necessarily implied. The typewritten note cannot be specifically enforced by Morins because they had not received an adequate consideration for the contract and because the contract lacks mutuality. Moreover, no involuntary trust was created. Morin v. Mapston, 217 M 403, 705 P2d 118, 42 St. Rep. 1283 (1985).

Operation and Effect: Under the common law as well as 70-1-520, 70-15-105, and this section, whoever grants a thing tacitly grants that without which the grant would be of no avail, and the principal thing carries with it the incident. Yellowstone Valley Co. v. Assoc. Mtg. Investors, Inc., 88 M 73, 290 P 255, 70 ALR 1002 (1930), followed in Erker v. Kester, 1999 MT 231, 296 M 123, 988 P2d 1221, 56 St. Rep. 912 (1999).

70-1-520. Transfer of incidents.

Case Notes

Water Right Held Through Pre-1973 Mesne Conveyances — Summary Judgment Incorrectly Granted — Abandonment of Right Factually Dependent: Duncan, who lived on a tract of land in Madison County, used water from a spring located on property (the large parcel) now owned separately from the parcel (the small parcel) lived on by Duncan. In 1950, Duncan conveyed all the property in what is now the large and small parcels to Baker. In 1951, Baker divided the property, conveying the large parcel and all appurtenances to Halse and reserving the small parcel for herself. Baker made no express reservation of water rights with the reserved property, and the deed to Halse conveying the large parcel made no express grant of water rights. For the next 10 years, Baker made no use of the house located on the small parcel. In 1961, Baker conveyed the small parcel to the Hunts, expressly conveying water rights on the property. In 1963, Halse filed a declaration of vested ground water rights for the "total flow of all springs" located on the large parcel. Fosseco, who acquired the large parcel from Halse, conveyed it, through mesne conveyances, to M.S. Consulting. The Hunts conveyed the small parcel, through mesne conveyances, to the Axtells. All uses of the water were for livestock and domestic use. In 1993, the Axtells filed a notice of water rights with the Department of Natural Resources and Conservation. M.S. Consulting subsequently served the Axtells with notice that their water rights would be cut off in 45 days, and the Axtells brought an action to enjoin the discontinuance of their water supply. The District Court granted summary judgment for the Axtells, and M.S. Consulting appealed. The Supreme Court reviewed the background of the prior appropriation law in Montana, noting that because the current statutes recognize existing water rights, the law before the 1973 statutes were enacted is still the law with regard to water rights acquired before 1973. The Supreme Court reviewed the pre-1973 law and concluded that the water rights appurtenant to all the property passed to Baker but that there was a factual issue whether, as a result of Baker's nonuse of the property and its water rights for over 10 years, Baker had abandoned the water rights conveyed to her by Duncan. If the abandonment occurred, there was no reservation of conveyance and no right to use of the water after that period of nonuse. The issue of abandonment, the Supreme Court noted, depended in turn upon several other issues, such as whether Baker intended to abandon her water right. The Supreme Court also agreed with M.S. Consulting that several other issues of fact raised by the company may also exist, although it noted that these other issues were only material if the District Court ruled a particular way on the question of abandonment. Because there were genuine issues of material fact, the Supreme Court held that the District Court erred in granting summary judgment to the Axtells. Axtell v. M.S. Consulting, 1998 MT 64, 288 M 150, 955 P2d 1362, 55 St. Rep. 276 (1998).

70-1-521. Grant may inure to benefit of stranger.

Compiler's Comments

2009 Amendment: Chapter 307 at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2009.

70-1-522. Certain restrictions on political free speech contrary to public policy — enforcement prohibited — definitions.

Compiler's Comments

Effective Date: This section is effective October 1, 2009.

Part 7
Gifts and Devises to Estates

Part Case Notes

Burden of Proof in Claiming Gift — General Rule: It is the general rule in Montana that the person claiming the fact of a gift has the burden of proving it, and a gift will not be presumed unless the parties stand in close relation to one another. This exception is limited to such relationships as parent and child or husband and wife and is not extended to more distant relationships. Further, a "close and loving" relationship does not establish an in loco parentis status. Niemen v. Howell, 234 M 471, 764 P2d 854, 45 St. Rep. 2058 (1988).

No Gift Intended Although Money Placed in Joint Tenancy Bank Account: The plaintiff added her nephew's name to a joint tenancy signature card for her bank checking account to facilitate the administration of her estate upon her death. All money in the account was deposited by the plaintiff, who exercised exclusive control over the account. The plaintiff transferred money from the account to her nephew and his wife, who used the sums to purchase real estate. After her nephew died, the plaintiff sought to secure title to the real property when her nephew's wife refused to repay the money the plaintiff had given the couple. The defendant contended the money was a gift to the couple, but the plaintiff testified at length that the money was intended as a loan. The addition of her nephew's name to the signature card of her checking account was not sufficient evidence to overcome the plaintiff's testimony that there was no donative intent. To constitute a gift, the addition of a party's signature to a bank account signature card must satisfy all the requirements of a gift inter vivos: delivery, donative intent, and acceptance by the donee. When, as in this case, the depositor raised the issue of donative intent during her lifetime, the language on the signature card was not conclusive evidence that a gift was intended. Peterson v. Kabrich, 213 M 401, 691 P2d 1360, 41 St. Rep. 2196 (1984).

70-1-703. Conveyances to an estate.

Compiler's Comments

1993 Amendment: Chapter 494 in first sentence deleted reference to subsection (8) of 72-1-103; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

CHAPTER 2
PERSONAL PROPERTY — SPECIAL KINDS QUIET TITLE AND PARTITION

Part 1
Special Kinds

70-2-101. Thing in action defined.

Case Notes

Tort Claim for Personal Injuries Not "Thing in Action": A cause of action for personal injuries is not a "thing in action" or "chose in action" and is not subject to levy of garnishment. Coty v. Cogswell, 100 M 496, 50 P2d 249 (1935), distinguishing State ex rel. Coffey v. District Court, 74 M 355, 240 P 667 (1925).

Execution Against Cause of Action: A cause of action is the right which a party has to institute a judicial proceeding, and if the relief sought is the recovery of money, the cause of action is designated a "thing" or "chose in action", which is personal property and therefore subject to seizure and sale in satisfaction of a judgment. State ex rel. Coffey v. District Court, 74 M 355, 240 P 667 (1925), distinguished in Coty v. Cogswell, 100 M 496, 50 P2d 249 (1935).

Assignment of Thing in Action: Where person engaged in business of supplying mining timbers borrowed money from defendant and as partial security for the loan assigned to defendant the money due him each month for timbers sold, transaction whereby the person's employee presented a due bill to defendant and received part of face amount in cash with remainder to be paid following month (the due bill calling for payments to be charged to employee's account) amounted to an assignment of a chose in action by employee to defendant. Parnell v. Davenport, 36 M 571, 93 P 939 (1908).

70-2-102. Transfer and succession.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Joinder of Insurance Company: The insured may prosecute an action for the full amount of the loss or either the insured or the insurer may separately sue for his portion of the loss, and if the action is instituted by either one alone, the defendant can compel joinder of the other or may waive joinder. State ex rel. Slovak v. District Court, 166 M 485, 534 P2d 850 (1975).

Claim Against Federal Government: Insurance company subrogated to rights of insured upon payment of claim had no right to sue under Federal Tort Claims Act (28 U.S.C. § 931) since 31 U.S.C. § 203 prohibits the assignments of claims against United States. Cascade County v. U.S., 75 F. Supp. 850 (D.C. Mont. 1948).

Oral Assignment: Things in action or rights arising out of obligations are assignable as a general rule, nonassignability being the exception, and the transfer may be made without writing whenever a writing is not expressly required by statute. Flinner v. McVay, 37 M 306, 96 P 340, 19 LRA (NS) 879, 15 Ann. Cas. 1175 (1908). See Winslow v. Dundom, 46 M 71, 125 P 136 (1912).

Subrogation to Insurance Company: Right to recover damages with interest for negligent destruction of property by fire is assignable and passes by subrogation to an insurance company to extent of proportion of loss paid by it to owner of property destroyed. Caledonia Ins. Co. v. N. Pac. Ry., 32 M 46, 79 P 544 (1905). See Gaugler v. Chicago, Milwaukee & St. Paul Ry., 197 F 79 (9th Cir. 1912).

70-2-111. Wild animals.

Case Notes

Operation and Effect: Under this section an owner of land has a qualified ownership in wildfowl which have been protected, fed, and claimed by him thereon, and he alone has the right to hunt them while on his land. Hence, a trespasser has no right to kill or take them away. Herrin v. Sutherland, 74 M 587, 241 P 328, 42 ALR 937 (1925).

Attorney General's Opinions

Game Harvesting — Game Ranch: The Fish and Game Commission (now Fish, Wildlife, and Parks Commission) does not have the authority to regulate the hunting and killing of privately owned game through the imposition of licensing requirements on individual hunters or open and closed seasons. 36 A.G. Op. 112 (1976).

Law Review Articles

The Right to Kill Wild Animals in Defense of Persons or Property, Bender, 31 Mont. L. Rev. 235 (1970).

Part 2
Quiet Title and Partition

70-2-201. Action for quieting title to personal property.

Case Notes

Rebuttable Presumption That Prison Escapee Abandoned Personal Property: Hawkins escaped from the state prison. Immediately following the escape, officials packed up Hawkins' personal property, sealed it in boxes with security tape and Hawkins' name on each box, and placed it in the prison storage room. After 2 days, Hawkins was apprehended and returned to prison. He was found guilty of escape, but his property was not ordered destroyed. Over the next 30 days, Hawkins requested the return of his personal property several times. Eventually, Hawkins was escorted to the storage room and allowed to remove his legal papers but was informed that, by policy, when a prisoner escapes, all personal property is considered abandoned, so the remainder of his property was destroyed or sold. Hawkins filed an action for the value of the property, alleging that prison officials destroyed his property without affording him due process, which constituted cruel and unusual punishment and violated a gratuitous bailment that Hawkins had formed. The District Court, concluding that Hawkins had abandoned his property by his escape and that the abandonment constituted a complete defense to any action brought by Hawkins that depended on his ownership of the property, dismissed the action based on failure to state a claim for which relief could be granted. On appeal, the Supreme Court cited Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939), for the proposition that in determining whether one has abandoned property or rights, intention is the first and paramount object of inquiry. If there is no expressed intent to abandon, then intent must be inferred from the acts of the property owner. The presumption or inference of intent to abandon one's property based solely on the acts of the owner is a rebuttable presumption. Here, upon returning to prison and requesting the return of his property, Hawkins effectively rebutted the presumption that he intended to abandon it, and when he reclaimed his property by requesting its return, he regained his status as owner of his personal property against all others. The District Court committed reversible error when it found that Hawkins abandoned the property by escape and dismissed the action based on failure to state a claim for which relief could be granted. Hawkins v. Mahoney, 1999 MT 296, 297 M 98, 990 P2d 776, 56 St. Rep. 1185 (1999), distinguishing Herron v. Whiteside, 782 SW 2d 414 (1989). See also 1 C.J.S. Abandonment § 12 (1985).

Bank Claim to Property Alleged as Fixtures — Inferior to Owners' Property Rights: Mills took out a loan to acquire personal property to be used in a roller-skating facility, including a removable heating system, and paid off the loan about 18 months later. Mills later sold the roller-skating facility, including the heating system, to Davises. The transaction was financed through the Little Horn State Bank. The contract provided that in case Davises defaulted, possession of the real and personal property would return to Mills and Davises would retain no further interest. Davises defaulted and entered an agreement and release with the bank whereby the property was deeded to the bank in consideration of the bank satisfying the mortgage debt. Mills later offered to sell the heating system to the bank, but the bank refused and advised Mills that the bank claimed the property as fixtures pursuant to Davises' mortgage, whereupon Mills removed the heating system. However, because Mills were at all times the owners of the personal property, the bank obtained no more interest than that held by Davises. Therefore, the bank's claim to the heating system as fixtures was inferior and subject to the property rights of Mills. Little Horn St. Bank v. Mill, 233 M 372, 760 P2d 91, 45 St. Rep. 1563 (1988).

Sale Without Authority: Because it holds land in public trust and it failed to comply with statutory requirements for land sales, the Department of Highways (now Department of Transportation) was without authority to make the sale of land. The deed derived from the sale without authority was held void. Therefore, the Department of Highways (now Department of Transportation) cannot be estopped from denying the validity of the deed. Norman v. St., 182 M 439, 597 P2d 715 (1979).

Jury Trial: Actions to quiet title and petitions for Writs of Possession to enforce a court's decree are of equitable cognizance, and the findings of a jury in such an action are only advisory. Fuller v. Gibbs, 122 M 177, 199 P2d 851 (1948).

Assessment Liens: City claiming to be holder of lien for unpaid sewer assessments could not maintain a quiet title action under this chapter against owners of the real property on ground that lien constituted personal property, in absence of any allegation showing that owners of real property claimed any adverse interest in the lien. Cut Bank v. Clapper Motor Co., 120 M 274, 182 P2d 474 (1947).

Mortgage Foreclosure: Where a mortgage on an automobile, though recorded, was given by one not in the chain of title and therefore did not constitute constructive notice to subsequent purchasers, an innocent purchaser relying on record ownership was protected, the mortgagee had no right or interest, and the defendant in a foreclosure action, having filed a cross-complaint to quiet title, could be awarded damages for wrongful seizure. Rigney v. Swingley, 112 M 104, 113 P2d 344 (1941).

Allegations of Complaint: Complaint in an action in the nature of one to quiet title to mill tailings deposited and impounded by a mining company on placer ground claimed by defendants, alleging generally that plaintiffs "are and at all times herein mentioned were the owners and in possession" thereof, was sufficient to admit proof of any legal, general, or special title in them without disclosing the source of their title, the rule applying as well to actions relating to rights in real property. Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939).

Mill Tailings: Mill tailings resulting from many years of operation of a quartz mine, deposited upon adjoining millsites and impounded by a cribbing of logs for the purpose of preventing them from escaping, with the idea of working them when improved metallurgical processes warrant, which millsites were later upon cessation of mining operations filed upon by others as placer ground, were personal property, and never having been abandoned, the property of the successors in interest of the mining company making the deposit. Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939).

Fixtures: In an action in claim and delivery, and to quiet title under this section, to recover the possession of a dredge used in placer mining operations claimed by plaintiff lessee as personal property and by defendant lessor as a fixture, the trial court erred in directing a verdict for plaintiff in view of the evidence relating to the intention of the parties in entering into the contract of lease, from which different inferences might have been drawn by different reasonable men. Story Gold Dredging Co. v. Wilson, 106 M 166, 76 P2d 73 (1938).

70-2-202. General procedural provisions applicable.

Compiler's Comments

Code Commissioner Correction: Substituted "Rules 4 and 12(a)" for "Rules 4, 12(a), and 41(e)" to reflect revisions adopted by Supreme Court Order No. AF 07-0157 dated April 26, 2011, and by Supreme Court Order dated September 28, 1999.

CHAPTER 3
TRANSFER OF PERSONAL PROPERTY — GIFTS

Chapter Law Review Articles

Gifts Effected by Written Instrument: Faith Lutheran Retirement Home v. Veis, Temple, 35 Mont. L. Rev. 132 (1974).

Part 1
General Provisions

Part Case Notes

Burden of Proof in Claiming Gift — General Rule: It is the general rule in Montana that the person claiming the fact of a gift has the burden of proving it, and a gift will not be presumed unless the parties stand in close relation to one another. This exception is limited to such relationships as parent and child or husband and wife and is not extended to more distant relationships. Further, a "close and loving" relationship does not establish an in loco parentis status. Niemen v. Howell, 234 M 471, 764 P2d 854, 45 St. Rep. 2058 (1988).

No Gift Intended Although Money Placed in Joint Tenancy Bank Account: The plaintiff added her nephew's name to a joint tenancy signature card for her bank checking account to facilitate the administration of her estate upon her death. All money in the account was deposited by the plaintiff, who exercised exclusive control over the account. The plaintiff transferred money from the account to her nephew and his wife, who used the sums to purchase real estate. After her nephew died, the plaintiff sought to secure title to the real property when her nephew's wife refused to repay the money the plaintiff had given the couple. The defendant contended the money was a gift to the couple, but the plaintiff testified at length that the money was intended as a loan. The addition of her nephew's name to the signature card of her checking account was not sufficient evidence to overcome the plaintiff's testimony that there was no donative intent. To constitute a gift, the addition of a party's signature to a bank account signature card must satisfy all the requirements of a gift inter vivos: delivery, donative intent, and acceptance by the donee. When, as in this case, the depositor raised the issue of donative intent during her lifetime, the language on the signature card was not conclusive evidence that a gift was intended. Peterson v. Kabrich, 213 M 401, 691 P2d 1360, 41 St. Rep. 2196 (1984).

70-3-101. Gift defined.

Case Notes

Father's Income From Parent Properly Characterized as Gift Income — Future Payments Considered Gifts. In re Marriage of Miller, 2022 MT 110, 409 Mont. 29, 511 P.3d 307.

Gift of Shares of Family Farm to Son — Undue Influence Not Proven by Other Son: The mother owned a family farm where one of her two sons worked as the full-time manager. The mother expressed interest in preserving the farm and she gifted her controlling shares to the manager son. After taking the mother to Billings for medical evaluations and facilitating a gift of a convertible to himself, the other son filed suit alleging undue influence. The District Court found that the mother's gift of shares to the manager son was not the result of undue influence, that the other son failed to meet his burden of proving undue influence, that the gift of shares without condition became irrevocable upon acceptance, and that the essential elements of an irrevocable gift inter vivos were satisfied. Larson v. Larson, 2017 MT 299, 389 Mont. 458, 406 P.3d 925.

Premarital Agreement — Allocation of 40% Ownership Interest in Brokerage Service Company Upheld: A wife argued that the District Court erred in allocating a 40% ownership interest in a brokerage service company to her husband. The Supreme Court held that the transfer was enforceable under 30-18-106 even though the wife had provided $280,000, which was transferred to the husband's separate checking account without an acknowledgment before a notary public. The $280,000 was a loan from the wife that was repaid in full. The $20,000 used to purchase the initial interest was a gift since no repayment schedule was ever executed and no consideration was requested. In addition, under 28-3-206, uncertainty is to be resolved against the party who caused the uncertainty to exist. With respect to the loan, the Supreme Court remanded after applying 31-1-106 and holding that the wife's loan of $280,000 was not interest free. In re Marriage of Weiss, 2010 MT 188, 357 Mont. 320, 239 P.3d 123. In Weiss v. Weiss, 2011 MT 240, 362 Mont. 157, 261 P.3d 1034, the Supreme Court concluded that the District Court correctly determined on remand that the $280,000 loan was paid off in full by the husband and that the District Court's calculation of simple interest on the loan was correct.

Evidence That Withdrawals Intended as Loans or Gifts — No Liability for Repayment: Parents argued that their children were obligated to repay two withdrawals from the parents' personal accounts that were used to effectuate the closing of a multimillion dollar corporate transaction. The District Court decided not to hold the children liable because the parents failed to present credible evidence as to whether the withdrawals were intended as loans or gifts. On appeal, the Supreme Court affirmed. Absent sufficient evidence whether the withdrawals were loans or gifts, the children could not be held liable for repayment. Hjartarson v. Hjartarson, 2006 MT 273, 334 M 212, 147 P3d 164 (2006).

Engagement Ring Given in Contemplation of Marriage Not Considered Gift — Conditional Gift Analysis: Albinger gave Harris a $29,000 diamond engagement ring when the two promised to marry. The relationship was strained, resulting in breakups and the return of the ring to Albinger several times, but each time the couple reconciled, and the ring was returned to Harris. Following their final separation, Albinger told Harris to "take the car, the horse, the dog, and the ring", so Harris moved to Kentucky, marriage plans evaporated, and Harris refused to return the ring. Albinger filed in District Court to settle ownership of the ring. The District Court found the ring to be a gift in contemplation of marriage, implying that the existence of a condition attached to the gift, and held that Albinger was entitled to return of the ring upon failure of the condition of marriage. Harris appealed, and the Supreme Court reversed. The rights and duties of parties regarding property exchanges in contemplation of marriage are determined by existing law and common-law principles. A gift is a transfer of personal property made voluntarily and without consideration, and the essential elements of an inter vivos gift are donative intent, voluntary delivery, and acceptance by the recipient. Delivery, which manifests the intent of the giver, must turn over dominion and control of the property to the recipient, and when made without condition, such a gift becomes irrevocable upon acceptance, so the Supreme Court will not void the transfer when the giver experiences a change of heart. The only revocable gift recognized under Montana law is a gift in view of death, and a gift causa mortis may be revoked by the giver at any time and is revoked by the giver's recovery from the illness or escape from the peril under which the gift was made. However, the Supreme Court declined to analogize gifts in contemplation of marriage with a gift in contemplation of death. Further, a purported gift that is part of the inducement for an agreement to do or not do a certain thing becomes the consideration essential to contract formation. An exchange of promises creates a contract to marry, albeit an unenforceable one, so when an engagement ring is given as consideration for the promise to marry, a contract is formed and legal action to recover the ring is barred by the abolition of breach of promise actions in 27-1-602. Here, the engagement ring was an unconditional, completed gift upon acceptance, and a completed gift is not revocable. Thus, the ring remained in Harris's ownership and control. Albinger v. Harris, 2002 MT 118, 310 M 27, 48 P3d 711 (2002).

Burden of Proof in Claiming Gift — General Rule: It is the general rule in Montana that the person claiming the fact of a gift has the burden of proving it, and a gift will not be presumed unless the parties stand in close relation to one another. This exception is limited to such relationships as parent and child or husband and wife and is not extended to more distant relationships. Further, a "close and loving" relationship does not establish an in loco parentis status. Niemen v. Howell, 234 M 471, 764 P2d 854, 45 St. Rep. 2058 (1988).

Evidence of Gift — Clear, Convincing, Strong, and Satisfactory: When a presumption of gift does not arise under the facts, proof that a gift was made must be established by clear, convincing, strong, and satisfactory evidence, i.e., by more than a mere preponderance of the evidence. In this case, there is substantial evidence to show that the plaintiff intended the transfer of money to her nephew as a loan to be repaid as he was able to do so. Thus, the burden of proof that a gift was intended has not been met. Peterson v. Kabrich, 213 M 401, 691 P2d 1360, 41 St. Rep. 2196 (1984).

No Gift Intended Although Money Placed in Joint Tenancy Bank Account: The plaintiff added her nephew's name to a joint tenancy signature card for her bank checking account to facilitate the administration of her estate upon her death. All money in the account was deposited by the plaintiff, who exercised exclusive control over the account. The plaintiff transferred money from the account to her nephew and his wife, who used the sums to purchase real estate. After her nephew died, the plaintiff sought to secure title to the real property when her nephew's wife refused to repay the money the plaintiff had given the couple. The defendant contended the money was a gift to the couple, but the plaintiff testified at length that the money was intended as a loan. The addition of her nephew's name to the signature card of her checking account was not sufficient evidence to overcome the plaintiff's testimony that there was no donative intent. To constitute a gift, the addition of a party's signature to a bank account signature card must satisfy all the requirements of a gift inter vivos: delivery, donative intent, and acceptance by the donee. When, as in this case, the depositor raised the issue of donative intent during her lifetime, the language on the signature card was not conclusive evidence that a gift was intended. Peterson v. Kabrich, 213 M 401, 691 P2d 1360, 41 St. Rep. 2196 (1984).

No "In Loco Parentis Relationship" — No Presumption of Gift: The plaintiff transferred money to her nephew and his wife, who used the sums to purchase real property. After her nephew died, the plaintiff brought an action to secure title to the real estate when her nephew's wife refused to repay the sums the plaintiff contended were a loan to her nephew. The defendant claimed that the transfer of funds from the plaintiff to her nephew raised a presumption that the transfer was intended as a gift because the plaintiff stood in loco parentis to her nephew and that relationship triggers the presumption of gift. However, the trial court found that no in loco parentis relationship existed between the plaintiff and her nephew. To stand in loco parentis to another, a person must intentionally assume the status of a parent by accepting the responsibilities and obligations incident to the parental relationship without benefit of legal adoption. The plaintiff did not assume any parental obligations toward her nephew. At the time the transfer of money was made, her nephew was an adult who lived in close contact with his own mother. As no in loco parentis relationship existed between the plaintiff and her nephew, no presumption of gift arises. Peterson v. Kabrich, 213 M 401, 691 P2d 1360, 41 St. Rep. 2196 (1984).

Language on Savings Account Signature Card Not Conclusive: A son was added as a joint tenant on his mother's savings accounts by signing the savings institution's signature card. The card contained language declaring one-half the deposit a gift to the joint tenant. The mother later brought an action against her son, asserting that she never intended to gift any portion of the accounts to her son but merely to allow him to withdraw money for her expenses if needed. Because the mother raised the issue of ownership of funds in a joint tenancy account during her lifetime, the language on the signature card was not conclusive. Additional evidence could be examined to ascertain the true intent of the parties. Anderson v. Baker, 196 M 494, 641 P2d 1035, 39 St. Rep. 273 (1982).

Payments in Excess of Decree — Gifts: The marriage of the parties was dissolved in 1973. The wife brought suit to collect $15,000 in satisfaction of delinquent payments for support and maintenance for the years 1976, 1977, and 1978. The husband contended that certain sums paid in excess of the decree, amounting to $15,546.11, should be offset against the payments. The husband voluntarily increased support payments and paid for the wife's psychiatric care under an oral agreement. Letters from the husband and his attorney stated that the payments were voluntary and intended as gifts to the children. The trial court held that the excess payments were gifts and that the husband was liable for the back payments. The husband contended that the payments were not gifts because they were not voluntary. He claimed that constant harassing, phone calls, and threats to withhold visitation rights were responsible for the extra payments. The Supreme Court held that while these factors no doubt had an effect, they did not overcome the substantial evidence that the payments were intended as gifts, and the husband was not entitled to offset them against the amount owed under the decree. Delaney v. Delaney, 195 M 259, 635 P2d 1306, 38 St. Rep. 1832 (1981).

Donative Intent: Evidence that donor was 88 years of age, suffered from cerebral arteriosclerosis and was disoriented and forgetful, was more susceptible to suggestion than the average healthy person, that the donee was a close friend and blood relative of the donor, and that the donee had written a letter suggesting that the donor put someone else's name on her savings account was sufficient to void purported gift effected by transfer of donor's savings account to donor and donee jointly due to donor's mental incapacity to form the requisite intent. Patterson v. Halterman, 161 M 278, 505 P2d 905 (1973).

Stock Certificates — No Delivery: Aged mother did not make gift of stock certificates to son where there was no transfer of title to certificates in manner provided by Uniform Stock Transfer Act (15-628 to 15-651, R.C.M. 1947, now repealed). Bodine v. Bodine, 149 M 29, 422 P2d 650 (1967).

Shares of Stock — Delivery: Stocks which had been purchased by the deceased with his own funds and had been issued jointly to him and his son and daughter with right of survivorship and to son and daughter as tenants in common, deposited in safety deposit boxes rented in the names of the owners who had inspected the stock in the safety deposit boxes and included dividends from stocks in individual income tax returns, were delivered by the donor to the donees and did not belong to deceased at the time of his death so as to be a part of his estate. Marans v. Newland, 141 M 32, 374 P2d 721 (1962).

Inter Vivos Gift — Elements: To constitute a gift inter vivos, within the statute, the donor must voluntarily deliver the subject of the gift to the donee with the present intention to vest the legal title in the donee, who must accept it. The essential elements are delivery, the accompanying intent, and acceptance by donee. Such a gift is made without condition and becomes at once irrevocable. Baird v. Baird, 125 M 122, 232 P2d 348 (1951); Fender v. Foust, 82 M 73, 265 P 15 (1928); O'Neil v. O'Neil, 43 M 505, 117 P 889 (1911).

70-3-102. Gift — how made.

Case Notes

Statement of Present Intent to Perform or Not Perform Not Considered Contract — Lease Not Altered by Gratuitous Promise: Defendants had a 99-year lease on a ranch owned by Earl. The lease provided that in case of need, it was subject to recall on demand by Earl. When Earl had to be placed in a nursing home without the assets to bear her expenses and needed to liquidate the property in order to qualify for federal benefits, defendants were notified that the lease was being terminated. Defendants objected, citing a letter from Earl purporting to gift to them all interest in the ranch. However, to be a gift, a transfer of property must be irrevocable, complete, without adequate or full consideration, and unmistakably intended to divest the donor of title, dominion, and control over the property. The District Court concluded that sufficient need existed to terminate the lease and denied defendants' motion to resolve any effect that the letter had on the original lease. The Supreme Court affirmed, finding that the letter was a mere statement by Earl of present intent to perform or not perform an act in the future and that such a gratuitous promise did not constitute a valid written modification of the original lease. Earl v. Beager, 2001 MT 44, 304 M 258, 20 P3d 788 (2001).

Language on Savings Account Signature Card Not Conclusive: A son was added as a joint tenant on his mother's savings accounts by signing the savings institution's signature card. The card contained language declaring one-half the deposit a gift to the joint tenant. The mother later brought an action against her son, asserting that she never intended to gift any portion of the accounts to her son but merely to allow him to withdraw money for her expenses if needed. Because the mother raised the issue of ownership of funds in a joint tenancy account during her lifetime, the language on the signature card was not conclusive. Additional evidence could be examined to ascertain the true intent of the parties. Anderson v. Baker, 196 M 494, 641 P2d 1035, 39 St. Rep. 273 (1982).

Instrument Transferring Title — No Delivery of Property Required: Where a gift inter vivos is made by a written instrument transferring the title to the donee, it is not necessary to the validity of the gift that delivery of the thing given be made to the donee. In the case of a sale of personal property, as in that of a gift, the transaction between the parties is good whether possession is delivered or not, want of delivery rendering it void only as to creditors and subsequent bona fide purchasers or encumbrancers. This rule is true with respect to a gift from husband to wife, the fact that donor at times had possession of the thing given after the execution of the instrument not changing the rule. Sylvain v. Page, 84 M 424, 276 P 16, 63 ALR 528 (1929).

70-3-103. Gift not revocable.

Case Notes

Gift of Shares of Family Farm to Son — Undue Influence Not Proven by Other Son: The mother owned a family farm where one of her two sons worked as the full-time manager. The mother expressed interest in preserving the farm and she gifted her controlling shares to the manager son. After taking the mother to Billings for medical evaluations and facilitating a gift of a convertible to himself, the other son filed suit alleging undue influence. The District Court found that the mother's gift of shares to the manager son was not the result of undue influence, that the other son failed to meet his burden of proving undue influence, that the gift of shares without condition became irrevocable upon acceptance, and that the essential elements of an irrevocable gift inter vivos were satisfied. Larson v. Larson, 2017 MT 299, 389 Mont. 458, 406 P.3d 925.

Doctrine of Corporation by Estoppel Versus De Facto Corporation Doctrine — Requisite Donative Intent to Show Inter Vivos Gift to Corporation by Estoppel: A church incorporated in 1998. The attorney who filed the incorporation subsequently moved out of state, and because annual reports were not filed, the Secretary of State involuntarily dissolved the church's corporate status in 2000. The church's corporate status was reinstated in 2004. The church was not aware that it was not a valid corporation when it received a gift of property in 2002, but claimed that it was nevertheless a de facto corporation able to accept the gift. The couple who donated the property claimed that because they did not know that the church was not a valid corporation, they should be allowed to revoke the gift and that the subsequent reinstatement of the church's corporate status after the couple sought to revoke the gift did not retroactively create donative intent that the couple had revoked. The Supreme Court distinguished the de facto corporation, which was abolished in 35-1-119 (now repealed), from the doctrine of corporation by estoppel, which provides that a party that has dealt with a corporation cannot then deny the corporation's existence. The court applied the doctrine of corporation by estoppel to this case. It would be inequitable to allow defendants to escape possible liability just because the church, acting in good faith, was involuntarily dissolved at the time that the possible liability arose. Thus, defendants were equitably estopped from denying the corporate status of the church. The couple had the requisite donative intent to meet the definition of an irrevocable inter vivos gift, and as owner of the gifted property, the church had standing to sue. Valley Victory Church v. Sandon, 2005 MT 72, 326 M 340, 109 P3d 273 (2005).

Language on Savings Account Signature Card Not Conclusive: A son was added as a joint tenant on his mother's savings accounts by signing the savings institution's signature card. The card contained language declaring one-half the deposit a gift to the joint tenant. The mother later brought an action against her son, asserting that she never intended to gift any portion of the accounts to her son but merely to allow him to withdraw money for her expenses if needed. Because the mother raised the issue of ownership of funds in a joint tenancy account during her lifetime, the language on the signature card was not conclusive. Additional evidence could be examined to ascertain the true intent of the parties. Anderson v. Baker, 196 M 494, 641 P2d 1035, 39 St. Rep. 273 (1982).

70-3-104. Unsolicited goods considered gift.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 2
Gifts in View of Death

70-3-201. Gift in view of death defined.

Case Notes

Gift of Shares of Family Farm to Son — Undue Influence Not Proven by Other Son: The mother owned a family farm where one of her two sons worked as the full-time manager. The mother expressed interest in preserving the farm and she gifted her controlling shares to the manager son. After taking the mother to Billings for medical evaluations and facilitating a gift of a convertible to himself, the other son filed suit alleging undue influence. The District Court found that the mother's gift of shares to the manager son was not the result of undue influence, that the other son failed to meet his burden of proving undue influence, that the gift of shares without condition became irrevocable upon acceptance, and that the essential elements of an irrevocable gift inter vivos were satisfied. Larson v. Larson, 2017 MT 299, 389 Mont. 458, 406 P.3d 925.

Deeding of Property for Purpose of Controlling Distribution — Revocation of Qualified Gift: Intending to avoid probate, the Gilroys added their son's name to the title on their home and four vehicles for the purpose of controlling distribution upon the Gilroys' deaths. When the father died, the mother was placed in an extended care facility and an independent guardian was appointed to manage her affairs. The guardian determined that the mother's estate was running short of funds to defray the cost of extended care and sought return of the property in possession of the son. The son refused to return the property on grounds that following the father's death, interest in the vehicles passed equally to the mother and son, that the gift was complete, and that the son's interest was vested. The District Court held that placing the son's name on the titles was a qualified gift that could be revoked by the mother or the guardian. The Supreme Court affirmed. Because the addition of the son's name to the titles was an estate planning mechanism and the property was to be available for the use and benefit of the parents as long as they desired, the transfer was considered a revocable qualified transfer. Under 70-3-203, conditional transfers made in view of death are qualified and may be revoked by the giver at any time. Further, the son had agreed to transfer interest in the parents' home back to the mother at her request, so 70-1-509 did not apply. In re Guardianship & Conservatorship of Gilroy, 2004 MT 267, 323 M 149, 99 P3d 205 (2004), distinguishing Gross v. Gross, 239 M 480, 781 P2d 284 (1989).

Inheritance Tax: The phrase "in contemplation of death" with reference to transfers made taxable under the inheritance tax statute is not confined to gifts causa mortis but embraces gifts inter vivos, even though they are fully executed. In re Wadsworth's Estate, 92 M 135, 11 P2d 788 (1932).

Delivery in Trust for Donee — Acceptance Presumed: A gift causa mortis may be affected by delivery to a third person in trust for the donee although the gift does not come to the knowledge of the latter and is not accepted by him until after the death of the donor. The acts of the trustee receiving the property are deemed to be in the interest of the donee and the acceptance of the gift is presumed. Stagg v. Stagg, 90 M 180, 300 P 539 (1931).

Gift Intended to Take Effect Only in Case of Death: One of the essential elements of a gift causa mortis is that the gift is intended to take effect only in case of death of the giver, but a gift made during the last illness of the giver or under circumstances which would impress him with an expectation of speedy death is presumed to be such a gift. Stagg v. Stagg, 90 M 180, 300 P 539 (1931).

Delivery of Bank Deposit Book: Where donor, believing himself to be in peril of death from heart disease, handed bank passbooks to his brother stating that he should have them, the delivery of the books was a sufficient delivery of the deposits represented by them, his intention to make the gift being shown by a writing left with each bank to the effect that the account in each was a joint one upon which the brother could draw and that on the death of either the other should have what was remaining in the account. Fender v. Foust, 82 M 73, 265 P 15 (1928).

Gift Causa Mortis — Conditions: A gift causa mortis is subject to the following conditions: (1) it must be made in contemplation, fear, or peril of death; (2) the donor must die of the illness or peril which he then fears or contemplates; and (3) the delivery must be made with the intent that title shall vest only in case of death. Fender v. Foust, 82 M 73, 265 P 15 (1928); O'Neil v. O'Neil, 43 M 505, 117 P 889 (1911).

Validity of Gift Where Interest Is Reserved: Delivery of promissory notes and Liberty bonds with the condition that the interest therefrom should go to donor as long as he lives does not invalidate the gift as one causa mortis, where the other two elements necessary to such gifts are present. Fender v. Foust, 82 M 73, 265 P 15 (1928).

Jurisdiction as to Validity of Gifts: The validity of a gift causa mortis is determinable by the law of the place where it is made, without reference to the domicile of the donor. O'Neil v. O'Neil, 43 M 505, 117 P 889 (1911).

70-3-202. When gift presumed to be in view of death.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-3-203. Revocation.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Deeding of Property for Purpose of Controlling Distribution — Revocation of Qualified Gift: Intending to avoid probate, the Gilroys added their son's name to the title on their home and four vehicles for the purpose of controlling distribution upon the Gilroys' deaths. When the father died, the mother was placed in an extended care facility and an independent guardian was appointed to manage her affairs. The guardian determined that the mother's estate was running short of funds to defray the cost of extended care and sought return of the property in possession of the son. The son refused to return the property on grounds that following the father's death, interest in the vehicles passed equally to the mother and son, that the gift was complete, and that the son's interest was vested. The District Court held that placing the son's name on the titles was a qualified gift that could be revoked by the mother or the guardian. The Supreme Court affirmed. Because the addition of the son's name to the titles was an estate planning mechanism and the property was to be available for the use and benefit of the parents as long as they desired, the transfer was considered a revocable qualified transfer. Under this section, conditional transfers made in view of death are qualified and may be revoked by the giver at any time. Further, the son had agreed to transfer interest in the parents' home back to the mother at her request, so 70-1-509 did not apply. In re Guardianship & Conservatorship of Gilroy, 2004 MT 267, 323 M 149, 99 P3d 205 (2004), distinguishing Gross v. Gross, 239 M 480, 781 P2d 284 (1989).

Engagement Ring Given in Contemplation of Marriage Not Considered Gift — Conditional Gift Analysis: Albinger gave Harris a $29,000 diamond engagement ring when the two promised to marry. The relationship was strained, resulting in breakups and the return of the ring to Albinger several times, but each time the couple reconciled, and the ring was returned to Harris. Following their final separation, Albinger told Harris to "take the car, the horse, the dog, and the ring", so Harris moved to Kentucky, marriage plans evaporated, and Harris refused to return the ring. Albinger filed in District Court to settle ownership of the ring. The District Court found the ring to be a gift in contemplation of marriage, implying that the existence of a condition attached to the gift, and held that Albinger was entitled to return of the ring upon failure of the condition of marriage. Harris appealed, and the Supreme Court reversed. The rights and duties of parties regarding property exchanges in contemplation of marriage are determined by existing law and common-law principles. A gift is a transfer of personal property made voluntarily and without consideration, and the essential elements of an inter vivos gift are donative intent, voluntary delivery, and acceptance by the recipient. Delivery, which manifests the intent of the giver, must turn over dominion and control of the property to the recipient, and when made without condition, such a gift becomes irrevocable upon acceptance, so the Supreme Court will not void the transfer when the giver experiences a change of heart. The only revocable gift recognized under Montana law is a gift in view of death, and a gift causa mortis may be revoked by the giver at any time and is revoked by the giver's recovery from the illness or escape from the peril under which the gift was made. However, the Supreme Court declined to analogize gifts in contemplation of marriage with a gift in contemplation of death. Further, a purported gift that is part of the inducement for an agreement to do or not do a certain thing becomes the consideration essential to contract formation. An exchange of promises creates a contract to marry, albeit an unenforceable one, so when an engagement ring is given as consideration for the promise to marry, a contract is formed and legal action to recover the ring is barred by the abolition of breach of promise actions in 27-1-602. Here, the engagement ring was an unconditional, completed gift upon acceptance, and a completed gift is not revocable. Thus, the ring remained in Harris's ownership and control. Albinger v. Harris, 2002 MT 118, 310 M 27, 48 P3d 711 (2002).

CHAPTER 4
ACCESSION AND INTERMIXTURE PERSONAL PROPERTY

Part 1
General Provisions

70-4-102. Uniting several things — to whom whole belongs.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-4-103. Rules for determination of principal part.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 2
Uniting of Materials — Workmanship

70-4-202. Uniting of materials of maker and other.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-4-203. Uniting of materials of several owners.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-4-204. Use of materials without consent — owner prevails.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-4-205. Owner of materials wrongfully used — election of remedies.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-4-206. Wrongdoer liable in damages.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

CHAPTER 5
FINDERS

Chapter Case Notes

Chapter Applicable Only to Private Citizens: It is highly unlikely that the legislative intent was to apply this chapter to police departments; the court interpreted the chapter to apply to a private citizen who finds a thing and chooses to take charge of it in order to find its rightful owner. Narum v. Billings, 207 M 322, 673 P2d 1253, 40 St. Rep. 2075 (1983).

Sale by Finder of Property He Gave Police — Negligent Treatment by Police: After contractor's employee painted building for city, he left the equipment by the curb for contractor to pick up later. Citizen, afraid it would be stolen, notified police, who picked the equipment up. Contractor reported the equipment stolen 4 days after police picked it up. After holding it for 90 days, police gave it to citizen, who sold it. The citizen, not the police, was the finder of the equipment, and since he failed to follow this chapter's procedure he was liable to contractor for twice the value of the equipment. However, police department had the duty to return the equipment to contractor but dealt with the equipment negligently, and that negligence was the proximate cause of contractor's loss. Citizen justifiably relied on the department's statement that the equipment was his after 90 days. Therefore, city was liable to citizen in the amount of his liability to contractor, minus what citizen had received from selling the equipment. Narum v. Billings, 207 M 322, 673 P2d 1253, 40 St. Rep. 2075 (1983).

Part 1
Rights and Duties of Finders Generally

70-5-102. Finder not bound to take charge — status as depositary.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Compensation for Finding:

In an action for compensation for finding, taking care of, and feeding a band of sheep, the plaintiff must recover on the basis of compensation alone. He is not entitled to recover a gratuity but he can recover for his services, though the sheep have been mingled with other sheep, if he can show the value of the proportion of his time, labor, feed, etc., given to the estrays. Kirk v. Smith, 48 M 489, 138 P 1088 (1914).

This section must be construed with 70-5-105, and when so construed, the terms of this section are made plain. The depositary for hire is only entitled to ordinary compensation, except insofar as this rule is modified by 70-6-404. Kirk v. Smith, 48 M 489, 138 P 1088 (1914).

Complaint to State That Property Was Lost: Assuming that Title 70, ch. 5, is applicable to the case of one who picks up estray domestic animals and takes care of and feeds them, a complaint which failed to allege that the animals were in fact lost did not state a cause of action under this section. Kirk v. Smith, 48 M 489, 138 P 1088 (1914).

70-5-103. Duty to inform owner when known.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-5-105. Compensation of finder.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-5-106. Exoneration of finder by storage of thing found.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-5-107. Exoneration of owner by surrender of thing to finder.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

CHAPTER 6
BAILMENT — DEPOSIT

Part 1
Nature and Classification of Deposits

70-6-101. Deposit — voluntary or involuntary.

Case Notes

Three-Year Statute of Limitations Applicable to Breach of Bailment Obligation: Pursuant to a breach of a bailment agreement related to the transfer of 10 horses and tack, plaintiff filed a claim for the value of the property, asserting that under 27-2-202(2), 5 years were allowed to bring the claim as a breach of contract. The District Court concluded that the voluntary bailment agreement was not a contract, but rather an obligation, which was governed by the 3-year statute of limitations in 27-2-202(3), and because the claim was not brought within 3 years, summary judgment for defendants was appropriate. On appeal, the Supreme Court affirmed. Regardless of the fact that plaintiff characterized the claim as a breach of contract, there was no evidence of an expressed agreement for sale of the property, so defendants were obligated but not contractually required to account for the property. Plaintiff's election to sue on a contract theory did not operate to grant 2 additional years for plaintiff to assert her rights. The District Court's conclusion that plaintiff's action was not timely was correct. Demarest v. Broadhurst, 2004 MT 147, 321 M 470, 92 P3d 1168 (2004).

70-6-102. Voluntary deposit — how made.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-6-103. Involuntary deposit — how made.

Case Notes

Reasonable Expectation of Privacy in Lost Wallet — Evidence Obtained From Search of Lost Wallet Subject to Suppression: Hamilton's lost wallet was turned into the Bozeman police, who opened it to determine ownership. In doing so, the police discovered prescription drugs. Hamilton confessed that the drugs were not prescribed for her, and she was arrested and convicted. On appeal, Hamilton asserted that she retained an expectation of privacy in the lost wallet and that the fruits of the search of the wallet should be suppressed. The Supreme Court agreed. In determining whether an unlawful search of the wallet occurred, the court applied St. v. Scheetz, 286 M 41, 950 P2d 722 (1997), looking at whether Hamilton had an actual expectation of privacy that society was willing to recognize as objectively reasonable and at the nature of the state's intrusion. When a person intentionally abandons property, the expectation of privacy is abandoned as well. However, when property is not intentionally or voluntarily abandoned, the expectation of privacy remains substantially intact. Thus, Hamilton's expectation of privacy was diminished only to the extent necessary for the police to determine ownership. The police search exceeded what was necessary to determine ownership of the wallet and was not justified by any exception to the warrant requirements. Therefore, the warrantless search was illegal, and the evidence obtained as a result of the search should have been suppressed. Hamilton's conviction was reversed. St. v. Hamilton, 2003 MT 71, 314 M 507, 67 P3d 871 (2003), distinguished in St. v. Demontiney, 2014 MT 66, 374 Mont. 211, 324 P.3d 344.

70-6-107. Deposit for exchange defined.

Case Notes

Storing Valuables in Business Safe of Friend Who Dies — Necessity of Presenting Original Receipt or Filing Creditor's Claim to Recover Valuables: Boyer stored gold and silver in the coin shop safe of a friend with whom he did a lot of business and received a receipt, thereby creating a deposit for exchange under this section. The friend died. The friend's sons and widow assured Boyer that they knew of the storage agreement, that his metals were safe, that he did not have to file a creditor's claim against the estate, and that they would return the metals on presentation of the receipt and a demand for the metals. They refused to return the metals on demand because Boyer could not find the original receipt and presented a copy. They testified that they had paid other claims for which a creditor's claim against the estate had not been filed and had returned properties without presentation of the original receipts. They knew Boyer had not already used the original receipt to retrieve the metals and that Boyer had a good excuse for losing the original receipt. Relying on NW. Bank of Lewistown v. Estate of Coppedge, 219 M 473, 713 P2d 523 (1986), the Supreme Court held that they were estopped by their actions, statements, and knowledge from denying the existence and validity of the claim. The lower court erred in holding that a creditor's claim against the estate was necessary to require the estate to return the property. Boyer v. Sparboe, 263 M 289, 867 P2d 1116, 51 St. Rep. 60 (1994).

Acceptance of Deposit: By accepting a deposit made for the purpose of exchange, a bank becomes the debtor of the depositor. In re Williams' Estate, 55 M 63, 173 P 790, 1 ALR 1639 (1918); Murphy v. Nett, 51 M 82, 149 P 713 (1915); Stadler v. First Nat'l Bank of Helena, 22 M 190, 56 P 111 (1899).

Loan for Exchange: Where a party let defendant have a check under an agreement that he would use the proceeds in his own business for cashing miners' pay checks and repay the amount on a certain day, defendant was not guilty of larceny as bailee where he used it for other purposes and did not repay it, as the transaction was a loan for exchange and the title passed to defendant. St. v. Karri, 51 M 157, 149 P 956 (1915), distinguished in St. v. Ahl, 140 M 305, 371 P2d 7 (1962).

70-6-108. Deposit for exchange — title passes.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Storing Valuables in Business Safe of Friend Who Dies — Necessity of Presenting Original Receipt or Filing Creditor's Claim to Recover Valuables: Boyer stored gold and silver in the coin shop safe of a friend with whom he did a lot of business and received a receipt, thereby creating a deposit for exchange under 70-6-107. The friend died. The friend's sons and widow assured Boyer that they knew of the storage agreement, that his metals were safe, that he did not have to file a creditor's claim against the estate, and that they would return the metals on presentation of the receipt and a demand for the metals. They refused to return the metals on demand because Boyer could not find the original receipt and presented a copy. They testified that they had paid other claims for which a creditor's claim against the estate had not been filed and had returned properties without presentation of the original receipts. They knew Boyer had not already used the original receipt to retrieve the metals and that Boyer had a good excuse for losing the original receipt. Relying on NW. Bank of Lewistown v. Estate of Coppedge, 219 M 473, 713 P2d 523 (1986), the Supreme Court held that they were estopped by their actions, statements, and knowledge from denying the existence and validity of the claim. The lower court erred in holding that a creditor's claim against the estate was necessary to require the estate to return the property. Boyer v. Sparboe, 263 M 289, 867 P2d 1116, 51 St. Rep. 60 (1994).

Bank Deposit:
By accepting a deposit for the purpose of exchange, a bank becomes the debtor of the depositor. In re Williams' Estate, 55 M 63, 173 P 790 (1918); Murphy v. Nett, 51 M 82, 149 P 713 (1915).

By a deposit, other than special, in a bank, the money becomes the property of the bank and the relation of debtor and creditor is created. Stadler v. First Nat'l Bank of Helena, 22 M 190, 56 P 111 (1899).

Part 2
Rights and Duties of the Parties Generally

70-6-201. Depositary not to use or open thing deposited.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Reasonable Expectation of Privacy in Lost Wallet — Evidence Obtained From Search of Lost Wallet Subject to Suppression: Hamilton's lost wallet was turned into the Bozeman police, who opened it to determine ownership. In doing so, the police discovered prescription drugs. Hamilton confessed that the drugs were not prescribed for her, and she was arrested and convicted. On appeal, Hamilton asserted that she retained an expectation of privacy in the lost wallet and that the fruits of the search of the wallet should be suppressed. The Supreme Court agreed. In determining whether an unlawful search of the wallet occurred, the court applied St. v. Scheetz, 286 M 41, 950 P2d 722 (1997), looking at whether Hamilton had an actual expectation of privacy that society was willing to recognize as objectively reasonable and at the nature of the state's intrusion. When a person intentionally abandons property, the expectation of privacy is abandoned as well. However, when property is not intentionally or voluntarily abandoned, the expectation of privacy remains substantially intact. Thus, Hamilton's expectation of privacy was diminished only to the extent necessary for the police to determine ownership. The police search exceeded what was necessary to determine ownership of the wallet and was not justified by any exception to the warrant requirements. Therefore, the warrantless search was illegal, and the evidence obtained as a result of the search should have been suppressed. Hamilton's conviction was reversed. St. v. Hamilton, 2003 MT 71, 314 M 507, 67 P3d 871 (2003), distinguished in St. v. Demontiney, 2014 MT 66, 374 Mont. 211, 324 P.3d 344.

70-6-202. Liability for damage from wrongful use.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-6-203. Loss or injury of thing deposited.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

70-6-204. Extent of depositary's liability for negligence.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Section Not Applicable if No Value Disclosed — Bags Lost by Armored Car Service: The Supreme Court held that the relationship between an armored car service and a customer was a contractual bailment. Five bags received from the customer were lost by the armored car service, but the contract receipt for the bags regarding the value of the contents had been left blank. This section is not applicable to the determination of damages in this case because it relates only to liability for the stated value of deposited items. Section 27-1-311, setting forth the general rule for the measure of damages for breach of contract, applies. Interstate Brands Corp. v. Cannon, 218 M 380, 708 P2d 573, 42 St. Rep. 1670 (1985).

Loan of Vehicle for Use — Section Inapplicable: A loan for use occurred when the owner of semitrailer left it with a log home company under an agreement that the company was to use it to haul one load of logs. The measure of damages in owner's suit arising when company used trailer to haul a second load and trailer was damaged in an accident was to be found in 27-1-317, not this section. McPherson v. Kerr, 195 M 454, 636 P2d 852, 38 St. Rep. 2021 (1981).

Measure of Damages: Measure of damages in action to recover for sailing sloop destroyed by fire in bailee's warehouse was the reasonable value of the boat based upon opinion testimony of both parties in action. Aetna Life & Cas. Co. v. Stan-Craft Corp., 159 M 474, 499 P2d 776 (1972).

70-6-205. Sale of thing in danger of perishing.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

70-6-206. Duty of depositary of animals.

Case Notes

No Implied Contract Agister's Lien Absent Custody or Control of Cattle: Bellanger obtained loans from the Daniels-Sheridan Federal Credit Union to finance a ranching operation, securing the loans with several promissory notes securing an interest in the cattle on the ranch. Bellanger subsequently defaulted on the loans, and the credit union initiated an action to enforce the promissory notes pursuant to the Uniform Commercial Code. The case broadened to encompass a dispute over proceeds from the sale of the cattle to include Bellanger's father Alfred, who asserted an agister's lien for having kept the cattle on his property. The cattle were subsequently seized and sold for $79,012.27, and the District Court split the proceeds, with $45,467.94 paid to the credit union and a judgment for the remainder owed on the promissory notes and $33,544.33 paid to the owner of the auction company where Bellanger customarily sold cattle, but Alfred and Bellanger were foreclosed of all interest in the proceeds. On appeal, Alfred asserted that his agister's lien should have entitled him to some of the proceeds. Alfred contended that an agister's lien was commenced via an implied contract when the credit union obtained a preliminary injunction against removal or sale of the cattle, which required Alfred to care for the cattle on his property, pursuant to 27-1-222, 45-8-211, and this section. The Supreme Court affirmed the District Court's finding that because Alfred never had custody or control of the cattle, allowing Bellanger to run the cattle on the property rent-free in exchange for looking after Alfred's cattle, the statutory duties upon which Alfred relied in support of an implied contract agister's lien were inapplicable. The court declined to recognize any manner for the creation of an agister's lien except as provided in 71-3-1201. Daniels-Sheridan Fed. Credit Union v. Bellanger, 2001 MT 235, 307 M 22, 36 P3d 397 (2001).

70-6-207. Service rendered by depositary.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

70-6-208. Notice to owner of adverse claim.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Judgment Against Bank for Deposit: Where a special administratrix had a deposit as such in a bank and another claiming to have been appointed special administrator made demand on the bank for the payment of the deposit and the bank notified the depositor of the demand and was requested to refuse the demand and retain the deposit in the depositor's name and thereupon the demandant sued the bank and, after the removal by the depositor, demandant recovered judgment against the bank for the deposit and interest from the date of the demand, the depositor was not liable to the bank for the interest. Murphy v. Nett, 51 M 82, 149 P 713 (1915).

70-6-209. Notice to true owner of thing wrongfully detained.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-6-210. Depositor to indemnify depositary — damage — expenses.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-6-211. Depositary to deliver on demand.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Preservation of Property: In the absence of a special contract with reference to the bailment, a bailee is not liable so long as he uses ordinary care. It is incumbent upon him, in an action for failure to redeliver two horses as agreed, to show that he did use that degree of care for the preservation of the property. Shropshire v. Sidebottom, 30 M 406, 76 P 941 (1904).

70-6-212. No duty to deliver without demand.

Case Notes

Certificate of Deposit: In a cause of action counting on a certificate of deposit, a demand, if necessary, must be alleged in the complaint. Cassidy v. Slemons & Booth, 41 M 426, 109 P 976 (1910).

Denial of Liability: The general rule that where money is to become due only after demand, it is necessary for plaintiff to allege and prove that this requirement had been met does not apply where defendant denies all liability. Under such circumstances a demand would be useless and hence is not required by law. Cassidy v. Slemons & Booth, 41 M 426, 109 P 976 (1910); Judith Inland Transp. Co. v. Williams, 36 M 25, 91 P 1061 (1907).

Waiver of Demand: A cause of action does not arise in favor of a depositor until demand and refusal, unless the depositary has waived demand. Cassidy v. Slemons & Booth, 41 M 426, 109 P 976 (1910); Stadler v. First Nat'l Bank of Helena, 22 M 190, 56 P 111 (1899).

Interest on Money Deposited: This section refers only to the obligation resting upon the depositary to deliver. It cannot be applied in resisting the payment of interest on money deposited to indemnify sureties on a bond against loss. Leggat v. Palmer, 39 M 302, 102 P 327 (1909).

Bank Deposit: When money is deposited in a bank, the money becomes the property of the bank and the relation of debtor and creditor is created. A contract is implied that an equivalent sum shall be paid to the depositor upon demand. Stadler v. First Nat'l Bank of Helena, 22 M 190, 56 P 111 (1899). See Cassidy v. Slemons & Booth, 41 M 426, 109 P 976 (1910).

70-6-213. Place of delivery.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-6-214. Delivery of thing owned jointly.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 3

Gratuitous Deposits

70-6-301. Gratuitous deposit defined.

Case Notes

Bank Holding Securities for Safekeeping Without Compensation a Gratuitous Bailee: Where bank accepted Liberty bonds for safekeeping but made no charge therefor, contention that bank was not a gratuitous bailee because, by rendering such service, it would induce customers to deal with the bank in other matters for its profit, was improper in absence of evidence that the bank had sought or advertised for such deposits of valuable papers, and the bank was a gratuitous bailee. Boyd v. Harrison St. Bank, 102 M 94, 56 P2d 724 (1936).

Demand for Return of Property: Where defendant's position with respect to property was that of a gratuitous bailee, a demand made upon him for the return of the property and a refusal by him were prerequisites to the accrual of the plaintiff's right of action to recover the property. Gates v. Powell, 77 M 554, 252 P 377 (1926).

70-6-302. Degree of care required of gratuitous depositary.

Case Notes

Inventory Search — Not Justified: Contraband found under a seat during inventory of an automobile held in police custody was not in plain view, thus it was seized in violation of individual privacy and freedom from unreasonable searches. The inventory search was not justified by protection of the contents for the owner's benefit or protection of the police from claims for lost property beyond articles in plain view from outside the vehicle. St. v. Sawyer, 174 M 512, 571 P2d 1131 (1977), distinguished in St. v. Pastos, 269 M 43, 887 P2d 199, 51 St. Rep. 1441 (1994).

Degree of Care Required: Where Liberty bonds were lost in bank robbery, after bank advised that robbery was scheduled and failed to take precaution of safety devices with which equipped, the rule of "slight care" provided by this section was not met by proof that bank exercised same degree of care of bailor's property as it did its own of like kind and value. Failure to use care as situation demands is gross negligence. Boyd v. Harrison St. Bank, 102 M 94, 56 P2d 724 (1936).

70-6-303. When duties of gratuitous depositary cease.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 4
Deposit for Hire

70-6-403. Degree of care required of depositary for hire.

Case Notes

Ordinary Care — Burden of Proof on Bailee: A bailee for hire must use at least ordinary care for the preservation of the things stored. If the article placed in storage is in good condition and returned damaged or not returned at all, the presumption is that the bailee was negligent and the burden is upon the bailee to prove that he used due care. Aetna Life & Cas. Co. v. Stan-Craft Corp., 159 M 474, 499 P2d 776 (1972); Mont. Leather Co. v. Colwell, 96 M 274, 30 P2d 473 (1934).

Ordinary Care: There is not necessarily any conflict between this section and 70-6-211. The rule that a bailee for hire is charged only with ordinary care has not been changed. Shropshire v. Sidebottom, 30 M 406, 76 P 941 (1904).

70-6-412. Application of proceeds of sale.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 5
Innkeepers

70-6-501. Innkeeper's liability as to property of guests — dollar limitation.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-6-502. No liability without negligence.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-6-504. How exempted from liability — safe.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-6-505. Storage of property in outbuilding — nonliability.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-6-513. Consumption or possession of alcohol — civil liability — licensure protection.

Case Notes

Liability of Tavern Owner for Foreseeable Injury-Producing Conduct by Visibly Intoxicated Patron: Wells was served alcohol at the Town Tavern immediately prior to driving a car through the wall of the tavern, injuring another patron. The patron sued the tavern owner, Mortensen, under the dram shop law in 27-1-710, which provides tavern owner liability for accidents arising from an event involving a visibly intoxicated patron. In defense, Mortensen contended that the injuries to the patron resulted from an intervening, superseding, new, and independent cause that was not reasonably foreseeable, thereby severing the chain of causation from Mortensen's negligent act. Wells was in a wheelchair and appeared to be unable to operate the wheelchair himself. Causation requires a determination, ordinarily by the factfinder, that a defendant's conduct helped produce the injury and that the injury would not have occurred without it. In cases involving alleged intervening causes, foreseeability is properly considered with respect to causation. An intervening cause is one in which a force came into motion at the time of the defendant's negligent act and combined with the negligent act to cause the injury to the plaintiff and is also determined by foreseeability. The consequences, including criminal conduct, of serving alcohol to a visibly intoxicated person are reasonably foreseeable precisely because of the causal relationship between serving alcohol and drunken conduct. When a person consumes alcohol, subsequent driving resulting in an injury-producing accident is an intervening act, but it is an act that is reasonably foreseeable as a matter of law. Thus, the affirmative defense of an intervening, superseding cause did not apply. Cusenbary v. Mortensen, 1999 MT 221, 296 M 25, 987 P2d 351, 56 St. Rep. 864 (1999), following Nehring v. LaCounte, 219 M 462, 712 P2d 1329, 43 St. Rep. 93 (1986), and Jevning v. Skyline Bar, 223 M 422, 726 P2d 326, 43 St. Rep. 1845 (1986), and distinguishing USF&G v. Camp, 253 M 64, 831 P2d 586, 49 St. Rep. 372 (1992), King v. St., 259 M 393, 856 P2d 954, 50 St. Rep. 848 (1993), and Estate of Strever v. Cline, 278 M 165, 924 P2d 666, 53 St. Rep. 576 (1996). See also Palsgraf v. Long Island RR, 162 NE 99 (1928), and Deeds v. U.S., 306 F. Supp. 348 (D.C. Mont. 1969).

Part 6
Self-Storage Facilities Act

Part Compiler's Comments

Effective Date: This part is effective October 1, 2017.

70-6-602. Definitions.

Compiler's Comments

2019 Amendment: Chapter 67 deleted definition of certified mail; in definition of commercially reasonable sale in (b) near beginning inserted "or viewed"; in definition of default at end inserted "or this part"; in definition of emergency at end inserted "or any suspected use of the leased space for residential or other unlawful purposes"; in definition of rental agreement near end inserted "leased space at a"; in definition of self-storage facility before "real property" deleted "a rented or leased"; inserted definition of verified mail; and made minor changes in style. Amendment effective October 1, 2019.

70-6-603. Self-storage use — prohibition on residential or other unlawful purposes.

Compiler's Comments

2019 Amendment: Chapter 67 in (2) inserted "or other unlawful". Amendment effective October 1, 2019.

70-6-604. Operator inspection — repair — emergency.

Compiler's Comments

2019 Amendment: Chapter 67 in (1) in first sentence near middle substituted "by telephone, regular mail, or electronic mail at least 3 days before" for "by telephone or electronic mail 3 days before;" in (2) in first sentence at beginning substituted "In the event of an emergency" for "If an emergency occurs" and in second sentence near middle inserted "by telephone, regular mail, or electronic mail"; and inserted (4) relating to delivery of notices sent by regular mail or electronic mail. Amendment effective October 1, 2019.

70-6-606. Renter default — access restriction.

Compiler's Comments

2019 Amendment: Chapter 67 in (1) at beginning deleted "If the rent or other charges due from the renter are delinquent and unpaid"; inserted (1)(a), (1)(b), and (1)(c) relating to instances in which the operator has the right to deny the renter access; in (3) near middle after "denied access under" deleted reference to 70-6-607; and made minor changes in style. Amendment effective October 1, 2019.

70-6-607. Renter default — personal property sale.

Compiler's Comments

2019 Amendment: Chapter 67 in (3)(b) near middle substituted "notify by verified mail or electronic mail" for "notify by mail and electronic mail"; in (3)(c) near middle after "if the sale is attended" inserted "or viewed"; in (4) in first sentence near middle substituted "if charges or rent remain unpaid" for "if charges and rent remain unpaid"; in (7) at end inserted "despite noncompliance by the operator with the requirements of this part"; in (8) in first sentence substituted "verified mail or electronic mail" for "United States certified mail, standard mail, and verified mail", in second sentence near beginning substituted "verified mail" for "standard mail" and near end deleted "by the United States postal service", and in third sentence substituted "electronic mail" for "electronic message"; and made minor changes in style. Amendment effective October 1, 2019.

CHAPTER 7
LOANS FOR USE OR EXCHANGE PERSONAL PROPERTY

Part 1
Loan for Use

70-7-101. Optional loan — use or exchange — applicability of entire chapter.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-7-102. Loan for use defined.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Marital Separation Agreement: Where under a separation agreement the wife accepted certain real property in full satisfaction of her rights in the property of the husband and the latter granted her permission to use household furniture owned by him until he should want it, the transaction constituted a bailment for the benefit of the wife for an indefinite period, a loan within the meaning of this section. Viers v. Webb, 76 M 38, 245 P 257 (1926).

70-7-106. Skill required of borrower.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-7-107. Borrower to repair injuries.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-7-110. Who to bear expenses.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Authority for Additional Expenditures for Preservation and Protection of Property — Priority of Payment: Sections 70-7-110 and 71-3-112 provide sufficient statutory authority to allow lien claimants to add expenditures for the preservation and protection of encumbered property on to their liens after the liens are filed. Such preservation expenses should be accorded a first priority of payment. Tri-County Plumbing & Heating, Inc. v. Levee Restorations, Inc., 221 M 403, 720 P2d 247, 43 St. Rep. 928 (1986).

70-7-111. Lender liable for concealed defects.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Knowledge of Defect: In an action for damages for personal injuries sustained by the borrower of an automobile by reason of a defect in the steering gear, where it was incumbent upon plaintiff to charge in unqualified terms that defendant, the lender, knew of such defect and failed to warn the borrower thereof, the allegation that the former knew or in the exercise of ordinary care should have known thereof was insufficient to charge a breach of legal duty on the part of the latter, rendering the complaint subject to a general demurrer. Dickason v. Dickason, 84 M 52, 274 P 145 (1929).

70-7-112. Right of lender to require return — indemnification of borrower.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 2
Loan for Exchange

70-7-202. Loan for exchange defined.

Case Notes

Failure to Return Property: Where a party let defendant have a check on the agreement that he should use the proceeds for cashing checks and repay the amount on a certain day, defendant was not guilty of larceny as bailee where he used it for other purposes and did not repay it, as the transaction was a loan for exchange and the title passed to defendant. St. v. Karri, 51 M 157, 149 P 956 (1915).

70-7-203. Title to property lent — expenses — increase.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-7-204. Contract not to be modified by lender.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

CHAPTER 8
RENTALS OF PERSONAL PROPERTY

Part 2
Rental of Ships

70-8-201. Contract for letting of ship.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

CHAPTER 9
DISPOSITION OF UNCLAIMED PROPERTY

Part 4
Common Carriers, Commission Merchants, and Warehousemen

70-9-402. Storage of unclaimed property.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-9-403. Property unclaimed within 90 days to be sold — notice — surplus.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-9-404. Surplus proceeds unclaimed — disposition.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-9-405. Responsibility of carrier and bailee after storage.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-9-406. Sale of property upon which advances are due.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 5
Innkeepers

70-9-502. Disposition of surplus proceeds.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 6
Retail Launderers and Dry Cleaners

70-9-601. Disposal of property unclaimed within 180 days — notice — maintenance of records.

Compiler's Comments

Effective Date: Section 3, Ch. 17, L. 1995, provided: "[This act] is effective on passage and approval." Approved February 2, 1995.

Part 8
Uniform Unclaimed Property Act

Part Official Comments

Prefatory Note — Statement of History of 1995 Model Act: This Act is preceded by the 1954 Uniform Disposition of Unclaimed Property Act (1954), which was revised in 1966, and the Uniform Unclaimed Property Act (1981). The 1954 Act was drafted during a period of conflicting legislation among the various States and several Supreme Court decisions in the late 1940's and early 1950's. In 1965, these conflicts were resolved by the decision in Texas v. New Jersey, 379 U.S. 674 (1965), which established a set of priorities for claimant States. These rules of priority were then adopted in the 1981 Act. They were re-examined and reaffirmed in Delaware v. New York, [507] U.S. [490], 113 S.Ct. 1550, 123 L.Ed.2d 211 (1993). Although the Delaware Court made no change in the rules of priority, it clarified the issue of how to determine the identity of the "debtor" — the "holder" under this Act — when payments by intermediaries are at stake. The "debtor" will be defined by reference to the state law that creates the property interest; an intermediary which holds property in its own name will generally be the debtor, and not the original obligor which has satisfied its obligation by transmitting payment to the intermediary. Delaware v. New York also makes it clear that no State may supersede the Court's priority rules by seeking to establish different priorities under state law. See Comments to Section 1 [70-9-802] and Section 4 [70-9-805] for further discussion of these rules.

This Act retains the custodial features of the 1954 Act and the 1981 Act. Thus, the State does not take title to unclaimed property, but takes custody only, and holds the property in perpetuity for the owner.

A State may enforce its claim of custody in the courts of other jurisdictions, see Commonwealth of Pennsylvania v. Kervick, 60 N.J. 289, 288 A.2d 289 (1972), or in its own courts. Even if a holder does not do business in the State, that State should be able to require the holder to report and deliver unclaimed property in the State, under the Texas v. New Jersey rationale, based on the common law rule of mobilia sequunter personam: the right of succession to personal property is governed by the law of the owner's domicile. See also Connecticut Mutual Life Insurance Co. v. Moore, 333 U.S. 541, 546-47 (1947), where the Supreme Court described the State as a "conservator" when claiming property under a custodial unclaimed property law. The Court in Standard Oil Co. v. New Jersey, 347 U.S. 428, 437 (1951), characterized the Moore case as involving a "conservation statute." See generally Epstein, McThenia and Forslund, "Unclaimed Property Law and Reporting Forms," sections 2.01, 3.02, 4.01 (Matt. Bend. 1984).

Part Compiler's Comments

Montana Enactment: Chapter 124, L. 1997, enacted the Uniform Unclaimed Property Act, most of which was based on the language of the Uniform Unclaimed Property Act (1995), approved by the National Conference of Commissioners on Uniform State Laws in 1995. The commissioners' comments are those of the National Conference of Commissioners on Uniform State Laws and have been edited to show only those comments or portions of comments applicable to those parts of the 1995 Uniform Act adopted in Montana. The "Source" compiler's comments cite the comparable section or subsections of the Uniform Act.

Severability: Section 33, Ch. 124, L. 1997, was a severability clause.

Effective Date: Section 36, Ch. 124, L. 1997, provided: "[This act] is effective July 1, 1997."

Part Administrative Rules

Title 42, chapter 38, ARM Unclaimed property.

70-9-801. Short title.

Compiler's Comments

Source: Section 30, Uniform Unclaimed Property Act (1995).

70-9-802. Definitions.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

The definitions reflect, pursuant to Texas v. New Jersey, 379 U.S. 674, 85 S.Ct. 626, 13 L.Ed. 2d 596 (1965), the fact that the Act applies to persons in other States who are holding property, eliminating any requirement that those persons be engaged in business in the enacting State. The obligation of a holder to report to all States in which a creditor had an address, or in which a transaction took place, or which is the holder's domicile, is now well established in the abandoned property statutes of the States and in the decisions of the Supreme Court. The holder's obligation to report is not confined to situations where the holder is authorized to do business or actually transacts business in a State. These jurisdictional rules are spelled out in detail in Section 4 [70-9-805].

Paragraph (2) [(2)] defines "apparent owner" in terms of reference to the person who appears on the holder's records to be the person entitled to the property. The right of a State to claim abandoned property depends on the information in the holder's records concerning the apparent owner's identification. It is of no consequence that without notice to the holder, the owner may have transferred the property to another person. In Nellius v. Tampax, Inc., 394 A.2d 333 (Del. Ch. Ct. 1978), the court held that the address of the apparent, not the actual, owner controlled. The holder is not required to ascertain the name of the current owner or resolve a dispute between the owner of record and a successor contesting ownership. However, nothing in this Act prohibits the actual owner from recovering the property, pursuant to Sections 10 and 15 [70-9-811 and 70-9-815], from the holder or the administrator. Similarly, the State of last known address of the actual owner can recover the property, pursuant to Section 14 [70-9-814], from the State which initially receives custody.

The definition of "business association" in paragraph (3) [(3)] expressly includes mutual funds, which previously were covered in general terms.

The definition of "holder" in paragraph 5 [(6)] is a clarification. There had been some confusion in the past over the identity of the holder of an obligation that had been transferred by the original obligor, as in the payment of dividends on corporate stock. As held by the Supreme Court in Delaware v. New York, the holder is the person indebted under the applicable state law. Thus, if the original debtor, the dividend-paying corporation, has satisfied its debt under its share contract and under state law by transmitting payment to an intermediary, which has undertaken to make the payment, the intermediary becomes the debtor. The holder thus is "a person obligated," i.e., a person who could be sued successfully by the owner for refusing to make payment.

Although the 1981 Act defined "last known address" as "a description of the location of the apparent owner sufficient for the purpose of the delivery of mail," that Act indicated some uncertainty over whether this was an accurate interpretation of Texas v. New Jersey, since this definition was accompanied by a Commissioners' Comment that appeared to be at odds with the definition itself. Thus, the Comment stated that "Where a holder originally had the address of the owner and it has been subsequently destroyed, a computer code may be one way of establishing an address within the state." "Last known address" is no longer defined in the Act; instead, the sections dealing with the jurisdictional rules (Sections 4 and 14) [70-9-805 and 70-9-814] are rewritten so that they define, individually, the rules of the States' priorities of taking.

The touchstone of those rules of priority is Texas v. New Jersey, 379 U.S. 674, 85 S.Ct. 626, 13 L.Ed. 2d 596 (1965), in which the Court established as a primary rule that unclaimed property goes to "the State of the last known address of the creditor, as shown by the debtor's books and records." Id. at 681-82, 85 S.Ct. at 631, 13 L.Ed. 2d at 601. Where the debtor has "no record of any address at all," the state of corporate domicile could take, id. at 682, 85 S.Ct. at 631, 13 L.Ed. 2d at 601, subject to proof by another State "that the last known address of the creditor was within its borders." Id., 13 L.Ed. 2d at 602. See also Pennsylvania v. New York, 407 U.S. 206, 32 L.Ed. 2d 693, 92 S.Ct. 2075 (1972).

In Delaware v. New York, the Court reaffirmed the rules of Texas v. New Jersey: Delaware, as the State of corporate domicile, would take the property initially where the holder's records did not contain a last known address. That delivery of the property to Delaware, however, would not cut off the rights of another State to later claim the property from Delaware. For instance:

On remand, if New York can establish by reference to debtors' records that the creditors who were owed particular securities distributions had last known addresses in New York, New York's right to escheat under the primary rule will supersede Delaware's right under the secondary rule. As we noted in Texas, "the State of corporate domicile should be allowed to . . . retai[n] the property for itself only until some other State comes forward with proof that it has a superior right to escheat." 379 U.S., at 682. Accord, Pennsylvania, 407 U.S., at 210-211. If New York or any other claimant State fails to offer such proof on a transaction-by-transaction basis or to provide some other proper mechanism for ascertaining creditors' last known addresses, the creditor's State will not prevail under the primary rule, and the secondary rule will control. Id. at ____, 113 S.Ct. at 1561-62, 123 L.Ed. 2d at 227-28. (Deletions in original.)

In sum, Delaware v. New York requires that some "proper mechanism" show that the owner had an address within the State that asserts a primary claim. A computer code would appear to be such a means of proof. On the other hand, showing that the transaction took place in the State would not be sufficient proof of an owner's address. Pennsylvania v. New York, 407 U.S. 206, 92 S.Ct. 2075, 32 L.Ed. 2d 693 (1972).

For purposes other than these jurisdictional rules — i.e., the holder's duties of reporting and maintenance of records and the States' duties of publication — the "last known address" will depend on the nature and extent of the holder's records. Thus, the holder will include in its report the best address it has, which may or may not include a street address, or, for example, an "E mail" address.

The definition of "money order" in paragraph (10) [(10)] is designed to distinguish between personal money orders issued by business entities which are not financial organizations, which have a seven year holding period, and those issued by financial organizations, which have a five year holding period.

The Act provides exclusively for the disposition of unclaimed intangible property and does not apply to tangible property, with one exception: Section 3 [70-9-804] applies to tangible property contained in safe deposit boxes. Paragraph (12) [(13)], defining property, is not intended as a substantive addition to the coverage of the 1981 Act. It is, however, intended to be all-inclusive; the descriptions of property interests that are set forth as examples are not limiting, but are stated to help holders identify kinds of property interests which otherwise may be overlooked. Thus, "property" is not the check, note, certificate or other document that evidences the property interest, but the underlying right or obligation. See Blue Cross of Northern California v. Cory, 120 Cal. App. 3d 723, 174 Cal. Rptr. 901 (1981) ("right to be paid" is the "'intangible personal property' (or 'chose in action') . . . which is recognized in the UPL"). The requirement that the right be "fixed and certain" excludes unliquidated claims from the coverage of the Act, such as disputed tort claims.

Many States already have laws that define utilities. Paragraph (15) [(16)] gives a State the option to adopt the Act's definition of a utility, or another definition contained in existing law. The term is intended to be broadly applied.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 588, L. 2023. Amendment effective October 1, 2023.

2007 Amendment: Chapter 331 inserted definition of gift certificate; and made minor changes in style. Amendment effective April 27, 2007.

Effective Date — Retroactive Applicability: Section 4, Ch. 331, L. 2007, provided: "[This act] is effective on passage and approval and applies retroactively, within the meaning of 1-2-109, to gift certificates issued or sold after September 30, 2005." Approved April 27, 2007.

2003 Amendment: Chapter 480 in definition of property in (a) in first sentence near middle after "a holder's business or" inserted "except as provided in subsection (13)(b)" and inserted (b) providing that property does not include property of a local government entity; and made minor changes in style. Amendment effective April 24, 2003.

Source: Section 1, Uniform Unclaimed Property Act (1995).

Administrative Rules

ARM 42.38.103 Definitions.
ARM 42.38.220 Presumption of ownership.

70-9-803. Presumptions of abandonment.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

Section 2 [70-9-803] continues the general proposition that all intangible property is within the coverage of this Act. It provides in a single section for all the various periods of abandonment that were separately stated in several sections of the 1981 Act. With limited exceptions this reorganization does not alter the bases for presuming abandonment of the property from that established in the 1981 Act, but merely restates those standards in a unified section, more easily applied, with less repetition. One exception is that whereas the 1981 Act exempted from the presumption of abandonment certain property held by a bank if the bank held other property of the depositor not presumptively abandoned, the present Act does not. It was the conclusion of the Commissioners that an owner's knowledge of some property does not necessarily imply knowledge of all his or her property held by the bank, and that the owner is entitled to the protection of this Act as to all the owner's property.

This section treats underlying bond obligations the same as underlying stock, except as to bearer bonds and original issue discount bonds. Thus, registered interest paying bonds will be presumed abandoned five years after the date of an unpresented instrument issued to pay interest. In the case of bearer bonds, however, although interest held on deposit for more than five years that has not been paid out as a result of failure to present a coupon for payment will be considered abandoned, the underlying principal represented by the bearer certificate, provided such certificate is not held by an agent due to a mail return or other similar circumstance, will not be considered abandoned even if the coupons that were attached to that certificate at the time of original issuance have not been presented for payment. Where interest is accrued but not paid until the return of principal at the time the obligation matures or is called, and there is no making of periodic interest payments, there is not the same motivation for bond holders to communicate with the trustee or paying agent as in the case of interest paying bonds, and a lack of communication should not give rise to a presumption of abandonment. Therefore, bearer bonds and original issue discount bonds are excluded from paragraph (3) [(1)(c)] of this section, and will fall instead under paragraph (14) [(1)(n)]. Those bonds will be presumed abandoned five years after the issuer's obligation to pay arises, i.e., five years after call or maturity.

The 1981 Act shortened the general dormancy period from 7 years to 5 years. Certain exceptions continue to be appropriate. For instance, statistical evidence indicates that a period of 15 years continues to be appropriate in the case of travelers checks, and seven years in the case of personal money orders and money orders issued by express companies. Also, in certain instances shorter periods are appropriate. For instance, the likelihood of finding the owner of a payroll check is materially decreased after one year. Hence, there is a one year dormancy period for unclaimed wages. Coverage of consumer credits is specifically provided, which is a clarification of the 1981 Act. The term covers credits owed on consumer transactions such as returns of merchandise, cancellation of layaways, and various kinds of deposits. The existence and amounts of such credits will of course be dependent on the terms of the contract between the holder and the consumer.

The dormancy period for unpaid distributions from retirement accounts and plans has been modified to shorten the period of presumed abandonment from five to three years, since an earlier date of presumed abandonment should be of assistance in assuring that the assets of the plan are ultimately claimed by their owner.

Because the unclaimed property laws are matters of traditional state powers, are laws of general application, and have only a tenuous, remote and peripheral impact on ERISA plans, it has been held that they are not pre-empted by federal law. Aetna Life Ins. Co. v. Borges, 869 F.2d 142 (2nd Cir. 1989); Attorney General v. Blue Cross and Blue Shield of Michigan, 168 Mich. App. 372, 424 N.W.2d 54 (Ct. App. 1988), appeal denied, No. 83788 (March 31, 1989). These cases declined to follow two advisory opinions to the contrary, issued by the Department of Labor (Opinions 78-32A, December 22, 1978, and 79-30A, May 14, 1979). Thereafter, notwithstanding the Second Circuit and Michigan decisions, the Department continued to adhere to its position that unclaimed property laws "relate to" ERISA, and are thus pre-empted, in a letter opinion issued March 3, 1995. 22 BNA Pension & Benefits Reporter 743 (1995). That opinion relied on Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990), as holding that pre-emption extended to state laws that had only an indirect economic affect on ERISA plans. Subsequently, the Supreme Court in New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., [514] U.S. [645] (63 Law Week 4372, April 26, 1995), expounded a much narrower meaning of Ingersoll-Rand. The case held that ERISA does not pre-empt the imposition of statutorily-mandated surcharges on bills of hospital patients whose commercial insurance coverage is purchased by an ERISA plan, or on HMOs insofar as their membership fees are paid by an ERISA plan. The Court emphasized that even though such state statutes would affect choices made by plan administrators, the ERISA pre-emption was not so broad as to nullify those state laws. The Court emphasized the basic presumption that "Congress does not intend to supplant state law" (63 LW at 4374). The Court said that Ingersoll-Rand does not hold that "merely economic influence" on administrative decisions will trigger pre-emption. (63 LW at 4376.) Ingersoll-Rand was explained to hold only that pre-emption would be found where state law produced "such acute, albeit indirect, economic effects" as to force a certain substantive scheme of coverage or effectively restrict insurance choices. (Id. at 4375.) Thus, "the basic thrust of the [ERISA] pre-emption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." (Id. at 4375.) See also Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988), holding that ERISA does not pre-empt a state garnishment statute under which a creditor may reach plan participants' benefits. A state claim under its unclaimed property law would appear to be no more intrusive to the federal regulatory scheme than its garnishment laws. Accordingly, with one exception, the final distribution of assets of a terminated plan, which is governed by 29 U.S.C. sec. 1350, this Act presumes that it is not pre-empted by ERISA.

Intangible property held by a utility other than subscribers' deposits and refunds are subject to the five year rule of subsection (a)(14) [(1)(n)].

Subsection (e) [(5)] is intended to make clear that property is reportable notwithstanding that the owner, who has lost or otherwise forgotten his or her entitlement to property, fails to present to the holder evidence of ownership or to make a demand for payment. See Connecticut Mutual Life Insurance Co. v. Moore, 333 U.S. 541 (1948), in which the Court stated: "When the state undertakes the protection of abandoned claims, it would be beyond a reasonable requirement to compel the state to comply with conditions that may be quite proper as between the contracting parties." See also Provident Institution for Savings v. Malone, 221 U.S.. 660 (1911), involving savings account; Insurance Co. of North America v. Knight, 8 Ill. App. 3d 871, 291 N.E.2d 40 (1972), involving negotiable instruments, and People v. Marshall Field & Co., 83 Ill. App. 3d 811, 404 N.E.2d 368 (1980), involving gift certificates. With respect to gift certificates, see also Section

19(a) [70-9-819(1)], which invalidates private periods of limitation. Thus, gift certificates will be reportable notwithstanding language on the certificate purporting to avoid escheat by creating an expiration date prior to the time of presumed abandonment. Section (c) [(3)] also obviates the result reached in Oregon Racing Comm. v. Multonamah Kennel Club, 242 Or. 572, 411 P.2d 63 (1963), involving unpresented winning parimutuel tickets.

Since the holder is indemnified against any loss resulting from the delivery of the property to the administrator, no possible harm can result in requiring that holders turn over the property, even though the owner has not presented proof of death or surrendered the insurance policy, savings account passbook, the gift certificate, winning racing ticket, or other memorandum of ownership.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 588, L. 2023. Amendment effective October 1, 2023.

2021 Amendments — Composite Section: Chapter 17 in (1)(k) at beginning deleted "except as provided in subsection (1)(q)"; deleted former (1)(q) that read: "(q) surplus funds held by a county treasurer pursuant to 15-18-221, 5 years"; and made minor changes in style. Amendment effective February 23, 2021.

Chapter 503 in (1)(g) at end of second sentence after "inflation factor" deleted "defined in 15-30-2101"; and inserted (7) concerning definition of inflation factor. Amendment effective January 1, 2022.

Applicability: Section 14, Ch. 17, L. 2021, provided: "[This act] applies to tax liens for which the redemption period expires on or after [the effective date of this act]." Effective February 23, 2021.

Effective Date — Applicability: Section 69, Ch. 503, L. 2021, provided: "(1) Except as provided in subsection (2), [this act] is effective January 1, 2024, and applies to income tax years beginning after December 31, 2023.

(2) [Sections 14, 31, 32, 54, 59 through 64, 66, 68, and 69] [15-30-2303, 15-32-104, 15-32-106, 50-51-114, 70-9-803, 75-2-103, 75-5-103, 87-2-102, and 87-2-105] and this section are effective January 1, 2022, and apply to income tax years beginning after December 31, 2021."

Saving Clause: Section 12, Ch. 17, L. 2021, was a saving clause.

Severability: Section 68, Ch. 503, L. 2021, was a severability clause.

2019 Amendment: Chapter 317 in (1)(k) at beginning inserted exception clause; inserted (1)(q) regarding surplus funds held by a county treasurer; and made minor changes in style. Amendment effective May 7, 2019.

Applicability: Section 20, Ch. 317, L. 2019, provided: "[This act] applies to tax liens attached or assigned on or after [the effective date of this act]." Effective May 7, 2019.

Saving Clause: Section 18, Ch. 317, L. 2019, was a saving clause.

2007 Amendment: Chapter 331 in (1)(g) inserted second and third sentences concerning nonpresumption of abandonment and amount considered abandoned; and made minor changes in style. Amendment effective April 27, 2007.

Effective Date — Retroactive Applicability: Section 4, Ch. 331, L. 2007, provided: "[This act] is effective on passage and approval and applies retroactively, within the meaning of 1-2-109, to gift certificates issued or sold after September 30, 2005." Approved April 27, 2007.

1997 Amendment — Coordination: Section 33, Ch. 268, L. 1997, provided that if Senate Bill No. 125 was passed and approved (Ch. 124, L. 1997), then sec. 3, Ch. 124, L. 1997, was amended by inserting (1)(p) concerning unclaimed shares in cooperatives; inserting (6)(b) concerning unclaimed shares in cooperatives; and making minor changes in style.

Source: Section 2, Uniform Unclaimed Property Act (1995).

Administrative Rules

Title 42, chapter 38, ARM Unclaimed property.

70-9-804. Contents of safe deposit box or other safekeeping depository.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

Section 3 [70-9-804] parallels Section 2(d) of the 1966 Act and Section 16 of the 1981 Act. This section is not intended to cover property left in places other than safekeeping depositories, for example, airport lockers or field warehouses. Its coverage is limited to tangible property held in safe deposit boxes in banks and financial institutions. Intangible property, evidence of which is found in a safe deposit box, is covered by Section 2 [70-9-803].

Compiler's Comments

Source: Section 3, Uniform Unclaimed Property Act (1995).

70-9-805. Rules for taking custody.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

Section 4 [70-9-805] describes the general circumstances under which a State may claim abandoned intangible property. This section closely follows the language of Texas v. New Jersey, in which the court reasoned that unclaimed property is an asset of the creditor and should generally be paid to the creditor State, i.e., the State of residence of the apparent owner. Consistent with that reasoning it held that unclaimed intangible property is subject to escheat or custody as unclaimed property first by the State of the owner's last known address. (See Section 1(7) [70-9-802(7)] and the Comment with regard to "last known address.") If that State cannot claim the property, the State of the holder's domicile is entitled to custody. Consistent with the court's concern for a simple rule which would avoid the complexities of proving domicile and residence the court established the priority on the basis of information contained in the holder's records. Where the holder's records do not show that the owner had an address within the State, the second priority claimant, the State of domicile of the holder, is entitled to claim the property. Another State can later assume custody from the State of the holder's domicile by showing that the last known address of the owner was within its borders. Likewise, if the State of last known address does not have an unclaimed property law which applies to the property, the State of the holder's domicile can take the property, again subject to the right of the State of last known address to recover the property if and when it enacts an unclaimed property or escheat law.

Paragraph (1) [(1)] restates the factual situation in Texas v. New Jersey. As the court there said ". . . the address on the records of a debtor, which in most cases will be the only one available, should be the only relevant last known address."

Paragraph (2) [(2)] covers the situation in which, on the basis of the holder's records, the identity of the person entitled to the property is unknown, and the holder therefore reports to the State of its domicile, but it is later established by another State that the property was owned by or payable to a person whose last known address was within the claiming State. This is a rational extension of Texas v. New Jersey. Reunification of the owner with his or her property in this circumstance is impossible, and insofar as that issue is concerned, it makes no difference whether the property is delivered to the State of the holder's domicile or the State of the owner's last known address. However, following the equitable concept of distributing unclaimed property among creditor States articulated by the Supreme Court in Texas v. New Jersey, and reaffirmed in Delaware v. New York, the subsection directs that where there is no record of a name but there is a record that the last known address was within the State, that State where the owner had an address can claim the property.

Paragraph (3) [(3)] is the secondary rule of Texas v. New Jersey. The Supreme Court ruled that when property is owed to persons for whom there are no addresses, the property will be subject to escheat by the State of the holder's domicile, provided that another State may later claim upon proof that the last known address of the person entitled to the property was within its borders.

Paragraph (4) [(4)] provides that if the law of the State of the owner's last known address does not provide for escheat or taking custody of the unclaimed property or if that State's escheat or unclaimed property law is not applicable to the property in question, the property is subject to claim by the State in which the holder is domiciled. In that instance, the State of the owner's last known address may thereafter claim the property if it enacts an applicable unclaimed property law. The holder State will act as custodian and pay or deliver the property to the owner or the State which has priority under Texas v. New Jersey upon request. As held in State v. Liquidating Trustees of Republic Petroleum Co., 510 S.W.2d 311 (Texas 1974), Texas v. New Jersey dealt only with conflicting claims of two or more States, and provides no basis for a holder to object to the claim of its State of domicile by asserting that another State has a superior claim, if the holder has not already reported the property to that other State. Therefore a State which claims custody on the ground that it is the holder's domicile is not required to prove that the laws of some or all of the other 49 States do not "provide" for the taking of the property; if the holder has not reported and paid the property to another State, as between the domiciliary State and the holder, it will be presumed that such other State's laws do not apply. If another State does claim the property, it may of course proceed under Section 14 [70-9-814].

Paragraph (5) [(5)] provides that when the last known address of the apparent owner is in a foreign nation the State in which the holder is domiciled may claim the property. This issue was not dealt with by the Supreme Court in Texas v. New Jersey, but is a rational extension of that ruling.

Paragraph (6) [(6)] provides for a situation in which neither of the priority claims discussed in Texas v. New Jersey can be made, but the State has a genuine and important contact with the property. An example of the type of claim which might be made under paragraph (6) [(6)] arose in O'Connor v. Sperry & Hutchinson Co., 412 A.2d 539 (Pa.1980). There Pennsylvania sought to escheat unredeemed trading stamps sold by a corporation domiciled in New Jersey to retailers located in Pennsylvania. Pennsylvania took the position that Texas v. New Jersey did not create a jurisdictional bar to escheat by other States when the States granted priority were unable to take. There was no first priority claim since there were no addresses of the trading stamp purchasers. The second priority claimant, the State of corporate domicile (New Jersey), was not permitted under its law to escheat trading stamps (see New Jersey v. Sperry & Hutchinson Co., 56 N.J.Super. 589, 153 A.2d 691 (1959), affirmed per curiam, 31 N.J. 385, 157 A.2d 505 (1960)) and hence Pennsylvania urged that in order to prohibit a corporate windfall it should be allowed to claim this property. The Pennsylvania Supreme Court affirmed a lower court decision which overruled Sperry & Hutchinson's motion to dismiss but did not reach the Texas v. New Jersey issue.

Gift certificates, unused airline tickets, and other property for which there is no last known address may be claimed by the State where the purchase was made if the State of corporate domicile does not have an abandoned property law covering the property in question under paragraph (6) [(6)].

Travelers checks and money orders are covered under paragraph (7) [(7)], which states the rule adopted by Congress in 12 U.S.C. sections 2501 et seq. The congressional action was in response to the Supreme Court decision in Pennsylvania v. New York, 407 U.S. 206 (1972), which held that the State of corporate domicile was entitled to escheat money orders when there was no last known address of the purchaser although the property had been purchased in other States. Paragraph (7) [(7)], pursuant to the congressional mandate, substitutes as the test for asserting a claim to travelers checks and money orders the place of purchase rather than the State of incorporation of the issuer.

Wholly foreign transactions are excluded from the coverage of the Act. See Section 26 [70-9-826].

Compiler's Comments

Source: Section 4, Uniform Unclaimed Property Act (1995).

70-9-806. Dormancy charge.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

This section is consistent with those cases which have ruled on the issue of service charges under the 1966 Act and the 1981 Act. Section 5 [70-9-806] is a limitation on the deduction of charges based solely on dormancy and is applicable to all intangible property presumed abandoned. This section, which applies to all unclaimed property, replaces similar limitations that were specifically focused on various types of property in the 1981 Act. The limitation of a service charge to an amount that is not unconscionable is new and is drawn from Article 2, Section 302, of the Uniform Commercial Code.

Compiler's Comments

Source: Section 5, Uniform Unclaimed Property Act (1995).

70-9-807. Burden of proof as to property evidenced by record of check or draft.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

This provision clarifies the burden of proof in situations where the obligation evidenced by a negotiable instrument is disputed by the holder, and is consistent with cases which have ruled on the matter. See Insurance Co. of North America v. Knight, 8 Ill.App.3d 871, 291 N.E.2d 40 (1972), app. dismissed 414 U.S. 804, 38 L.Ed.2d 40, 94 S.Ct. 165 (1973), Blue Cross of Northern Cal. v. Cory, 120 Cal. App.3d 723, 174 Cal. Rptr. 901 (1981), and Revenue Cabinet v. Blue Cross & Blue Shield, 702 S.W.2d 433, 435 (Ky. 1986). See also Riggs Nat'l Bank v. District of Columbia, 581 A.2d 1229 (D.C. App. 1990). It is also consistent with the cases holding that when claiming abandoned property the State steps into the shoes of the owner (see Epstein, McThenia and

Forslund, "Unclaimed Property and Reporting Forms," sec. 3.02 (Matt. Bend. 1984), and Article 3-308 of the Uniform Commercial Code. Under U.C.C. Section 3-308(2), "When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense." The reason for requiring a plaintiff to produce the instrument is "to show that the plaintiff is in fact the holder, and in order to protect the defendant from double liability." 6 Anderson, Uniform Commercial Code, sec. 3-307:4, p. 158 (3rd ed., 1993). The administrator, by proving issuance of the instrument, succeeds to all rights of the payee. Because the issuer is relieved of all liability on the instrument by paying the obligation to the State as unclaimed property, and is indemnified by the State, there is no chance that the issuer would be held liable twice, and therefore the administrator is not required to produce the instrument in order to possess the same rights as a holder in due course.

Compiler's Comments

Source: Section 6, Uniform Unclaimed Property Act (1995).

70-9-808. Report of abandoned property.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

The $50 minimum provided in subsection (b)(1), (2), and (3) [(2)(b), (2)(c), and (2)(d)] represents an increase from $3.00 in the 1966 Act and $25 in the 1981 Act in order to minimize reporting expenses. Almost every State which enacted the prior Uniform Act now provides for a $25 minimum.

Before filing its report, the holder must send written notice to the apparent owner, if the owner's claim is not barred by the statute of limitations, the property has a value of $50 or more, and the holder's records do not disclose the address to be inaccurate. Other efforts to locate the owner are no longer required.

Subsection (f) [(6)] provides new flexibility to the holder and to the administrator in cases where the holder's timely compliance is not feasible. In the past, some administrators have felt themselves to be without authority to extend the filing deadlines, or to accept less than a final report. It is now made clear that an extension can be had for good cause, and the holder can limit its exposure to interest by making a partial payment.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 3, Ch. 588, L. 2023. Amendment effective October 1, 2023.

Source: Section 7, Uniform Unclaimed Property Act (1995).

70-9-809. Payment or delivery of abandoned property.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

Subsections (b) and (c) [(2) and (3)] particularize the general duty stated in subsection (a) [(1)] with respect to investment securities, including securities positions held directly and securities positions held through accounts with brokers or other intermediaries (referred to as "security entitlements" under revised Article 8 of the Uniform Commercial Code). UCC Article 8 provides that the issuer of a security, or intermediary with respect to a security entitlement, has a duty to act at the direction of the "appropriate person." Subsection (b) [(2)] provides that with respect to securities and security entitlements that have been reported as abandoned property pursuant to Section 7 [70-9-808], the administrator is an "appropriate person." Accordingly, the administrator has the same rights under UCC Article 8 as other persons who succeed by operation of law to securities or security entitlements, such as the executor or administrator of a decedent. Subsection (c) [(3)] deals with situations where the holder reporting abandoned property is itself the issuer of a certificated security, and hence does not have the original certificate to turn over to the administrator. Accordingly, subsection (b) [(2)] provides that the administrator can invoke the provisions of UCC Article 8 governing replacement certificates, without an indemnity bond.

Subsection (d) [(4)] indemnifies a person causing a replacement certificate to be issued to the administrator from any claims that the person acted wrongfully in so doing. This indemnification is desirable in that it eliminates any duty of the transferring authority to make an independent investigation into whether the listed owner of the security is in fact missing, or into other factors which might affect the administrator's right to obtain custody of the property.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 4, Ch. 588, L. 2023. Amendment effective October 1, 2023.

Source: Section 8, Uniform Unclaimed Property Act (1995).

70-9-810. Notice and publication of lists of abandoned property.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

This section sets forth the minimum requirements for advertisement. The administrator may publish more frequently or extensively. The Act does not establish a specific time for the publication so that the administrator can choose a time that will provide the best exposure and flexibility in scheduling the workload and personnel available.

The advertisement must contain a minimum of two items of information, one of which explains that the abandoned property has been paid into the protective custody of the administrator. Since abandoned property is delivered with the report under the revisions of this Act, this statement is necessary to explain the location of the property and to insure that inquiries are directed to the administrator.

Subsection (b) [(2)] limits the duty to advertise in recognition of the fact in the specified circumstances the value of the property is so slight as to negate the benefits of the advertising, or the names and addresses of the owners of the instruments are not maintained by the holder, or in the case of travelers checks, after 15 years the advertisement is unlikely to be productive.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 5, Ch. 588, L. 2023. Amendment effective October 1, 2023.

Source: Section 9, Uniform Unclaimed Property Act (1995).

70-9-811. Custody by state — recovery by holder — defense of holder.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

When property is turned over to the State, the holder is relieved of all liability for any turnover made in good faith. Subsection (a) [(1)] sets forth a definition of good faith which inter alia allows the holder to rely on its records if they meet reasonable commercial standards of practice in the industry.

The section also permits the holder to obtain reimbursement for claims it elected to pay to owners who appeared after the property was turned over. If a State in enacting Section 12(b) [70-9-812(2)] provides for the payment of interest on property delivered to the administrator, then the holder will add such interest when paying the claim.

If after turnover, any person or another State makes a claim on the holder, the State, upon request, is required to defend the holder and provide indemnification against any liability.

Compiler's Comments

Source: Section 10, Uniform Unclaimed Property Act (1995).

70-9-812. Public sale of abandoned property.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

If the security is stock or other intangible interest in a business association, the administrator is permitted to sell the security, but if the missing owner appears and makes claim for the security within three years after the administrator has sold it, the missing owner is entitled to receive the proceeds of the sale or the market value of the securities at the time the claim is made. Thus there is a genuine incentive for an administrator to hold this property for the requisite three-year period.

Subsection (b) [(2)] permits an administrator to sell securities at prevailing prices directly to the issuing companies.

This section is not intended as a direction to the administrator to sell "money," although money is included in the definition of property, unless it is a collector's specie having value greater than the face value of the money as cash.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 6, Ch. 588, L. 2023. Amendment effective October 1, 2023.

Source: Section 12, Uniform Unclaimed Property Act (1995).

70-9-813. Deposit of funds.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

This section increases from $25,000 to $100,000 the sum which is recommended to be retained in a trust account for payment of claims. It is contemplated that the amount of the trust fund which is ultimately established will reflect a State's experience in paying owners' claims.

Compiler's Comments

Source: Section 13, Uniform Unclaimed Property Act (1995).

70-9-814. Claim of another state to recover property.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

Section 14 [70-9-814] should be read together with Section 4 [70-9-805]. Sections 4 and 14 [70-9-805 and 70-9-814] are designed to carry out the priority scheme enunciated in Texas v. New Jersey, 379 U.S. 674 (1965). In general the State in which the owner had his or her last known address is entitled to claim abandoned property. Where there is insufficient information to permit this assertion of custody, the State of the holder's domicile takes the property subject to a later claim by the State of the last known address.

Paragraph (1) of subsection (a) [(1)(a)] provides that if property was paid to the State of the holder's domicile because the last known address of the owner was unknown and it is later established by another State that the last known address of the person entitled to the property was in the other State, the State of domicile should pay the property over to the other State.

Paragraph (2) [(1)(b)] parallels Section 4, paragraph (4) [70-9-805(4)], which permits the State of corporate domicile to take if the State of the last known address does not provide for the escheat or custodial taking of the property. If the State of the last known address subsequently enacts an unclaimed property law which covers the property, the taking State must turn it over.

Paragraph (3) [(1)(c)] addresses the problem of Nellius v. Tampax, Inc., 394 A.2d 333 (Del. Ch. Ct. 1978) in which the holder's records did not reflect the fact that the record owner had sold the property to another. The court concluded, under Texas v. New Jersey, that the holder's records were controlling and that it could properly report and deliver the property to the State in which its records showed the owner to be resident. However, as provided in Texas v. New Jersey and in paragraph 4 [(1)(d)], the State of the owner's actual residence could then claim the property from the State to which it was initially reported.

Paragraph (4) [(1)(c)], paralleling Section 4(6) [70-9-805(6)], provides that property initially claimed under a "contacts" test because there was no last known address and the State of domicile had no applicable unclaimed property law may be reclaimed by the State of corporate domicile if it enacts an applicable unclaimed property law.

Subsection (c) [(3)] provides that the State that initially receives property later claimed by another State may require an indemnification agreement from the claiming State.

Compiler's Comments

Source: Section 14, Uniform Unclaimed Property Act (1995).

70-9-815. Filing claim with administrator — handling of claims by administrator.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

A person claiming property from the administrator is not limited to the number of times the claim may be filed or refiled prior to commencing an action under Section 16 [70-9-816]. The administrator's decision on a claim does not operate as collateral estoppel or res judicata. A person who has commenced an action under Section 16 [70-9-816] may also reassert a claim before the administrator if the action has been dismissed without prejudice. A claim which has become the subject of a final judgment may not thereafter by refiled with the administrator.

Compiler's Comments

Source: Section 15, Uniform Unclaimed Property Act (1995).

70-9-816. Action to establish claim.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

After property is presumed abandoned and reported to the administrator the administrator must attempt to locate the missing owner. Thereafter, if the property has been delivered to the administrator and the owner or his representative appears, the administrator must pay the claim. The owner's rights are never cut off; under this Act, the owner's rights exist in perpetuity. Although some state administrators have urged legislation that would terminate an owner's right to the property merely by the passage of time, such enactments may be unconstitutional.

In Hamilton v. Brown, 161 U.S. 256, 275, 16 S. Ct. 585, 592, 40 L. Ed. 691, 699, (1896), the Supreme Court held that any procedure by which the State seeks to cut off the owner's title through escheat must include "actual notice by service of summons to all known claimants, and constructive notice by publication to all possible claimants who are unknown . . . ." Any lesser procedure appears to fall short of due process. The history of escheat, as compared with modern unclaimed property legislation, is discussed in "Unclaimed Property and Reporting Forms," Epstein, McThenia & Forslund, ch. 1 (Matt. Bend. 1984).

In any judicial action commenced to recover the property from the administrator, the claimant may proceed de novo, and the court will not be limited to a mere review of the administrator's decision.

Compiler's Comments

Source: Section 16, Uniform Unclaimed Property Act (1995).

70-9-817. Election to take payment or delivery.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

Subsection 17(b) [70-9-817(2)] authorizes the administrator to assume custody of property prior to the time for presuming abandonment. Administrators have expressed a need for this authority to enable them to take possession of property, such as the contents of a safe deposit box repository, when the holder is terminating business but the property is not yet reportable. Additionally, other holders which have conducted business in the State and are ceasing operations might use the provisions of this section. The property must be held by the administrator until the abandonment period runs and then the property will be subject to the other provisions of the Act.

Compiler's Comments

Source: Section 17, Uniform Unclaimed Property Act (1995).

70-9-818. Destruction or disposition of property having no substantial commercial value — immunity from liability.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

This section provides for the disposition of property which has no commercial value. As an example, the contents of safety deposit boxes often include such items as rent receipts, personal correspondence and lapsed insurance policies. In such cases, these contents might have some personal significance to the owner, which the administrator would take into consideration in determining for what period of time he will hold the property awaiting a claim by the owner. However, in the usual situation there will be no interest to be preserved by maintaining this property under state custody.

Under this section the administrator would be free to retain property having no commercial value. Further, the administrator could transfer it to other agencies or institutions which might have an interest in the property because of its historical value or other independent significance.

Compiler's Comments

Source: Section 18, Uniform Unclaimed Property Act (1995).

70-9-819. Periods of limitation.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

Subsection (a) [(1)] is consistent with cases such as People v. Marshall Field & Co., 83 Ill. App. 3d 811, 404 N.E.2d 368 (1980), Screen Actors Guild, Inc. v. Cory, 91 Cal.App.3d 111, 154 Cal.Rptr. 77 (1979), and State v. Jefferson Lake Sulphur Co., 36 N.J. 577, 178 A.2d 329 (1962). It also abrogates another contractual condition often asserted as a defense to reporting property otherwise presumed abandoned, the failure to present the evidence of indebtedness.

Subsection (a) [(1)] is written to insure also that although the owner's claim against the holder may be barred by the statute of limitations prior to the effective date of the Act, the holder is not relieved of his obligation to pay abandoned property to the administrator. The Comment to Section 16 of the 1966 Act noted that local law must be consulted in order to ascertain whether legislation constitutionally may be enacted reviving a cause of action barred by the statute of limitations. This issue has been litigated in several States, e.g., Country Mutual Insurance Co. v. Knight, 40 Ill.2d 523, 240 N.E.2d 612 (1968); Douglas Aircraft Co. v. Cranston, 24 Cal.Rptr. 851, 374 P.2d 819 (1962); cf. Standard Oil v. New Jersey, 5 N.J. 281, 74 A.2d 565 (1950). Even though the statute of limitations has run before the effective date of the Act, the holder may be required to report and deliver the property to the State if the holder does not regularly enforce the statute. See South Carolina Tax Commission v. Metropolitan Life Insurance Co., 266 S.C. 34, 221 S.E.2d 522 (1975). But see State of Washington v. Puget Sound Power & Light Co., 103 Wash.2d 501, 694 P.2d 7, 10 (1985).

Subsection (b) [(2)] provides that an administrator must commence an action against a holder within 10 years after the time the property was first reported or specifically placed in issue. The 1995 amendment clarifies existing law and codifies the holdings of abandoned property cases that have ruled on issues of limitations. See Blue Cross of Northern California v. Cory, 174 Cal. Rptr. 901, 913, 120 Cal. App.3d 743 (App., 1981) (no statute of limitations will commence to run against the State until after the holder duly reports in compliance with the unclaimed property act); Travelers Express Co., Inc. v. Cony, 664 F.2d 763 (9th Cir. 1981) (statute of limitations commences to run only after filing of report which contains written explanation of why property is not subject to the act); Employers Insurance of Wausau v. Smith, 453 N.W.2d 856 (Wis. 1990) (filing of report essential to running of statute of limitations, since unclaimed property act depends on self-reporting); Sennet v. Insurance Co. of North America, 432 Pa. 5215, 247 A.2d 774, 777-78 (1968) (same; "INA simply has to take its stand: if it reports the holding [of funds in issue] (as a precautionary measure), the statute will run; if it does not, the Commonwealth is not precluded . . . ."); State of New Jersey v. U.S. Steel Corporation, 22 N.J. 341, 126 A.2d 168 (1956) (same); Treasurer and Rec. Gen. v. John Hancock Mut. Life Ins. Co., 388 Mass. 410, 446 N.E.2d 1376 (1983) (same). The provision also parallels the Internal Revenue Code, 26 U.S.C. sec. 6501(c). Since the Unclaimed Property Act is based on a theory of truthful self-reporting, a holder which conceals property, wilfully or otherwise, cannot expect the protection of the stated limitations period.

Compiler's Comments

Source: Section 19, Uniform Unclaimed Property Act (1995).

70-9-820. Requests for reports, examination of records, and confidentiality.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

This section is designed to facilitate compliance with the Act. Subsection (a) [(1)] provides for the filing of a negative report if the administrator requires such a report and will minimize disruption which would otherwise be caused to the holder if an examination of records instead were conducted by the administrator. Subsection (b) [(2)] is based on Section 30 of the 1981 Act. Aside from the requirement that the administrator conduct the examination at reasonable times and upon reasonable notice, the only limitations on the administrator's right to examine are constitutional limitations. Even though the Fourth Amendment does not extend as broadly to corporations as to individuals, Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 90 L.Ed. 614, 66 S.Ct. 494 (1946), inspections of commercial property may be unreasonable if they are not authorized by law or are unnecessary for the furtherance of a governmental interest. Donovan v. Dewey, 452 U.S. 594, 56 L.Ed.2d 486, 98 S.Ct. 1942 (1980). This Act is deemed to meet that standard. Also, since one of the dual purposes of this Act is the collection of revenue, reference may be made to the cases holding that it is not an unreasonable search to require taxpayers to produce their books and records. See Annot., "Constitutionality of statutory provisions for examination of records, books, or documents for taxation purposes," 103 ALR 522.

Subsection (c) [(3)] is intended to provide a useful method whereby the administrator can conduct a single examination of a dividend disbursing agent or transfer agent serving in such capacity for numerous business associations.

Subsection (f) [(6)] permits the use of estimates in instances where the holder has failed to report and deliver property that is abandoned and no longer has reasonably accessible records sufficient to prepare a specific report. Additionally, if the holder fails to maintain records of the last known address, States can assert claims based on any other records which might exist. Resort may be had to computer codes. While the holding in Texas v. New Jersey is intended to prevent multiple liability of holders, this subsection, viewed as a penalty for failure to maintain records of names and last known address, is not inconsistent with that decision. That part of subsection (f) [(6)] which permits the State to make estimates was prospective only from the date of adoption of the 1981 Act. This Act expressly states the bases on which estimates may be made. Thus, the State may use estimating techniques — where a holder has not maintained records as required by statute — based on industry averages, and may rely on inferences that may be based on statistics drawn from a broader basis than that of the holder in question who has failed to keep records. This section, together with Section 23 [70-9-823], also clarifies the administrator's authority to enter into agreements to enforce the State's custodial powers in all States.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 7, Ch. 588, L. 2023. Amendment effective October 1, 2023.

Source: Section 20, Uniform Unclaimed Property Act (1995).

70-9-821. Retention of records.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

This section does not require that the holder in the first instance obtain the address of the owner. For example, a record of the address of the purchaser or recipient of a gift certificate customarily is not obtained.

Initially, the period for which records of address must be obtained is established at 10 years from the date the property was first reportable as abandoned property. However, this section permits a State to shorten this period by rule. Because the reporting practices of holders vary, an administrator will want to consider such factors as the burden imposed on the holder in maintaining such records, the opportunity of returning the property, and the type of business of the holder. For example, in the case of property that would be reportable in the aggregate without the name and address of the apparent owner under Section 7 [70-9-808], a State might adopt a rule providing for a relatively short record retention period on condition that the holder maintain a record sufficient to satisfy the requirements of Texas v. New Jersey that there be a last known address or that the State can prove that the last known address of the creditor was within its borders.

Subsection (b) [(2)] is designed to assure that the information required for asserting a claim to travelers checks and money orders is retained by the issuers of travelers checks and money orders.

Compiler's Comments

Source: Section 21, Uniform Unclaimed Property Act (1995).

70-9-822. Enforcement.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

Although generally an action would be brought in an administrator's own State, action to enforce the Act may also be brought in the courts of another State. See Section 23 [70-9-823]. See also, Commonwealth of Pennsylvania v. Kervick, 60 N.J. 289, 288 A.2d 289 (1972).

Compiler's Comments

Source: Section 22, Uniform Unclaimed Property Act (1995).

70-9-823. Interstate agreements and cooperation — joint and reciprocal actions with other states.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

To avoid conflicts between the administrator's procedures and the procedures of administrators in other jurisdictions that enact the Uniform Unclaimed Property Act, the administrator, before adopting, amending or repealing rules, should advise and consult with administrators in other jurisdictions that adopt this Act substantially and take into consideration the rules of administrators in other jurisdictions that enact the Uniform Unclaimed Property Act.

Cooperation among States is essential if abandoned property programs are to be efficiently administered. In recent years several States have joined together to audit major holders. Additionally, several States have entered into agreements to act as collection agents for each other. Interstate cooperation and the development of uniform reporting forms and uniform regulations will be of assistance to holders as well as program administrators. This section encourages joint agreements and cooperation among the States. An agreement among the States might expressly relieve holders from reporting piecemeal to separate States. Instead, they might be able to file a single report of all abandoned property, wherever located, and regardless of the address of the owner.

Reciprocal agreements envisioned under subsection (c) [(3)] do not require the consent of Congress under the Compact Clause of the Constitution, Art. I, 10, cl. 3. The Supreme Court has held that the restriction of the Compact Clause is limited to combinations or agreements that tend to increase the political power of the States to such an extent that it interferes with the supremacy of the United States. United States Steel v. Multi-State Tax Commission, 434 U.S. 452 (1978). In Multi-State Tax Commission the Court upheld a tax compact, that had not been approved by Congress creating a permanent administrative body to perform audits of multi-state taxpayer operations, and at the request of a member State, to sue to enforce the audits in the courts of the member States.

This section simply authorizes an economical approach to enforcing a State's claim under Texas v. New Jersey. Each State retains discretion to bring suit or to decide against such action, remaining free to adopt its own abandoned property policies. The position of the States will not be politically improved at the expense of the federal government although the process for claiming abandoned property will be more efficient.

Action by one State for another is expressly permitted by this section. In some cases the administrator of a State may deem it wise to seek counsel in a foreign jurisdiction. There may be small claims which would not justify individual action by the claimant State in a foreign forum, but if several States join forces and retain counsel in the holder State to sue for all of them, it might be administratively justified. This section expressly permits such joint action.

Compiler's Comments

Source: Section 23, Uniform Unclaimed Property Act (1995).

70-9-824. Interest and penalties.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

A major weakness of the 1966 Act was its ineffective penalty provision. Although the 1981 Act increased penalties for non-compliance, voluntary compliance with the Act continued to be a problem. In this Act, compliance failures not accompanied by willfulness are dealt with by moderate increases in the applicable penalties, and the administrator simultaneously is given authority to waive both interest and penalties where the holder has attempted in good faith to comply, or where the failure has been due to excusable neglect. Where the holder's failure is willful or fraudulent, and not in good faith, penalties are increased more substantially.

Criminal penalties, which were the sole enforcement mechanism of the 1954 Act and which were retained in the 1981 Act have been eliminated, as they were not effective and rarely, if ever, pursued.

The provision for the discretionary waiver of interest upon a showing of good cause is intended to apply to situations in which the holder has attempted to comply with the Act. Establishment of "good cause" is likely to be difficult where the holder has failed to file a report.

Compiler's Comments

Source: Section 24, Uniform Unclaimed Property Act (1995).

70-9-825. Agreement to locate property.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

This section is intended to enhance the likelihood that the owner of the abandoned property will be located by the efforts of the State, and will receive a return of the property without payment of a "finder's fee." In the past, it appears to have been the practice in many States for unclaimed property locators or heir finders to utilize the State's lists of names and addresses of missing owners to contact them and propose to find their property for them for a fee, before the State has had an opportunity to locate the missing owners. Some States have enacted legislation that prohibits examination of these lists by anyone except an apparent owner or other person having a legal interest in the property, but in many States that kind of provision may be in conflict with the State's public records laws.

Subsections (b) and (d) [(2) and (4)] apply to agreements entered into at any time. These subsections apply to all finders' and locators' contracts, regardless of when the contract is made, including agreements with an owner as a result of a holder providing to private parties, the holder's information regarding an inactive account.

This section is not intended to apply to situations such as the probating of an estate, which may incidentally include a necessity of locating unclaimed property. Agreements in such cases do not have as their principal purpose, the rendition of services to locate, deliver or recover unclaimed property. This section also does not apply to agreements for legal representation of an owner who is claiming property the identity of which is already known to the owner.

Compiler's Comments

Source: Section 25, Uniform Unclaimed Property Act (1995).

70-9-826. Foreign transactions.

Compiler's Comments

Source: Section 26, Uniform Unclaimed Property Act (1995).

70-9-827. Transitional provisions.

Official Comments

Commissioners' Comment: [See part official comments and part compiler's comments.]

Paragraph (a) [(1)] is retained from the 1981 Act and deals with the problem of how far back a holder must check its records to determine what property not subject to the prior Act must be paid to the State under this Act. Thus, property which was not covered by any unclaimed property law prior to adoption of the 1981 Act, but was covered by that Act, continues to be covered by this Act if the obligation was incurred not more than 10 years prior to adoption of the 1981 Act and the statute of limitations is not tolled under Section 19(b) [70-9-819(2)]. For example, if a State enacts this Act effective January 1, 1996 for property not previously presumed abandoned, the holder must report it if, as of January 1, 1986, it had been unclaimed for the abandonment period. A similar provision is found in Section 11(g) of the 1966 Act.

Paragraph (b) [(2)] provides that if a State had an unclaimed property law prior to the adoption of this Act, a holder is not relieved of his duty to report and pay over the property abandoned under the Act then existing. Except as otherwise provided in Section 19(b) [70-9-819(2)], a holder who did not comply with the law in effect before the effective date of this Act is subject to the applicable provisions for enforcement and penalties which then existed and which are continued in effect for the purpose of this section.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 8, Ch. 588, L. 2023. Amendment effective October 1, 2023.

Source: Section 27, Uniform Unclaimed Property Act (1995).

70-9-828. Rules.

Compiler's Comments

Source: Section 28, Uniform Unclaimed Property Act (1995).

70-9-829. Uniformity of application and construction.

Compiler's Comments

Source: Section 29, Uniform Unclaimed Property Act (1995).

70-9-830. When security presumed abandoned.

Compiler's Comments

Effective Date: This section is effective October 1, 2023.

CHAPTER 15

DEFINITIONS AND KINDS OF ESTATES IN REAL PROPERTY

Part 1

Real Property Defined Fixtures and Appurtenances

70-15-101. Real property defined.

Case Notes

Pivot Irrigation System Constituted Fixture — Three-Factor Test Applied: The District Court did not err in determining that an entire pivot irrigation system on the defendant's property constituted a fixture. In upholding the District Court, the Supreme Court applied three factors: (1) annexation to the realty, (2) an adaptation to the use to which the realty is devoted, and (3) the intent that the object become a permanent accession to the land. As to the first factor, there was no evidence in the record that the parties intended the pivot irrigation system to be moved to different locations on different fields. Instead of removing and stacking the pipes, the pivot irrigation system was winterized in place and was not specifically designed to be used in more than one location and each pivot arm had to be assembled in specific lengths pursuant to its unique location on the property. Therefore, the District Court did not err in concluding that the pivot irrigation system was factually annexed to the real property within the meaning of the Supreme Court's precedent involving fixtures. As to the second factor, it was indisputable that the components constituted an integral part of the pivot irrigation system as a whole. The record reflected that the installation of the pivot irrigation system required a visit to the property and assemblage of each individual pivot arm in specific lengths, tailored to fit its location on the property. Further, the pivot arms were assembled in specific lengths for five separate locations on the defendant's property and were winterized in place once installed, rather than removed for storage. Under these factual circumstances, the Supreme Court concluded that the components that the plaintiff sought to remove from the defendant's property and the pivot irrigation system as a whole were adapted to the realty. As to the third factor, the Supreme Court determined that the objective circumstances surrounding the plaintiff's installation of the pivot irrigation system illustrated that it was the plaintiff's intent for the system to become a permanent fixture on the land. Welu v. Twin Hearts Smiling Horses, Inc., 2016 MT 347, 386 Mont. 98, 386 P.3d 937.

Plastic Irrigation Pipe Not Considered Fixture: Plastic irrigation pipe did not meet the definition of a fixture because it was not annexed to the land, as evidenced by the fact that it was: (1) attached to riser pipes only during irrigation season and was stacked when not in use; (2) useful apart from the land; and (3) easily and readily replaceable. Schwend v. Schwend, 1999 MT 194, 295 M 384, 983 P2d 988, 56 St. Rep. 754 (1999), applying the annexation, adaptation, and intent factors of the fixture test in Grinde v. Tindall, 172 M 199, 562 P2d 818 (1977).

Property Description of "2 Acres, More or Less" Not Ambiguous: A property agreement provided that Tract 1 be "2 acres, more or less". Although the phrase "more or less" may not be particularly precise, it is a phrase commonly understood by its plain and ordinary meaning and is not subject to two interpretations. More or less means "approximately", regardless of whether one party would prefer "less", while the other party "more". The property agreement was clear, unambiguous, and enforceable. Schwend v. Schwend, 1999 MT 194, 295 M 384, 983 P2d 988, 56 St. Rep. 754 (1999).

Tax Sale Provisions Applicable to Improvements on Tax-Exempt Land — Meaning of "Real Property" and "Real Estate": Montana's tax collection laws governing real estate tax sales apply to improvements located on tax-exempt lands. The conveyance by tax deed of appellant's log cabin for nonpayment of taxes was upheld against his assertion that the cabin, situated on Forest Service land, is not an improvement fixed to land for purposes of the Realty Transfer Act and not "real estate" for purposes of the tax sale provisions. The court traced the Legislature's circuitous route to a definition of taxable real property in support of its holding. Brown v. Hart, 213 M 517, 692 P2d 14, 41 St. Rep. 2264 (1984).

Building on Leased Real Property That Must Be Removed at End of Lease — Personal Property: A building constructed on leased real property, pursuant to a lease that required the lessee to remove the building upon termination of the lease, is personal property to which a judgment lien does not attach. Pac. Metal Co. v. NW. Bank of Helena, 205 M 323, 667 P2d 958, 40 St. Rep. 1301 (1983).

Status of Property for Taxation Purposes Not Relevant to Determination of Its Status Under Property Law: The method by which property is assessed for purposes of taxation has no bearing on whether the structure is real or personal property. Pac. Metal Co. v. NW. Bank of Helena, 205 M 323, 667 P2d 958, 40 St. Rep. 1301 (1983).

Rescission of Lease — Claim for Wrongful Retention of Fixtures Properly Dismissed: In an action for damages caused by breach of a lease, the District Court did not err in dismissing the defendants' counterclaim for wrongful retention of certain fixtures added to the property by the defendants. As a matter of law, the plaintiff cannot be unjustly enriched because a fixture, by definition, is a part of real property to be retained by the owner of the premises at the expiration of the lease. Certain fixtures may be removed but only during "the continuance of his [the tenant's] term". As no effort was made by the defendants to remove the fixtures until 9 months after vacating the premises, the defendants' counterclaim was properly rejected. Ragen v. Weston, 191 M 546, 625 P2d 557, 38 St. Rep. 456 (1981).

Crops — Ownership: When the crops were planted, work done, and harvest completed by defendant prior to a court-ordered change of possession, the crops belong to the defendant. Whitney v. Bails, 172 M 121, 560 P2d 1344 (1977).

Oil and Gas in Place — Realty: So long as petroleum and gas remain in the ground they are part of the realty and as such subject to the owner's control. Williard v. Fed. Sur. Co., 91 M 465, 8 P2d 633 (1932).

Shares of Stock in Mutual Irrigation Company: While shares of stock in a mutual irrigation company, organized for the convenience of its members in the distribution to them of water for use upon their lands in proportion to their respective interest, are personal property for the purpose of transfer, they are appurtenant to the lands held by their owners and, unless reserved, pass with the conveyance of the lands though not mentioned therein. Yellowstone Valley Co. v. Assoc. Mtg. Investors, Inc., 88 M 73, 290 P 255, 70 ALR 1002 (1930).

Change of Possession of Land With Growing Crops — Title Passes Crops: Annual crops growing upon land are not part of the land under the statutes of this state, but where the owner of the land sells it with the right of immediate possession in the purchaser and without reserving the crops thereon and the purchaser takes possession before severance, title passes to the crops as well, and this principle is applicable where the land is sold at decretal or execution sale. Kester v. Amon, 81 M 1, 261 P 288 (1927).

Annual Crops — Personal: Annual crops are usually treated as chattels personal, subject to sale or mortgage and levy of execution as are other chattels, even while still annexed to the soil, and are not included within the definition of real property. Morton v. Union Cent. Life Ins. Co., 80 M 593, 261 P 278 (1927).

Growing Grass — Real Property: Growing grass is a part of the soil of which it is the natural growth, within meaning of this section and 70-15-103, and destruction thereof by the herding of livestock thereon constitutes a damage to the owner's real property. Kiehl v. Holliday, 77 M 451, 251 P 527 (1926).

Easements — Interest in Real Property:

A right-of-way and the right to a ditch, canal, or other structure in which water is conveyed for irrigation or other lawful purposes are easements over the land occupied by the ditch, canal, etc. An "easement" is an appurtenance to land and constitutes an interest in real property. Mannix v. Powell County, 60 M 510, 199 P 914 (1921). See also Rodda v. Best, 68 M 205, 217 P 669 (1923).

An easement for a right-of-way for cutting and hauling timber is realty under Montana law. R. M. Cobban Realty Co. v. Donlan, 51 M 58, 149 P 484 (1915).

Buildings: In the absence of anything to show an intention to the contrary, things affixed to the realty, such as buildings permanently resting upon foundations embedded in the soil, are part of the realty and pass with it. Ownership of such a structure necessarily followed ownership of the land rightfully decreed to plaintiff. Hauf v. School District, 52 M 395, 158 P 315 (1916).

Growing Timber — Realty: Growing timber is realty under Montana law. R. M. Cobban Realty Co. v. Donlan, 51 M 58, 149 P 484 (1915).

Bridges: Where a person enters upon an existing public highway and voluntarily erects a bridge, intending that it should be a part of the same and belong to the public, it becomes of necessity affixed to the land and is real property. State ex rel. Donlan v. Bd. of Comm'rs, 49 M 517, 143 P 984 (1914), followed in Kelly v. Wallace, 1998 MT 307, 292 M 129, 972 P2d 1117, 55 St. Rep. 1271 (1998).

Mining Machinery: Mining machinery, being deemed affixed to the mine, is real property. Britannia Min. Co. v. USF&G Co., 43 M 93, 115 P 46 (1911).

Law Review Articles

A Historical Perspective on Montana Property Tax: 25 Years of Statewide Appraisal and Appeal Practice, Powell, 70 Mont. L. Rev. 21 (2009).

Landowner Liability in Montana, Nelson, 47 Mont. L. Rev. 109 (1986).

Nature of the Landowner's Interest in Oil and Gas, Walker, 17 Mont. L. Rev. 22 (1955).

70-15-102. Land defined.

Case Notes

Building on Leased Real Property That Must Be Removed at End of Lease — Personal Property: A building constructed on leased real property, pursuant to a lease that required the lessee to remove the building upon termination of the lease, is personal property to which a judgment lien does not attach. Pac. Metal Co. v. NW. Bank of Helena, 205 M 323, 667 P2d 958, 40 St. Rep. 1301 (1983).

Improvements on Land: Special assessments for flood control purposes under 85-8-341(1)(d) and 85-8-342 are limited to land, exclusive of improvements. In re W. Great Falls Flood Control & Drainage District, 159 M 277, 496 P2d 1143 (1971).

70-15-103. Fixture defined.

Case Notes

Pivot Irrigation System Constituted Fixture — Three-Factor Test Applied: The District Court did not err in determining that an entire pivot irrigation system on the defendant's property constituted a fixture. In upholding the District Court, the Supreme Court applied three factors: (1) annexation to the realty, (2) an adaptation to the use to which the realty is devoted, and (3) the intent that the object become a permanent accession to the land. As to the first factor, there was no evidence in the record that the parties intended the pivot irrigation system to be moved to different locations on different fields. Instead of removing and stacking the pipes, the pivot irrigation system was winterized in place and was not specifically designed to be used in more than one location and each pivot arm had to be assembled in specific lengths pursuant to its unique location on the property. Therefore, the District Court did not err in concluding that the pivot irrigation system was factually annexed to the real property within the meaning of the Supreme Court's precedent involving fixtures. As to the second factor, it was indisputable that the components constituted an integral part of the pivot irrigation system as a whole. The record reflected that the installation of the pivot irrigation system required a visit to the property and assemblage of each individual pivot arm in specific lengths, tailored to fit its location on the property. Further, the pivot arms were assembled in specific lengths for five separate locations on the defendant's property and were winterized in place once installed, rather than removed for storage. Under these factual circumstances, the Supreme Court concluded that the components that the plaintiff sought to remove from the defendant's property and the pivot irrigation system as a whole were adapted to the realty. As to the third factor, the Supreme Court determined that the objective circumstances surrounding the plaintiff's installation of the pivot irrigation system illustrated that it was the plaintiff's intent for the system to become a permanent fixture on the land. Welu v. Twin Hearts Smiling Horses, Inc., 2016 MT 347, 386 Mont. 98, 386 P.3d 937.

Proper Deposit of Leasehold Interest Entitling Leaseholder to Notice and Right to Redeem Property Tax Lien: Section 15-18-212 requires that the purchaser or assignee of a tax sale certificate notify all persons interested in the property, including a person with properly recorded interest in the property, that a tax deed will be issued to the purchaser unless the tax lien is redeemed prior to the expiration date of the redemption period. Under 70-21-209, an acknowledged or certified instrument is considered recorded when it is deposited with the appropriate County Clerk and Recorder. In this case, an instrument reflecting plaintiffs' interest as assignee of a vendor's interest in the contract for sale of a cabin and leasehold, which constituted real property, was properly recorded at the Lewis and Clark County Clerk and Recorder's office, so plaintiffs were entitled as an interested party to notice by certified mail pursuant to 15-18-212; however, no notice was given. Plaintiffs' right to redeem the property tax lien continued indefinitely until proper notice was given; thus, a tax deed subsequently issued by the county was void for failure to comply with the notice provisions of 15-18-212. Ditto v. Kipp, 2000 MT 162, 300 M 278, 3 P3d 647, 57 St. Rep. 679 (2000). See also Kneedler v. League Wide, Inc., 1999 MT 80, 294 M 101, 979 P2d 163 (1999).

Plastic Irrigation Pipe Not Considered Fixture: Plastic irrigation pipe did not meet the definition of a fixture because it was not annexed to the land, as evidenced by the fact that it was: (1) attached to riser pipes only during irrigation season and was stacked when not in use; (2) useful apart from the land; and (3) easily and readily replaceable. Schwend v. Schwend, 1999 MT 194, 295 M 384, 983 P2d 988, 56 St. Rep. 754 (1999), applying the annexation, adaptation, and intent factors of the fixture test in Grinde v. Tindall, 172 M 199, 562 P2d 818 (1977).

Building on Leased Real Property That Must Be Removed at End of Lease — Personal Property: A building constructed on leased real property, pursuant to a lease that required the lessee to remove the building upon termination of the lease, is personal property to which a judgment lien does not attach. Pac. Metal Co. v. NW. Bank of Helena, 205 M 323, 667 P2d 958, 40 St. Rep. 1301 (1983).

Rescission of Lease — Claim for Wrongful Retention of Fixtures Properly Dismissed: In an action for damages caused by breach of a lease, the District Court did not err in dismissing the defendants' counterclaim for wrongful retention of certain fixtures added to the property by the defendants. As a matter of law, the plaintiff cannot be unjustly enriched because a fixture, by definition, is a part of real property to be retained by the owner of the premises at the expiration of the lease. Certain fixtures may be removed but only during "the continuance of his [the tenant's] term". As no effort was made by the defendants to remove the fixtures until 9 months after vacating the premises, the defendants' counterclaim was properly rejected. Ragen v. Weston, 191 M 546, 625 P2d 557, 38 St. Rep. 456 (1981).

Test as to Fixtures: The test for determining whether a particular object has become a fixture or not is based upon annexation, adaptation, and intent. Intent is the controlling factor. Fixtures here were intended to become personal property. Grinde v. Tindall, 172 M 199, 562 P2d 818 (1977), followed in Schwend v. Schwend, 1999 MT 194, 295 M 384, 983 P2d 988, 56 St. Rep. 754 (1999).

Crops — Ownership: When the crops were planted, work done, and harvest completed by defendant prior to a court-ordered change of possession, the crops belong to the defendant. Whitney v. Bails, 172 M 121, 560 P2d 1344 (1977).

Attachment to Leased Property: Where tenant built a small apartment attached to rented premises with the intention that it be permanent and without an agreement with the lessor that he would be allowed to remove any of the items which went into the construction and where the improvement was so attached that removal injured the premises, the property and chattels used in building the apartment became fixtures as a matter of law and lessor who removed them after tenant left the premises was not guilty of conversion. Sanders v. Butte Motor Co., 142 M 524, 385 P2d 263 (1963).

Electrical Equipment: Machines, motors, and other electrical equipment placed upon movable platform were not fixtures so as to make them real estate and subject to mechanics' lien. (Mechanics' lien provisions repealed, 1987—see construction liens, Title 71, ch. 3, part 5.) Cascade Elec. Co. v. Assoc. Creditors, Inc., 124 M 370, 224 P2d 146 (1950).

Application in General: This section is merely a rule for general guidance, concerning itself more with ultimate than with probative facts. Pritchard Petroleum Co. v. Farmers Co-op, 117 M 467, 161 P2d 526 (1945).

Presumptions as to Intent: While question of whether personal property has become affixed to the land is one concerning the intention of the affixer, it is presumed that when the property is affixed it is intended to become part of the realty. Generally the manner in which the attachment is made, the adaptability of the thing attached to the use to which the realty is applied, together with the intention of the one making the attachment, determine whether the thing attached is realty or personalty. Pritchard Petroleum Co. v. Farmers Co-op, 117 M 467, 161 P2d 526 (1945).

Casing in Oil Well: Casing in an oil well, like engines, buildings, machinery, and appliances placed upon land by a lessee for operating the premises for oil and gas purposes, are trade fixtures and become part of the land and the leasehold. Callender v. Crossfield Oil Synd., 84 M 263, 275 P 273 (1929), overruled on another point in Pioneer Eng'r Works, Inc. v. McConnell, 113 M 392, 130 P2d 685, 132 P2d 160 (1942).

Building: School building and fence around it reverted to grantor in absence of evidence rebutting presumption that building and fence became a part of school site and in view of clause in deed that property should revert to grantor on abandonment of site "together with all tenements, hereditaments and appurtenances thereunto belonging". School District v. Pribyl, 82 M 295, 267 P 289 (1928).

Annual Crops: Annual crops are usually treated as chattels personal, subject to sale or mortgage and levy of execution as are other chattels, even while still annexed to the soil, and are not included within the definition of real property. Morton v. Union Cent. Life Ins. Co., 80 M 593, 261 P 278 (1927).

When Chattels Affixed to Land Do Not Become Fixtures: Whether a thing imbedded in the soil is a fixture depends upon the intention of the party making the annexation and the use or purpose of annexation. To become a fixture the intention to make an article a permanent accession to the realty must affirmatively and plainly appear. If left in doubt, it must be deemed a chattel. If attached for a use which does not enhance the value of the land, it does not become a fixture. Butte Elec. Ry. v. Brett, 80 M 12, 257 P 478 (1927).

Growing Grass: Growing grass is a part of the soil of which it is the natural growth, within meaning of 70-15-101 and this section, and destruction thereof by the herding of livestock thereon constitutes a damage to owner's real property. Kiehl v. Holliday, 77 M 451, 251 P 527 (1926).

Fences: A fence is a fixture, and its annexation to land is governed by the law of fixtures. Schmuck v. Beck, 72 M 606, 234 P 477 (1925).

Owner of Land as Owner of Fixtures: Where one places a fence on the land of another without an agreement permitting him to do so, it belongs to the owner of the land unless he chooses to require him to remove it, the presumption, disputable in nature, being that one in possession of land is also the owner of the fixtures thereon. Schmuck v. Beck, 72 M 606, 234 P 477 (1925).

Burden on Person Claiming Building as Personalty: A building belongs to owner of the land; one claiming that it is personalty has the burden of proof, the presumption to the same effect declared by this section being a disputable one which may be overcome by evidence that the building was constructed in such a manner or under such circumstances as to preclude the idea that it was intended to become part of the realty. Shipler v. Potomac Copper Co., 69 M 86, 220 P 1097 (1923).

Fructus Naturales Distinguished From Fructus Industriales: This section, so far as it refers to roots, vines, and shrubs, is intended to include the things produced essentially by the powers of nature only, namely, fructus naturales, as distinguished from fructus industriales. Power Mercantile Co. v. Moore Mercantile Co., 55 M 401, 177 P 406 (1918).

Attachment to Realty in General: An attachment made in the manner indicated in this section and 70-15-104 raises a presumption that the one who made the attachment intended the thing affixed to become a part of the realty, and as a general rule, the manner in which the attachment is made, the adaptability of the thing attached to the use to which the realty is applied, and the intention of the one making the attachment determine whether the thing attached is realty or personalty. The relation of the parties to the property may affect the application of the rule. Mont. Elec. Co. v. N. Valley Min. Co., 51 M 266, 153 P 1017 (1915), distinguished in Lawrence v. Clepper, 263 M 45, 865 P2d 1150, 50 St. Rep. 1699 (1993). See Padden v. Murgittroyd, 54 M 1, 165 P 913 (1917).

Machinery: Where owner of mining claim, before selling it, explained to buyer that a rented electric hoist which could be removed without material injury to either claim or hoist did not belong to him but had been installed at the instance of a company which had been working the claim under an option to purchase and that he was merely holding it as security for money due him from such company, the buyer was not a bona fide purchaser but one with notice and therefore not entitled to claim the machinery as a fixture. Mont. Elec. Co. v. N. Valley Min. Co., 51 M 266, 153 P 1017 (1915).

Growing Timber: Growing timber is realty under Montana law. R. M. Cobban Realty Co. v. Donlan, 51 M 58, 149 P 484 (1915).

Bridge: A bridge is of necessity affixed to the realty and is real estate. State ex rel. Donlan v. Bd. of Comm'rs, 49 M 517, 143 P 984 (1914), followed in Kelly v. Wallace, 1998 MT 307, 292 M 129, 972 P2d 1117, 55 St. Rep. 1271 (1998).

Cover for Stovepipe Flue: A cover for a stovepipe flue, opening into the chimney from the interior of a building and removable when such flue was to be used, was not material entering into the construction of the building or a fixture, and such building was not subject to a lien therefor. Missoula Mercantile Co. v. O'Donnell, 24 M 65, 60 P 594 (1900).

Law Review Articles

Montana Law and the Uniform Commercial Code, 21 Mont. L. Rev. 1 (1959).

70-15-104. Fixtures attached to mines.

Case Notes

Mining Equipment:

Grantee under tax deed of patented lode claim became owner of a mill and machinery used in mining both patented and unpatented mining claims, as they were fixtures within meaning of this section and therefore a part of the patented claim, although located on adjacent land, since use of the mill by the former owner showed intent that it be attached. Benson & Bissell v. Wiseman, 145 M 429, 401 P2d 78 (1965).

By virtue of this section mining tools and machinery are deemed affixed to the mine and therefore constitute "machinery or fixtures for" mining claims within meaning of 71-3-501 (repealed, 1987—see provisions relating to construction liens, Title 71, ch. 3, part 5), entitling one who furnished the same or performs labor thereon to a lien. Purchase price of such tools and machinery and labor charges for repairs are lienable items. Caird Eng'r Works v. Seven-Up Gold Min. Co., Inc., 111 M 471, 111 P2d 267 (1940).

Mining machinery, being deemed affixed to the mine, is real property. Britannia Min. Co. v. USF&G Co., 43 M 93, 115 P 46 (1911).

Dredge Deemed Fixture in Absence of Contract: A dredge used in placer mining operations is mining machinery within meaning of this section and is deemed affixed to the mine, in absence of an express agreement that it may be removed. When dredge is used on mining property for working and developing the mine, the disputable presumption arises that the dredge is part of the realty. Where personal property is affixed to the land under express agreement that it may be removed, this presumption is overcome as between the parties and those having notice of such agreement. Story Gold Dredging Co. v. Wilson, 106 M 166, 76 P2d 73 (1938).

Intention — Drawn by Deductions — Presumption: Whether machinery used in operation of a mine is realty or personalty is not determined by the secret intention of the person making the annexation but the intention deducible as a presumption of law from the character of the chattel, the manner and effect of its annexation, its adaptability to the use of the realty, the purpose to which it is put, the relation of the parties, and the policy of the law. Story Gold Dredging Co. v. Wilson, 106 M 166, 76 P2d 73 (1938).

When This Section Controlling: As to question whether dredge used in placer mining operations was a fixture, this section controlled over 70-18-102, relating to fixtures as applied to all classes and kind of tenancies, since a specific statute governs a general one to extent of any necessary repugnance between them. Story Gold Dredging Co. v. Wilson, 106 M 166, 76 P2d 73 (1938).

Oil Well Casing: Where casing used in sinking an oil well was furnished to owner of leasehold by a third person under contract that ownership of casing should remain in such person unless oil or gas in commercial quantities was encountered and operations resulted in a dry hole, the casing retained its character as personal property and did not become affixed to the land, and therefore the lien of the driller did not extend to it. Cheadle v. Bardwell, 95 M 299, 26 P2d 336 (1933).

70-15-105. Incident or appurtenance defined.

Case Notes

Proration Based on Irrigated Acreage Appropriate Allocation — No Actual Water Measurement Records: To properly determine the historical use of appurtenant water rights, the Water Court allocated the flow rate based on the amount of irrigated acreage occurring on each claimant's property. On appeal, the Supreme Court upheld the Water Court's allocation, noting that actual water measurement records were absent. The allocation based on irrigated acreage ensured that each party received its historical share of the disputed rights that were appurtenant to or used in connection with the properties as contemplated in the original deeds. Little Big Warm Ranch, LLC v. Doll, 2020 MT 198, 400 Mont. 536, 469 P.3d 689.

Original Decree Did Not Specify Where Water Right Could Be Used — Rights Appurtenant to All Irrigated Lands in Ranch Before Split — Right Determined by Historic Acres Irrigated: The claimants owned adjoining ranches, which were once owned as a single ranch in the Blackfoot River Basin. In 1909, when the ranch was under common ownership, the District Court issued a decree declaring the water rights of users of Nevada Creek and its tributaries. Among the rights that the District Court decreed to the ranch were four water rights for irrigation from Nevada Creek. In 1912, the ranch was split and sold. No deed transfer for the properties in the ensuing years reserved specific water rights as appurtenances to the land. Both predecessors of the claimants filed water rights claims. The Water Court largely adopted the Water Master's conclusion that proportionally split the flow rates of each decreed right between the claimants based on the historic number of acres irrigated on each property using the formula provided in Spaeth v. Emmett, 142 Mont. 231, 383 P.2d 812 (1963). The Supreme Court affirmed, reasoning that because the original District Court decree itself did not specify parcels within the ranch where the water right could be used, the rights were appurtenant to all of the irrigated lands on the ranch. In re Quigley, 2017 MT 278, 389 Mont. 283, 405 P.3d 627.

Water Court Properly Applied Clear Error Standard to Water Master's Findings of Fact — Need Firm Conviction of Mistake to Overrule: The Water Court did not err in applying the clear error standard to the Water Master's findings of fact on a "decree exceeded" issue remark. The Supreme Court reasoned that it is a necessary outcome that at least one party will be apportioned less water than it previously claimed when the Water Court adjudicates a "decree exceeded" issue remark. Additionally, the Supreme Court was not left with a firm conviction that the Water Master committed a mistake in resolving the issue remark when it apportioned the parties less water than they originally claimed. The Water Master did not clearly err in its factual findings and properly applied the formula from Spaeth v. Emmett, 142 Mont. 231, 383 P.2d 812 (1963), to divide the water right given the evidence before it. In re Quigley, 2017 MT 278, 389 Mont. 283, 405 P.3d 627.

District Court Jurisdiction to Determine Contractual Appurtenance of Water Rights Based on Historic Use: District Courts have jurisdiction to determine appurtenance of water rights based on historic use. Although a District Court may not have jurisdiction to reallocate disputed water rights absent a contract, in this case defendant contractually sold water rights to plaintiffs, and upon disagreement over which water rights were sold, the District Court was asked to resolve the disagreement and did so by interpreting the contract, which was wholly within the court's jurisdiction and did not impose on the exclusive domain of the Water Court. Kruer v. Three Creeks Ranch of Wy., L.L.C., 2008 MT 315, 346 M 66, 194 P3d 634 (2008). See also Castillo v. Kunnemann, 197 M 190, 642 P2d 1019 (1982), Axtell v. M.S. Consulting, 1998 MT 64, 288 M 150, 955 P2d 1362 (1998), and In re Petition of Deadman's Basin Users, 2002 MT 15, 308 M 168, 40 P3d 387 (2002).

Ditches Not Necessary for Exercise of Water Right — No Ownership Interest in Ditches: A dispute arose over whether plaintiff with water rights had an ownership interest in two ditches that crossed a neighbor's property. The District Court determined that no ownership interest existed, and plaintiff appealed. The Supreme Court noted that ditches are easements that attach to land and that a transfer of real property also transfers a ditch right in the same manner and to the same extent as at the time that the property was transferred, but also noted that a ditch right and a water right are separate and distinct property rights and that if a water right passes as an appurtenance, the means of conveying the water also passes. In order to determine whether the ditch right was appurtenant to the water right, the court examined necessity and beneficial use. In this case, the ditches in question were not necessary for plaintiff to exercise its water rights. Testimony indicated that no one had used the ditches to irrigate plaintiff's land and that plaintiff was able to exercise its water right through two other ditches, nor did plaintiff recognize a historical ownership interest in or beneficial use of the ditches in question. In addition, because the deeds were ambiguous with respect to which ditch rights were conveyed to each parcel, a search of the chain of title would not have revealed that plaintiff had an easement in the ditches. The District Court weighed the conflicting evidence and did not err in holding that plaintiff did not have an ownership interest in the ditches. The judgment was affirmed. Wills Cattle Co. v. Shaw, 2007 MT 191, 338 M 351, 167 P3d 397 (2007), following Lincoln v. Pieper, 245 M 12, 798 P2d 132 (1990), and Ponderosa Pines Ranch, Inc. v. Hevner, 2002 MT 184, 311 M 82, 53 P3d 381 (2002).

Easement by Grant Interpreted in Favor of Grantee — Access Provided by Initial Easement Affirmed: When Watson, in conjunction with her former husband Roger, purchased a parcel of property from defendants, Roger's parents, Watson and Roger received a permanent easement across defendants' property to access the parcel, as evidenced by defendants' representation in a loan agreement that allowed the purchase of the parcel. When Watson and Roger later divorced, Watson was granted full title to the parcel, but defendants then redefined the easement and informed Watson that only part of their property could be accessed through defendants' property, so Watson sued to enforce the terms of the initial easement. The District Court granted defendants summary judgment, but on appeal, the Supreme Court reversed. Applying general principles of contract law and interpreting the easement in favor of grantee Watson, the court noted that under 1-3-213, one who grants a thing is presumed to also grant whatever is essential to its use. Further, the granting document, written by and thus construed against defendants, contained a significant ambiguity by providing Watson and Roger a permanent easement across all of defendants' remaining lands while contradictorily limiting the easement to cover only part of defendants' property. Interpreting the document as a whole and considering the acceptable intrinsic evidence, the Supreme Court concluded that Watson was entitled to a permanent easement across defendants' remaining property as necessary and essential to the complete use and enjoyment of the landlocked parcel sold by defendants. Watson v. Dundas, 2006 MT 104, 332 M 164, 136 P3d 973 (2006), following Erker v. Kester, 1999 MT 231, 296 M 123, 988 P2d 1221 (1999).

Conveyance of Water Right Includes Use of Water System: When use a of water conveyance system was necessary for the plaintiffs to exercise their water rights, it was incidental to the use of and part and parcel of the realty. The easement in the water system necessary for the beneficial enjoyment of the property was appurtenant to the premises conveyed. Lincoln v. Pieper, 245 M 12, 798 P2d 132, 47 St. Rep. 1803 (1990), distinguished in Flaig v. Gramm, 1999 MT 181, 295 M 297, 983 P2d 396, 56 St. Rep. 710 (1999).

School Trust Land Water Rights Owned by State: In a case involving a dispute over ownership of water rights on state school trust lands, the Supreme Court ruled that title to the surface and ground water rights on school trust lands vests in the state and that the lessee, in making appropriations on and for school trust sections, is acting on behalf of the state. It is only through state action that the lessee is on the land, and Montana law expressly provides that the lessee must be reimbursed for all capital expenditures made in putting the water to beneficial use. The state is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land without receiving full compensation for it or from giving up control over the water rights. Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985). However, see Advocates for School Trust Lands v. St., 2022 MT 46, 408 Mont. 39, 505 P.3d 825, holding that 85-2-441, which presumes against a state a ground water right from private property, was not facially unconstitutional.

Water Rights Appurtenant to School Trust Lands: Unless specifically excepted in the conveyance document, water rights on school trust lands are appurtenant to those lands and pass with the conveyance of the lands. Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985).

Appurtenance a Fact Question: Whether or not a thing is an appurtenance under this section is a question of fact. Rose v. Rose, 201 M 86, 651 P2d 1018, 39 St. Rep. 1971 (1982).

Road Signs Advertising Noncontiguous Business: Pursuant to a divorce, wife sold husband her interest in a motel they had jointly operated for years. Four road signs, sign permits, and leasehold interests in separate lands that were not contiguous to the motel property and that were not mentioned in the documents of the sale passed to the husband as appurtenances. The signs advertised the motel, were used for the benefit of the motel, were acquired with motel money, were carried as assets on the motel's books, and an advertisement for the motel stated that the property included four road signs. Rose v. Rose, 201 M 86, 651 P2d 1018, 39 St. Rep. 1971 (1982).

Sale of Water Right With Implied Reservation of Another Water Right: Landowner owned two water rights on river, and each had a related ditch right; one was called the "McNiven right" and the other was called the "Grannis right". He sold part of his land together with part of the McNiven right and "related ditch rights". The Supreme Court held that the words "related ditch rights" in the deed's water right grant referred only to the McNiven ditch and further held that since the landowner held two water rights and related ditch rights, the conveyance of the McNiven water and ditch right impliedly reserved to landowner the Grannis water right and related ditch right. Castillo v. Kunnemann, 197 M 190, 642 P2d 1019, 39 St. Rep. 460 (1982); reversing on rehearing, Castillo v. Kunnemann, 38 St. Rep. 1618 (1981) (apparently not reported in Montana Reports).

Water Rights Made Appurtenant by Court Decree and Beneficial Use: Where a prior District Court water rights adjudication decree determined that there was an appropriation of 240 miner's inches on a river, appurtenant to the south half of a certain section of land, and the rancher who sold part of the half section to subdivider, who then sold a parcel to coplaintiff, testified that the 20-acre parcel purchased by coplaintiff had traditionally been irrigated by water from a ditch used to carry the appropriated water to the land, and the rancher's testimony was confirmed by the son of the rancher's predecessor in interest and by a hired hand, clearly, both by decree and by beneficial use, the water and ditch rights were appurtenant to the 20-acre parcel through which the ditch ran. Further, where the rancher testified that he had used the ditch and water to irrigate land south of the 20-acre parcel, coplaintiff had purchased from the subdivider a 9.114-acre parcel south of the 20-acre parcel, the ditch ran through the 9.114-acre parcel, and evidence supported a finding that both parcels would have been irrigated at the same time, the water and ditch rights were also appurtenant to the 9.114-acre parcel. Castillo v. Kunnemann, 38 St. Rep. 1618 (1981) (apparently not reported in Montana Reports), reversed on other grounds on rehearing, 197 M 190, 642 P2d 1019, 39 St. Rep. 460 (1982).

Appurtenant Water Right Transferred With Land: The seller of land owned stock in a water association. The water obtained from the association had been used on the land being sold. After the sale was completed, a dispute arose over whether the contract water right had been sold. The court found that, since the contract water was beneficially used in connection with the land, it is considered appurtenant to the land. Where the property is transferred without an express reservation of the appurtenant water right, it accompanies the land. Adams v. Chilcott, 182 M 511, 597 P2d 1140 (1979).

Water Rights Conveyed in Absence of Reservation: Water rights represented by the water stocks, the registered owner of which was the seller of land under contract for deed, were incidental and appurtenant to the land where water rights were beneficially used on the land. Contract for deed effectively conveyed beneficial ownership in water rights in absence of an express reservation or exception. Schwend v. Jones, 163 M 41, 515 P2d 89 (1973).

Rights Appurtenant to Divided Tract: In absence of reservation by grantor, water rights appurtenant to a divided tract are proportioned to each division, and the share received by each division is determined by the ratio of number of irrigated acres to the total number of irrigated acres irrigated by the water. Spaeth v. Emmett, 142 M 231, 383 P2d 812 (1963). See also Axtell v. M.S. Consulting, 1998 MT 64, 288 M 150, 955 P2d 1362, 55 St. Rep. 276 (1998).

Rights of Stockholders of Nonprofit Irrigation Company as Appurtenances:

Shares of reservoir company's stock, each of which entitled owner to 1/1000 part of distributable water of the corporation were but indicia of the contract for the percentage of the water which owners had a right to receive, which right might become "appurtenant" to the land served by the water, but the water and the facilities used to transport the water were not "appurtenant" to land within this section. Ackroyd v. Winston Bros. Co., 113 F2d 657 (9th Cir. 1940).

The rights of stockholders in a nonprofit irrigation company, i.e., to use the storage and distribution facilities of the corporation and to receive a pro rata share of the water, are rights which, when used on certain lands, become appurtenant thereto under this section. Brady Irrigation Co. v. Teton County, 107 M 330, 85 P2d 350 (1938).

Tacit Grant: Under the common law as well as 70-1-519 and 70-1-520, whoever grants a thing tacitly grants that without which the grant would be of no avail—the principal thing carries with it the incident. Yellowstone Valley Co. v. Assoc. Mtg. Investors, Inc., 88 M 73, 290 P 255, 70 ALR 1002 (1930), followed in Erker v. Kester, 1999 MT 231, 296 M 123, 988 P2d 1221, 56 St. Rep. 912 (1999).

Annual Crops: This section does not, strictly speaking, embrace things such as annual crops produced by industry, for they are not used with the land for its benefit, the section dealing with rights-of-way and the like, which are servitudes upon other land and easements attached to the land benefited. Power Mercantile Co. v. Moore Mercantile Co., 55 M 401, 177 P 406 (1918).

Water Right:

Where a water right was not granted for any certain purpose or for use on any particular land, it did not become an appurtenance by the terms of the deed and could not thereafter be conveyed as an appurtenance unless the grantee had given it that character by using it with and for the benefit of the land. Custer Consol. Mines Co. v. Helena, 52 M 35, 156 P 1090 (1916); Sweetland v. Olsen, 11 M 27, 27 P 339 (1891); Tucker v. Jones, 8 M 225, 19 P 571 (1888).

This section may not be interpreted to mean that a water right acquired by prior appropriation by one who has only possessory title to the land, although with the intent at the time to use the water upon such land, shall, by the mere act of using it as intended, become inseparably attached as an appurtenance and that the appropriator thereby loses his water right. Smith v. Denniff, 24 M 20, 60 P 398 (1900), distinguished in Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985).

A water right acquired and used for a beneficial and necessary purpose in connection with realty is an appurtenance thereto, and as such, passes with a conveyance of the land, unless expressly reserved from the grant. Smith v. Denniff, 23 M 65, 57 P 557 (1899), reversed on rehearing on other grounds in 24 M 20, 60 P 398 (1900); Carman v. Staudaker, 20 M 364, 51 P 738 (1898); Sloan v. Glancy, 19 M 70, 47 P 334 (1897); Beatty v. Murray Placer Min. Co., 15 M 314, 39 P 82 (1895); Sweetland v. Olsen, 11 M 27, 27 P 339 (1891); Tucker v. Jones, 8 M 225, 19 P 571 (1888).

Watercourse and Easement and an Appurtenance to Land: A watercourse from or across the land of another is an easement, and an appurtenance to land is in any and every case an easement. Smith v. Denniff, 24 M 20, 60 P 398 (1900), distinguished in Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985).

Part 2

Classification of Interests in Real Property

70-15-202. Enumeration of estates.

Case Notes

Proper Deposit of Leasehold Interest Entitling Leaseholder to Notice and Right to Redeem Property Tax Lien: Section 15-18-212 requires that the purchaser or assignee of a tax sale certificate notify all persons interested in the property, including a person with properly recorded interest in the property, that a tax deed will be issued to the purchaser unless the tax lien is redeemed prior to the expiration date of the redemption period. Under 70-21-209, an acknowledged or certified instrument is considered recorded when it is deposited with the appropriate County Clerk and Recorder. In this case, an instrument reflecting plaintiffs' interest as assignee of a vendor's interest in the contract for sale of a cabin and leasehold, which constituted real property, was properly recorded at the Lewis and Clark County Clerk and Recorder's office, so plaintiffs were entitled as an interested party to notice by certified mail pursuant to 15-18-212; however, no notice was given. Plaintiffs' right to redeem the property tax lien continued indefinitely until proper notice was given; thus, a tax deed subsequently issued by the county was void for failure to comply with the notice provisions of 15-18-212. Ditto v. Kipp, 2000 MT 162, 300 M 278, 3 P3d 647, 57 St. Rep. 679 (2000). See also Kneedler v. League Wide, Inc., 1999 MT 80, 294 M 101, 979 P2d 163 (1999).

Life Estate Created by Words "Rent-Free for the Rest of Life": In an appeal from a summary judgment decree that a life estate in an apartment of the defendant-mother was void, the Supreme Court held that the words "entitled to remain in possession thereof, rent-free, for the rest of her life" are clear and unambiguous as an indication that the mother holds a life estate as against a buyer of the apartment building. This is particularly true given that in the contract creating the life estate, provisions clearly show an intention to create such a life estate by providing for all of the details of such estate, including the matter of repairs, replacement, taxation, utilities, and other provisions. Harbeck v. Orr, 192 M 243, 627 P2d 1217, 38 St. Rep. 668 (1981).

Lease of Realty Not Real Estate:

Where person entered into possession of offices under oral agreement to pay $100 per month in advance as rent therefor and without any new agreement, such person held over for a considerable period of time, paying to landlords $100 on or before the 15th day of each month, such arrangement, under Ch. 48, L. 1931 (this section), constituted the person a "tenant from month to month". State ex rel. Needham v. Justice Court, 119 M 89, 171 P2d 351 (1946).

A lease of real property is not real estate under this section or 70-15-206, so that a contract employing a broker to secure or sell a lease need not be in writing and is not within the Statute of Frauds (28-2-903). The same rule applies to option to purchase realty. O'Neill v. Wall, 103 M 388, 62 P2d 672 (1936).

State Grazing Leases: An estate for years is an interest in land, and the alienation of an interest by lease for a number of years is a disposal of such interest. Hence, the prohibition of Art. XVII, sec. 1, 1889 Mont. Const. (Art. X, sec. 11, 1972 Mont. Const.), that none of the state lands "nor any estate or interest therein" be disposed of unless the full market value thereof be paid applies to the leasing of state grazing lands. Rider v. Cooney, 94 M 295, 23 P2d 261 (1933).

Notice Prior to Unlawful Detainer Action: Prior to amendment of this section by Ch. 48, L. 1931, a tenancy from month to month was in effect one at will and therefore the rule under which the 3-day notice required by 70-16-401 was a condition precedent to commencement of an action in unlawful detainer controlled as to tenancy from month to month. Boucher v. St. George, 88 M 162, 293 P 315 (1930).

Estates by Sufferance: It is not likely that this section has the effect of destroying estates by sufferance, as known at common law, and making them estates at will. Power Mercantile Co. v. Moore Mercantile Co., 55 M 401, 177 P 406 (1918).

Lease for Years: A lease for years is a chattel real. Wheeler v. McIntyre, 55 M 295, 175 P 892 (1918).

70-15-203. Fee simple.

Case Notes

Railway Deed — Fee Simple Title, Not Right-of-Way Easement: Defendants obtained a deed to abandoned property from the railway company when it filed for bankruptcy. Adjoining landowners now claim that the railroad held the land as an easement for railroad purposes and that the abandonment of the lands resulted in a reversion to them. However, the granting and habendum clauses of the deeds by which the railroad claimed title clearly showed the intent that the railroad was to receive title in fee simple. The deeds were general form warranty deeds of the type used in the unrestricted transfer of real property in this state. Maberry v. Gueths, 238 M 304, 777 P2d 1285, 46 St. Rep. 1287 (1989).

Fee Simple Defined: A fee-simple title signifies an estate of inheritance clear of any condition, limitation, or restriction. It stands at the head of estates as the highest in dignity and the most ample in extent. Gantt v. Harper, 82 M 393, 267 P 296 (1928).

Marketable Title: A "marketable title", "good title", and "clear title" are equivalent. They mean a title concerning which there is no fair or reasonable doubt, one which a court of equity would compel a purchaser to accept in a suit by the vendor for specific performance, namely, a fee-simple title. Gantt v. Harper, 82 M 393, 267 P 296 (1928), followed in First Mont. Title Co. v. N. Point Square Ass'n, 240 M 33, 782 P2d 376, 46 St. Rep. 1920 (1989).

Timber Grants: Where a landowner conveyed growing timber, with a right-of-way over the land for the purpose of removing it, to the buyer, "his heirs and assigns forever", without limitation or condition, a fee-simple estate in the timber passed to the grantee, and such grant was not defeated by the latter's failure to cut and remove it within a reasonable time. R. M. Cobban Realty Co. v. Donlan, 51 M 58, 149 P 484 (1915).

70-15-205. Remainder limited upon fee tail valid — vesting.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-15-206. Freehold estates — chattels real — chattel interests.

Case Notes

Lease of Realty Not Real Estate: A lease of real property is not real estate under this section or 70-15-202, so that a contract employing a broker to secure or sell a lease need not be in writing and is not within the Statute of Frauds (28-2-903). The same rule applies to option to purchase realty. O'Neill v. Wall, 103 M 388, 62 P2d 672 (1936).

Freeholder and Taxpayer Distinguished: A "freeholder" is one who holds an estate in real property, either of inheritance or for life (this section), while a "taxpayer" may be paying taxes on personal property alone. Warren v. Chouteau County, 82 M 115, 265 P 676 (1928).

Lease for Years: A lease for years is a chattel real, both under this section and the common law. Wheeler v. McIntyre, 55 M 295, 175 P 892 (1918).

70-15-208. Term of years — suspension of absolute ownership.

Case Notes

Declaration of Trust Held Not Invalid: Where under terms of declaration of a common-law trust trustees had absolute power of alienation of the property of the trust at any time in their discretion, the trust may not be declared invalid as in violation of statutes prohibiting restraints on the power of alienation (70-1-406 through 70-1-410, now repealed). Hodgkiss v. Northland Petroleum Consol., 104 M 328, 67 P2d 811 (1937).

70-15-210. Reversion.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Part 3
Powers

70-15-301. Power defined.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Authority of Property Manager to Request Person to Leave Property — Written Authority of Property Owner Not Required: Allum caused a disturbance in a grocery store and was asked by the manager to leave. When Allum refused, he was arrested for trespass. Allum contended that the manager did not have the authority to ask Allum to leave without written authority from the property owner. The Supreme Court disagreed. The manager was authorized to make decisions regarding the property and did not need explicit written authorization from the owner in order to exercise the power of asking Allum to leave the property. St. v. Allum, 2005 MT 150, 327 M 363, 114 P3d 233 (2005).

70-15-303. Married persons — execution.

Compiler's Comments

2009 Amendment: Chapter 56 deleted former (2) that read: "No power can be executed by a married woman before she attains her majority which could not be executed by a married man before he attains his majority."; and made minor changes in style. Amendment effective October 1, 2009.

CHAPTER 16
RIGHTS AND OBLIGATIONS INCIDENTAL TO OWNERSHIP IN REAL PROPERTY

Part 1
General Provisions

70-16-101. Rights of owner in fee — above and below surface.

Case Notes

Property Boundary Properly Established Following Accretion and Avulsion of River: The District Court found that the meander channel of the Sun River between plaintiffs' and one defendant's property moved south by accretion from where it was depicted in a 1906 government survey into a channel depicted in a 1937 aerial photograph and that the channel moved north by avulsion to its present channel in 1916. The court further concluded that the Sun River between plaintiffs' and another defendant's property also moved north by avulsion in 1948. The record amply supported the 1906 accretion that created the lots in question, at which time the property boundary moved with the water line. However, when the river avulsed to its present location in 1916, the property boundary did not move. Likewise, when the river avulsed north in 1948, the property boundary also did not move, so the District Court properly determined the boundaries between the lots after considering the avulsion and accretion of the river, and judgment was affirmed. Harding v. Savoy, 2004 MT 280, 323 M 261, 100 P3d 976 (2004).

Crops — Ownership: When the crops were planted, work done, and harvest completed by defendant prior to a court-ordered change of possession, the crops belong to the defendant. Whitney v. Bails, 172 M 121, 560 P2d 1344 (1977).

70-16-102. Rights of life tenant.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Right to Alienate Life Estate: The right given by this section to the owner of a life estate, to use the land in the same manner as the owner of a fee simple, includes the right of alienation, which is one of the rights inherent in the ownership of the fee. Kerlee v. Smith, 46 M 19, 124 P 777 (1912).

70-16-103. Duties of life tenant.

Case Notes

Improvements: Cost of installation of sidewalk and steps and painting done at request of life tenant at her private dwelling should be paid by her and not out of corpus or estate funds. Improvements made by an executor pursuant to some ordinance or statute or improvements where the property was in an untenable condition should be charged to the corpus of the estate. In re Lindhardt's Estate, 133 M 65, 320 P2d 357 (1958).

Insurance: Fire insurance on buildings and automobile insurance taken out by executor in favor of the estate was properly chargeable against corpus rather than income. In re Lindhardt's Estate, 133 M 65, 320 P2d 357 (1958).

Repairs: Ordinary repairs on business property, such as repairs on a furnace, a new door, and a lock, should have been paid out of income since the duty to pay was on the life tenant. However, repairs normally charged off over more than one accounting period, such as new roofs, a new sidewalk, and repairing the interior in connection with business property, should be paid for by charging the initial expense to the estate funds and then allocating a portion from each year's income to be deducted and paid back into the corpus. In re Lindhardt's Estate, 133 M 65, 320 P2d 357 (1958).

Payment of Taxes: Requirement that owner of life estate pay taxes refers to entire tax on land itself. Rist v. Toole County, 117 M 426, 159 P2d 340, 162 ALR 406 (1945).

70-16-104. Rights of tenant for years or at will.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Lessee of State Land Not Granted Timber Rights — State as Proper Party in Interest as to Damages Resulting From Taking of Timber: State land lessee was improperly awarded damages for the harvesting of timber by another from the leased land. The lease granted grazing rights but made no mention of timber rights. Under this section, a tenant for years is not afforded timber rights by reason of his tenancy. As rightful owner of the land, the state is the only real party in interest as to damages arising out of the taking of timber. Edwards v. Severin, 241 M 168, 785 P2d 1022, 47 St. Rep. 169 (1990).

Ownership of Crops: Unless a tenant at will becomes a wrongdoer by holding over, he may take the annual products of the soil and may cultivate and harvest the crops growing at the end of his tenancy, which makes him at all times the owner, as against the landlord, of the crops, whether growing or severed. Power Mercantile Co. v. Moore Mercantile Co., 55 M 401, 177 P 406 (1918), distinguished in Hamilton v. Rock, 121 M 245, 191 P2d 663 (1948).

70-16-105. Remedy of person having remainder or reversion.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Characterization of Succeeding Beneficiaries as Remaindermen Not Error: In deciding that good cause did not exist to warrant division of a trust, the District Court described the succeeding beneficiaries as remaindermen. Two trust primary beneficiaries contended that the court erred in its description because the primary beneficiaries did not have life estates in the trust, to which they would succeed, but rather had a perpetual interest in the trust. The primary beneficiaries asserted that the court's misunderstanding of the nature of the succeeding beneficiaries' interests granted greater protection to the succeeding beneficiaries than was granted by the trust itself. On appeal, the Supreme Court noted that the primary beneficiaries' interest in the trust was not perpetual because the trust was designed to terminate upon the death of the last primary beneficiary, at which time the corpus would be distributed to the beneficiaries who succeeded to the primary beneficiaries' interests or to their assigns. It was understandable that the District Court would use the analogy of remaindermen to describe the succeeding beneficiaries, and the Supreme Court found no error in the analogy. In re Stevens Revocable Trust, 2005 MT 106, 327 M 39, 112 P3d 972 (2005).

70-16-106. Action for waste — treble damages.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Unlawful Detainer by Tenant in Common — Amendment of Pleading Properly Denied: Where the plaintiff and her sister leased farmland they owned as tenants in common to the defendant for a 6-year period and the sister conveyed her interest in the property to the defendant shortly before the expiration of the lease, the court did not err, in an action by the plaintiff brought in 1974 for an accounting of rents and profits from the defendant, in refusing to allow the plaintiff to plead and prove an unlawful detainer against the defendant. Leave of court should not be granted to allow amendments that present theories totally inapplicable to the case. As a tenant in common is an owner of an undivided interest in the property, a claim of unlawful detainer may not be asserted against a cotenant, but only against a tenant for a term less than life. A cotenant is allowed to possess and use commonly held property, and an action will lie for waste but not unpermitted use. Fry v. Heble, 191 M 272, 623 P2d 963, 38 St. Rep. 228 (1981).

70-16-107. Trespass for taking timber.

Compiler's Comments

2005 Amendment: Chapter 239 near middle of introductory clause after "house" substituted "town" for "village"; inserted (1) regarding the amount of damages due if the trespass was casual and inadvertent or committed under the belief that the land belonged to the trespasser or if the wood was taken by the authority of state or local government officers or employees for the purposes of a highway; in (2) after "damages" substituted "incurred if the trespass was willful, wanton, or malicious" for "which may be assessed therefor in a civil action in any court having jurisdiction"; and deleted former (2) that read: "(2) Nothing in subsection (1) authorizes the recovery of more than the just value of the timber taken from uncultivated woodland for the repair of a public highway or bridge upon the land or adjoining it"; and made minor changes in style. Amendment effective October 1, 2005.

Case Notes

Intentional Trespass Does Not Require Proof of Specific Intent: While civil trespass is an intentional tort, intentional trespass does not require proof of specific intent, i.e., that the tortfeasor intended to enter or remain on property owned or controlled by another. The intent element of civil trespass only requires proof that the tortfeasor intentionally entered or remained, or caused a third party or thing to enter or remain, on the property of another regardless of the tortfeasor's knowledge, lack of knowledge, or good faith mistake as to actual property ownership or right. Davis v. Westphal, 2017 MT 276, 389 Mont. 251, 405 P.3d 73.

Summary Judgment — Encroachment and Tree-Felling Constitute Civil Trespass — No Other Relief at Law Available Prior to Final Judgment: The parties were owners of adjoining tracts of rural property. Without verification or inquiry, the defendants mistakenly assumed that a line of pink survey flags running across the ground from a corner survey marker delineated the boundary line. As a result, the defendants cut down several trees on the plaintiffs' property and built a shop building and installed an accompanying septic system drain field near their property line mistakenly encroaching on the plaintiff's property. The District Court granted the plaintiffs' summary judgment declaring that the defendants' encroachments and tree-felling constituted civil trespasses. However, the District Court denied the plaintiffs' requests for immediate ejection and removal of all encroaching improvements, site restoration, and a permanent injunction enjoining any further intrusion on the plaintiffs' property or noncompliance with county zoning setback requirements. On appeal of the summary judgment motion, the Supreme Court analyzed civil trespass, common law trespass and ejectment, declaratory judgment of trespass and ejectment, and supplemental preliminary and permanent equitable relief. As applied, the plaintiffs obtained summary judgment declaring that the defendants' tree-felling and encroaching building and drain field constituted civil trespasses. As far as it goes, that declaratory judgment was the substantive equivalent of a judgment of ejectment declaring the plaintiffs' right to exclusive possession of their property to the exclusion of the subject encroachments. Thus, the plaintiffs successfully obtained an interlocutory judgment, prevailing on their alternatively pleaded declaratory judgment and common law ejection claims. Except for undetermined damages not at issue on appeal, and in contrast to any supplemental injunctive relief otherwise appropriate in equity, no other relief at law was available to the plaintiffs on their common law ejectment claim prior to final judgment. As such, the District Court did not err in declining to grant relief at law other than a declaration of trespass on the plaintiffs' common law ejectment claim. Davis v. Westphal, 2017 MT 276, 389 Mont. 251, 405 P.3d 73.

Damages for Casual or Involuntary Timber Trespass — Proposed Instruction as to Measure of Damages Properly Refused: The plaintiffs brought an action to recover for damages caused when one of the defendant's employees inadvertently cut timber on the plaintiffs' property without permission. The defendant admitted liability, so the only issue at trial was the amount of damages. The District Court gave the plaintiffs' proposed instruction stating that there are two separate elements of damage, the damage to the land and the damage for the removal of the timber. The District Court refused to give the plaintiffs' second instruction as to damages. The Supreme Court held that the District Court did not abuse its discretion and that the court correctly instructed the jury as to the measure of damages for injury to real property. When there was no pending issue of fact, it was not error for the court to refuse the plaintiffs' proposed instruction on treble damages. (See 2005 amendment.) Hartle v. Nelson, 2000 MT 356, 303 M 264, 15 P3d 484, 57 St. Rep. 1494 (2000).

Lessee of State Land Not Granted Timber Rights — State as Proper Party in Interest as to Damages Resulting From Taking of Timber: State land lessee was improperly awarded damages for the harvesting of timber by another from the leased land. The lease granted grazing rights but made no mention of timber rights. Under 70-16-104, a tenant for years is not afforded timber rights by reason of his tenancy. As rightful owner of the land, the state is the only real party in interest as to damages arising out of the taking of timber. Edwards v. Severin, 241 M 168, 785 P2d 1022, 47 St. Rep. 169 (1990).

Treble Damages — Factual Question: The determination of whether treble damages should be awarded hinged on the trial court's findings under 70-16-108 (now repealed) as to whether the treble damages provision was excused under the facts of this case, since 70-16-107 was held to be inapplicable (see 2005 amendment). Mtn. View Cemetery v. Granger, 175 M 351, 574 P2d

254 (1978), followed in Hartle v. Nelson, 2000 MT 356, 303 M 264, 15 P3d 484, 57 St. Rep. 1494 (2000).

Malice Required: Treble damages for the cutting of timber on plaintiff's land and its conversion by defendant are not recoverable under this section in an action for willful and malicious trespass, in the absence of proof of malice, wantonness, or evil design. McDonald v. Mont. Wood Co., 14 M 88, 35 P 668 (1894), distinguished in Tripp v. Silver Dyke Min. Co., 70 M 120, 224 P 272 (1924). McDonald was overruled in Hartle v. Nelson, 2000 MT 356, 303 M 264, 15 P3d 484, 57 St. Rep. 1494 (2000).

Remedies: This section provides no new remedy for the trespasses it specifies. The proceedings to redress those trespasses are the same as the proceedings to redress any other private trespass. Its only effect is the giving of additional pecuniary relief. Morse v. Swan, 2 M 306 (1875).

70-16-111. Entry to property by professional land surveyor or other qualified person — trespass exception — notice — liability.

Compiler's Comments

Preamble: The preamble attached to Ch. 604, L. 1993, provided: "WHEREAS, the Legislature finds that in the interest of the public health, safety, and welfare, the entry onto private property by a professional land surveyor in the performance of the surveyor's legal duties and obligations should not be considered criminal trespass."

Part 2

Adjoining Landowners and Boundaries — Fences

Part Case Notes

Intentional Trespass Does Not Require Proof of Specific Intent: While civil trespass is an intentional tort, intentional trespass does not require proof of specific intent, i.e., that the tortfeasor intended to enter or remain on property owned or controlled by another. The intent element of civil trespass only requires proof that the tortfeasor intentionally entered or remained, or caused a third party or thing to enter or remain, on the property of another regardless of the tortfeasor's knowledge, lack of knowledge, or good faith mistake as to actual property ownership or right. Davis v. Westphal, 2017 MT 276, 389 Mont. 251, 405 P.3d 73.

Natural and Artificial Boundaries Prevail: In this action to quiet title, the boundary line between the parties' properties, based upon a resurvey that located the original corner monuments, was correctly determined. The general rule is that courses and distances must yield to natural and artificial monuments. Bollinger v. Hollingsworth, 227 M 454, 739 P2d 962, 44 St. Rep. 1228 (1987).

70-16-201. Owner of land bounded by water.

Case Notes

Lakeside Property Dispute — Presumption That Grantee Takes Land to Low-Water Mark: In a property dispute relating to a subdivided lakeside parcel, the defendant asserted ownership of all land between the high- and low-water marks on the lake. The Army Corps of Engineers previously declared that the lake was a nonnavigable intrastate body and not subject to the Corps' jurisdiction. The District Court held that the plaintiff owned the land between the high- and low-water marks of the lake bordering her property. On appeal, the Supreme Court held that Montana's public trust easement was not at issue, that a conveyance of riparian property by reference to a specific metes and bounds description along the high-water mark is insufficient alone to overcome the presumption of 70-16-201 that the grantee takes at least to the low-water mark, and that the District Court correctly held that the plaintiff's property included the disputed land between the high- and low-water marks of the lake. Ash v. Merlette, 2017 MT 305, 389 Mont. 486, 407 P.3d 304.

Ownership of Property Between River Low-Water Line and High-Water Line — Applicability of Meander Lines to Property Ownership: Two neighbors claimed ownership of an 11.14-acre parcel between the high-water line and the low-water line on the bank of the Jefferson River. The District Court determined that a meander line defined that boundary of plaintiff's property, so plaintiff owned the land. On appeal, the Supreme Court noted that a surveyor uses a meander line in a property description to show that a navigable river serves as a property boundary and that if a meander line does not appear in the description, the boundary is fixed and does not alter with the river's shifting bank. Meander lines are not run to define the boundaries of a tract, but rather to define the sinuosities of the banks of a river or lake; therefore, the title of a grantee is not limited to a meander line, but the waters themselves constitute the real boundary. The rule applies to both government and private surveys and also applies to nonnavigable bodies of water, except that ownership then extends to the middle of the stream, not just to the low-water line. Additionally, this section provides that the property between the high-water line and the low-water line belongs to the party owning property to the high-water line unless a grant specifically indicates otherwise. In the present case, the description of plaintiff's property defined the river bank as the property boundary three times, so absent a contrary indication in the deeds and plats, the plaintiff was correctly determined to be the owner of the disputed property, and the District Court was affirmed. Given this ruling, the Supreme Court declined to consider, as irrelevant, extrinsic evidence regarding which party had paid taxes on the property and what the original intent was in establishing a boundary for subdivision purposes. Andersen v. Monforton, 2005 MT 310, 329 M 460, 125 P3d 614 (2005), following RR Co. v. Schurmeir, 74 US 272 (1868), and U.S. v. Boynton, 53 F2d 297 (9th Cir. 1931). See also Ash v. Merlette, 2017 MT 305, 389 Mont. 486, 407 P.3d 304.

Property Boundary Properly Established Following Accretion and Avulsion of River: The District Court found that the meander channel of the Sun River between plaintiffs' and one defendant's property moved south by accretion from where it was depicted in a 1906 government survey into a channel depicted in a 1937 aerial photograph and that the channel moved north by avulsion to its present channel in 1916. The court further concluded that the Sun River between plaintiffs' and another defendant's property also moved north by avulsion in 1948. The record amply supported the 1906 accretion that created the lots in question, at which time the property boundary moved with the water line. However, when the river avulsed to its present location in 1916, the property boundary did not move. Likewise, when the river avulsed north in 1948, the property boundary also did not move, so the District Court properly determined the boundaries between the lots after considering the avulsion and accretion of the river, and judgment was affirmed. Harding v. Savoy, 2004 MT 280, 323 M 261, 100 P3d 976 (2004).

Missouri River Islands Connected to Shore by Accretion — Ownership by State: The ownership of two tracts of land that were discernible Missouri River islands prior to attaching to adjoining lands was properly claimed by the state. Migration of the Missouri was not avulsion, which creates an identifiable piece of land through a sudden change in the river channel, but rather accretion, which is the deposit of sediment on one bank along the waterline due to the gradual and imperceptible change in the river course over a period of time. The property boundary line shifts with the waterline. Dept. of State Lands v. Armstrong, 251 M 235, 824 P2d 255, 49 St. Rep. 10 (1992), distinguishing McCafferty v. Young, 144 M 385, 397 P2d 96 (1964).

Access Right of Riparian Owner Not Destroyed by Changing Water Level: A riparian owner has a right of access to the water, and his access cannot be destroyed by the changing of the water level by gradual recession. He has the right to preserve his contact with the water by appropriating the accretions of the land that form along the shore and are exposed by reliction. Land formed by accretion or reliction becomes part of the shore, and the riparian owner acquires title to the water. He has a share in the land left exposed by the receding of the lake. Stidham v. Whitefish, 229 M 170, 746 P2d 591, 44 St. Rep. 1869 (1987).

Division of Relicted Exposed Shoreline — General Principle: The general principle that governs how a relicted exposed shoreline is divided between lot owners on a lake is that any division must be equitable and proportional so far as to give each owner a share of the land to be divided relative to his portion of the original shoreline. Stidham v. Whitefish, 229 M 170, 746 P2d 591, 44 St. Rep. 1869 (1987).

Public Recreational Use Rights Statute — Constitutionality: Following Curran and Hildreth decisions, which held that the public trust doctrine provides the public with a constitutional right to use the bed and banks of navigable streams up to the high-water mark despite a landowner's fee title, the Legislature enacted a statute providing public recreational use of streams. Plaintiff filed suit requesting the court to declare the recreational use statute an unconstitutional taking of private property without just compensation. Plaintiff then appealed after the trial court upheld the statute's constitutionality and awarded the state summary judgment. The Supreme Court ruled unconstitutional 23-2-302(2)(d), (2)(e), and (2)(f), which provided the public a right to hunt big game, build duck blinds and boat moorages, and camp overnight so long as not within sight of an occupied dwelling or within 500 yards of an occupied dwelling, whichever is less. The court further held as unconstitutional 23-2-311(3)(e), which required a landowner to pay costs of constructing a portage route around artificial barriers. The public has a right of use of the bed and banks up to the high-water mark but only such use as is necessary to utilization of the water itself. Any use of the bed and banks must be of minimal impact. Galt v. St., 225 M 142, 731 P2d 912, 44 St. Rep. 103 (1987), followed in Bitterroot River Protective Assoc., Inc. v. Bitterroot

Conserv. Dist., 2008 MT 377, 346 M 507, 198 P3d 219 (2008). See also Pub. Lands Access Ass'n, Inc. v. Madison County Bd. of Comm'rs, 2014 MT 10, 373 Mont. 277, 321 P.3d 38.

Public Right to Use Beaverhead River for Recreational Purposes: Following the decision in Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984), the Supreme Court held that: (1) the Beaverhead River is navigable for recreational purposes and the public has a right to use its bed and banks up to the ordinary high-water mark with limited right to portage across private property in order to bypass barriers in the water; (2) determination of navigability for title is not necessary; (3) the public does not have the right to trespass over private property in order to reach the state-owned waters; and (4) plaintiff's action did not constitute inverse condemnation because public use of waters, rather than title, was determined. Mont. Coalition for Stream Access, Inc. v. Hildreth, 211 M 29, 684 P2d 1088, 41 St. Rep. 1192 (1984).

Determination of Public's Right to Use Dearborn River — Standing of Coalition of Citizens: In action for determination of the public's right to use the Dearborn River, whether the Montana Coalition for Stream Access, Inc., had standing to bring suit was immaterial because the Department of State Lands (now Department of Natural Resources and Conservation) and the Department of Fish, Wildlife, and Parks were also plaintiffs. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Determining Public's Right to Use Dearborn River — Indispensable Parties: Stream access coalition, the Department of State Lands (now Department of Natural Resources and Conservation), and the Department of Fish, Wildlife, and Parks sued landowner along the Dearborn River, seeking a determination of the public's right to use the river. The District Court did not err for failure to dismiss the plaintiffs' claims for failure to join indispensable parties. When litigation seeks vindication of a public right, those who may be adversely affected by a decision do not thereby become indispensable parties. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Navigability for Title Purposes — Federal Test — Dearborn River Navigable: Federal law controlled the issue of whether the Dearborn River was, at the time Montana became a state, navigable for the purpose of determining title to its bed. Under federal law, rivers are navigable in law if they are navigable in fact, and they are navigable in fact if they were used or capable of being used, in their ordinary condition, as highways for commerce over which trade and travel were or could be conducted in the customary modes of trade and travel on the water at the time of the state's admission to the Union. Navigability in fact can be determined by using the log-floating test. That test was satisfied by evidence that in 1887, 2 years before Montana became a state, the Dearborn was used to float about 100,000 railroad ties and that in 1888 or 1889, one or two log drives a year were floated down the river, one of them containing 700,000 board feet. Title to the riverbed was thus in the federal government when Montana became a state in 1889 and was transferred to the State upon its admission to the Union. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Navigability for Title Purposes — Summary Judgment — Dearborn River: The District Court properly granted the coalition for stream access and two state departments summary judgment on the issue of navigability of the Dearborn River in 1889 for title purposes. The affidavits and depositions of plaintiffs' two competent historians were admissible because the historians were qualified experts who provided evidence of the history of the river, their affidavits and depositions disclosed circumstantial guaranties of trustworthiness, and the facts and data they relied on were of a type reasonably relied on by experts in their field; the facts and data did not themselves have to be admissible. The affidavits of defendant landowner's witnesses were worthless, were not admissible, and did not create any genuine issue of material fact concerning the navigability of the river at the time Montana became a state in 1889. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Public Recreational Use of Dearborn River — No Inverse Condemnation: Landowner along Dearborn River was sued by parties seeking a determination of the public's right to use the river for recreational uses. Landowner counterclaimed for inverse condemnation, basing the counterclaim on his claim to ownership of the riverbed. The Supreme Court held that the question of title to the bed was irrelevant to determining navigability for use by the public; that landowner had no claim to the waters; that since there was no claim to the waters, nothing was taken and thus there was no ground for an inverse condemnation claim; and that, consequently, the District Court did not err in dismissing the counterclaim. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Public Recreational Use Rights on Dearborn River — Limits: Navigability for public use is governed by state law and is separate from the question of navigability under federal law for title purposes. The question is whether waters owned by the State under Art. IX, sec. 3(3), Mont. Const., are susceptible to recreational use by the public. The capability of use of the waters for recreational purposes determines the availability of the waters for recreational use by the public. Whether or not a private party owns the bed beneath the waters is irrelevant. The constitution and the Public Trust Doctrine bar a private party from interfering with the public's right to use of the surface of the waters owned by the State, and any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes. The public's recreational use right extends to the point of the high-water marks. The public does not have the right to cross over private property to reach waters upon which they have a recreational use right, though they may portage around barriers in the water in the least intrusive way possible, avoiding damage to any private property holder's rights. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Title to and Public Recreation on Dearborn River — Ex Post Facto, Contract Clause, and Irrevocable Privileged Considerations: The Supreme Court held that the State, not the landowner along the Dearborn River, held title to the bed of the river under the federal test of navigability (at the time Montana became a state) for purposes of determining title to the riverbed. The court also held that landowner had no right to exclude the public from recreational use of the waters of the Dearborn. Because of these holdings, landowner's questions relating to ex post facto laws, violation of the contract clause of the constitution, and irrevocable rights and privileges were not germane to the case. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Title to and Public Use of Dearborn River — Federal Commerce Clause Navigability Immaterial: In action for determination of the public's right to use the Dearborn River, whether Montana has adopted the log-floating test of commercial navigability and whether the Dearborn is navigable under the federal commercial use test were immaterial because the question was one of recreational use or navigability, not commercial navigability. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Title to and Public Use of Dearborn River — Subject Matter Jurisdiction Found: Landowner along the Dearborn River claimed the District Court lacked subject matter jurisdiction over action for determination of the public's right to use the river, basing his claim on the presumption that he held title to the riverbed and that the State had no power to strip him of that title under the guise of determining navigability of the waters over the riverbed. The claim lacked merit because the State holds title to the riverbed and the water flowing over it, so that there was no question of the District Court's subject matter jurisdiction. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Avulsive Change: Where stream channel, intended to serve as boundary, moved one-quarter mile in less than 100 years, such movement was "perceptible" and therefore avulsive. McCafferty v. Young, 144 M 385, 397 P2d 96 (1964).

Accretions by Dumping: Where lots abutted on river and additional land was formed through dumping by the city, such additional land belonged to the lot owners since their ownership extended to the middle of the stream. Such ownership was not cut off by fact that an alley ran across such land. Missoula v. Bakke, 121 M 534, 198 P2d 769 (1948).

Large Excess of Land Left Between Shore and Meander Line When Surveyed — Public Domain: Where shown in condemnation action by United States that lands in question were in place when survey was made and large body of unsurveyed land in controversy lay between meander line and low-water mark of Missouri River, such lands (and accretions thereto) remained and continued to be public domain. Where river subsequently changed its channel when ice broke up in spring by cutting across an oxbow loop, the abandoned bed belonged to the state under 70-1-202. U.S. v. Eldredge, 33 F. Supp. 337 (D.C. Mont. 1940).

Meander Lines: Meander lines run in surveying public lands bordering upon navigable bodies of water are run for the purpose of ascertaining the quantity of land for which the government requires payment. They are not boundary lines and title of the grantee is not limited to such lines but extends to the edge of the lake or stream at low-water mark, the water itself constituting the real boundary. Faucett v. Dewey Lumber Co., 82 M 250, 266 P 646 (1928), followed in Andersen v. Monforton, 2005 MT 310, 329 M 460, 125 P3d 614 (2005).

Pleading in Eminent Domain: A complaint in a condemnation suit which described the land by metes and bounds on three sides and on the fourth merely designated a navigable river as the boundary, without stating that by the latter description the high or low watermark was meant, was sufficient to meet the requirements of this section. Interstate Power Co. v. Anaconda Copper Min. Co., 52 M 509, 159 P 408 (1916).

Ejectment by Riparian Owner: The boundary of land on a nontidal navigable river, whenever another intent is not expressed, extends to the ordinary low-water mark, and ejectment will lie at the suit of a riparian owner on a navigable stream to recover the possession of land between high- and low-water mark from one who is in possession thereof not claiming rights as a navigator or fisherman. Gibson v. Kelly, 15 M 417, 39 P 517 (1895).

Attorney General's Opinions

Access to Rivers and Streams Via County Road Right-of-Way and Bridges: Given that the public has the right to use public highways in any manner and for any purpose consistent with or reasonably incidental to public travel, this right includes the use of public rights-of-way created by county roads to gain access to rivers and streams. Using a county road right-of-way as an access point to a river or stream right-of-way is consistent with and reasonably incidental to the public's right to travel on county roads. Further, a bridge and its abutments, as part of a public highway, offer the same access to rivers and streams for recreational use as the highway to which they are attached. However, the public's right of access is not unlimited and is subject to the following limitations: (1) the recreating public must stay within the county road and bridge right-of-way, which is assumed to be 60 feet unless otherwise stated by petition or dedication; (2) access may be limited by the reasonable exercise of a governing body's police power to control the use of roads for purposes such as safety and parking; and (3) use of a public highway may be limited by the manner in which it was created, such as a road created by prescriptive easement, which is limited both in size and usage to the original use during the prescriptive period and may include access for hunting, fishing, and recreation. 48 A.G. Op. 13 (2000).

Law Review Articles

Recent Developments in Montana Natural Resources Law, Roberts & Stone, 38 Mont. L. Rev. at 192 (1977).

Access and Wharfage Rights and the Territorial Extent of Indian Reservation Bordering on Navigable Water—Who Owns the Bed of Flathead Lake?, 27 Mont. L. Rev. 55 (1965).

70-16-202. Owner of land bounded by road.

Case Notes

Boundary With and to Side of Street — Fee to Center of Street: A boundary to and with the side of a street carries the fee to the center of the street unless a contrary intent appears from the deed. Herreid v. Hauck, 254 M 496, 839 P2d 571, 49 St. Rep. 884 (1992), followed in Knutson v. Schroeder, 2008 MT 139, 343 M 81, 183 P3d 881 (2008).

Deed Not Rebutting Presumption: Fact that deed described boundary as "following the south side of said county road" did not rebut presumption that owner of land owned to center of road. McPherson v. Monegan, 120 M 454, 187 P2d 542 (1947).

70-16-203. Adjoining owner's right to lateral and subjacent support — excavations.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Liability of Lessor of Mining Claim: Whether lessor of mining claim can be held liable for damages caused by lessee of mining claim failing to furnish proper subjacent and lateral support depends on terms of lease. Butte Copper & Zinc Co. v. Poague, 164 F2d 201 (9th Cir. 1947), certiorari denied, 333 US 843, 92 L Ed 1127, 68 S Ct 661 (1947).

Manner of Giving Notice: The notice required by this section to be given by a lot owner to an adjoining owner of his intention to make excavations, in absence of a specific provision as to the manner in which it is to be given, may be served in a way best calculated to bring the matter to his attention. Notice in writing left at adjoining owner's home for delivery to him on his return to city on day excavation was commenced was sufficient. Neyman v. Pincus, 82 M 467, 267 P 805 (1928).

Notice to Tenants: This section provides for notice to the adjoining owner only, and therefore notice to his tenants is not required. Neyman v. Pincus, 82 M 467, 267 P 805 (1928).

70-16-204. Trees on or near boundary.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

70-16-205. Monuments and fences — mutual obligation of adjoining owners.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: Inserted (2) clarifying mutual responsibility of coterminous owners to maintain fencing between them (see 1989 Session Law for text); and made minor changes in form and phraseology.

Saving Clause: Section 2, Ch. 402, L. 1989, was a saving clause.

Case Notes

Boundary Not Established by Fence When True Line Known: A fence does not establish a boundary line when it does not conform to the true line, even if the property owners thought it was the true line. Once a true boundary is determined, the parties must conform to the true line. Smithers v. Hagerman, 244 M 182, 797 P2d 177, 47 St. Rep. 1483 (1990).

Natural and Artificial Boundaries Prevail: In this action to quiet title, the boundary line between the parties' properties, based upon a resurvey that located the original corner monuments, was correctly determined. The general rule is that courses and distances must yield to natural and artificial monuments. Bollinger v. Hollingsworth, 227 M 454, 739 P2d 962, 44 St. Rep. 1228 (1987).

Requirements of Doctrine of Agreed Boundary Not Fulfilled: In 1920, a tenant of Christie's predecessor in interest built a fence which served as the boundary between two adjoining parcels now owned by Christie and Papke. In 1976, Christie had the property surveyed and learned that the fence had been improperly placed and that part of his property had been fenced out. Christie destroyed the 1920 fence and built a new one on the actual boundary line. Papke then destroyed that fence and built another where the 1920 fence had been. Under the doctrine of agreed boundary, Papke brought an action to quiet title in him to the portion in dispute. The Supreme Court affirmed the District Court's ruling that Papke had not established a claim under the agreed boundary doctrine because in order to establish an agreed boundary line, the evidence must show more than mere acquiescence and occupancy for the statutory period. The evidence must also show that there was uncertainty in the location of the line and that the coterminous owners fixed the line by express or implied agreement. The court ruled that Christie's long acquiescence in the existence of the 1920 fence did not create an implied agreement establishing a boundary. Christie v. Papke, 201 M 200, 657 P2d 88, 39 St. Rep. 2054 (1982), followed in Smithers v. Hagerman, 244 M 182, 797 P2d 177, 47 St. Rep. 1483 (1990).

Division Fence:

A party wishing to build a fence on a boundary line may do so without the consent of the other party, although the other party, when he decides to inclose his land, is obligated to pay his share of the cost of erecting and maintaining the fence. Montgomery v. Gehring, 145 M 278, 400 P2d 403 (1965).

Under this section, coterminous landowners are mutually bound equally to maintain a division fence. Each must contribute his share of the land, material, and labor for its erection and maintenance. Schmuck v. Beck, 72 M 606, 234 P 477 (1925).

When one adjoining landowner neglects or refuses to erect his portion of a division fence and the other erects the whole thereof with the knowledge of the owner of the adjoining land and, while intending to erect it on the line, by mistake erects it on the land of the other, he may on discovery of his mistake remove the fence without subjecting himself to an action for trespass or for material. Schmuck v. Beck, 72 M 606, 234 P 477 (1925).

Where two properties are divided by a fence which both owners suppose to be on the line, such fence is a division fence, as between them, until the true line is ascertained, when they must conform to the true line. Schmuck v. Beck, 72 M 606, 234 P 477 (1925), distinguished in Thibault v. Flynn, 133 M 461, 325 P2d 914 (1958).

A division fence erected on a boundary line agreed upon between adjoining properties is properly erected. Hoar v. Hennessy, 29 M 253, 74 P 452 (1903).

This section contemplates that the fence shall lie one-half on the land of each owner, each contributing his share to its erection and maintenance and the ground upon which it stands, and thus the fence may stand on the land of each without any agreement. Hoar v. Hennessy, 29 M 253, 74 P 452 (1903).

Construction Without Agreement: In boundary dispute, fence constructed by defendant as a stock barrier, without any agreement to fix boundary line, was not the true line as against line established by plaintiffs' surveyor. Tillinger v. Frisbie, 132 M 583, 318 P2d 1079 (1957), distinguished in Thibault v. Flynn, 133 M 461, 325 P2d 914 (1958).

70-16-206. Partition fences required — adjoining lands previously enclosed.

Case Notes

Effect of Natural Barriers: Trial court's allowing plaintiff to fence land 15 feet on other side of boundary line because of natural obstacles was erroneous, since where a stream, bluff, or other obstacle is encountered, the fence should be either discontinued or moved to the very edge of land around the obstacle, in fairness to the interests of both parties. Montgomery v. Gehring, 145 M 278, 400 P2d 403 (1965).

70-16-207. Occupant of land adjoining enclosure of another — when required to share expense of partition fence.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-16-208. Partition fence when common occupancy ceases.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Sharing of Cost: Landowner was not entitled to recover half of cost of division fence where land had previously been left open as matter of convenience and there had been joint occupancy for mutual benefit of parties. Sparks v. Halseth, 154 M 395, 465 P2d 100 (1970).

70-16-209. Repair or rebuilding of partition fences.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Venue: Since the liability imposed by this section is a penalty, under 25-2-104 venue lies where the cause of action arose and not where the defendant resides. Hidden Hollow Ranch v. Collins, 146 M 321, 406 P2d 365 (1965).

70-16-210. Removal of partition fence.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Requirements of Doctrine of Agreed Boundary Not Fulfilled: In 1920, a tenant of Christie's predecessor in interest built a fence which served as the boundary between two adjoining parcels now owned by Christie and Papke. In 1976, Christie had the property surveyed and learned that the fence had been improperly placed and that part of his property had been fenced out. Christie destroyed the 1920 fence and built a new one on the actual boundary line. Papke then destroyed that fence and built another where the 1920 fence had been. Under the doctrine of agreed boundary, Papke brought an action to quiet title in him to the portion in dispute. The Supreme Court affirmed the District Court's ruling that Papke had not established a claim under the agreed boundary doctrine because in order to establish an agreed boundary line, the evidence must show more than mere acquiescence and occupancy for the statutory period. The evidence must also show that there was uncertainty in the location of the line and that the coterminous owners fixed the line by express or implied agreement. The court ruled that Christie's long acquiescence in the existence of the 1920 fence did not create an implied agreement establishing a boundary. Christie v. Papke, 201 M 200, 657 P2d 88, 39 St. Rep. 2054 (1982), followed in Smithers v. Hagerman, 244 M 182, 797 P2d 177, 47 St. Rep. 1483 (1990).

Removal of Line Fence:

Absent agreement, a line fence may be removed by either owner only after 6 months' notice to the other. Thompson v. Mattuschek, 134 M 500, 333 P2d 1022 (1959).

In action to restrain trespass by livestock and to recover for partial loss of a growing barley crop then being trampled and grazed down by livestock after defendant had removed a long-standing section line fence bounding one side of a field which plaintiff had just planted, complaint alleging malicious removal of fence was sufficient to state cause of action for trespass of cattle upon plaintiff's property although he did not allege a secure inclosure of the barley field but did so testify. Thompson v. Mattuschek, 134 M 500, 333 P2d 1022 (1959).

Part 3

Gratuitous Permittee for Recreation

70-16-301. Recreational purposes defined.

Compiler's Comments

2007 Amendment: Chapter 353 inserted last sentence regarding private, noncommercial flying of aircraft. Amendment effective April 27, 2007.

1995 Amendment: Chapter 303 inserted "biking".

1993 Amendment: Chapter 264 near end inserted "spelunking"; and made minor changes in style.

1987 Amendment: Inserted "touring or viewing cultural and historical sites and monuments".

Case Notes

City Playground Injury — City Liable if Willful or Wanton Misconduct Shown: Based on agreement of the parties, the Supreme Court assumed, without deciding, that playing in a city park constituted a "recreational purpose" under the recreational use statute. The issue of whether the city committed willful or wanton misconduct for failure to maintain a park and the playground area was remanded to the District Court. Gatlin-Johnson v. Miles City, 2012 MT 302, 367 Mont. 414, 291 P.3d 1129.

Applicability — Recreational Purpose Defined: Plaintiffs, surviving parents of a child killed accidentally during a field trip arranged by the child's school to the Lee Metcalf National Wildlife Refuge, argued that the purpose of the trip was educational, not recreational, and therefore 70-16-302 does not operate to relieve the defendant landowner of liability. The federal District Court held the statute is applicable in any case where the entry is made for what could reasonably be regarded by the general public as a recreational purpose regardless of some different purpose in the mind of a particular user. Fisher v. U.S., 534 F. Supp. 514, 39 St. Rep. 518 (D.C. Mont. 1982).

70-16-302. Restriction on liability of landowner — definitions.

Compiler's Comments

2007 Amendment: Chapter 353 inserted definitions of airstrip and flying of aircraft; in definition of property after "roads" inserted "airstrips"; and made minor changes in style. Amendment effective April 27, 2007.

2003 Amendment: Chapter 596 in (1) at end of last sentence inserted reference to funds provided under 77-1-815. Amendment effective March 1, 2004.

Preamble: The preamble attached to Ch. 596, L. 2003, provided: "WHEREAS, the Department of Natural Resources and Conservation presently authorizes the public to use state school trust land through individual recreational use licenses; and

WHEREAS, the primary recreational uses of state school trust land are hunting and fishing; and

WHEREAS, the Department of Natural Resources and Conservation and the Department of Fish, Wildlife, and Parks wish to provide a more efficient system for authorizing public recreational use for hunting, fishing, and trapping on state trust land and concurrently provide greater benefit to the institutional beneficiaries of the trust; and

WHEREAS, the Department of Fish, Wildlife, and Parks has the discretionary authority in section 87-1-209, MCA, to enter into an agreement to compensate state trust land beneficiaries for the use and impacts associated with hunting, fishing, and trapping on legally accessible state trust land as defined by department of natural resources and conservation rule; and

WHEREAS, the Department of Fish, Wildlife, and Parks needs additional revenue to offset the cost of an agreement with the Department of Natural Resources and Conservation to compensate state trust land beneficiaries for the use and impacts associated with hunting, fishing, and trapping on legally accessible state trust land; and

WHEREAS, the Department of Natural Resources and Conservation and the Department of Fish, Wildlife, and Parks have reached an agreement that, given the legislative authority, they intend to enter into an agreement for the recreational use of school trust land parcels for hunting, fishing, and trapping purposes."

Severability: Section 11, Ch. 596, L. 2003, was a severability clause.

1995 Amendment: Chapter 303 near beginning of first sentence of (1) substituted "a person who uses property, including property owned or leased by a public entity, for recreational purposes" for "a person who makes recreational use of any property in the possession or under the control of another", after "permission" deleted "and without giving a valuable consideration therefor", after "landowner" deleted "his agent, or his tenant", and near end, after "purpose", inserted "if the person does not give a valuable consideration to the landowner in exchange for the recreational use of the property", in second sentence, in two places after "landowner", deleted "his agent, or his tenant", and inserted last sentence defining consideration as excluding the state land recreational use license fee; inserted (2) defining landowner; inserted (3) defining property; and made minor changes in style.

1987 Amendments: Chapter 209 substituted (1) outlining landowner, agent, or tenant liabilities for recreational use of property for former section that read: "A landowner or tenant who permits, by act or implication, any person to enter upon any property in the possession or under the control of such landowner or tenant for any recreational purpose without accepting a valuable consideration therefor does not by granting such permission extend any assurance that such property is safe for any purpose or confer upon such a person the status of invitee or licensee to whom any duty of care is owed, and such landowner or tenant shall not be liable to such person for any injury to person or property resulting from any act or omission of such landowner or tenant unless such act or omission constitutes willful or wanton misconduct."

Chapter 440 inserted (2) delineating liabilities of Department in operating snowmobile areas.

Landowner Liability — Preamble: The preamble to Ch. 209, L. 1987, provided: "WHEREAS, the Montana Supreme Court in Limberhand v. Big Ditch Co., [218] Mont. [132], 706 P.2d 491 (1985), replaced the traditional invitee, licensee, and trespasser standards for measuring landowner liability with a single standard of reasonable care; and

WHEREAS, this single standard adopted by the Montana Supreme Court conflicts with the policy of restricted landowner liability established by the Legislature in sections 23-2-321 and 70-16-302, MCA."

Case Notes

City Playground Injury — City Liable if Willful or Wanton Misconduct Shown: Based on agreement of the parties, the Supreme Court assumed, without deciding, that playing in a city park constituted a "recreational purpose" under the recreational use statute. The issue of whether the city committed willful or wanton misconduct for failure to maintain a park and the playground area was remanded to the District Court. Gatlin-Johnson v. Miles City, 2012 MT 302, 367 Mont. 414, 291 P.3d 1129.

Application of Montana Negligence Law to Snowmobile Accident on Federal Forest Service Trail: This case involved a Federal Tort Claims Act action brought by a snowmobiler who was severely injured on a U.S. Forest Service signed and maintained trail by members of the injured person's party who were following him. The Ninth Circuit Court certified to the Montana Supreme Court a question on the appropriate standard of care and received the Montana Supreme Court's response in Oberson v. U.S. Dept. of Agriculture, 2007 MT 293, 339 M 519, 171 P3d 715 (2007). The Ninth Circuit Court held that the actions of the Forest Service in signing the snowmobile trail involved in the action did not rise to the type of policy decisions that are not subject to the Federal Tort Claims Act. Applying the Montana negligence standards and foreseeability of risk from the response, the Ninth Circuit Court held that the negligence elements were applied correctly relating to the accident. Oberson v. U.S. Dept. of Agriculture, 514 F3d 989 (2008).

Gross Negligence Standard of Care in Snowmobile Liability Law Violative of Equal Protection — Ordinary Standard of Care Applicable to Snowmobile Liability: Musselman was severely injured in a snowmobile accident on U.S. Forest Service land, and Musselman's guardian sued the Forest Service under the Federal Tort Claims Act. The Forest Service argued that its decision not to mark the trail was discretionary under federal law and that Montana's snowmobile liability statutes relieved the Forest Service from a duty to warn of the hazardous trail because a snowmobile area operator had no duty under 23-2-653(3) to eliminate, alter, control, or lessen the risk inherent in the sport of snowmobiling. The federal District Court rejected both affirmative defenses and concluded that neither the gross negligence standard of liability in 23-2-653 nor the willful or wanton conduct standard of liability in this section applied, but rather that the ordinary care standard of liability in 27-1-701 applied, and apportioned liability between the Forest Service and the snowmobilers. The case was appealed to the Ninth Circuit Court, which affirmed in all respects except the determinative question of which standard of care applied. Three questions were certified to the Montana Supreme Court for resolution, including whether the gross negligence standard of care in 23-2-653 was constitutional and, if not, whether the willful or wanton conduct standard of liability in this section or the ordinary care standard of liability in 27-1-701 applied. The Supreme Court concluded that the same rationale applied to skiers in Brewer v. Ski-Lift, Inc., 234 M 109, 762 P2d 226 (1988), also applied to snowmobile area operators. The gross negligence standard of care in 23-2-653 is overbroad, extends beyond its stated purpose, fails to pass rational basis review, and violates the equal protection clause in Art. II, sec. 4, Mont. Const. The remainder of the snowmobile area operator law was left intact. The general recreational use willful or wanton conduct standard of liability in this section was held inapplicable. Rather, the ordinary care standard of liability in 27-1-701 governed the Forest Service's actions in this case. Oberson v. U.S. Dept. of Agriculture, Forest Serv., 2007 MT 293, 339 M 519, 171 P3d 715 (2007).

State Entitled to Immunity for Attack by Indigenous Wild Animal on State Lands — Grizzly Bear Considered Condition of Property: Hilston was killed by grizzly bears while hunting elk on state land in a wildlife management area. Hilston's personal representative sued the state for negligence in the operation, control, leasing, maintenance, and management of grizzly bears, natural resources, land, and people in the wildlife management area. The District Court held that the state was entitled to judgment as a matter of law under this section. On appeal, plaintiff asserted that this section applies only to defects in property and that grizzly management in the wildlife area is not a condition of the property for which immunity is granted. The Supreme Court disagreed, noting that the rule of law has developed that landowners cannot be held liable for the acts of wild animals on their property unless a landowner has reduced the wild animals to possession or control or introduced a nonindigenous animal onto the property. Grizzly bears are wild animals existing in the wildlife management area and as such are a condition of the property for purposes of this section, so the state owed no duty to protect Hilston from the bear attack. Summary judgment for the state was proper. Estate of Hilston v. St., 2007 MT 124, 337 M 302, 160 P3d 507 (2007).

Sufficient Evidence of City's Willful or Wanton Misconduct to Preclude Summary Judgment — Negligence Claim Against City Barred by Recreational Use Statute: Plaintiff was injured on June 20, 2001, after falling through a damaged plank on the Polson city dock, and filed suit against the city for negligently maintaining the premises and for failing to warn of the unsafe condition. The District Court granted summary judgment for the city on grounds that plaintiff failed to present evidence in support of the claim that the city was aware of the defective plank before June 20 or that the city acted willfully or wantonly. The court also concluded that plaintiff's negligence claim was precluded by this section, the recreational use statute. On appeal, the Supreme Court concluded that the facts, when considered in a light most favorable to plaintiff, were sufficient to raise a genuine issue as to whether the city's failure to timely repair the damaged plank or warn plaintiff of the danger constituted willful or wanton misconduct, precluding summary judgment and warranting a trial on the issue. However, the Supreme Court agreed that the recreational use statute barred plaintiff's negligence claim. Jobe v. Polson, 2004 MT 183, 322 M 157, 94 P3d 743 (2004).

Failure to Give Notice of Constitutional Challenge to Landowner's Liability Law — Consideration of Constitutional Challenge Precluded: Plaintiff was injured on a sledding hill at a city park. Plaintiff contended that legislation that provided immunity to landowners was defective because the title did not mention that liability was also extended to governmental units, including municipalities. However, plaintiff failed to give notice to the Supreme Court or to the Attorney General, pursuant to former Rule 38, M.R.App.P. (now superseded), that an action in which neither the state nor a state agency or employee was a party was being challenged for constitutionality. The municipality was not a state agency, so the rule applied, and absent plaintiff's compliance with the notice requirements, the Supreme Court declined to address the constitutional issue. Weinert v. Great Falls, 2004 MT 168, 322 M 38, 97 P3d 1079 (2004).

Sledding in City Park Considered Recreational Purpose for Which City Immune From Liability: Plaintiff was injured on a sledding hill at a city park. The trial court held that the city was immune from liability pursuant to 70-16-302. Citing Dobrocke v. Columbia Falls, 2000 MT 179, 300 M 348, 8 P3d 71 (2000), plaintiff contended that because city parks are freely available to the public, it was unnecessary for the law to encourage availability by limiting a city's tort liability. The Supreme Court disagreed and distinguished Dobrocke, holding that the use of city parks is discretionary, unlike the use of city streets and boulevards that was at issue in Dobrocke, so the legislative rationale behind this section to encourage the availability of recreational areas applied. Winter sports, such as sledding, are explicitly listed in the statute as a recreational purpose, so summary judgment for the city was affirmed. Weinert v. Great Falls, 2004 MT 168, 322 M 38, 97 P3d 1079 (2004).

No Requirement That Private Property Be Available for Public Use Before Landowner Liability Shield Applies — Landowner Immune From Suit Absent Consideration or Evidence of Misconduct: Saari went inner tube sledding with a church group on a hill at a ski resort after the resort was closed for the day. The group paid no fees to use the hill and did not rent or purchase equipment from the resort operator. During that evening, Saari lost control and crashed in a creek bed, suffering injuries which subsequently caused Saari's death. Saari's estate sued the resort operator on six negligence counts, including survival action, wrongful death, negligence, premises liability, attractive nuisance, and infliction of emotional distress. The District Court held that this section precluded liability by the operator because there was no duty of care owed to Saari and granted summary judgment to the operator on all counts. The estate appealed, but the Supreme Court affirmed. By its terms, this section provides for landowner liability when a recreational user gives valuable consideration to the landowner in exchange for using the property or when the landowner acts with willful or wanton misconduct. While conceding that Saari paid no consideration for use of the ski hill, the estate nevertheless argued that the operator generally benefited from after-hours sledders, which constituted consideration. However, no legal authority was advanced for the proposition that economic benefits received at a different point in time constituted valuable consideration given by Saari on the night in question, and these speculative statements did not give rise to a genuine issue of material fact. Moreover, the operator's failure to prevent or supervise after-hours sledding did not constitute willful or wanton misconduct. An absence of evidence cannot establish the existence of a genuine issue of material fact. Finally, the estate cited Simchuk v. Angel Island Community Ass'n, 253 M 221, 833 P2d 158 (1992), for the proposition that a question of fact existed regarding whether the property was open to the public. Under Simchuk, if the land upon which an injury occurs is not available for public use, the landowner does not enjoy the limited liability afforded by this section. However, a public use requirement would essentially negate the "without permission" language of the statute and exceed the parameters of the statute, and because the statute contains no express language that property be open for public use before the liability shield applies, the Supreme Court overruled Simchuk to that extent. Summary judgment on all counts was proper. Saari v. Winter Sports, Inc., 2003 MT 31, 314 M 212, 64 P3d 1038 (2003).

Summary Judgment Based on Recreational Use Statute Inappropriate: Plaintiff was injured after tripping on a fence wire while walking her dog at night in an unmaintained grassy area on city right-of-way next to a city street. The District Court allowed the city to assert an affirmative defense based on this section, which restricts the liability of a landowner when a person is injured while using the landowner's property for recreational purposes. Because plaintiff submitted no facts, arguments, or evidence to rebut the inference that she was on city property for recreational purposes, the District Court ruled that the city was immune from liability pursuant to the recreational use statute. Notwithstanding that plaintiff was precluded from arguing on appeal what was not raised at trial, the Supreme Court nevertheless considered the argument as part of its de novo review and disagreed that the city was entitled to judgment as a matter of law or that summary judgment was appropriate in this case. The court noted that although walking may in some circumstances be considered a recreational purpose, walking to and from one's home in a residential area of a city may not. Rather than a recreational purpose, walking to and from one's home is an everyday, ordinary, and expected use of city property by one of its citizens, and the District Court erred in applying the recreational use statute in these circumstances when granting summary judgment. Dobrocke v. Columbia Falls, 2000 MT 179, 300 M 348, 8 P3d 71, 57 St. Rep. 718 (2000).

Landowner Derivation of Economic Benefit as Voiding Liability Limitation: A private tennis/basketball court was not open to the public, and a valuable consideration was paid by members of a home owner's association for its use. The economic benefit derived by the association placed the property beyond the scope of this section, the recreational use statute, the clear intent of which is to grant a landowner relief from liability to any person gratuitously present for a recreational purpose. The valuable consideration need not flow directly from the injured party to the landowner in order to retain tort liability; the consideration need only be paid by someone to create access to the property for the ultimate user. (See 1995 amendment.) Simchuk v. Angel Island Community Ass'n, 253 M 221, 833 P2d 158, 49 St. Rep. 473 (1992).

Limited Liability Inapplicable if Land Not Available for Public Use: This section applies only to land made available for public use. If the land on which an injury occurs is not available for public use, the landowner does not enjoy the protection of limited liability. Therefore, limited liability does not extend to an injury that occurs at a private resort on a private tennis court. Simchuk v. Angel Island Community Ass'n, 253 M 221, 833 P2d 158, 49 St. Rep. 473 (1992), overruled in Saari v. Winter Sports, Inc., 2003 MT 31, 314 M 212, 64 P3d 1038 (2003).

Applicability — Recreational Purpose Defined: Plaintiffs, surviving parents of a child killed accidentally during a field trip arranged by the child's school to the Lee Metcalf National Wildlife Refuge, argued that the purpose of the trip was educational, not recreational, and therefore this section does not operate to relieve the defendant landowner of liability. The federal District Court held the statute is applicable in any case where the entry is made for what could reasonably be regarded by the general public as a recreational purpose regardless of some different purpose in the mind of a particular user. Fisher v. U.S., 534 F. Supp. 514, 39 St. Rep. 518 (D.C. Mont. 1982).

Government Licensee: Notwithstanding that the agreement between power company and U.S. government used word "licensee", power company qualified as "landowner or tenant", as used in this section, since legal effect of instrument was to create lease. Therefore, power company could properly use this section as an affirmative defense in personal injury action. State ex rel. Tucker v. District Court, 155 M 202, 468 P2d 773 (1970).

Property: In action for personal injuries resulting from fall from private train being operated on defendant's property, trial court properly overruled plaintiff's motion to strike affirmative defense based on this section on ground that this section applies only to injuries caused by real estate, since under 1-1-205, "property", as used in this section, includes both real and personal property. (See 1995 amendment.) State ex rel. Tucker v. District Court, 155 M 202, 468 P2d 773 (1970).

Law Review Articles

Landowner Liability in Montana, Nelson, 47 Mont. L. Rev. 109 (1986).

Part 7
Montana Mold Disclosure Act

Part Compiler's Comments

Effective Date: Section 4, Ch. 584, L. 2003, provided: "[This act] is effective on passage and approval." Approved May 5, 2003.

CHAPTER 17
SERVITUDES, EASEMENTS, AND COVENANTS RUNNING WITH THE LAND

Chapter Case Notes

Abuse of Discretion to Restrict Injunction to Light Vehicles Only — Preliminary Injunction Improper: The plaintiffs sought declaratory judgment to have legal access along a road that crossed the defendants' property. The plaintiffs sought a preliminary injunction on the theory that there was an express public easement on that portion of the road. The District Court granted a preliminary injunction enjoining the defendants from barring the plaintiffs' access to the road and allowing the plaintiffs to drive only light vehicles on the road. The plaintiffs appealed, and the Supreme Court reversed the restriction because, the court determined, the status quo had been the plaintiffs driving some heavy equipment across the easement to maintain their property. Flora v. Clearman, 2016 MT 290, 385 Mont. 341, 384 P.3d 448.

Preliminary Injunction Granted on Theory of Prescriptive Easement — Appeal on Public Easement Premature: The plaintiffs sought declaratory judgment to have legal access along a road that crossed the defendants' property. The plaintiffs sought a preliminary injunction on the theory that there was an express public easement on that portion of the road. The District Court granted the plaintiffs a preliminary injunction enjoining the defendants from barring the plaintiffs' access to the road under the theory of prescriptive easement. The plaintiffs appealed to the Supreme Court, which affirmed the ruling and noted that the plaintiffs' appeal regarding a public easement was premature because the District Court's order had not been certified and therefore was not final. Flora v. Clearman, 2016 MT 290, 385 Mont. 341, 384 P.3d 448.

Easement Holders' Failure to Remove Fill From Temporary Easement Road — Landowner Properly Awarded Damages for Removal Cost: The plaintiff property owners had an easement road across the defendants' land to their property. After a flood left the road impassable, and with the defendants' permission, the plaintiffs used a temporary road located on the defendants' land. The plaintiffs brought in fill to raise the road, which they agreed to remove later. However, when the county and the defendants asked them to remove the fill, they refused. Ultimately, the defendants removed the fill and the plaintiffs sued them for conversion of the fill. The District Court ruled that the plaintiffs had suffered no damage by the removal of the fill and awarded damages to the defendants for their cost of removing the fill. On appeal, the Supreme Court affirmed the award of damages to the defendants. Low v. Reick, 2016 MT 167, 384 Mont. 101, 376 P.3d 777.

Easement Road Maintenance Agreement — Essential Elements of Contract — Agreement Enforceable: Easement owners and landowners entered into a road maintenance agreement for which the landowners did not receive any remuneration. Later, when the easement owners filed suit against the landowners for breach of the agreement, the District Court ruled that the agreement was not enforceable because of a lack of consideration. On appeal, the Supreme Court ruled that the District Court had erred when it concluded that the agreement was not enforceable. The Supreme Court concluded that because the landowners also used the easement road, they received a conferred benefit in its maintenance, and therefore the agreement contained the essential elements of a contract. Low v. Reick, 2016 MT 167, 384 Mont. 101, 376 P.3d 777.

No Authority to Repair Road Beyond Bounds of Easement: The plaintiffs were property owners who had a 20-foot-wide easement road across the defendants' land to their property. After a flood left the road impassable, the plaintiffs wanted to reconstruct the road in a way that would expand the easement by 7 feet. After the defendants refused to grant them permission to reconstruct the road as proposed, the plaintiffs filed suit and asked the District Court to grant them the authority to apply and sign for permits to repair the road, which the District Court denied. On appeal, the Supreme Court agreed that the plaintiffs had a right to repair the existing road, but only in a manner that would not expand the width of the easement. Low v. Reick, 2016 MT 167, 384 Mont. 101, 376 P.3d 777.

Express Easement Created by Virtue of Writing — Not Easement by Necessity: The plaintiffs owned land that was subject to a written easement allowing ingress and egress to the defendant's property. The easement was the only access to the defendant's property when it was recorded in 1978, but subsequent access was created and used. The plaintiffs claimed the easement was an implied easement created by necessity, the necessity no longer existed, external evidence should be considered regarding its creation, the defendant's potential use could overburden the estate, and the defendant had abandoned the easement. The District Court granted the defendant's motion to dismiss based on the plaintiffs' failure to state a justiciable claim for relief. On appeal, the Supreme Court affirmed, holding that the easement was an express easement by virtue of being in writing, that the terms of the easement did not require external evidence, that ingress and egress allowed for a road and for vehicle use, and that mere nonuse did not establish abandonment. Woods v. Shannon, 2015 MT 76, 378 Mont. 365, 344 P.3d 413.

Commission Order to Remove Partially Constructed Barn Not Unreasonable — Negative Easement Analysis Inapplicable: A planning and zoning commission determined that a partially constructed barn that was outside the designated building site violated applicable zoning regulations and covenants and must be removed. On appeal, the Supreme Court held that the commission's decision did not constitute an abuse of discretion since it was not so lacking in fact and foundation as to be clearly unreasonable. Moreover, the Supreme Court declined to apply the negative easement analysis in Conway v. Miller, 2010 MT 103, 356 Mont. 231, 232 P.3d 390, reasoning that the express language of the sales documents, the zoning regulations, and the covenants was sufficient justification for the commission's action. Botz v. Bridger Canyon Planning & Zoning Comm'n, 2012 MT 262, 367 Mont. 47, 289 P.3d 180.

Building Restriction Line on Subdivision Plat Creating Negative Easement Precluding Building in Restricted Portion of Lot: Defendant constructed a garage that was located on both sides of a building restriction line marked on a subdivision plat. Plaintiffs sought removal of the portion of the garage that crossed the building restriction line. Although defendant was aware of the building restriction line when purchasing the subdivision property, defendant contended that an easement was not created because the deed failed to have express language of the grantor's request to create an easement and because the deed did not identify the dominant and servient tenement or give the servient tenement knowledge of the building restriction line's use and necessity. The District Court found that defendant was aware of the building restriction by virtue of the recorded plat and a special exception to the title policy obtained upon purchase of the property, and defendant was ordered to remove the garage. Defendant appealed, but the Supreme Court affirmed. The description of the building restriction line on the subdivision plat clearly created a negative easement in plaintiffs' favor, restricting any building on a portion of defendant's lot, so the District Court did not err in prohibiting defendant from building in that area. Plaintiffs' easement was thus enforceable and removal of the garage was proper. Conway v. Miller, 2010 MT 103, 356 Mont. 231, 232 P.3d 390, following Halverson v. Turner, 268 Mont. 168, 885 P.2d 1285 (1994), and Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 Mont. 52, 993 P.2d 688, and distinguishing Blazer v. Wall, 2008 MT 145, 343 Mont. 173, 183 P.3d 84. See also Lewis & Clark County v. Wirth, 2022 MT 105, 409 Mont. 1, 510 P.3d 1206.

Sufficient Evidence to Support Public Access to Land Via Old County Road: Plaintiff sued to quiet title to any interest in a property that once constituted an old county road right-of-way and that had fallen into disuse. The District Court held that the public, including the state, had access to a particular section of land via the right-of-way, which was never formally abandoned. Plaintiff appealed, but the Supreme Court affirmed. The District Court's ruling was supported by an 1893 petition for the roadway, a 1902 USGS map, a 1915 railroad map, a 1938 aerial photograph, testimony by the state's expert witness, and a viewing of the property by the District Court Judge. The Supreme Court declined to reweigh the evidence, and despite conflicting evidence, the evidence before the District Court was substantial and credible and supported the District Court's ruling. Only A Mile, LLP v. St., 2010 MT 99, 356 Mont. 213, 233 P.3d 320.

Elements of Implied Easement by Necessity Established — Easement Properly Granted — Interference Claim Properly Dismissed: Plaintiffs sought an easement by necessity across defendants' property. The District Court held that an easement by necessity existed and defined the scope of the easement, and both parties appealed. The Supreme Court affirmed. There was sufficient clear and convincing evidence of both unity of ownership and strict necessity to establish an easement by necessity. Additionally, nothing in the history or condition of the property at the time of severance supported a finding that the extent of the implied easement by necessity across the servient estate should be unlimited, so plaintiffs were entitled to cross defendants' land to reach a public road. However, plaintiffs' claim that defendants interfered with the easement failed. The essential acts that gave rise to the easement by necessity arose in the 1930s, but plaintiffs' right to the easement was not established until 2007, so defendants could not have wrongfully interfered with the easement. Ashby v. Maechling, 2010 MT 80, 356 Mont. 68, 229 P.3d 1210. See also Albert G. Hoyem Trust v. Galt, 1998 MT 300, 292 Mont. 56, 968 P.2d 1135, Watson v. Dundas, 2006 MT 104, 332 Mont. 164, 136 P.3d 973, and Wolf v. Owens, 2007 MT 302, 340 Mont. 74, 172 P.3d 124.

Lack of Express Utility Easements Not Condition Adversely Affecting Title: The buyer of condominium units refused to close on the sale because the sale agreement did not expressly state the existence of utility easements for each parcel. The District Court determined that the lack of express utility easements was not a condition that adversely affected title and held that the buyer breached the contract by refusing to close the sale. On appeal, the Supreme Court affirmed. The entire property was part of the sale, including all units and appurtenances. If the buyer wanted each unit to have a stated right to access the utility areas, the buyer could affirmatively grant that right to each unit after acquiring the property. Also, the buyer could have required the express establishment of the easements in a written addendum to the contract to be a condition precedent to closing, but the buyer did not do so. The buyer failed to establish that the absence of individual unit easements was an adverse condition of title that allowed the buyer to refuse to close the sale. Apple Park, LLC v. Apple Park Condominiums, LLC, 2008 MT 284, 345 M 359, 192 P3d 232 (2008).

Prescriptive Easement Established for One of Two Exits on Loop Road — Other Exit Considered Abandoned: Renner accessed his property by crossing Nemitz's property in two different places in order to form a loop driveway at Renner's house. The west easement was not at issue, but both the existence and location of an approximately 100-foot easement over the east side of the loop was contested. A series of interactions between the parties eventually led to Nemitz building a fence across the east side of the loop and Renner filing a claim to establish an easement over the east side of the loop. At trial, both parties presented testimony regarding use of the east side loop, including testimony regarding two possible exits on the loop. The District Court did not distinguish between the two exits, but found a prescriptive easement for the entire east side loop, held that the easement was not abandoned and that Nemitz's activities did not extinguish the easement, and granted Renner an easement for both exits of the east side loop, ordering all obstructions removed. Nemitz appealed. The District Court found clear and convincing evidence that a prescriptive easement existed for the east side loop based on testimony of its use from 1948 to 1974, and after reviewing the record, the Supreme Court affirmed the trial court's findings of open, notorious, exclusive, adverse, continuous, and uninterrupted use of the easement. However, it was not clear from the testimony regarding use between 1948 and 1974 whether both exits met the requirements of a prescriptive easement, and that lack of specificity indicated that it was error for the District Court to find a prescriptive easement for both exits, but the error was harmless based on evidence regarding use from 1975 to 1995. Renner's predecessor in interest during that period continued to use the loop as in prior years and never sought permission and so could not be characterized as having abandoned the east loop easement. Testimony was undisputed that the left exit was used until 1995, but the right exit was not used past 1982, and testimony of Renner's predecessor in interest established that use of the right exit was intended to be subordinate to Nemitz's use, so it was error for the District Court to find that the right exit was not abandoned. The Supreme Court noted that extinguishment did not apply to the left exit because only 3 years passed between the time Renner acquired the property and when the claim was filed. Thus, the Supreme Court affirmed the easement on the left exit and the order requiring removal of the fence across that exit, but reversed the part of the order requiring removal of the fence across the abandoned right exit. Renner v. Nemitz, 2001 MT 202, 306 M 292, 33 P3d 255 (2001), distinguishing Morrison v. Higbee, 204 M 501, 668 P2d 1029 (1983).

Prescriptive Easement — "Clear and Convincing" Evidence Burden Adopted: Overruling Downing v. Grover, 237 M 172, 772 P2d 850 (1989), and earlier decisions requiring that the elements of a prescriptive easement be proved by a preponderance of the evidence, the Supreme Court held that the proper burden of proof is that each element of a prescriptive easement claim be proved by clear and convincing evidence. Wareing v. Schreckendgust, 280 M 196, 930 P2d 37, 53 St. Rep. 1362 (1996), followed in Renner v. Nemitz, 2001 MT 202, 306 M 292, 33 P3d 255 (2001), Harding v. Savoy, 2004 MT 280, 323 M 261, 100 P3d 976 (2004), Combs-DeMaio Living Trust v. Kilby Butte Colony, Inc., 2005 MT 71, 326 M 334, 109 P3d 252 (2005), and Watson v. Dundas, 2006 MT 104, 332 M 164, 136 P3d 973 (2006). See also Steiger v. Brown, 2007 MT 29, 336 M 29, 152 P3d 705 (2007), and Baston v. Baston, 2010 MT 207, 357 Mont. 470, 240 P.3d 643.

Prescriptive Easement — No Proof of Permissive Use: The District Court's finding that a prescriptive easement had been established was proper where testimony of claimant's witnesses indicated open, notorious, exclusive, adverse, continuous, and uninterrupted use of the road and the landowner offered no evidence to establish permissive use other than his uncorroborated assertions. Thomas v. Barnum, 211 M 137, 684 P2d 1106, 41 St. Rep. 1266 (1984).

Part 1
Servitudes — Easements

Part Case Notes

Certificate of Survey and Deed Together Established Tract as Servient Estate for Depicted Easement — District Court Did Not Improperly Use Extrinsic Evidence. Mary Ellen Duke Trust v. Lee Lou, LLC, 2023 MT 177, 413 Mont. 356, 535 P.3d 1133, following Blazer v. Wall, 2008 MT 145, 343 Mont. 173, 183 P.3d 84.

Existence of Implied Easement by Preexisting Use — Easement by Implication Created by Operation of Law at Time of Severance — Undisputed Facts Established Scope of Easement Providing Ingress and Egress to Owner, Invitees, and Public. Thomas Mann Post No. 81 v. Knudsen Family Ltd. Partnership, 2022 MT 150, 409 Mont. 318, 514 P.3d 409.

Quiet Title Action — District Court Abused Discretion by Granting Attorney Fees Without Holding Evidentiary Hearing and Calculating Award Based Solely on Affidavit of Counsel — Award of Attorney Fees Must Be Based on Competent Evidence. Thomas Mann Post No. 81 v. Knudsen Family Ltd. Partnership, 2022 MT 150, 409 Mont. 318, 514 P.3d 409.

Reasonable Elements of Necessity Existed for Implied Easement by Preexisting Use — Prescriptive Easement Established by Clear and Convincing Evidence: The District Court concluded that a landowner association established unity of ownership, and the parties to the deed at the time of severance that intended the road to be used to access the river for the purpose of accessing the parcels that could not otherwise be accessed established the element of intent for an easement by preexisting use. Thus, a prescriptive easement was established for the landowner association members' use over the road. On appeal, the Supreme Court held that an implied easement by preexisting use was established, but the implied easement was established only for residential use of the properties that have no other means of access to reach their land. The Supreme Court further held that the landowner association established by clear and convincing evidence a prescriptive easement over the road for its members' residential and recreational use.

The association's use was open, notorious, apparent, obvious, extensive, and continuous. JRN Holdings, LLC v. Dearborn Meadows Land Owners Ass'n, 2021 MT 204, 405 Mont. 200, 493 P.3d 340.

Abandonment of Public Highway Only by Order or Operation of Law — McCauley Clarified: The plaintiffs alleged that a road that traversed their property to the defendants' property, for which the defendants did not have an easement, was abandoned and filed an action to declare the road private. The defendants counterclaimed that the road was a public highway. The District Court determined that the road, though once a public highway, had been abandoned, and the court ruled in favor of the plaintiffs. On appeal, the Supreme Court reversed, clarifying McCauley v. Thompson-Nistler, 2000 MT 215, 301 Mont. 81, 10 P.3d 794, and holding that a public highway can only be abandoned by an order of county commissioners or a court, or by an operation of law. Soup Creek LLC v. Gibson, 2019 MT 58, 395 Mont. 105, 439 P.3d 369.

Ditch Easement — Trees and Shrubs Permissible — No Unreasonable Interference — Ditch Maintained by Owner of Land: The District Court did not err when it determined that the defendant hotel did not unreasonably interfere with the plaintiff easement holder's secondary ditch easement by planting and maintaining trees and shrubs along a ditch. The Supreme Court reasoned that the ditch had been sufficiently, if not excellently, maintained since 1999, when the defendant acquired the property. The plaintiff's sole purpose for accessing the defendant's property was to inspect, repair, and maintain his irrigation ditch. Nothing the defendant (or its predecessors) did in the easement area restricted or inhibited the plaintiff's right to access for inspection purposes. And although the plaintiff could no longer utilize his large farm equipment to maintain the ditch, adequate or better-than-adequate maintenance was regularly performed. Fox v. BHCC II, 2017 MT 218, 388 Mont. 443, 401 P.3d 705.

Duty to Clean Ditch Properly Imposed on Property Owner — Easement Holder's Argument to Have Trees and Shrubs Removed Not Valid: The District Court did not err by imposing a duty on the defendant property owner to clean and maintain a ditch when the plaintiff easement holder held a secondary ditch easement. The plaintiff argued on appeal that the District Court abused its discretion when it imposed the duty to maintain the ditch onto the defendant rather than ordering trees and shrubs to be removed. The Supreme Court disagreed and affirmed, reasoning that the District Court had fashioned a unique, workable, and equitable solution for both parties under the facts and circumstances. Consequently, the District Court's factual findings were not erroneous, its conclusions of law were correct, and it did not abuse its discretion in accepting the defendant's judicial admission and tender of its duty to clean and maintain the plaintiff's irrigation ditch. Fox v. BHCC II, 2017 MT 218, 388 Mont. 443, 401 P.3d 705.

Determination of Easement Based on Historical Use — Failure to Identify Plaintiffs' Access as Litigation Issue: In a family dispute regarding once commonly held land, the plaintiffs owned the southern half of the property and the defendants owned the northern half. Two roads went through the plaintiffs' land and gave access to the defendants' land and adjacent public land. The defendants eventually constructed a fence at the boundary between the two, and the plaintiffs eventually locked the gates at the southern border of their property, preventing access to the defendants' property. The plaintiffs filed a quiet title action seeking a determination of the location, width, and scope of the defendants' easements. The District Court entered findings determining the location, width, and scope of the defendants' express easement to be limited to one road, and it denied the defendants' claim for a utility easement. On appeal, the Supreme Court found that the District Court erred when it limited the defendants' access to one roadway because the historical record established use of two roadways at the time of the conveyance, that the defendants misconstrued a judicial admission relating to fencing of a new relocated easement, and that the District Court did not err by failing to determine the plaintiffs' easement over the defendants' land because the parties did not identify it as an issue to be litigated. Ganoung v. Stiles, 2017 MT 176, 388 Mont. 152, 398 P.3d 282.

Title Policy Ensured Right of Access, Not "Legal Access" — No Coverage Under Clear Language of Title Policy: The plaintiffs purchased title insurance for real property they acquired. The policy insured against loss or damage from "lack of a right of access to and from the land". Later, the plaintiff learned that although they had access to the property from permissive, adjacent landowners, they did not have what they considered "legal access" to the property. The plaintiffs filed suit against the title company, arguing that the policy required the title company to provide them legal access to the property, such as a recorded easement dedicated to their use. The title company argued that the plaintiffs had access to their property and that the policy did not provide for any certain kind of access. The District Court agreed and granted the title company summary judgment. On appeal, the Supreme Court affirmed, noting that the language of the policy was clear in insuring against loss from not having "a right of" access and that the plaintiffs clearly had a right of access based on easements filed earlier. James v. Chicago Title Ins. Co., 2014 MT 325, 377 Mont. 264, 339 P.3d 420.

Prescriptive Easement Not Extinguished by Landowner's Temporary Cooperation: The plaintiff filed an action to prevent the defendants, who are neighboring landowners, from crossing his land. The defendants sought a declaration that they had a prescriptive easement to access their ranch across the plaintiff's property. At trial, other adjacent landowners testified that the defendants had never requested permission to cross their land and had crossed the land for decades, and that no landowner had resisted until the plaintiff filed suit. The District Court ruled that the defendants had a prescriptive easement that had been perfected before the plaintiff had purchased his property given the neighboring landowners' testimony that the defendants had always crossed this land to access their ranch without asking for permission. The plaintiff appealed and argued that the District Court had erred. The Supreme Court affirmed and noted that the defendants' temporary cooperation with the plaintiff when he first acquired the property did not extinguish their prescriptive easement. Lyndes v. Green, 2014 MT 110, 374 Mont. 510, 325 P.3d 1225.

Use of Public Road Created by Prescriptive Use Extends to All Reasonably Foreseeable Uses: Once a public road is established by prescriptive use, the use of that road is not limited to the adverse usage through which the road was acquired, but rather extends to all reasonably foreseeable uses, including foot travel. Pub. Lands Access Ass'n, Inc. v. Madison County Bd. of Comm'rs, 2014 MT 10, 373 Mont. 277, 321 P.3d 38.

Width of Public Right-of-Way Established by Prescription — Portion of Right-of-Way Necessary to Maintain County Road for Public Use — Not Reserved to County: Plaintiff association sued the county because property owners had erected fences along the county road to the ends of a bridge, thereby preventing the public from using the right-of-way access to the river. The parties stipulated that the right-of-way for this portion of the road had been established by prescriptive use. The plaintiff argued that the public's right-of-way extended not only to the road, but to portions along the road necessary to maintain it. The District Court disagreed and ruled that only the county had an easement that exceeded the fences for the purpose of maintaining and repairing the road. The plaintiff appealed and the Supreme Court reversed, holding that the width of a public road right-of-way established by prescriptive easement includes the areas necessary to support and maintain the road and that those areas are not reserved for the county. The Supreme Court therefore remanded the matter to the District Court to determine the actual width of the right-of-way in accordance with its guidelines. Pub. Lands Access Ass'n, Inc. v. Madison County Bd. of Comm'rs, 2014 MT 10, 373 Mont. 277, 321 P.3d 38.

Accrual of Adverse Use Prohibited When Property Owned by Government: Because a private party cannot obtain a prescriptive easement against the federal government, a private party's adverse use of property did not begin to run until the federal government conveyed title to the property to a private entity. Burcalow Family, LLC v. Corral Bar, Inc., 2013 MT 345, 372 Mont. 498, 313 P.3d 182.

Broad Chain of Title Concept Adopted: Recognizing that there are two lines of authority — the broad approach and narrow approach — on the question of whether a servitude created by a common grantor in the deed to the benefited parcel is in the chain of title of the burdened parcel, the Supreme Court adopted the broad approach and concluded that a prospective purchaser is on constructive notice not only of conveyances to the prior owners of the parcel, but also of conveyances from the prior owners of the parcel during each of their respective periods of ownership. Earl v. Pavex Corp., 2013 MT 343, 372 Mont. 476, 313 P.3d 154.

Permission to Use Dock Granted by Prior Owner — Whether Permission Carries Over to Subsequent Owners to Be Evaluated on Case-by-Case Basis — No Prescriptive Easement: In urging the Supreme Court to find that they had established an easement by prescription to a dock owned by the plaintiff, the defendants urged the court to follow the rule outlined in Han Farms, Inc. v. Molitor, 2003 MT 153, 316 Mont. 249, 70 P.3d 1238, which declared that one owner's grant of permission does not continue by default to the next owner. After reviewing significant case law regarding the transferability of permission for use, the court declined to adopt the defendants' argument and overruled the proposition in Han Farms that permission can never carry over from one owner to another after the sale of the servient property. Rather, the court reiterated that based on a thorough reading of its permissive use cases, the court will always consider the nature of the initial permission and attendant circumstances to analyze whether permission exists. Pedersen v. Ziehl, 2013 MT 306, 372 Mont. 223, 311 P.3d 765.

Easement by Reservation — Creation by Reference — Location Description on Plat Sufficient to Establish Burden Imposed by Easement With Reasonable Certainty: The Supreme Court held that an easement by reservation was created when the deed conveying title referred to the plat on file with the County Clerk and Recorder. While the plat did not provide a metes-and-bounds description of the easement's location, the court determined that the plat identified the dominant and servient tenements, the intended use or necessity for the easement, and a description of the easement's location sufficient to establish with reasonable certainty the course of the easement across the property. Yorlum Properties, Ltd. v. Lincoln County, 2013 MT 298, 372 Mont. 159, 311 P.3d 748.

No Express Easement to Use Adjoining Property — Insufficient Description in Restrictive Covenants: Several homeowners on Big Sky Lake near Missoula alleged the existence of an express easement for unrestricted use of four roads or trails on property owned by the defendants. The homeowners relied primarily on restrictive covenants as the source of the easement, but the covenants granted only an easement for ingress and egress and use of a perimeter road around the lake. The District Court found no evidence that the homeowners had an easement for unobstructed use of roads on the defendants' property, and the Supreme Court affirmed. Thayer v. Hollinger, 2013 MT 52, 369 Mont. 181, 296 P.3d 1183.

Prescriptive Easement Determined by Use During Prescriptive Period: During easement litigation concerning Boadle Bridge, the original bridge burned down and was rebuilt by the defendant with privately owned materials. The Supreme Court found that there was a public prescriptive easement burdening the defendant's land that was not limited to the bridge's physical structure. In 2011, the defendant removed the bridge, asserting that it was his private property, and built a new bridge accessing a private road. The plaintiffs claimed that the defendant had destroyed the bridge in violation of the Supreme Court's decision. The District Court dismissed the case, ruling that the public's easement to a specific bridge included only the one that burned down, although the public retained the right to use any future bridge at the same site. The Supreme Court reversed, noting that although the defendant may own the bridge, a prescriptive easement is not determined by ownership of the property but by use during the prescriptive period. Therefore, the defendant could not remove the bridge or interfere in the public access to it. Pub. Land/Water Access Ass'n, Inc. v. Jones, 2013 MT 31, 368 Mont. 390, 300 P.3d 675.

Express Easement Allowed When Dominant Tenement Not Contiguous to Servient Tenement: An express easement may be appurtenant to noncontiguous property if both tenements are clearly defined and it was the parties' intent that the easement be appurtenant. Davis v. Hall, 2012 MT 125, 365 Mont. 216, 280 P.3d 261.

Implied Easement by Necessity — Negated by Eminent Domain Power: In the context of federal checkerboard land grants to railroads, the claimant of an implied easement by necessity traced common ownership of the dominant and servient parcels to the federal government, and the necessity for the easement arose when the parcels were severed from the federal government's common ownership, thus satisfying the unity of ownership requirement. However, the easement failed because the United States' power of eminent domain negated the "strict necessity" requirement, and the claimant failed to produce evidence regarding the government's intent to reserve an easement and its inability to condemn an easement. Yellowstone River, LLC v. Meriwether Land Fund I, LLC, 2011 MT 263, 362 Mont. 273, 264 P.3d 1065.

Unreasonable Interference With Ditch Easement: In a ditch easement dispute, the District Court allowed the defendant's culvert and rock bridge to remain in the plaintiff's irrigation ditch. Applying 70-17-112, under which an owner of the ditch easement has the right to enter on the servient tenement to maintain the ditch, the Supreme Court reversed, concluding that the defendant, by constructing permanent encroachments, had unreasonably interfered with the plaintiff's ditch easement. Musselshell Ranch Co. v. Seidel-Joukova, 2011 MT 217, 362 Mont. 1, 261 P.3d 570.

Servient Estate Not to Unilaterally Change Location of Right-of-Way — Changes in Easement Ordered Altered to Accommodate Historical Use: The plaintiffs had an easement over a road that subsequently was declared a public road. Developers later purchased a portion of the dominant estate and reconfigured the road to convert an "S" curve into two right angles. The changes to the road made it impossible for the plaintiffs to drive their oversized equipment on the road as they had historically. The District Court ordered the servient estate to increase the radii of the turns in the road to allow the plaintiffs to use the road for their oversized equipment without having to go off the roadway or cross lanes. Gibson v. Paramount Homes, LLC, 2011 MT 112, 360 Mont. 421, 253 P.3d 903.

Elements of Implied Easement by Necessity Established — Easement Properly Granted — Interference Claim Properly Dismissed: Plaintiffs sought an easement by necessity across defendants' property. The District Court held that an easement by necessity existed and defined the scope of the easement, and both parties appealed. The Supreme Court affirmed. There was sufficient clear and convincing evidence of both unity of ownership and strict necessity to establish an easement by necessity. Additionally, nothing in the history or condition of the property at the time of severance supported a finding that the extent of the implied easement by necessity across the servient estate should be unlimited, so plaintiffs were entitled to cross defendants' land to reach a public road. However, plaintiffs' claim that defendants interfered with the easement failed. The essential acts that gave rise to the easement by necessity arose in the 1930s, but plaintiffs' right to the easement was not established until 2007, so defendants could not have wrongfully interfered with the easement. Ashby v. Maechling, 2010 MT 80, 356 Mont. 68, 229 P.3d 1210. See also Albert G. Hoyem Trust v. Galt, 1998 MT 300, 292 Mont. 56, 968 P.2d 1135, Watson v. Dundas, 2006 MT 104, 332 Mont. 164, 136 P.3d 973, and Wolf v. Owens, 2007 MT 302, 340 Mont. 74, 172 P.3d 124.

No Improper Reliance on Extrinsic Evidence in Finding of Valid and Enforceable Express 60-Foot Easement for Subdivision: Defendant acquired certain property after an express easement across the property was created by the former owner. Defendant refused to allow the building of an access road across the property, contending that the easement agreement was invalid on several grounds. The District Court examined the agreement and concluded that the easement was valid and enforceable and granted summary judgment for plaintiffs. On appeal, defendant asserted that the District Court erroneously relied on facts outside the agreement, making summary judgment inappropriate, but the Supreme Court affirmed. For purposes of interpreting a writing granting an interest in real property, evidence of the surrounding circumstances, including the situation of the property and the context of the parties' agreement, may be shown so that the judge is placed in the position of those whose language the judge is to interpret. However, to comply with the statute of frauds and the recording system, the writing itself must ultimately stand on its own and meet the formal requirements for granting a property interest. In this case, the District Court was allowed to consider various facts not contained in the easement agreement for purposes of understanding the situation, but the court's analysis of the easement's validity apparently was limited to the face of the agreement, so the court did not erroneously rely on extrinsic facts. The easement agreement satisfied the formal requirements for expressly granting an easement and created a valid 60-foot emergency public access and utility easement that was enforceable against defendant. Additionally, the District Court properly concluded that because there was no dominant tenement, the easement was in gross and could be used by members of the public to travel between the subdivision and the public highway for emergency purposes and to provide utility services. There being no questions of material fact, summary judgment was proper. Broadwater Dev., LLC v. Nelson, 2009 MT 317, 352 M 401, 219 P3d 492 (2009), distinguishing Blazer v. Wall, 2008 MT 145, 343 M 173, 183 P3d 84 (2008). See also Kuhlman v. Rivera, 216 M 353, 701 P2d 982 (1985).

Sandstone Not Considered Mineral With Respect to Mineral Reservation in Lease — Summary Judgment Proper: A deed conveying property to Craig reserved to Hart the rights, leases, and royalties to minerals on the property. After the sale, Craig mined and sold sandstone from a quarry on the property. Based on the reservation, Hart sued for the money Craig collected from the sale of the sandstone. The District Court granted summary judgment to Craig, and on appeal the Supreme Court affirmed. Sandstone is not considered an exceptionally rare or valuable mineral simply because it can be sold commercially. Therefore, sandstone was not considered to be a mineral included in the general reservation of mineral rights. Hart v. Craig, 2009 MT 283, 352 M 209, 216 P3d 197 (2009). See also Farley v. Booth Bros. Land & Livestock Co., 270 M 1, 890 P2d 377 (1995).

No Reserved Easement to Off-Survey Property Absent Language in Deed Expressly Reserving Easement: Blazer asserted that an easement was reserved across Wall's property that allowed access to Blazer's off-survey property. The District Court agreed and ordered Wall to remove encroachments in the easement. On appeal, the Supreme Court disagreed. An express easement arises when a property owner conveys property that includes language in the conveyance reserving the right to use some part of the transferred land as a right-of-way or when the instrument of conveyance to a recorded plat or certificate of survey adequately describes an easement. Additionally, an easement by reservation may be established only when the dominant and servient estates are split from single ownership, and express depiction of an easement on a referenced plat or certificate of survey is not sufficient, in and of itself, to create an easement for the benefit of a stranger to the deed. In this case, there was no express language in the transaction documents reserving an easement to an adjoining parcel or to Blazer's off-survey property, so no easement for Blazer was created. The District Court was reversed. Blazer v. Wall, 2008 MT 145, 343 M 173, 183 P3d 84 (2008), following Bache v. Owens, 267 M 279, 883 P2d 817 (1994), Halverson v. Turner, 268 M 168, 885 P2d 1285 (1994), Ruana v. Grigonis, 275 M 441, 913 P2d 1247 (1996), and Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 M 52, 993 P2d 688 (2000). See also Davis v. Hall, 2012 MT 125, 365 Mont. 216, 280 P.3d 261, in which the Supreme Court distinguished and followed Blazer, concluding that if a referenced plat or certificate of survey is the only document describing a purported easement then the document must stand on its own, but if a referenced plat or certificate of survey is used to confirm or amplify another document's description of a purported easement, the documents should be read together. And see Mary Ellen Duke Trust v. Lee Lou, LLC, 2023 MT 177, 413 Mont. 356, 535 P.3d 1133.

No Express Federal Reservation of Public Road Pursuant to Land Patent — Easement by Reference Reversed: The District Court held that the federal government expressly reserved a public road across patented mining claims by referring in an 1896 federal land patent to a mineral survey that depicted a road labeled "ROAD". Citing Leo Sheep Co. v. U.S., 440 US 668 (1979), the Supreme Court disagreed. Plaintiff cited no authority for the proposition that a reference in a federal land patent to a mineral survey that depicts a road labeled "ROAD" qualified as an express reservation under federal law. Rather, the inference prompted by the presence of certain other express reservations in the patent and the absence of an express reservation for a particular right-of-way was that no right-of-way was reserved. The intent to create an easement must be clearly and unmistakably communicated on the referenced plat or certificate of survey, using labeling or other express language, and an easement may not be inferred or implied from an unlabeled or inadequately described swath of land or other depiction appearing on a certificate of survey. Additionally, the Supreme Court has recognized the creation of privately held easements only by reference and has never applied the doctrine to create a public road, and the court declined to do so in this case. Nothing in the field notes or in the patent evidenced an intent by the federal government to reserve a public road across a patented mining claim, and the District Court erred in finding that the road traversing the mining claim was a public road pursuant to an express easement by reservation created in the mining survey and referenced in the conveying documents of the mining claim. The District Court was reversed. Our Lady of the Rockies, Inc. v. Peterson, 2008 MT 110, 342 M 393, 181 P3d 631 (2008).

Deed Outside Chain of Title — No Easement Absent Notice That Property Servient to Access Stated in Deed: Nelson's deed for a subdivision lot stated that Nelson would have a roadway easement for access to another lot bordered by Flathead Lake. That lot was subsequently purchased by Barlow. Barlow's deed contained no reference to an easement or reference to Nelson's deed stating that Nelson had a roadway easement to access Barlow's lot. When Barlow began building a cabin on his lot, Nelson sued to enjoin construction, alleging that Nelson's deed entitled him to cross Barlow's lot to access Flathead Lake. The District Court granted Barlow's motion for judgment on the pleadings and dismissed Nelson's claim, so Nelson appealed. The Supreme Court first noted that the language in Nelson's deed was ambiguous and concluded that the District Court erred in holding otherwise. However, the District Court correctly noted that Barlow was not a party to Nelson's deed, and because no similar access provision existed in Barlow's deed, Barlow was not bound by Nelson's deed. Nelson's deed was outside Barlow's chain of title. Even though Nelson's deed was recorded several years prior to Barlow's purchase, that fact was insufficient to impose an easement on Barlow's lot. Barlow was not required to examine the chain of title to Nelson's land to discover an alleged easement across the Barlow property for the benefit of Nelson, and the purported grant of lake access in Nelson's deed did not put Barlow on notice that his property was servient to an easement. The District Court was affirmed. Nelson v. Barlow, 2008 MT 68, 342 M 93, 179 P3d 529 (2008), overruled in part in Earl v. Pavex Corp., 2013 MT 343, 372 Mont. 476, 313 P.3d 154. See also Rigney v. Swingley, 112 M 104, 113 P2d 344 (1941), and Goeres v. Lindey's, Inc., 190 M 172, 619 P2d 1194 (1980).

Failure to Establish Uninterrupted Possession to Qualify as Extinguished Easement — Summary Judgment Proper: A deed of restriction reserved easements on all existing roads within a subdivision for the scenic views and enjoyment of the property and for the reasonable general use of all subdivision property owners to access public lands. In 1984, defendants bought three subdivision tracts and promptly erected a locking gate across the road that intersected their property. Plaintiff subdivision association requested that defendants remove the gate because it was interfering with property owners' access to public lands. However, defendants refused and threatened legal action, so the association took no immediate action. The association eventually filed a complaint in 2000, accusing defendants of violating the deed of restriction by interfering with the easement. Defendants contended that the association had waived or abandoned any easement by not using the road for over 17 years. The District Court disagreed and granted summary judgment to the association. Defendants appealed on grounds that summary judgment was improper because a material fact existed as to whether the easement had been extinguished, but the Supreme Court affirmed. The association established the existence of a valid recorded easement that encumbered defendants' land, and defendants failed to show that their use of the road was continuous and uninterrupted for 5 years. In fact, the record was replete with admissions that association members continued to use the road, interrupting defendants' attempted adverse possession of the easement. Additionally, defendants testified that the gate was not locked all the time, that they lived outside the state part of the year, during which time they were unable to enforce their claim of right, and that the association had graded and maintained the road during the time in question. Thus, defendants' own testimony contradicted their claim of abandonment and adverse possession. The District Court did not err in finding that defendants' claims failed to establish a genuine issue of material fact that would preclude summary judgment. Meadow Lake Estates Homeowners Ass'n v. Shoemaker, 2008 MT 41, 341 M 345, 178 P3d 81 (2008).

No Easement by Necessity Absent Showing of Strict Necessity to Access Property: Plaintiff claimed an implied easement by necessity to a road that burdened two properties adjoining that of plaintiff. The District Court applied the criteria in Albert G. Hoyem Trust v. Galt, 1998 MT 300, 292 M 56, 968 P2d 1135 (1998), for establishing an easement by necessity: (1) unity of ownership; and (2) strict necessity at the time that the tracts are severed. The court held that plaintiff failed to establish unity of ownership and held that no easement by necessity existed. On appeal, plaintiff argued that there was unity of ownership based on original ownership of the tracts by the federal government in 1906 and that when the government granted odd-numbered sections of land to the railroad, the government reserved an implied easement over the odd-numbered sections in order to reach the even-numbered sections, citing Leo Sheep Co. v. U.S., 440 US 668 (1979). The Supreme Court questioned citation of Leo Sheep because that case explicitly held that the doctrine of implied easement by necessity did not apply in that case and that the federal government could not claim an easement by necessity. Nevertheless, even if it was agreed that unity of ownership existed at one time through federal ownership, plaintiff failed to satisfy the second prong of the Hoyem Trust test, in that plaintiff could not prove that strict necessity to access existed in 1906 because no one lived on the property when the tracts were severed, so there was no necessity to reach the property. The District Court was affirmed. Leisz v. Avista Corp., 2007 MT 347, 340 M 294, 174 P3d 481 (2007). The Hoyem Trust criteria for determining the existence of an implied easement by necessity were also applied in McKay v. Wilderness Dev., LLC, 2009 MT 410, 353 M 471, 221 P3d 1184 (2009).

Private Use of Access Road Not Unexplained — Remand for Findings on Whether Private Use Constituted Prescriptive Easement: The District Court found that private use of an access road was both periodic and unexplained, and the court declined to analyze that use any further. The Supreme Court disagreed that use of the road was unexplained. Two long-time residents testified that persons previously lived on property accessed by that road and that the road was maintained by the early residents and used by them to access the property. Because the use was explained, the question was whether that use satisfied the elements of a prescriptive easement, and the case was remanded for further findings and conclusions. Leisz v. Avista Corp., 2007 MT 347, 340 M 294, 174 P3d 481 (2007).

Sporadic, Infrequent Public Use of Road — Insufficient Evidence of Public Prescriptive Easement or Easement by Grant or Reservation: Citing Granite County v. Komberec, 245 M 252, 800 P2d 166 (1990), plaintiff contended that public use of an access road for logging, cattle grazing, hay harvesting, recreation, and search and rescue operations established a public prescriptive easement or an easement by grant or reservation. The Supreme Court noted that public use of the road was sporadic, infrequent, and of limited duration and thus the use did not meet the requirement in Granite County that the public followed a definite course continuously and uninterruptedly for the prescribed statutory period together with an assumption of control adverse to the owner. Plaintiff's claim of a public prescriptive easement was properly denied. Because no public easement existed, an easement by grant or reservation likewise did not exist. Leisz v. Avista Corp., 2007 MT 347, 340 M 294, 174 P3d 481 (2007). See also Lewis & Clark County v. Schroeder, 2014 MT 106, 374 Mont. 477, 323 P.3d 207, which held that there was no prescriptive easement when use of public funds to maintain a road was intermittent and equivocal.

On remand, the District Court determined that the prescriptive easement was abandoned, and Leisz appealed. The Supreme Court noted that abandonment must be proven with words or acts that indicate a clear intent to abandon and that mere nonuse does not establish abandonment. In this case, Leisz's predecessors took no actions demonstrating a manifestation not to resume beneficial use of the easement or an intent to relinquish possession of the easement, but rather they simply stopped using the easement in favor of a different access. Therefore, the District Court erred in finding abandonment, and that decision was reversed and judgment was entered for Leisz allowing Leisz a prescriptive easement. Leisz v. Avista Corp., 2010 MT 105, 356 Mont. 259, 232 P.3d 419.

Subdivision Lot Limited to Residential Use — Nonresidential Structure on Lot Without Accompanying Residence Violative of Covenant: When a restrictive covenant limits a subdivision lot's use to residential use, a nonresidential structure that is placed on the lot without an accompanying residential dwelling on the same lot violates the covenant, even if the structure is used in conjunction with a residential dwelling on an adjoining lot. Micklon v. Dudley, 2007 MT 265, 339 M 373, 170 P3d 960 (2007), following Hillcrest Homeowners Ass'n v. Wiley, 239 M 54, 778 P2d 421 (1989), and Tipton v. Bennett, 281 M 379, 934 P2d 203 (1997).

Easement Transferred With Transfer of Portion of Dominant Estate — Subdivision of Dominant Tenement Not Considered Increased Burden on Servient Tenement: The District Court found that the creation of a tract and the subsequent sale to Dabney constituted a transfer of a portion of the dominant estate and that the transfer conveyed all easements attached to the property to Dabney, so Dabney had a prescriptive easement to use a road across Leichtfuss's property to access the Dabney property. The court also concluded that Leichtfuss's parcels were not impermissibly burdened by Dabney's use of the road. On appeal, the Supreme Court affirmed. Although a life tenant or lessee generally cannot impose upon land a burden that passes to a remainderman or reversioner, the termination of a dominant estate held in less than fee simple does not automatically extinguish an appurtenant easement. Rather, it is the intent or expectations of the parties to the servitude that determine its duration. In this case, there was no evidence that the parties intended to abandon Dabney's parcel, so Dabney's use of the road was within the scope of the original easement on the parcel, and the easement was apportioned according to the division of the dominant tenement. In addition, Leichtfuss's contention that the apportionment increased the burden on the servient tenement also failed. "Subdivision and conveying away of portions of a dominant estate does not, in and of itself, mean that an additional burden is imposed upon the servient estate." Dabney's use of the parcel was consistent with the predecessor's historical use, and this was not a case in which the easement was suddenly being used to serve additional land or residences or in which the character of the easement's use was changed, so no increased burden to Leichtfuss's parcel was created. Leichtfuss v. Dabney, 2005 MT 271, 329 M 129, 122 P3d 1220 (2005), distinguishing Leffingwell Ranch, Inc. v. Cieri, 276 M 421, 916 P2d 751 (1996), and following Burleson v. Kinsey-Cartwright, 2000 MT 278, 302 M 141, 13 P3d 384 (2000).

Extent of Public Easement Not Limited to Contested Portion on Defendant's Property — Prescriptive Easement Properly Found as Matter of Law: A part of Boadle Road that crossed a portion of defendant's property had been chained and closed by defendant's predecessor in interest in 1999. Plaintiff land access association sought to have the road declared a public road and have defendant enjoined from prohibiting public access. The trial court found that Boadle Road was in existence since the early 1900s and that open public use without landowner permission continued unabated until the road was closed in 1999. Defendant contended that because the litigated portion of the road began and ended on his property, the road essentially went nowhere and thus it was pointless for the trial court to find a public prescriptive easement. The Supreme Court disagreed. Nothing supported defendant's contention that an easement cannot begin and end on the servient landowner's estate. The portion of the road on defendant's property was part of a much longer public road, and there was sufficient evidence to support the trial court's conclusion that the public was entitled to a prescriptive easement over the portion of the road in dispute. Pub. Lands Access Ass'n, Inc. v. Jones, 2004 MT 394, 325 M 236, 104 P3d 496 (2004). See also Han Farms, Inc. v. Molitor, 2003 MT 153, 316 M 249, 70 P3d 1238 (2003), and Pub. Land/Water Access Ass'n, Inc. v. Jones, 2013 MT 31, 368 Mont. 390, 300 P.3d 675.

Mere Denial of Public Nature of Road Insufficient to Raise Genuine Issue of Material Fact — Public Prescriptive Easement Affirmed: The District Court found that the elements of a prescriptive easement over a road on defendants' property were satisfied and granted summary judgment to plaintiff county. Defendants contended that disputed issues of fact existed regarding proof of a prescriptive easement, but the Supreme Court affirmed. The county proved that use of the road was open, notorious, exclusive, adverse, continuous, and uninterrupted for the statutorily required period. The only evidence in support of defendants' position was a conclusory hearsay statement claiming that the previous owners had indicated that the road was not public. Defendants' mere denial of the public nature of the road was insufficient to raise a genuine issue of material fact sufficient to withstand summary judgment. Powell County v. 5 Rockin' MS Angus Ranch, Inc., 2004 MT 337, 324 M 204, 102 P3d 1210 (2004), following Heller v. Gremaux, 2002 MT 199, 311 M 178, 53 P3d 1259 (2002).

Finding of Gap Between Easements Not Clearly Erroneous — Remediation and Injunctive Relief Proper: In attempting to exercise an easement to some trust property, defendants breached plaintiffs' fence line and plowed about 70 to 80 feet of new road across plaintiffs' property to connect a 1950 road on the trust property to defendants' newly relocated easement. Plaintiffs sued, contending that there was a mismatch between the terminus of the 1950 road and defendants' newly surveyed and relocated easement. Faced with conflicting testimony from two professional surveyors, the District Court Judge conducted an on-the-ground inspection of the property, concluding that in the process of relocating the original easement running along defendants' property line, defendants created a gap of 70 to 80 feet between the old road and the new road and breached the gap by crossing plaintiffs' property. Defendants appealed, but the Supreme Court found no clear error in the District Court's findings and affirmed. The District Court was at liberty to give the expert testimony whatever weight that the court considered to be justified. Substantial credible evidence supported the finding that a large gap existed and that defendants connected the roadways by plowing across plaintiffs' land without regard to plaintiffs' property rights. The Supreme Court also affirmed the District Court's grant of plaintiffs' request to enjoin defendants from using the connecting road, its order to defendants to reinstall plaintiffs' fence line and gates and to resurface and restore plaintiffs' property, and its holding of defendants in contempt for failing to obey the mandates of the preliminary injunction. Koeppen v. Bolich, 2003 MT 313, 318 M 240, 79 P3d 1100 (2003).

Damages for Wrongful Interference With Easement — Remand for Calculation of Applicable Expenses: Although there was no indication how the figure was arrived at, the District Court awarded plaintiff $75,000 in damages for defendant's wrongful interference with plaintiff's easement, and defendant appealed. The Supreme Court noted that plaintiff unnecessarily paid for private access across a neighboring ranch, for which defendant was not liable, and that plaintiff submitted claims for road plowing, maintenance, insurance, and spraying of noxious weeds even though plaintiff would have incurred some of those costs even if plaintiff had used the road across defendant's property. Thus, because there was no discussion of how the $75,000 figure was arrived at, and to the extent that the trial court awarded damages that plaintiff would have incurred no matter which access was used, the trial court erred, and the case was remanded for a determination of actual costs. Brimstone Min., Inc. v. Glaus, 2003 MT 236, 317 M 236, 77 P3d 175 (2003).

No Public Prescriptive Use of Mining Road Never Declared Public Road — Prescriptive Easement Established and Not Extinguished by Reverse Adverse Possession: Owners of a road used since 1936 for mining access claimed a public prescriptive use. The road was never formally declared a public road or used for the statutorily required period of time sufficient to establish a prescriptive easement. Thus, the existence of a public prescriptive easement depended on the exploratory use that took place when the mine was not in full operation, recreational use by the public, and county road maintenance. However, even taken together, this evidence did not rise to the level of public prescriptive use. The District Court did not err in finding that no public prescriptive easement existed over the road. However, while the evidence did not qualify as a public easement, it did qualify as a private easement in plaintiff's favor. Virtually unrestricted use of the road between 1936 and 1961 met the requirements of open, notorious, exclusive, adverse, continuous, uninterrupted use for the required statutory period. Further, defendant's act of locking a gate across the road and providing plaintiff a key and access with permission was not a distinct and positive assertion unequivocally hostile and adverse to plaintiff sufficient to extinguish plaintiff's easement by reverse adverse possession. Brimstone Min., Inc. v. Glaus, 2003 MT 236, 317 M 236, 77 P3d 175 (2003). See also Granite County v. Komberec, 245 M 252, 800 P2d 166 (1990).

Burden of Rebutting Claim of Prescriptive Easement by Showing Permissive Use: There was no dispute that plaintiff's use of a road was open, notorious, exclusive, continuous, and uninterrupted, but the parties did dispute whether use of the road was hostile. The District Court held that the use was hostile and granted plaintiff a prescriptive easement. On appeal, defendant contended that her predecessor in interest gave permission to plaintiff's predecessor in interest to use the road and cited Morrison v. Higbee, 204 M 515, 668 P2d 1025 (1983), for the proposition that if use of a road begins as a permissive use, it cannot ripen into a prescriptive right unless there is a distinct and positive assertion of a hostile right to the owner. Defendant pointed out that plaintiff did nothing to make a distinct and positive assertion of a right hostile to defendant. The Supreme Court noted that under Rettig v. Kallevig, 282 M 189, 936 P2d 807 (1997), permissive use is not transferable and distinguished Morrison because in that case, there was ample evidence that the use of the road was permissive. The court then cited Wareing v. Schreckendgust, 280 M 196, 930 P2d 37 (1996), for the rule that once a claimant has established the elements of a prescriptive right, a presumption of adverse use arises and the burden shifts to the owner affected by the claim to establish that the claimant's use was permissive. Thus, the burden was not on plaintiff to show that use of the road was hostile, but rather on defendant to show that the use was permissive. Defendant did not meet the burden, and the District Court's conclusion that a prescriptive easement existed across defendant's land was affirmed. Han Farms, Inc. v. Molitor, 2003 MT 153, 316 M 249, 70 P3d 1238 (2003), overruled, to the extent that Han Farms held that permissive use is never transferable, by Pedersen v. Ziehl, 2013 MT 306, 372 Mont. 223, 311 P.3d 765. See also Brown & Brown of MT, Inc. v. Raty, 2012 MT 264, 367 Mont. 67, 289 P.3d 156, and Brown & Brown of MT, Inc. v. Raty, 2013 MT 338, 372 Mont. 463, 313 P.3d 179.

Failure to Prove Unity of Ownership — No Implied Easement by Necessity: As a general rule, creation of an implied easement by necessity requires that the easement be granted over the grantor's land and never over the land of a third party or a stranger to the title. Here, the easement claimed by plaintiffs ran across property not owned by plaintiffs' grantor at the time of the grant, so plaintiffs were unable to prove unity of ownership necessary to establish an implied easement by necessity. Kullick v. Skyline Homeowners Ass'n, Inc., 2003 MT 137, 316 M 146, 69 P3d 225 (2003), following Graham v. Mack, 216 M 165, 699 P2d 590 (1984), and followed in Yellowstone River, LLC v. Meriwether Land Fund I, LLC, 2011 MT 263, 362 Mont. 273, 264 P.3d 1065.

Conflicting Evidence Regarding Prescriptive Easement for Ditch Maintenance — District Court Affirmed: Plaintiff alleged that defendant's access to plaintiff's property for ditch maintenance must be limited to the historic use of the ditch bank. The District Court was presented with conflicting evidence regarding how open defendant's use of plaintiff's property was and determined that plaintiff knew or should have known that defendant was accessing the ditch by various routes across plaintiff's property and that the access was not permissive. The evidence was sufficient to support the finding that defendant had a prescriptive easement, and that finding was not disturbed on appeal. Graveley Simmental Ranch Co. v. Quigley, 2003 MT 34, 314 M 226, 65 P3d 225 (2003).

No Establishment of Public Road by Common-Law Dedication When Use of Road Permissive: Two elements are required to establish a common-law dedication of a roadway: (1) an offer by the owner evidencing an intention to dedicate the roadway; and (2) an acceptance by the public. The intent of an offer to dedicate must be clear, satisfactory, and unequivocal, and evidence of mere permissive use does not prove an intention to dedicate. In this case, plaintiffs failed to clearly and unequivocally demonstrate defendants' intention to dedicate a private road to the public. A 1916 petition for the opening of a school and a 1948 petition to establish a road did not establish that the owners intended to dedicate the road to the public; rather, use of the road was shown to be permissive, so no common-law dedication was established. Heller v. Gremaux, 2002 MT 199, 311 M 178, 53 P3d 1259 (2002), following Descheemaeker v. Anderson, 131 M 322, 310 P2d 587 (1957), and Richter v. Rose, 1998 MT 165, 289 M 379, 962 P2d 583 (1998).

Use of Private Road Permissive by Neighborly Accommodation — Public Prescriptive Easement Not Established: Plaintiffs sought an easement of record from defendants regarding the rural road crossing plaintiffs' property, but defendants refused. Plaintiffs then sought a declaratory judgment that the road was a public road established by prescriptive use, asserting that the road was a public thoroughfare established by common-law dedication as evidenced by a 1916 petition for the opening of a school and a 1948 petition to establish a road. The District Court found that the 1916 and 1948 petitions did not establish an offer evidencing an intention to dedicate the road to the public and that use of the road was instead permissive through neighborly accommodation. Plaintiffs appealed, but the Supreme Court affirmed. All elements of a prescriptive easement must be proved by clear and convincing evidence because one who has legal title should not be forced to give up what is rightfully theirs without the opportunity to know that the title is in jeopardy and to fight for it. Once a claimant establishes the elements of a prescriptive right, a presumption of adverse use arises, and the burden shifts to the landowner to establish that the use was permissive. If permissive use is shown, no easement can be acquired because the theory of prescriptive easement is based on adverse use. Use of a neighbor's land based upon mere neighborly accommodation or courtesy is not adverse and cannot ripen into a prescriptive easement. Rather, in addition to use, generally some circumstance or act tending to indicate that the use was not merely permissive is required. The presence of gates or other obstructions, to be opened and closed by parties passing over the land, has always been considered strong evidence in support of a mere license to the public to pass over the designated way. The facts here showed that use of the road was permissive and at the pleasure of the landowners, so no public prescriptive easement existed. Heller v. Gremaux, 2002 MT 199, 311 M 178, 53 P3d 1259 (2002). See also Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525 (1993), Hitshew v. Butte/Silver Bow County, 1999 MT 26, 293 M 212, 974 P2d 650 (1999), and Pedersen v. Ziehl, 2013 MT 306, 372 Mont. 223, 311 P.3d 765.

Aerial Photographs Establishing Presence of Open and Visible Road on Property Before and After Purchase — Summary Judgment Regarding Easement Proper: Defendant purchased a lot in plaintiff's subdivision. Plaintiff's declaration of easements and rights-of-way granted and reserved easements across and in favor of all lots in the subdivision, but did not specify the location of any particular easement. Defendant blocked the road running across her property, and plaintiff sought monetary, injunctive, and declaratory relief. The District Court granted plaintiff a preliminary injunction prohibiting defendant from interfering with the road. Plaintiff then moved for partial summary judgment, arguing that plaintiff had an easement on the road by express reservation, by implication, and by prescription, supporting the motion with affidavits and aerial photographs taken 6 years before and 6 years after defendant purchased the property, indicating that the road was open and obvious. The District Court granted partial summary judgment, and defendant appealed. The Supreme Court affirmed. When an easement is reserved without designating a location and a road exists at the time of the reservation, then a court will treat the road as an easement that the parties anticipated and the parties are presumed to contract with reference to the condition of the property at the time of sale if the marks are open and visible. The aerial photographs established the absence of a genuine issue of material fact regarding the existence of the road in its present location prior to defendant's purchase of the property, and defendant denied but offered no proof that the road was not open and visible. The photographs were not susceptible to cross-examination because the credibility of the affiant who testified regarding the veracity of the photographs was not crucial to the decision of material fact. Plaintiff demonstrated the presence of the easement, and partial summary judgment on that issue was proper. Ponderosa Pines Ranch, Inc. v. Hevner, 2002 MT 184, 311 M 82, 53 P3d 381 (2002). See also Pioneer Min. Co. v. Bannack Gold Min. Co., 60 M 254, 198 P 748 (1921), and Godfrey v. Pilon, 165 M 439, 529 P2d 1372 (1974).

Potential Access Rights Merged With Deeds and Extinguished — Applicability of Contract Law Doctrine of Merger: Prior to Gehring's consent to sell 360 acres to APS Corporation (APS) in 1970, they entered an agreement that included a provision on access rights, whereby Gehring purported to grant future purchasers access to other land owned by Gehring for certain recreational purposes. After being told by the Gehring Ranch Corporation that they would not be allowed access to Gehring's land for recreation, the successors in interest to APS sought to enforce the agreement, alleging that they had been improperly excluded from the land and that the agreement created an easement over Gehring's land. The District Court granted summary judgment for the Gehring Ranch Corporation, noting that the agreement did not identify Gehring's other lands upon which an easement was purportedly created. The court also held that any agreement prior to execution of the deeds was merged with the deeds and that because the deeds transferring title did not provide for access, any access rights promised in the agreement were lost. The decision was appealed, and the Supreme Court affirmed. The clause in the agreement was part of a larger agreement to transfer property in the future, and Gehring did not intend to create an easement, but at most intended to provide for potential access privileges if certain conditions, such as creation of a property owners' association and adoption of rules governing the use of the recreational privileges, were met. The Supreme Court cited Urquhart v. Teller, 1998 MT 119, 288 M 497, 958 P2d 714 (1998), in applying the contract law doctrine of merger, holding that the deeds contained all the rights of the parties and that because no access privileges were mentioned in the deeds, any potential access rights referred to in the agreement merged with the deeds and were lost. Richman v. Gehring Ranch Corp., 2001 MT 293, 307 M 443, 37 P3d 732 (2001).

Reverse Adverse Possession — Public Prescriptive Easement Extinguished by Relocation of Road and Public Acquiescence With Locked Gates for Thirty Years: Dome Mountain Ranch's predecessor in interest relocated a road in 1965 and installed locked gates and no trespassing signs. Public access was limited to occasional, seasonal recreational use by permission or when the gates were unlocked, until Park County officially declared the road a county road in 1994. Dome Mountain Ranch claimed that the 5-year statutory period of reverse adverse possession concluded in 1970, so it was not required to show a clear intent by the county to abandon the road in proving its claim of reverse adverse possession. Title to a public road may not be obtained by adverse possession, and there must be a clear showing of intent to abandon a county road. Mere nonuse, even for extended periods of time, is generally insufficient in itself to indicate an intent to abandon. Likewise, mere nonuse or lack of maintenance by the county is not sufficient to indicate an intent to abandon, absent notice and a public hearing. To be continuous and uninterrupted, the use of a claimed right in a prescriptive easement must not be abandoned by the user or interrupted by an act of the landowner. Seasonal recreational use, use by neighbors visiting neighbors, and use by persons cutting Christmas trees and gathering firewood are generally not sufficient to establish use by the public over a definite course continuously and uninterruptedly. In this case, the Supreme Court agreed with Dome Mountain Ranch that reverse adverse possession applied. The relocation of the road, coupled with the public's acquiescence with locked gates for almost 30 years, extinguished the county's public prescriptive easement, if one ever existed. Dome Mtn. Ranch, LLC v. Park County, 2001 MT 289, 307 M 420, 37 P3d 710 (2001), following Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525 (1993), and McCauley v. Thompson-Nistler, 2000 MT 215, 301 M 81, 10 P3d 794 (2000).

Easement by Reservation — Showing of Intent to Create Easement in Favor of Stranger to Deed Required: The Loomises contended that an easement by reservation to their property was created by two clauses within an original contract for deed when the Kolbs sold some adjoining property to the Luraskis. The language in the contract for deed purported to reserve a right-of-way and easement over and across the west 30 feet of the Luraski property for the purpose of establishing a public road and an easement for utilities. The District Court concluded that the disputed easement was outside the Loomises' chain of title, making them strangers to the deed, because the express reservation was from the Kolbs to the Luraskis and the Loomises were not parties. The Supreme Court agreed. An easement by reservation in favor of a stranger to a deed can be created only by clearly showing the grantor's intent to do so. In this case, testimony and evidence established that the Kolbs intended to preserve the option for means of access to other property only in the event that property was purchased, but the optional property was never purchased and the road was never constructed. The Supreme Court also disagreed with the Loomises' contention that no one should be considered a stranger to the deed because the reservation was for a public road. No rights are granted to the public prior to a road's actual creation and dedication. The court found it unlikely that a prudent landowner would reserve an easement for the benefit of the public at large, and the burden was on the Loomises, as strangers to the deed, to show the Kolbs' intent to reserve an easement for the Loomises' benefit. The fact that the Kolbs subsequently amended the original certificate of survey to eliminate the disputed easement was further proof that no easement reservation was created for the Loomises. Subsequent acts of the parties that tend to show the construction that they themselves placed upon the writing are also important in determining intent if intent is not clearly expressed in the deed. No easement by reservation was created in favor of the Loomises as a matter of law, and the District Court did not err in so holding. Loomis v. Luraski, 2001 MT 223, 306 M 478, 36 P3d 862 (2001).

No Easement by Necessity Absent Showing of Lack of Practical Access to Public Road: The Loomises contended that evidence at trial was sufficient to support a finding of an easement by necessity over a disputed easement on the Luraskis' property. Easement by necessity arises only in very special circumstances—when an owner of land conveys a parcel that has no outlet to a highway except over the remaining lands of the grantor or over the lands of strangers. The District Court found that the Loomises failed to establish an easement by necessity because they had access to their property by means other than a disputed easement and because they failed to prove strict necessity. Strict necessity, together with unity of ownership, is one of two elements of an easement by necessity and is defined by a lack of practical access to a public road for ingress and egress. The Loomises' own expert testified that a road could be constructed at a cost of up to $12,000 on the Loomises' undisputed 60-foot legal easement, which ran to the property up a steep hill and could be connected to a public road. The Supreme Court affirmed. There was no evidence that the cost of constructing the road was disproportionate to the value of the land itself. Failure to prove strict necessity negated a conclusion that an easement by necessity existed. Loomis v. Luraski, 2001 MT 223, 306 M 478, 36 P3d 862 (2001), following Graham v. Mack, 216 M 165, 699 P2d 590 (1984).

Determination That Servient Estate Burdened by Expansion of Easement Based on Credible Evidence — Correct Case Law Properly Applied: Hardy contended that the District Court had insufficient evidence to define the scope of Hardy's easement and to find that Hardy burdened the servient estate by trying to improve an access road for subdivision purposes and that the court failed to apply the correct case law in making its determination. The Supreme Court disagreed on both issues. The District Court had substantial credible evidence upon which to find that Hardy changed the use of the access road to the detriment of the servient owners, who were burdened by Hardy's unreasonable and vexatious use of the easement to the extent that some equitable remedy was required to preserve their right of use and enjoyment and to maintain the status quo. Circumstances dictated that the District Court tailor a precise and restrictive remedy, and the court did so. Further, in arriving at its conclusion, the court properly applied the correct case law in looking beyond the plain language of the unrestricted easement to define the scope and breadth of the servitude. The District Court did not abuse its discretion in enjoining Hardy from any activity other than using the easement for temporary secondary access in the event that his primary access became impaired, based on the conclusion that Hardy was incapable of responsibly exercising his nonpossessory rights associated with repairing and maintaining the easement burdening plaintiffs' property. However, to avoid a potential issue for future dispute, the Supreme Court did remand for a clarification of the injunction for the limited purpose of determining responsibility for the maintenance and repair on the entire easement road. Guthrie v. Hardy, 2001 MT 122, 305 M 367, 28 P3d 467 (2001). See also Laden v. Atkeson, 112 M 302, 116 P2d 881 (1941), and Leffingwell Ranch, Inc. v. Cieri, 276 M 421, 916 P2d 751 (1996).

Public Highway Established Pursuant to 1895 Law — Mere Nonuse by County Not Considered Abandonment — Inapplicability of Prescriptive Easement and Reverse Adverse Possession: The District Court found that the Tucker Gulch Road was clearly defined and in use by the public for at least 27 years prior to enactment of sec. 2600, The Codes and Statutes of Montana (1895), which declared all highways and roads then used by the public as public highways. However, the court went on to hold that it was not a petitioned county road and that there was a prescriptive easement by the public over the road that had been lost through abandonment and by reverse adverse possession when a new road was relocated near the old one. The District Court properly found that Tucker Gulch Road was a public highway; however, mere nonuse or lack of maintenance by the county was insufficient to indicate a clear intent to abandon the road without notice and a public hearing. Moreover, the county's failure to respond to several quiet title actions in which the county was not served and the county's adoption of a resolution naming the road did not indicate an intent to abandon. Abandonment cannot be established by mere implication. The Supreme Court cited Baertsch v. Lewis & Clark County, 256 M 114, 845 P2d 106 (1992), for the general rule that title to a public road may not be obtained by adverse possession. The Supreme Court also cited Granite County v. Komberec, 245 M 252, 800 P2d 166 (1990), and affirmed the District Court's finding that there was not a public prescriptive easement along the relocated new road because most of the nonpermissive use of the new road was by occasional recreationists. The District Court's conclusion that creation of the easement was not specific and that the easements were designed for the access of the owners for activities associated with residential living was in error, however, absent evidence in the access agreement or survey establishing such a restriction. Thus, the grant of unrestricted access to landowners who had owned a mine adjoining the property in question was not in error. McCauley v. Thompson-Nistler, 2000 MT 215, 301 M 81, 10 P3d 794, 57 St. Rep. 855 (2000), distinguishing Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525 (1993), and followed in Lee v. Musselshell County, 2004 MT 64, 320 M 294, 87 P3d 423 (2004). The Supreme Court clarified its ruling in McCauley on abandonment of a public highway in Soup Creek, LLC v. Gibson, 2019 MT 58, 395 Mont. 105, 439 P.3d 369.

Bridle Path Easement — Express Easement by Reservation Versus Implied Easement — Extrinsic Evidence Regarding Parties' Intent Inadmissible: Purchasers in a subdivision had language in their deeds creating an express easement for a bridle path in the subdivision. The bridle path was never built, and over the years, the easement was obstructed by improvements on the lots of several subdivision residents. Eventually, the subdivision association attempted to extinguish the easement at a meeting of the board of directors. Some residents asked the District Court to establish the validity of the easement and to restrain obstruction of the easement, and their request was granted by partial summary judgment. On appeal, the Supreme Court noted the difference between an implied easement, which is a creature of equity dependent on the intent of the parties, and an express easement by reservation, which is a creature of the documents of conveyance and the record. An express easement by reservation arises when the purchaser's deed refers to the plat where the easement is clearly depicted and labeled. In this case, the intent of the parties to create a bridle path easement was manifested through the language in the deeds and the plat, so under 28-2-905, extrinsic evidence regarding the intent of the parties was inadmissible. Further, the subdivision association was given oversight of the easement, but not ownership of it, and so lacked authority to extinguish the easement. The lower court's finding that a valid bridle path easement existed was affirmed. Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 M 52, 993 P2d 688, 57 St. Rep. 65 (2000), following Missoula v. Mix, 123 M 365, 214 P2d 212 (1950), Bache v. Owens, 267 M 279, 883 P2d 817 (1994), Halverson v. Turner, 268 M 168, 885 P2d 1285 (1994), and Tungsten Holdings, Inc. v. Parker, 282 M 387, 938 P2d 641, 54 St. Rep. 399 (1997), and distinguishing White v. Landerdahl, 191 M 554, 625 P2d 1145, 38 St. Rep. 412 (1981).

Public Use for Statutory Period Coupled With Assumption of Adverse Control — Public Prescriptive Easement Established: An easement by prescription is created by operation of law through open, notorious, exclusive, adverse, continuous, and uninterrupted use for 5 years. Following the same criteria, applied to public prescriptive easements in Granite County v. Komberec, 245 M 252, 800 P2d 166, 47 St. Rep. 2061 (1990), the Supreme Court noted that to establish the existence of a public road by prescription, it must be shown that the public followed a definite course continuously and uninterruptedly for the prescribed statutory period, together with an assumption of control adverse to the owner. To be open and notorious, the use of a claimed right must give the landowner actual knowledge of the claimed right or be of such a character as to raise a presumption of notice. To be continuous and uninterrupted, the use of a claimed right may not be abandoned by the user or interrupted by an act of the landowner. To be adverse, the use or assumption of control of a claimed right must be exercised under a claim of right and not as a mere license revocable at the pleasure of the landowner. Regular maintenance of a roadway by the party asserting a prescriptive easement is evidence of adverse rather than permissive use. Because a public prescriptive easement is "public", the element of exclusivity is not required in establishing the existence of a public prescriptive easement. In the present case, the county presented sufficient evidence establishing the existence of a public prescriptive easement on German Gulch Road, including a history of open public use and county maintenance of the road, an absence of evidence that the public ever abandoned use of the road, and the fact that plaintiff never erected gates, barriers, or signs on the road to create the impression of permissive use or established permissive use through neighborly accommodation. Hitshew v. Butte/Silver Bow County, 1999 MT 26, 293 M 212, 974 P2d 650, 56 St. Rep. 111 (1999), distinguishing Leffingwell Ranch, Inc. v. Cieri, 276 M 421, 916 P2d 751, 53 St. Rep. 453 (1996). However, see Lyndes v. Green, 2014 MT 110, 374 Mont. 510, 325 P.3d 1225.

Establishment of Public Highway Under United States Revised Statutes Section 2477 — Use Alone Insufficient Under State Law — State Declaration of Existence of Public Highways Inapplicable: The Richters brought an action in District Court to condemn an easement across the land of a neighbor that surrounded their property on three sides, claiming that a public highway had been established, pursuant to United States Revised Statutes section 2477 (R.S. 2477), across public land before that land ultimately passed to their neighbor. The Supreme Court reviewed the purpose of R.S. 2477, as described in Butte v. Mikosowitz, 39 M 350, 102 P 593 (1909), and noted that it had earlier held in St. v. Nolan, 58 M 167, 191 P 150 (1920), that R.S. 2477, later codified as 43 U.S.C. 932, was only an offer by the United States to convey land but that state law determined how that offer was accepted and, in that case, held that at that time there were four ways in which a public highway could be established under Montana law. The Supreme Court then reviewed the history of the Montana statutes governing how the R.S. 2477 offer was accepted by the state and pointed out that in 1895, section 2603 of the Political Code of Montana was adopted providing that use alone was insufficient to establish a public road over private land, although section 2603 was amended in 1913 to delete the prohibition against creating a public highway by use alone. Therefore, between 1895 and 1913, a public road could be established by use only if public authorities with jurisdiction over the property on which the road was claimed took an act tantamount to a declaration that a particular road was a public road. Because the Richters presented no evidence that the County Commissioners with jurisdiction over the road that they claimed to exist upon their neighbor's property had taken any action to declare that road to be a public highway, the Supreme Court held that as a matter of law, the Richters' evidence of use alone was insufficient to establish a public right-of-way upon that land between 1903 and 1907. The Supreme Court also held that section 2600, Political Code of Montana, enacted in 1895, declaring that highways used by the public are public highways, did not create a public highway across what became their neighbor's property because that statute applied only to existing uses at the time of the statute's enactment and Richters' evidence did not demonstrate any use of the road until 1902. Richter v. Rose, 1998 MT 165, 289 M 379, 962 P2d 583, 55 St. Rep. 663 (1998). See also McCauley v. Thompson-Nistler, 2000 MT 215, 301 M 81, 10 P3d 794, 57 St. Rep. 855 (2000), and Watson v. Dundas, 2006 MT 104, 332 M 164, 136 P3d 973 (2006).

Evidence Insufficient to Prove Common-Law Dedication of Public Right-of-Way Across Private Property: The Richters brought an action in District Court to condemn an easement across the land of a neighbor that surrounded their property on three sides, claiming that a public highway had been established across what became their neighbor's land after the United States had sold the property to its first private owner. The Supreme Court noted that it had previously held in Kaufman v. Butte, 48 M 400, 138 P 770 (1914), that Montana law required that both an offer by the owner of the land evidencing the owner's intent to dedicate the land for a public right-of-way and an acceptance of that offer by the public had to be demonstrated to prove a common-law easement. Distinguishing McKey v. Hyde Park, 134 US 84 (1890), the Supreme Court held that because the Richters presented no evidence that the first private owner of the land took any action demonstrating an intent to dedicate a public right-of-way across her property, the Richters failed to prove the existence of that right-of-way. Richter v. Rose, 1998 MT 165, 289 M 379, 962 P2d 583, 55 St. Rep. 663 (1998).

Reservation of Easement Held Sufficient — Wild Rivers and Ruana Distinguished: The Andersons, as the buyers, entered into a buy-sell agreement with the Rankins, as the sellers, that stated that the Rankins were "keeping an easement 30' Wide" across the property sold to the Andersons. Later, the Andersons entered into a contract for deed with the Rankins that attached an Exhibit "A". Exhibit "A" stated that the property was purchased "[s]ubject however, to reservation of an easement of right of way with ingress and egress" by the Rankins and then described the easement. A notice of purchasers' interest was later signed by both parties and recorded with the county with the same Exhibit "A" attached. Still later, a warranty deed was filed that stated that the property acquired by the Andersons was subject to the easement reserved by the Rankins. At the same time, the Andersons recorded a homestead exemption that reserved the 30-foot easement for the Rankins. Subsequently, the Rankins sold property to the Reichles through a buy-sell agreement and warranty deed, both of which noted that the Reichles would be able to use the Anderson-Rankin 30-foot easement as a public road for access to the Reichles' property. After the Reichles notified the Andersons that the Reichles intended to fence off the easement and graze llamas, the Rankins notified the Reichles' attorney that the Reichles would not be allowed any further use of the easement. The Reichles brought a declaratory judgment action against the Andersons and the Rankins for enforcement of the right-of-way easement. The Supreme Court, distinguishing the "subject to" language at issue in Wild Rivers Adventures, Inc. v. Bd. of Trustees, 248 M 397, 812 P2d 344 (1991), and Ruana v. Grigonis, 275 M 441, 913 P2d 1247 (1996), held that the language of Exhibit "A" with its "reservation" of an easement was sufficient to reserve that easement when the Rankins' property was conveyed to the Andersons and that the Rankins could later convey that easement to the Reichles. Reichle v. Anderson, 284 M 384, 943 P2d 1324, 54 St. Rep. 930 (1997).

Restriction for "Residential Use" Defined — Conditional Satisfaction of Covenant Reversed — Estoppel Inapplicable to Second Plaintiff: Tipton agreed to sell property to the Bennetts and executed a warranty deed with a covenant that provided that the property "shall be used strictly for residential purposes and no business, trade or manufacture of any sort or nature shall be conducted thereon". The real estate agent informed Tipton that the Bennetts intended to build first a garage and then, later, a house on the property. The Bennetts built a building with a ground floor area of 3,200 square feet and with a height of 21 feet. Tipton and another neighbor, Wetherall, sued to enforce the restrictive covenant. The Bennetts argued that the building was used only for personal storage and that Tipton had been warned of the Bennetts' intent to construct the building and was therefore estopped from enforcing the covenant. The District Court held that the building violates the covenant unless the Bennetts constructed a dwelling on the property within 1 year. Citing Hillcrest Homeowners Ass'n v. Wiley, 239 M 54, 778 P2d 421 (1989), the Supreme Court held that "residential purposes" excluded the storage building and upheld the District Court on the issue of whether the building violated the covenant. However, the Supreme Court reversed the District Court as to the District Court's requirement that the Bennetts construct a dwelling on the property within 1 year, holding that the building was inconsistent with use for "residential purposes" with or without a house on the property. The Supreme Court noted that it would have arrived at the same conclusion whether or not the issue of estoppel was fully addressed because the second plaintiff, Wetherall, was not informed of the

Bennetts' plans to construct a garage and therefore could not be estopped from bringing the action. Tipton v. Bennett, 281 M 379, 934 P2d 203, 54 St. Rep. 229 (1997), followed in Micklon v. Dudley, 2007 MT 265, 339 M 373, 170 P3d 960 (2007).

Abandonment of State Highway — Statements by State Field Supervisor Contemporaneous With Removal of Asphalt Held Not Evidence of Official Act by State Evidencing Clear Intent to Abandon Easement — Asphalt Alone Not "Highway": DeVoe brought a declaratory judgment action against the state, claiming that the removal of asphalt from a curving intersection and statements by a supervisor of a crew removing the old roadway evidenced an intent by the state to abandon its easement granted in 1937. DeVoe argued that statements by James Williams, the state's field project manager in charge of removal of the asphalt from the section of highway on the state's easement claimed by DeVoe to have been abandoned, showed that the state intended to abandon the easement. The Supreme Court held that the statements by Williams, to the effect that the state might give up the easement, were evidence of an intent to abandon but did not constitute evidence of an official act by the state indicating a clear intent to abandon the 1937 easement. The Supreme Court also noted that a "highway" is defined as including the highway right-of-way and that, for this reason, removal of asphalt does not constitute removal of the highway. The Supreme Court held that the District Court properly granted summary judgment against DeVoe because the District Court properly found that the easement was still subject to highway-related uses. DeVoe v. St., 281 M 356, 935 P2d 256, 54 St. Rep. 207 (1997).

Summary Judgment Proper: In the first appeal of this case to the Supreme Court, the court held that the buy-sell agreement, warranty deed, contract for deed, and certificate of survey created a valid easement for the plaintiffs. On remand, the District Court granted the plaintiffs' motion for summary judgment. On a second appeal, the Supreme Court rejected the defendant's arguments based on specific performance, breach of contract, estoppel, fraud and deceit, and quiet title and held that the District Court did not err when it denied the defendant's motion for summary judgment and granted summary judgment in favor of the plaintiffs. Bache v. Owens, 280 M 106, 929 P2d 217, 53 St. Rep. 1320 (1996).

Road Not County Road by Prescription — Insufficient Evidence of Adverse Public Use and County Maintenance: Leffingwell Ranch and Peckenpaugh Ranches brought a declaratory judgment action against Elk Park Ranch to determine whether Miles Creek Road was a county road. The evidence at trial consisted of testimony that showed that Park County had plowed the road occasionally as a favor to local ranchers and had repaired a bridge, but had ceased plowing and maintenance in 1968. The evidence also showed that previous owners of the Elk Park Ranch had sought permission for use of Miles Creek Road from others who maintained gates across the road. Citing Descheemaeker v. Anderson, 131 M 322, 310 P2d 587 (1957), the Supreme Court affirmed the District Court, holding that there was insufficient adverse use by the public and insufficient exercise of control by the county for the county to gain a public easement by prescription. Leffingwell Ranch, Inc. v. Cieri, 276 M 421, 916 P2d 751, 53 St. Rep. 453 (1996), distinguished in Hitshew v. Butte/Silver Bow County, 1999 MT 26, 293 M 212, 974 P2d 650, 56 St. Rep. 111 (1999).

Easement by Necessity Found Across Condominium Property: Big Sky Camper Village, Inc., filed a declaration that submitted Tract I-A to the Unit Ownership Act and allowed Big Sky Camper Village, Inc., to expand the number of condominium units in its development within 10 years. Hidden Village, Inc. (HVI), the successor in interest of Big Sky Camper Village, sought to construct improvements on property adjacent to the Big Sky Hidden Village Condominium, but the owners' association, Big Sky Hidden Village Owners Association, brought an action to prevent development without its permission, claiming that the roads sought to be used by HVI were private property and could not be used without permission of the Association. Relying upon Graham v. Mack, 216 M 165, 699 P2d 590 (1984), and Smith v. Moran, 215 M 31, 693 P2d 1246 (1985), the Supreme Court found that HVI had satisfied the two prerequisites of necessity and unity of title for creation of an easement by implication in that the roads were necessary for it to develop the property and all of the lands were originally owned by HVI's predecessor. Big Sky Hidden Village Owners Ass'n, Inc. v. Hidden Village, Inc., 276 M 268, 915 P2d 845, 53 St. Rep. 379 (1996), followed in Albert G. Hoyem Trust v. Galt, 1998 MT 300, 292 M 56, 968 P2d 1135, 55 St. Rep. 1230 (1998).

No Easement Granted or Reserved When Easement Not Shown on Certificate of Survey or Other Document — "Subject to" Language Not Creating Easement: In 1977, Henslers conveyed property to Reely and Ashmore to the south of a section line, retaining property to the north of the section line. In the same year, Reely and Ashmore conveyed the property to Hidden Valley Ranches (HVR). Both 1977 conveyances included language noting that the conveyance was "subject to" an access easement, called North Hidden Valley Road, along an east/west section line. The conveyance to HVR also noted that it was "subject to" an easement shown in certificate of survey (COS) 1316, but the certificate showed no such easement. In 1978, HVR conveyed part of the property to Reely, noting that the sale was made "according to" an easement shown on COS 1503, which clearly showed a 60-foot-wide utility and access easement along the section boundary. None of these conveyances showed or described an easement in property north of the section line. In 1990, Henslers conveyed property to Ruana and Bielby north of the section line. Ruana and Bielby claimed an access easement, called Blue Sky Lane, extending at a right angle from North Hidden Valley Road to their property. Relying upon Wild River Adventures, Inc. v. Bd. of Trustees, 248 M 397, 812 P2d 344 (1991), Bache v. Owens, 267 M 279, 883 P2d 817 (1994), and Halverson v. Turner, 268 M 168, 885 P2d 1285 (1994), the Supreme Court held that the "subject to" language in the 1977 Hensler and Reely-Ashmore conveyances did not create an easement and that because no easement was shown in COS 1316, the 1977 Reely-Ashmore conveyance was ineffective to grant or reserve an easement by reference to a COS as well. For these reasons, the Supreme Court held that the 1990 Hensler conveyance to Ruana and Bielby was ineffective to grant an easement along North Hidden Valley Road. Likewise, no easement was granted or reserved to Ruana and Bielby for the purposes of Blue Sky Lane because no document in their chain of title showed or described such a grant or reservation. Ruana v. Grigonis, 275 M 441, 913 P2d 1247, 53 St. Rep. 216 (1996), followed in Blazer v. Wall, 2008 MT 145, 343 M 173, 183 P3d 84 (2008).

Easement by Grant Upheld on Basis of Stipulation and Circumstantial Evidence: Tanners and others purchased property on Flathead Lake. Tanners and the others obtained access to their property by driving on roads located on Daly's property to the north. When Daly erected a fence across the roads and blocked access to their property, Tanners and the others brought suit, alleging that they had purchased with their properties an easement by grant for the use of the roads. The Supreme Court held that inasmuch as Daly had stipulated to the admissibility of the chain of title documents without foundation testimony and had not objected to introduction of the exhibits at trial, Daly could not now refute the authenticity of the deeds of Tanners' predecessors by arguing that the deeds bore no signatures or notary seal. The Supreme Court also noted that Daly testified that she knew of the roads at the time that she purchased her property and could therefore not claim to be a bona fide purchaser without notice. The Supreme Court also held that even though there was no direct evidence that the present roads were the ones referred to in the 1932 deed, there was circumstantial evidence in the form of testimony from two elderly witnesses that the same roads existed in the mid-1930s and were well traveled at that time, and Daly's attorney had admitted in correspondence that road A existed in 1932. Tanner v. Dream Island, Inc., 275 M 414, 913 P2d 641, 53 St. Rep. 208 (1996).

Scoria Not Mineral With Respect to Mineral Reservation in Lease — Payments for Surface Damage From Removing Scoria Pass With Land: Farley argued that under a lease to Booth reserving mineral rights, Farley was entitled to receive the payments from Western Energy Company to compensate for surface damages incurred in removing scoria from the land. The Supreme Court held that scoria was used in road building, but it was not of a rare and exceptional quality that would make it a mineral with respect to the mineral reservation clause in a lease. Farley also argued that the payments for surface damage in removing the scoria were royalty payments and as such personal property that did not pass to Booth when Booth purchased the surface rights to the property. The Supreme Court held that regardless of whether a royalty interest is personal or real property was of no significance because the royalty was appurtenant to the land and passed to Booth upon purchase of the surface. Farley v. Booth Bros. Land & Livestock Co., 270 M 1, 890 P2d 377, 52 St. Rep. 46 (1995).

Presumption of Adverse Use Established Through Preliminary Requirements for Prescriptive Right: After a claimant has established the preliminary requirements for a prescriptive right, a presumption of adverse use arises. The burden then shifts to the owner of the land on which the prescriptive easement is claimed to establish permissive use or license. If an owner establishes that the use is permissive, no easement can be acquired. In the present case, no genuine issue of material fact existed with regard to defendant's open, notorious, continuous, uninterrupted, and exclusive use of a road access for the statutory period; thus, the presumption of adverse use was applicable. Plaintiff failed to raise material facts regarding whether the use was permissive, including questions of permission or license, control of access by use of a gate, and neighborly accommodation. Defendant was therefore entitled to summary judgment based on adverse use as a matter of law. Lemont Land Corp. v. Rogers, 269 M 180, 887 P2d 724, 51 St. Rep. 1459 (1994), distinguishing Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M

279, 856 P2d 525 (1993). See also Brown & Brown of MT, Inc. v. Raty, 2012 MT 264, 367 Mont. 67, 289 P.3d 156, Brown & Brown of MT, Inc. v. Raty, 2013 MT 338, 372 Mont. 463, 313 P.3d 179, Lyndes v. Green, 2014 MT 110, 374 Mont. 510, 325 P.3d 1225, and Cremer Rodeo Land & Livestock Co. v. McMullen, 2023 MT 117, 412 Mont. 471, 531 P.3d 566.

Conveyance Referencing Certificate of Survey Creates Express Easement Running With Land: Dahlia Halverson recorded a certificate of survey (COS) showing a 30-foot easement for a road upon her property in favor of adjoining property. Later, she conveyed the property subject to the easement by quitclaim deed to Shirley Turner and included a land description and a reference to the previously recorded COS. Her successor in interest claimed that the Turner property was subject to the easement originally created in the COS. Relying upon Benson v. Pyfer, 240 M 175, 783 P2d 923 (1989), and Bache v. Owens, 267 M 279, 883 P2d 817, 51 St. Rep. 1001 (1994), the Supreme Court held that the reference in the quitclaim deed to the previously filed COS that noted the creation of the easement was sufficient to create in the Turner property an express easement running with the land that was not personal to Dahlia Halverson and was therefore available to her successor in interest. Halverson v. Turner, 268 M 168, 885 P2d 1285, 51 St. Rep. 1233 (1994), followed in Ruana v. Grigonis, 275 M 441, 913 P2d 1247, 53 St. Rep. 216 (1996), and Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 M 52, 993 P2d 688, 57 St. Rep. 65 (2000). See also Bache v. Owens, 280 M 106, 929 P2d 217, 53 St. Rep. 1320 (1996), and Yorlum Properties, Ltd. v. Lincoln County, 2013 MT 298, 372 Mont. 159, 311 P.3d 748.

Prescriptive Easement Not Established by Unexplained Use: The lower court awarded the plaintiff a prescriptive easement based upon the unexplained use of the road by the plaintiff and the plaintiff's predecessors. The Supreme Court recognized that the lower court had based its decision on dicta found in certain earlier decisions but ruled that a prescriptive easement may be established only by proving open, notorious, exclusive, adverse, continuous, and uninterrupted use. Warnack v. Coneen Family Trust, 266 M 203, 879 P2d 715, 51 St. Rep. 739 (1994), overruling in part Scott v. Weinheimer, 140 M 554, 374 P2d 91 (1962), and followed in Leisz v. Avista Corp., 2007 MT 347, 340 M 294, 174 P3d 481 (2007).

Former Curative Statute Inapplicable When Road Not Laid Out by Public or Dedicated or Abandoned to Public: Former 32-103, R.C.M. (repealed 1965 but in effect when a private road was established) read: "All highways, roads, lanes, streets, alleys, courts, places and bridges laid out or erected by the public or now traveled or used by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such by the partition of real property, are public highways." The District Court inappropriately applied this curative statute in declaring that the road was converted from a public easement into a county road because the road was never laid out or erected by the public or dedicated or abandoned to the public or made such by partition, nor was there ever a public prescriptive easement established through public use. Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525, 50 St. Rep. 794 (1993).

Abandonment of Water Right by Nonuse Distinguished From Abandonment of Easement or Ditch Right: After hearing, the Water Court determined that three water rights held by appellants Pitsch had been abandoned because of nonuse over approximately 40 years. The Supreme Court held that the Water Court did not err in holding that the case was not governed by E.E. Eggebrecht, Inc. v. Waters, 217 M 291, 704 P2d 422 (1985), and that there was no conflict between Eggebrecht and 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215 (1983). Eggebrecht concerns the abandonment of easements by grant, more analogous to a ditch right by grant than a water right, while 79 Ranch concerns abandonment of a water right. There is no reason why Montana law on abandonment of those interests should be identical. In re Adjudication of Musselshell River Rights, 255 M 43, 840 P2d 577, 49 St. Rep. 866 (1992).

No Implied Warranty of Habitability or Use Found: The plaintiffs, a condominium owners' association and its individual members, sued Big Sky of Montana Realty, Inc., the successor in interest of Big Sky of Montana, Inc., for breach of implied warranties in failing to originally construct and later repair construction defects in fireplaces in the Deer Lodge Condominiums at Big Sky, Montana, in accordance with applicable fire and building codes. The plaintiffs based their claim of implied warranty on case law that found an implied warranty of habitability and on cases that held that subdivision plats create an implied covenant between developers and subsequent purchasers to use space in the manner designated in the plat. The District Court granted the defendants' motion for summary judgment, dismissing Big Sky of Montana Realty, Inc. The Supreme Court held that the District Court correctly found that no implied warranties existed. Ass'n of Unit Owners of Deer Lodge Condominium v. Big Sky of Mont., Inc., 245 M 64, 798 P2d 1018, 47 St. Rep. 1814 (1990).

Railway Deed — Fee Simple Title, Not Right-of-Way Easement: Defendants obtained a deed to abandoned property from the railway company when it filed for bankruptcy. Adjoining landowners now claim that the railroad held the land as an easement for railroad purposes and that the abandonment of the lands resulted in a reversion to them. However, the granting and habendum clauses of the deeds by which the railroad claimed title clearly showed the intent that the railroad was to receive title in fee simple. The deeds were general form warranty deeds of the type used in the unrestricted transfer of real property in this state. Maberry v. Gueths, 238 M 304, 777 P2d 1285, 46 St. Rep. 1287 (1989).

Equitable Easement — No Basis for Finding: The plaintiff purchased lakefront property with knowledge that the defendants' summer cabin encroached on the plaintiff's land. The plaintiff sued to quiet title and have the defendants' cabin removed. The District Court granted summary judgment for the defendants and found that the defendants had an equitable easement to keep the building on the land. On appeal, the Supreme Court found that no formerly recognized common equitable theories for the creation of easements support the District Court's finding and that the development of a new doctrine of "relative hardship" is inappropriate on a motion for summary judgment. The Supreme Court reversed and remanded for trial. Penland v. Derby, 220 M 257, 714 P2d 158, 43 St. Rep. 342 (1986).

Use of Plats to Induce Purchasers: In order to sell lots, a subdivider prepared and recorded subdivision plat maps that designated common areas and roadways. The purchase and sale contracts did not state who would construct roads or common areas. The issue of whether purchasers of lots have any legally enforceable right to have roads constructed depends not on their designation in the plats but on the subdivider's use of the plats in inducing purchasers. The instruments in question do not comprise a promise, express or implied, to construct roads. The purchasers did acquire an easement for the designated use. The case was remanded to determine factual issues relating to the use of the plats in inducing purchasers. Magers v. Shining Mtns., 219 M 366, 711 P2d 1375, 43 St. Rep. 16 (1986).

Intent — Necessary to Abandon Easement: Defendant had a reservoir right-of-way under 43 U.S.C. §§ 946 through 949. The reservoir site was used as a reservoir from 1910 until 1938, when the dam creating the reservoir washed out. Defendant rebuilt the dam in 1976, and the resulting reservoir flooded portions of plaintiff's field in times of heavy runoff. Plaintiff brought a quiet title action. The District Court found that the reservoir right-of-way had been abandoned. The Supreme Court found that the reservoir right-of-way was properly characterized as an easement. The rule in Montana is that in order to constitute an abandonment, an intent to abandon is necessary. The court held that mere nonuse of an easement by grant, no matter how long, does not constitute an abandonment. The question of whether 38 years of nonuse constituted forfeiture of the right-of-way could only be raised by the grantor, the United States. The District Court was reversed. Eggebrecht, Inc. v. Waters, 217 M 291, 704 P2d 422, 42 St. Rep. 1205 (1985).

Creation of Easement: An easement may be created by grant, reservation, exception, or covenant, by implication or by prescription. Kuhlman v. Rivera, 216 M 353, 701 P2d 982, 42 St. Rep. 863 (1985), followed in Ducham v. Tuma, 265 M 436, 877 P2d 1002, 51 St. Rep. 595 (1994).

Easement Distinguished From License: Appellant's written grant to respondents of a right-of-way across appellant's land was an easement and not a license because she did not reserve to herself the right to terminate the grant while respondents resided on the property. Kuhlman v. Rivera, 216 M 353, 701 P2d 982, 42 St. Rep. 863 (1985).

Prescriptive Easement — Use to Be Adverse: The District Court found that a prescriptive easement existed across defendants' land. The evidence presented established that several of the defendants' neighbors used the road across defendants' land but also testified that defendants had consented to the use. Evidence was also presented that there were gates across the road posted with "No Trespassing" signs. This kind of use is not adverse and does not create a public prescriptive easement. Madison County v. Elford, 203 M 293, 661 P2d 1266, 40 St. Rep. 457 (1983).

Custom and Gates — Prescriptive Easement Defeated: Plaintiff attempted to establish western access to his land by means of a prescriptive easement. The District Court found use of the route permissive, thereby defeating a prescriptive easement. Evidence was introduced to show it was customary in homesteading days to allow the neighbors access across another's land. Permission was automatic if the individual closed the gates and respected the property. Several gates were established and maintained across the access. The evidence of local custom coupled with the existence of gates clearly supported the trial court's conclusion that use of the western access was always permissive. Rathbun v. Robson, 203 M 319, 661 P2d 850, 40 St. Rep. 475 (1983), followed in Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525, 50 St. Rep. 794 (1993), Greenwalt Family Trust v. Kehler, 267 M 508, 885 P2d 421, 51 St. Rep. 1130 (1994), and Rettig v. Kallevig, 282 M 189, 936 P2d 807, 54 St. Rep. 307 (1997). Rathbun and Pub. Lands Access Ass'n, Inc., were followed in Swandal Ranch Co. v. Hunt, 276 M 229, 915 P2d 840, 53 St. Rep. 361 (1996). Pub. Lands Access Ass'n, Inc. and Rettig were followed in Hitshew v. Butte/Silver Bow County, 1999 MT 26, 293 M 212, 974 P2d 650, 56 St. Rep. 111 (1999).

Finding of Way of Necessity Properly Denied: Jenkins sold a parcel of land to the defendant's predecessor in interest. The land was surrounded by other property, including state and railroad lands, and there was no access to it. The plaintiffs subsequently purchased property immediately behind the defendant's land. The District Court did not err in finding that no way of necessity in favor of the plaintiffs existed across the defendants' land. In order for a way of necessity to exist, the way must: (1) have existed prior to or at the time of the severance of the sold land; and (2) run over land, granted or reserved by the same grantor, over which there was access to a public road. In this case a third party, the state of Montana, owns land over which the way is alleged to run and, additionally, there was no access to or from a public road at the time of the conveyance. The prerequisites for a way of necessity did not exist. Schmid v. McDowell, 199 M 233, 649 P2d 431, 39 St. Rep. 1313 (1982), followed in Rathbun v. Robson, 203 M 319, 661 P2d 850, 40 St. Rep. 475 (1983), Peters v. Johnson, 203 M 120, 661 P2d 24, 40 St. Rep. 336 (1983), Big Sky Hidden Village Owners Ass'n, Inc. v. Hidden Village, Inc., 276 M 268, 915 P2d 845, 53 St. Rep. 379 (1996), and Frame v. Huber, 2010 MT 71, 355 Mont. 515, 231 P.3d 589.

Recognition of Implied Negative Easements Under Limited Circumstances Only: Appellant appealed from a permanent injunction restraining it from making commercial use of its property. A number of land transactions in the title chain preceded appellant's purchase of its parcel. The issue on appeal was whether or not the parcel was subject to a restriction against commercial use set forth in the 1948 deed. Because of the way various transactions in the chain of title were handled, any restriction on appellant's land would have to be an implied one. The reviewing court stated that equitable principles control the application of implied restrictions on land use. Additionally, recognition of any implied negative easements as to a particular lot was to be considered with extreme caution since such an action results in depriving a person of the use of his property by imposing a servitude through mere implication. An implied restriction on land use should be enforced only as an equitable servitude against a transferee who takes with knowledge of its terms and under circumstances that would make enforcement of the restriction equitable. In this case, there was no evidence that the appellant or its predecessor was ever informed in a deed, contract, or brochure or by representations of the seller that the lots were subject to a restriction against commercial use. No evidence was presented that the restriction was ever placed on the original subdivision. The reviewing court refused to find an implied use restriction and lifted the injunction. Goeres v. Lindey's, Inc., 190 M 172, 619 P2d 1194, 37 St. Rep. 1846 (1980), followed in Flaig v. Gramm, 1999 MT 181, 295 M 297, 983 P2d 396, 56 St. Rep. 710 (1999), and Pennington v. Flaherty, 2013 MT 160, 370 Mont. 388, 303 P.3d 274.

Establishment of Prescriptive Easement by the Public — Road Across Private Land: Plaintiffs owned land through which a road ran. The public used that road in a continuous and uninterrupted way for over 25 years without objection by the plaintiffs. Plaintiffs sought unsuccessfully to close the road to public use. The plaintiffs' assertion of error in this case concerned only the last element for establishing a prescriptive easement, the exercise of control adverse to the owner. Adverse control is presumed when all other elements have been proved. The undisputed facts supported rather than rebutted this presumption. For example, most members of the public never asked for permission to use the road, and the county graded and maintained the road and laid gravel on the road without the plaintiffs' permission. McClurg v. Flathead County Comm'rs, 188 M 20, 610 P2d 1153 (1980), distinguished in Leffingwell Ranch, Inc. v. Cieri, 276 M 421, 916 P2d 751, 53 St. Rep. 453 (1996), and followed in Hitshew v. Butte/Silver Bow County, 1999 MT 26, 293 M 212, 974 P2d 650, 56 St. Rep. 111 (1999).

Elements Required to Prove Prescriptive Easement: To establish a prescriptive easement, the owner of the purported dominant tenement must establish open, notorious, exclusive, adverse, continuous, and unmolested use of the servient tenement for the full statutory period of 5 years required to acquire title by adverse possession. Garrett v. Jackson 183 M 505, 600 P2d 1177 (1979), followed in Stamm v. Kehrer, 222 M 167, 720 P2d 1194, 43 St. Rep. 1143 (1986).

Part Law Review Articles

New Prescriptive Easement Law: The Montana Supreme Court Expands Public Access to Private Land in Public Access Ass'n v. Board of County Commissioners of Madison County, Inabnit, 77 Mont. L. Rev. 185 (2016).

Blazer v. Wall: The Restriction of the Easement by Reservation Doctrine, Warhank, 71 Mont. L. Rev. 183 (2010).

Running With the Land in Montana, Natelson, 51 Mont. L. Rev. 17 (1990).

Housing in Montana: Not For Adults Only, Even, 47 Mont. L. Rev. 139 (1986).

Attorneys' Guide to Montana Conservation Easements, Knight & Dye, 42 Mont. L. Rev. 21 (1981).

Montana Land Use Law—Conservation Easements, Goetz, 38 Mont. L. Rev. 161 (1977).

Real Property: Reciprocal Negative Easement Implied From Contract, Deed, and General Building Plan, Gordon, 27 Mont. L. Rev. 91 (1965).

Real Property—Easements—Implied Grants and Reservations of Ways of Necessity Abolished, Willey, 19 Mont. L. Rev. 73 (1957).

Touch and Concern, the Restatement (Third) of Property: Servitudes, and a Proposal, 122 Harv. L. Rev. 938 (2009).

70-17-101. Servitudes attached to land.

Compiler's Comments

1993 Amendment: Chapter 111 inserted (20) allowing an easement for a firearms shooting range safety zone.

1983 Amendment: Inserted (19) relating to the right to receive sunlight or wind for energy generation.

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Certificate of Survey and Deed Together Established Tract as Servient Estate for Depicted Easement — District Court Did Not Improperly Use Extrinsic Evidence. Mary Ellen Duke Trust v. Lee Lou, LLC, 2023 MT 177, 413 Mont. 356, 535 P.3d 1133, following Blazer v. Wall, 2008 MT 145, 343 Mont. 173, 183 P.3d 84.

Easement by Reservation — Creation by Reference — Location Description on Plat Sufficient to Establish Burden Imposed by Easement With Reasonable Certainty: The Supreme Court held that an easement by reservation was created when the deed conveying title referred to the plat on file with the County Clerk and Recorder. While the plat did not provide a metes-and-bounds description of the easement's location, the court determined that the plat identified the dominant and servient tenements, the intended use or necessity for the easement, and a description of the easement's location sufficient to establish with reasonable certainty the course of the easement across the property. Yorlum Properties, Ltd. v. Lincoln County, 2013 MT 298, 372 Mont. 159, 311 P.3d 748.

No Express Easement to Use Adjoining Property — Insufficient Description in Restrictive Covenants: Several homeowners on Big Sky Lake near Missoula alleged the existence of an express easement for unrestricted use of four roads or trails on property owned by the defendants. The homeowners relied primarily on restrictive covenants as the source of the easement, but the covenants granted only an easement for ingress and egress and use of a perimeter road around the lake. The District Court found no evidence that the homeowners had an easement for unobstructed use of roads on the defendants' property, and the Supreme Court affirmed. Thayer v. Hollinger, 2013 MT 52, 369 Mont. 181, 296 P.3d 1183.

Express Easement Allowed When Dominant Tenement Not Contiguous to Servient Tenement: An express easement may be appurtenant to noncontiguous property if both tenements are clearly defined and it was the parties' intent that the easement be appurtenant. Davis v. Hall, 2012 MT 125, 365 Mont. 216, 280 P.3d 261.

Implied Easement by Necessity — Negated by Eminent Domain Power: In the context of federal checkerboard land grants to railroads, the claimant of an implied easement by necessity traced common ownership of the dominant and servient parcels to the federal government, and the necessity for the easement arose when the parcels were severed from the federal government's common ownership, thus satisfying the unity of ownership requirement. However, the easement failed because the United States' power of eminent domain negated the "strict necessity" requirement, and the claimant failed to produce evidence regarding the government's intent to reserve an easement and its inability to condemn an easement. Yellowstone River, LLC v. Meriwether Land Fund I, LLC, 2011 MT 263, 362 Mont. 273, 264 P.3d 1065.

No Improper Reliance on Extrinsic Evidence in Finding of Valid and Enforceable Express 60-Foot Easement for Subdivision: Defendant acquired certain property after an express easement across the property was created by the former owner. Defendant refused to allow the building of an access road across the property, contending that the easement agreement was invalid on several grounds. The District Court examined the agreement and concluded that the easement was valid and enforceable and granted summary judgment for plaintiffs. On appeal, defendant asserted that the District Court erroneously relied on facts outside the agreement, making summary judgment inappropriate, but the Supreme Court affirmed. For purposes of interpreting a writing granting an interest in real property, evidence of the surrounding circumstances, including the situation of the property and the context of the parties' agreement, may be shown so that the judge is placed in the position of those whose language the judge is to interpret. However, to comply with the statute of frauds and the recording system, the writing itself must ultimately stand on its own and meet the formal requirements for granting a property interest. In this case, the District Court was allowed to consider various facts not contained in the easement agreement for purposes of understanding the situation, but the court's analysis of the easement's validity apparently was limited to the face of the agreement, so the court did not erroneously rely on extrinsic facts. The easement agreement satisfied the formal requirements for expressly granting an easement and created a valid 60-foot emergency public access and utility easement that was enforceable against defendant. Additionally, the District Court properly concluded that because there was no dominant tenement, the easement was in gross and could be used by members of the public to travel between the subdivision and the public highway for emergency purposes and to provide utility services. There being no questions of material fact, summary judgment was proper. Broadwater Dev., LLC v. Nelson, 2009 MT 317, 352 M 401, 219 P3d 492 (2009), distinguishing Blazer v. Wall, 2008 MT 145, 343 M 173, 183 P3d 84 (2008). See also Kuhlman v. Rivera, 216 M 353, 701 P2d 982 (1985).

Finding of Gap Between Easements Not Clearly Erroneous — Remediation and Injunctive Relief Proper: In attempting to exercise an easement to some trust property, defendants breached plaintiffs' fence line and plowed about 70 to 80 feet of new road across plaintiffs' property to connect a 1950 road on the trust property to defendants' newly relocated easement. Plaintiffs sued, contending that there was a mismatch between the terminus of the 1950 road and defendants' newly surveyed and relocated easement. Faced with conflicting testimony from two professional surveyors, the District Court Judge conducted an on-the-ground inspection of the property, concluding that in the process of relocating the original easement running along defendants' property line, defendants created a gap of 70 to 80 feet between the old road and the new road and breached the gap by crossing plaintiffs' property. Defendants appealed, but the Supreme Court found no clear error in the District Court's findings and affirmed. The District Court was at liberty to give the expert testimony whatever weight that the court considered to be justified. Substantial credible evidence supported the finding that a large gap existed and that defendants connected the roadways by plowing across plaintiffs' land without regard to plaintiffs' property rights. The Supreme Court also affirmed the District Court's grant of plaintiffs' request to enjoin defendants from using the connecting road, its order to defendants to reinstall plaintiffs' fence line and gates and to resurface and restore plaintiffs' property, and its holding of defendants in contempt for failing to obey the mandates of the preliminary injunction. Koeppen v. Bolich, 2003 MT 313, 318 M 240, 79 P3d 1100 (2003).

Easement by Reservation — Showing of Intent to Create Easement in Favor of Stranger to Deed Required: The Loomises contended that an easement by reservation to their property was created by two clauses within an original contract for deed when the Kolbs sold some adjoining property to the Luraskis. The language in the contract for deed purported to reserve a right-of-way and easement over and across the west 30 feet of the Luraski property for the purpose of establishing a public road and an easement for utilities. The District Court concluded that the disputed easement was outside the Loomises' chain of title, making them strangers to the deed, because the express reservation was from the Kolbs to the Luraskis and the Loomises were not parties. The Supreme Court agreed. An easement by reservation in favor of a stranger to a deed can be created only by clearly showing the grantor's intent to do so. In this case, testimony and evidence established that the Kolbs intended to preserve the option for means of access to other property only in the event that property was purchased, but the optional property was never purchased and the road was never constructed. The Supreme Court also disagreed with the Loomises' contention that no one should be considered a stranger to the deed because the reservation was for a public road. No rights are granted to the public prior to a road's actual creation and dedication. The court found it unlikely that a prudent landowner would reserve an easement for the benefit of the public at large, and the burden was on the Loomises, as strangers to the deed, to show the Kolbs' intent to reserve an easement for the Loomises' benefit. The fact that the Kolbs subsequently amended the original certificate of survey to eliminate the disputed easement was further proof that no easement reservation was created for the Loomises. Subsequent acts of the parties that tend to show the construction that they themselves placed upon the writing are also important in determining intent if intent is not clearly expressed in the deed. No easement by reservation was created in favor of the Loomises as a matter of law, and the District Court did not err in so holding. Loomis v. Luraski, 2001 MT 223, 306 M 478, 36 P3d 862 (2001).

No Easement by Necessity Absent Showing of Lack of Practical Access to Public Road: The Loomises contended that evidence at trial was sufficient to support a finding of an easement by necessity over a disputed easement on the Luraskis' property. Easement by necessity arises only in very special circumstances—when an owner of land conveys a parcel that has no outlet to a highway except over the remaining lands of the grantor or over the lands of strangers. The District Court found that the Loomises failed to establish an easement by necessity because they had access to their property by means other than a disputed easement and because they failed to prove strict necessity. Strict necessity, together with unity of ownership, is one of two elements of an easement by necessity and is defined by a lack of practical access to a public road for ingress and egress. The Loomises' own expert testified that a road could be constructed at a cost of up to $12,000 on the Loomises' undisputed 60-foot legal easement, which ran to the property up a steep hill and could be connected to a public road. The Supreme Court affirmed. There was no evidence that the cost of constructing the road was disproportionate to the value of the land itself. Failure to prove strict necessity negated a conclusion that an easement by necessity existed. Loomis v. Luraski, 2001 MT 223, 306 M 478, 36 P3d 862 (2001), following Graham v. Mack, 216 M 165, 699 P2d 590 (1984).

Determination That Servient Estate Burdened by Expansion of Easement Based on Credible Evidence — Correct Case Law Properly Applied: Hardy contended that the District Court had insufficient evidence to define the scope of Hardy's easement and to find that Hardy burdened the servient estate by trying to improve an access road for subdivision purposes and that the court failed to apply the correct case law in making its determination. The Supreme Court disagreed on both issues. The District Court had substantial credible evidence upon which to find that Hardy changed the use of the access road to the detriment of the servient owners, who were burdened by Hardy's unreasonable and vexatious use of the easement to the extent that some equitable remedy was required to preserve their right of use and enjoyment and to maintain the status quo. Circumstances dictated that the District Court tailor a precise and restrictive remedy, and the court did so. Further, in arriving at its conclusion, the court properly applied the correct case law in looking beyond the plain language of the unrestricted easement to define the scope and breadth of the servitude. The District Court did not abuse its discretion in enjoining Hardy from any activity other than using the easement for temporary secondary access in the event that his primary access became impaired, based on the conclusion that Hardy was incapable of responsibly exercising his nonpossessory rights associated with repairing and maintaining the easement burdening plaintiffs' property. However, to avoid a potential issue for future dispute, the Supreme Court did remand for a clarification of the injunction for the limited purpose of determining responsibility for the maintenance and repair on the entire easement road. Guthrie v. Hardy, 2001 MT 122, 305 M 367, 28 P3d 467 (2001). See also Laden v. Atkeson, 112 M 302, 116 P2d 881 (1941), and Leffingwell Ranch, Inc. v. Cieri, 276 M 421, 916 P2d 751 (1996).

Obstruction of Easement Properly Enjoined: Burleson filed an action to enjoin defendant from refusing access to an easement across defendant's property, and the District Court granted summary judgment to Burleson, permanently enjoining defendant from obstructing the easement. Defendant appealed, making various overlapping arguments attacking the creation of the easement, contending that the easement did not pass to subsequent purchasers, that the easement was somehow extinguished, and that defendant was not provided notice of the easement. The Supreme Court addressed each argument, noting that an easement is a nonpossessory interest in land creating a right of one person to use the land of another for a specific purpose or a servitude imposed as a burden upon the land and that an easement cannot be created, granted, or transferred except by operation of law, by an instrument in writing, or by prescription. In this case, an easement by reservation was created by the original documents and attached to the property when the dominant tenement was partitioned or subdivided. Summer access roads were clearly defined rights-of-way constituting easements that were attached to the remaining parcels in the subdivision and passed to subsequent purchasers, such as Burleson. Defendant's argument regarding lack of notice failed because each purchaser of land in the subdivision was notified of the easement through specific language in the contracts, deeds, and title insurance and defendant had actual notice of the easement when inspecting the property prior to purchase. The documents were sufficiently clear to indicate that the summer access roads, despite their designation, were intended to be available to subdivision owners for full-time access to their property. Defendant also presented no evidence to satisfy the necessary elements of extinguishment or abandonment. The owner of the servitude and the servient tenement were not the same person; there was no unity of ownership; the servient tenement was not destroyed; there was no evidence that the owner of the servitude performed or assented to an act that was incompatible with the nature of the easement; and the necessary elements of extinguishment through adverse possession were neither alleged nor satisfied. On the basis of the record, the District Court was affirmed. Burleson v. Kinsey-Cartwright, 2000 MT 278, 302 M 141, 13 P3d 384, 57 St. Rep. 1162 (2000), distinguished in Roland v. Davis, 2013 MT 148, 370 Mont. 327, 302 P.3d 91.

Bridle Path Easement — Express Easement by Reservation Versus Implied Easement — Extrinsic Evidence Regarding Parties' Intent Inadmissible: Purchasers in a subdivision had language in their deeds creating an express easement for a bridle path in the subdivision. The bridle path was never built, and over the years, the easement was obstructed by improvements on the lots of several subdivision residents. Eventually, the subdivision association attempted to extinguish the easement at a meeting of the board of directors. Some residents asked the District Court to establish the validity of the easement and to restrain obstruction of the easement, and their request was granted by partial summary judgment. On appeal, the Supreme Court noted the difference between an implied easement, which is a creature of equity dependent on the intent of the parties, and an express easement by reservation, which is a creature of the documents of conveyance and the record. An express easement by reservation arises when the purchaser's deed refers to the plat where the easement is clearly depicted and labeled. In this case, the intent of the parties to create a bridle path easement was manifested through the language in the deeds and the plat, so under 28-2-905, extrinsic evidence regarding the intent of the parties was inadmissible. Further, the subdivision association was given oversight of the easement, but not ownership of it, and so lacked authority to extinguish the easement. The lower court's finding that a valid bridle path easement existed was affirmed. Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 M 52, 993 P2d 688, 57 St. Rep. 65 (2000), following Missoula v. Mix, 123 M 365, 214 P2d 212 (1950), Bache v. Owens, 267 M 279, 883 P2d 817 (1994), Halverson v. Turner, 268 M 168, 885 P2d 1285 (1994), and Tungsten Holdings, Inc. v. Parker, 282 M 387, 938 P2d 641, 54 St. Rep. 399 (1997), and distinguishing White v. Landerdahl, 191 M 554, 625 P2d 1145, 38 St. Rep. 412 (1981).

Easement by Reservation — Written Documents — All Easements Considered Conveyed: An easement by reservation must arise from the written documents of conveyance. Deeds that reference plats are considered to convey all easements that are established by the recording of the plat. Tungsten Holdings, Inc. v. Parker, 282 M 387, 938 P2d 641, 54 St. Rep. 399 (1997), following Ruana v. Grigonis, 275 M 441, 913 P2d 1247 (1996), and followed in Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 M 52, 993 P2d 688, 57 St. Rep. 65 (2000). See also Yorlum Properties, Ltd. v. Lincoln County, 2013 MT 298, 372 Mont. 159, 311 P.3d 748.

Easement of Necessity — Strict Definition: Necessity must be strictly defined by the lack of means of ingress and egress. When at the time of severing unity of title of two parcels of land there was access across open prairie to the remainder, then no easement of necessity ever existed with respect to the road access through the severed parcel. Wagner v. Olenik, 234 M 135, 761 P2d 822, 45 St. Rep. 1790 (1988). See also Kelly v. Burlington N. RR Co., 279 M 238, 927 P2d 4, 53 St. Rep. 1132 (1996), in which an easement was granted on the basis that easement of necessity existed at the time that unity of ownership was severed.

Limited Commercial Use Restriction on Parking Lot: The Supreme Court determined that there was a commercial use restriction on a Bridger Bowl ski area parking lot. Appellants argued that the restriction acted to prohibit use of the parking lot by customers who bought beer and wine on other Bridger Bowl lands. The court noted that the primary purpose of the parking lot was to provide parking for skiers using the ski hill, that the land was conveyed to respondents for that purpose, and that the parking lot was not being used primarily by commercial business patrons. The court refused to construe the fact that skiers using the lot might incidentally buy beer or wine in ski area chalets as violative of the commercial use restriction on the parking lot. Haggerty v. Gallatin County, 221 M 109, 717 P2d 550, 43 St. Rep. 674 (1986).

Merger of Prior Agreement Into Deed — No Presumption of Surrender of Covenants: Appellants contended that since there was no express language in deeds recorded in 1972 that the parties intended to merge the restrictive provisions of a 1971 agreement into the deeds, the commercial use restrictions in the 1971 agreement still applied, regardless of being left out of the deeds. The Supreme Court, recalling its decision in Story v. Montforton, 112 M 24, 113 P2d 507 (1941), noted that "whether or not there has been a merger depends on the intention of the parties". The court applied this principle in Thisted v. Country Club Tower Corp., 146 M 87, 405 P2d 432 (1965), quoting Reid v. Sykes, 27 Ohio St. 285: ". . . evidence of that intention may exist in or out of the deed. There is no presumption that a party, in giving or accepting a deed, intends to give up the covenants of which the deed is not a performance or satisfaction." In the present case, the court found strong evidence that the deeds contained all of the restrictions on the lands that were intended by the parties and that the contract had merged in the deeds. Haggerty v. Gallatin County, 221 M 109, 717 P2d 550, 43 St. Rep. 674 (1986).

Creation of Easement: An easement may be created by grant, reservation, exception, or covenant, by implication or by prescription. Kuhlman v. Rivera, 216 M 353, 701 P2d 982, 42 St. Rep. 863 (1985), followed in Ducham v. Tuma, 265 M 436, 877 P2d 1002, 51 St. Rep. 595 (1994).

Easement Distinguished From License: Appellant's written grant to respondents of a right-of-way across appellant's land was an easement and not a license because she did not reserve to herself the right to terminate the grant while respondents resided on the property. Kuhlman v. Rivera, 216 M 353, 701 P2d 982, 42 St. Rep. 863 (1985).

Distinction Between Servitudes and Easements: While a servitude may by definition be an easement, not all servitudes are easements since not all servitudes are attached to the land as appurtenances. Burlingame v. Marjerrison, 204 M 464, 665 P2d 1136, 40 St. Rep. 1005 (1983).

No Interest Acquired in Property by Possessory Use Without Payment of Taxes: In 1978, Burlingames acquired a parcel of land adjoining Marjerrisons' land. A survey of Burlingames' property indicated that Marjerrisons' fence enclosed 5 acres of Burlingames' property. Since 1935, Marjerrisons had used the 5-acre parcel, along with their property, for cattle grazing, agriculture, and timber harvesting. Burlingames filed an action to quiet title. The District Court ruled that Burlingames possessed title to the 5-acre parcel but that Marjerrisons had acquired prescriptive easements for grazing, agricultural, and timber harvesting purposes. On appeal, the Supreme Court reversed, stating that since an easement is a nonpossessory interest and Marjerrisons had complete possession of the parcel for the statutory period, the only interest they could have acquired was full title. Treating Marjerrisons' claim as one for adverse possession, the court then ruled that although their use was open, notorious, exclusive, adverse, continuous, and uninterrupted for a 5-year period, they had not paid property taxes on the disputed parcel as required by 70-19-411, and thus have acquired no interest in the property. Burlingame v. Marjerrison, 204 M 464, 665 P2d 1136, 40 St. Rep. 1005 (1983).

Implied Easements — When Found — Effect of Contract: The plaintiffs sold a parcel of land to the defendants after a series of negotiations. No easement was specified through that parcel to the plaintiffs' adjoining parcel, and no other access existed to that second parcel. The Supreme Court found no implied easement, noting that the trial court would have been rewriting the contract had it found an implied easement. The trial court cited eight offers and counteroffers regarding an easement in this land sale and noted that there was a final decision between the parties that there would be no easement across the defendants' land. A court may not create as a matter of law an implied easement when the facts indicate the parties did not intend that an easement be created. Implied easements rest upon the intent of the parties gathered from the evidence. The record contained insufficient evidence to support an implied easement but contained substantial evidence to support the trial court's findings, conclusions, and judgment. White v. Landerdahl, 191 M 554, 625 P2d 1145, 38 St. Rep. 412 (1981), distinguished in Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 M 52, 993 P2d 688, 57 St. Rep. 65 (2000), with regard to the applicability of an implied easement, which is a creature of equity dependent on the intent of the parties, versus an expressed easement by reservation, which is a creature of the documents of conveyance and the record.

Roadway — An Interest in Real Property: The District Court did not err in granting the remedy of specific performance under 27-1-411 for breach of an agreement to establish a roadway in a specified route because the right to a roadway granted in a written instrument is an interest in real property under 70-17-101, and money damages under 27-1-419 are presumed to be an inadequate remedy for breach of an agreement to transfer real property. Silva v. McGuinness, 189 M 252, 615 P2d 879 (1980).

Purported Conveyance of Easement — Waiver: When a buy-sell agreement indicated that the transfer of property included an easement to use a swimming pool located on an adjacent lot and appellant was made aware of a possible defect in the easement prior to the closing of the transaction, the appellant waived any defect in title when he subsequently closed the transaction and was precluded from recovering from the former owner and the real estate broker on a contract or fraud theory. Van Ettinger v. Pappin, 180 M 1, 588 P2d 988 (1978).

Suit Over Alleged Defect in Easement — Indispensable Parties: When appellants sued the party from whom they had purchased land and his real estate broker on the grounds of breach of contract and fraud for an alleged defect in an easement allowing appellants the use of a swimming pool located on adjacent land, appellants should have first litigated the existence of the easement and joined the owners of the purported servient estate, who were indispensable parties. Van Ettinger v. Pappin, 180 M 1, 588 P2d 988 (1978).

Public Easement: A general clause in a deed stating that the grant is subject to easement for roads and ditches as now established and located upon or across premises does not reserve an easement to the general public. Wilson v. Chestnut, 164 M 484, 525 P2d 24 (1974).

Secondary Easements: Landowners who acquired an easement by prescription for maintenance of waterline and diversion system on adjoining property had right, under doctrine of secondary easement, to fence the diversion works to protect it from livestock and pollution. O'Connor v. Brodie, 153 M 129, 454 P2d 920 (1969).

Ditch Right-of-Way:

In an action for a ditch easement, where defendant showed no actual right to the easement, the District Court erred in granting it merely because in doing so the damage done to plaintiff's property would be less than that done to the property of the defendant should the easement be denied. Colarchik v. Watkins, 144 M 17, 393 P2d 786 (1964).

A ditch right is an easement under subsection (11) of this section. Hughes v. King, 142 M 227, 383 P2d 816 (1963).

A right-of-way and the right to a ditch, canal, or other structure in which water is conveyed for irrigation or other lawful purposes are easements over the land occupied by the ditch, canal, etc. An "easement" is an appurtenance to land and constitutes an interest in real property. Mannix v. Powell County, 60 M 510, 199 P 914 (1921).

Restrictive Covenant in Deed — Easement Created: Restrictive covenant forbidding sale of liquor on premises conveyed created a negative easement under this section, appurtenant to other lands of grantor as the dominant tenement. This easement was not destroyed by tax sale and issuance of tax deed conveying the servient tenement, and the grantor could enforce the easement by obtaining an injunction against sale of liquor on the servient premises. NW. Improvement Co. v. Lowry, 104 M 289, 66 P2d 792, 110 ALR 605 (1937).

Timber Right-of-Way: An easement for a right-of-way for cutting and hauling timber is realty. R. M. Cobban Realty Co. v. Donlan, 51 M 58, 149 P 484 (1915).

Appurtenance as Easement: An appurtenance to land is in any and every case an easement. Smith v. Denniff, 24 M 20, 60 P 398 (1900), distinguished in Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985).

PRESCRIPTIVE EASEMENT

Prescriptive Easement Not Extinguished by Landowner's Temporary Cooperation: The plaintiff filed an action to prevent the defendants, who are neighboring landowners, from crossing his land. The defendants sought a declaration that they had a prescriptive easement to access their ranch across the plaintiff's property. At trial, other adjacent landowners testified that the defendants had never requested permission to cross their land and had crossed the land for decades, and that no landowner had resisted until the plaintiff filed suit. The District Court ruled that the defendants had a prescriptive easement that had been perfected before the plaintiff had purchased his property given the neighboring landowners' testimony that the defendants had always crossed this land to access their ranch without asking for permission. The plaintiff appealed and argued that the District Court had erred. The Supreme Court affirmed and noted that the defendants' temporary cooperation with the plaintiff when he first acquired the property did not extinguish their prescriptive easement. Lyndes v. Green, 2014 MT 110, 374 Mont. 510, 325 P.3d 1225.

Use of Public Road Created by Prescriptive Use Extends to All Reasonably Foreseeable Uses: Once a public road is established by prescriptive use, the use of that road is not limited to the adverse usage through which the road was acquired, but rather extends to all reasonably foreseeable uses, including foot travel. Pub. Lands Access Ass'n, Inc. v. Madison County Bd. of Comm'rs, 2014 MT 10, 373 Mont. 277, 321 P.3d 38.

Width of Public Right-of-Way Established by Prescription — Portion of Right-of-Way Necessary to Maintain County Road for Public Use — Not Reserved to County: Plaintiff association sued the county because property owners had erected fences along the county road to the ends of a bridge, thereby preventing the public from using the right-of-way access to the river. The parties stipulated that the right-of-way for this portion of the road had been established by prescriptive use. The plaintiff argued that the public's right-of-way extended not only to the road, but to portions along the road necessary to maintain it. The District Court disagreed and ruled that only the county had an easement that exceeded the fences for the purpose of maintaining and repairing the road. The plaintiff appealed and the Supreme Court reversed, holding that the width of a public road right-of-way established by prescriptive easement includes the areas necessary to support and maintain the road and that those areas are not reserved for the county. The Supreme Court therefore remanded the matter to the District Court to determine the actual width of the right-of-way in accordance with its guidelines. Pub. Lands Access Ass'n, Inc. v. Madison County Bd. of Comm'rs, 2014 MT 10, 373 Mont. 277, 321 P.3d 38.

Permission to Use Dock Granted by Prior Owner — Whether Permission Carries Over to Subsequent Owners to Be Evaluated on Case-by-Case Basis — No Prescriptive Easement: In urging the Supreme Court to find that they had established an easement by prescription to a dock owned by the plaintiff, the defendants urged the court to follow the rule outlined in Han Farms, Inc. v. Molitor, 2003 MT 153, 316 Mont. 249, 70 P.3d 1238, which declared that one owner's grant of permission does not continue by default to the next owner. After reviewing significant case law regarding the transferability of permission for use, the court declined to adopt the defendants' argument and overruled the proposition in Han Farms that permission can never carry over from one owner to another after the sale of the servient property. Rather, the court reiterated that based on a thorough reading of its permissive use cases, the court will always consider the nature of the initial permission and attendant circumstances to analyze whether permission exists. Pedersen v. Ziehl, 2013 MT 306, 372 Mont. 223, 311 P.3d 765.

Mere Denial of Public Nature of Road Insufficient to Raise Genuine Issue of Material Fact — Public Prescriptive Easement Affirmed: The District Court found that the elements of a prescriptive easement over a road on defendants' property were satisfied and granted summary judgment to plaintiff county. Defendants contended that disputed issues of fact existed regarding proof of a prescriptive easement, but the Supreme Court affirmed. The county proved that use of the road was open, notorious, exclusive, adverse, continuous, and uninterrupted for the statutorily required period. The only evidence in support of defendants' position was a conclusory hearsay statement claiming that the previous owners had indicated that the road was not public. Defendants' mere denial of the public nature of the road was insufficient to raise a genuine issue of material fact sufficient to withstand summary judgment. Powell County v. 5 Rockin' MS Angus Ranch, Inc., 2004 MT 337, 324 M 204, 102 P3d 1210 (2004), following Heller v. Gremaux, 2002 MT 199, 311 M 178, 53 P3d 1259 (2002).

Incorrect Finding of Prescriptive Easement for Road and Residence — Moving of Residence Not Required: The District Court found that a prescriptive easement had been established for a road that strayed into an adjoining parcel and for a residence, the corner of which also extended into the adjoining parcel. The Supreme Court found the record full of contradictory assertions and findings, but noted that because the actual location of the road was concealed from the owner by way of maps and misrepresentations as to its true location, the record did not come close to establishing the elements of hostility or open and notorious use by clear and convincing evidence to establish a prescriptive easement for the road. Further, the owner of the residence conceded that the corner of the foundation and eaves encroached onto the adjoining parcel. Never having paid taxes on the land in question, the owner could not prevail on a claim of adverse possession to obtain title to the ground under the encroachment, so a finding of a prescriptive easement for the residence was also in error. However, because the property owner indicated at trial and in appeal briefs that he was willing to work something out regarding the encroachment, the Supreme Court concluded that to require removal of the encroachment would be extreme and declined to order that the residence be moved from its foundation. Gelderloos v. Duke, 2004 MT 94, 321 M 1, 88 P3d 814 (2004).

Failure to Prove Unity of Ownership — No Implied Easement by Necessity: As a general rule, creation of an implied easement by necessity requires that the easement be granted over the grantor's land and never over the land of a third party or a stranger to the title. Here, the easement claimed by plaintiffs ran across property not owned by plaintiffs' grantor at the time of the grant, so plaintiffs were unable to prove unity of ownership necessary to establish an implied easement by necessity. Kullick v. Skyline Homeowners Ass'n, Inc., 2003 MT 137, 316 M 146, 69 P3d 225 (2003), following Graham v. Mack, 216 M 165, 699 P2d 590 (1984), and followed in Yellowstone River, LLC v. Meriwether Land Fund I, LLC, 2011 MT 263, 362 Mont. 273, 264 P.3d 1065. See also Hughes v. Hughes, 2013 MT 176, 370 Mont. 499, 305 P.3d 772, providing that a prescriptive easement existed.

Conflicting Evidence Regarding Prescriptive Easement for Ditch Maintenance — District Court Affirmed: Plaintiff alleged that defendant's access to plaintiff's property for ditch maintenance must be limited to the historic use of the ditch bank. The District Court was presented with conflicting evidence regarding how open defendant's use of plaintiff's property was and determined that plaintiff knew or should have known that defendant was accessing the ditch by various routes across plaintiff's property and that the access was not permissive. The evidence was sufficient to support the finding that defendant had a prescriptive easement, and that finding was not disturbed on appeal. Graveley Simmental Ranch Co. v. Quigley, 2003 MT 34, 314 M 226, 65 P3d 225 (2003).

Use of Private Road Permissive by Neighborly Accommodation — Public Prescriptive Easement Not Established: Plaintiffs sought an easement of record from defendants regarding the rural road crossing plaintiffs' property, but defendants refused. Plaintiffs then sought a declaratory judgment that the road was a public road established by prescriptive use, asserting that the road was a public thoroughfare established by common-law dedication as evidenced by a 1916 petition for the opening of a school and a 1948 petition to establish a road. The District Court found that the 1916 and 1948 petitions did not establish an offer evidencing an intention to dedicate the road to the public and that use of the road was instead permissive through neighborly accommodation. Plaintiffs appealed, but the Supreme Court affirmed. All elements of a prescriptive easement must be proved by clear and convincing evidence because one who has legal title should not be forced to give up what is rightfully theirs without the opportunity to know that the title is in jeopardy and to fight for it. Once a claimant establishes the elements of a prescriptive right, a presumption of adverse use arises, and the burden shifts to the landowner to establish that the use was permissive. If permissive use is shown, no easement can be acquired because the theory of prescriptive easement is based on adverse use. Use of a neighbor's land based upon mere neighborly accommodation or courtesy is not adverse and cannot ripen into a prescriptive easement. Rather, in addition to use, generally some circumstance or act tending to indicate that the use was not merely permissive is required. The presence of gates or other obstructions, to be opened and closed by parties passing over the land, has always been considered strong evidence in support of a mere license to the public to pass over the designated way. The facts here showed that use of the road was permissive and at the pleasure of the landowners, so no public prescriptive easement existed. Heller v. Gremaux, 2002 MT 199, 311 M 178, 53 P3d 1259 (2002). See also Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525 (1993), Hitshew v. Butte/Silver Bow County, 1999 MT 26, 293 M 212, 974 P2d 650 (1999), and Pedersen v. Ziehl, 2013 MT 306, 372 Mont. 223, 311 P.3d 765.

Public Use for Statutory Period Coupled With Assumption of Adverse Control — Public Prescriptive Easement Established: An easement by prescription is created by operation of law through open, notorious, exclusive, adverse, continuous, and uninterrupted use for 5 years. Following the same criteria, applied to public prescriptive easements in Granite County v. Komberec, 245 M 252, 800 P2d 166, 47 St. Rep. 2061 (1990), the Supreme Court noted that to establish the existence of a public road by prescription, it must be shown that the public followed a definite course continuously and uninterruptedly for the prescribed statutory period, together with an assumption of control adverse to the owner. To be open and notorious, the use of a claimed right must give the landowner actual knowledge of the claimed right or be of such a character as to raise a presumption of notice. To be continuous and uninterrupted, the use of a claimed right may not be abandoned by the user or interrupted by an act of the landowner. To be adverse, the use or assumption of control of a claimed right must be exercised under a claim of right and not as a mere license revocable at the pleasure of the landowner. Regular maintenance of a roadway by the party asserting a prescriptive easement is evidence of adverse rather than permissive use. Because a public prescriptive easement is "public", the element of exclusivity is not required in establishing the existence of a public prescriptive easement. In the present case, the county presented sufficient evidence establishing the existence of a public prescriptive easement on German Gulch Road, including a history of open public use and county maintenance of the road, an absence of evidence that the public ever abandoned use of the road, and the fact that plaintiff never erected gates, barriers, or signs on the road to create the impression of permissive use

or established permissive use through neighborly accommodation. Hitshew v. Butte/Silver Bow County, 1999 MT 26, 293 M 212, 974 P2d 650, 56 St. Rep. 111 (1999), distinguishing Leffingwell Ranch, Inc. v. Cieri, 276 M 421, 916 P2d 751, 53 St. Rep. 453 (1996). However, see Lyndes v. Green, 2014 MT 110, 374 Mont. 510, 325 P.3d 1225.

Use of Property Through Neighborly Accommodation Not Adverse Use — Prescriptive Easement Precluded: A prescriptive easement is established by open, notorious, exclusive, adverse, continuous, and uninterrupted use of the easement for 5 years. If the property owner shows permissive use, no easement can be acquired because the theory of prescriptive easement is based on adverse use. In the present case, the property owners and their predecessors in interest exercised complete dominion and control over the road in question. The road was used to control not only livestock, but also to restrict access to the property and to protect the property from theft. Any use of the road was by express or implied permission of the landowners, according to a community understanding or local custom of accommodating neighbors' use of the road, a pattern of neighborly accommodation that persisted for years. Because use of the road was not adverse, it could not ripen into a prescriptive easement. Amerimont, Inc. v. Anderson, 278 M 495, 926 P2d 688, 53 St. Rep. 924 (1996). See also Amerimont, Inc. v. Gannett, 278 M 314, 924 P2d 1326, 53 St. Rep. 929 (1996), followed in Gelderloos v. Duke, 2004 MT 94, 321 M 1, 88 P3d 814 (2004).

Presumption of Adverse Use Under Claim of Right — No Evidence of Neighborly Accommodation: Tanners and others purchased property on Flathead Lake. Tanners and the others obtained access to their property by driving on roads located on Daly's property to the north. When Daly erected a fence across the roads and blocked access to their property, Tanners and the others brought suit, alleging that they had acquired an easement by prescription for the use of several of the roads. The Supreme Court held that Tanners had established a presumption of adverse use under a claim of right based upon the 1932 deed of their predecessors in interest. Because Daly claimed that Tanners' use of the roads was by her permission or neighborly accommodation, the Supreme Court held that Daly had the burden of proving permissive use. The Supreme Court referred to testimony in the record from which the jury could have found that no permission had been granted by Daly. Tanner v. Dream Island, Inc., 275 M 414, 913 P2d 641, 53 St. Rep. 208 (1996).

No Relocation of Prescriptive Easement by Consent of Parties: For nearly 100 years, access to Glenn's property was across the "old road" that crossed Grosfields' land. The parties agreed that Glenn and her neighbors had established a prescriptive easement by use of the "old road". After 1992, Glenn quit using part of the old road and began using a "new road" across another part of Grosfields' land. All of the property owners, including Grosfields, used the new road for approximately 2 years, until Grosfields placed barbed wire across it. Glenn brought an action to enjoin Grosfields from placing the fence across the new road. The Supreme Court held that the location of a prescriptive easement cannot be changed by mutual consent of the parties, tacit or otherwise, and that because Glenn did not otherwise satisfy the requirements for a prescriptive easement on the new road, the District Court erred in granting the injunction. The court overruled Scott v. Weinheimer, 140 M 554, 374 P2d 91(1962), to the extent that it suggested that a prescriptive easement can be relocated by verbal or tacit consent. Glenn v. Grosfield, 274 M 192, 906 P2d 201, 52 St. Rep. 1150 (1995), followed in Rafanelli v. Dale, 278 M 28, 924 P2d 242, 53 St. Rep. 746 (1996), and Leisz v. Avista Corp., 2007 MT 347, 340 M 294, 174 P3d 481 (2007).

Easement Created by Evidence of Other Than Recreational Use by Public: The defendant argued that the seasonal use by hunters and fishermen of a road was not sufficient to create a prescriptive easement. The Supreme Court agreed that recreational use alone was not enough but ruled that there was sufficient evidence of nonrecreational use to establish the easement. Granite County v. Komberec, 245 M 252, 800 P2d 166, 47 St. Rep. 2061 (1990), followed in Swandal Ranch Co. v. Hunt, 276 M 229, 915 P2d 840, 53 St. Rep. 361 (1996), and Hitshew v. Butte/Silver Bow County, 1999 MT 26, 293 M 212, 974 P2d 650, 56 St. Rep. 111 (1999).

Prescriptive Easement Not Established by Travel on Public Road: A defendant cannot establish a prescriptive easement by traveling on a public road, which is a road that all people have a right to use. The open and public nature of the road forestalls its use from being adverse or exclusive. Cummings v. Canton, 244 M 132, 796 P2d 574, 47 St. Rep. 1493 (1990).

Easement by Prescription Extinguished: Although a landowner's predecessors in interest may have obtained a prescriptive easement to use an irrigation ditch, the landowner's subsequent actions in apparent recognition that his use was permissive are incompatible with the nature of a prescriptive easement and have extinguished any easement by prescription. Robertson v. Hughes, 204 M 515, 668 P2d 1025, 40 St. Rep. 1041 (1983).

Permissive Use Not Basis for Easement by Prescription: When use of an easement begins as a permissive use, it cannot ripen into a prescriptive right no matter how long it continues, unless there is a distinct and positive assertion of a right hostile to the owner. Robertson v. Hughes, 204 M 515, 668 P2d 1025, 40 St. Rep. 1041 (1983).

Nonexclusive Prescriptive Easement by Nature of the Use: Under the settled principle in Montana that in acquiring a prescriptive easement, the right of the owner of the dominant estate is governed by the character and extent of the use during the period requisite to acquire it, Ferguson v. Standley, 89 M 489, 300 P 245 (1931), the nature of the right of the plaintiffs to a roadway cannot exceed the use which they made of it during the prescriptive period. Thus, where it is shown that other persons have participated in the use of the roadway, plaintiffs cannot establish a private or exclusive easement. Marta v. Smith, 191 M 179, 622 P2d 1011, 38 St. Rep. 28 (1981).

Prescriptive Easement Not Created When Original Use Was Permissive: The use of land not owned by plaintiff for a driveway since 1934 does not give rise to a prescriptive easement because the use at its inception was permissive, and although since 1957 the land was owned by another, there was no later distinct assertion of right hostile to the present owner. Justice Sheehy, dissenting: Distinguishing between "permissive use" relied on in the majority opinion, which defeats a prescriptive easement, and "acquiescence" of the original owner, which should be applied here making his land servient to a prescriptive right of plaintiff. Wiedman v. Trinity Evangelical Lutheran Church, 188 M 10, 610 P2d 1149 (1980).

Use to Be Exclusive: Trial court properly held for defendant when plaintiff claimed a prescriptive easement to right-of-way because plaintiff shared use of claimed land with former neighboring tenants. Thus, use was not exclusive or adverse and hostile and did not create an easement by prescription or implication but only a permissive use. Ingels v. Mickalson, 170 M 1, 549 P2d 459 (1976).

Presence of Gates — Presumption of Permissive Use Created: Summary judgment for defendant was proper because plaintiff failed to establish an easement by prescription to a road crossed at several points by fences with closed gates owned and controlled by defendant. The presence of gates which must be opened by the user was strong evidence of permissive rather than adverse use since it tended to establish "total dominion" over the roadway by defendant. Harland v. Anderson, 169 M 447, 548 P2d 613 (1976).

Easement by Prescription: Landowners and their predecessors in interest acquired by prescription an easement for the diversion and conveyance of water validly appropriated from adjoining land where water system had been in existence prior to 1908, had been in continuous use since that time, and had been regularly repaired and maintained with knowledge of and without complaint by previous owners of the adjoining land. The easement encompassed both the waterline and the diversion system. Circumstances of adverse possession were sufficient to put a prudent man upon inquiry since a casual inspection of premises would have disclosed fenced inclosure with intake system and attached underground waterline. Failure of former owners of adjoining land to object to water system raised inference of acquiescence rather than license. O'Connor v. Brodie, 153 M 129, 454 P2d 920 (1969).

NEGATIVE EASEMENT

Properly Created Negative Easements Not Automatically Void: Appellants contended the District Court erred in concluding that the commercial use limitation on Bridger Bowl land was void as an unlawful restraint of trade. The Supreme Court agreed and reversed the District Court, finding that the conditions of the test outlined in O'Neil v. Ferraro, 182 M 214, 596 P2d 197 (1979), had been met. Additionally, the Supreme Court noted the statutory authority in 70-17-101 for allowing creation of covenants and easements governing the right to transact business on land and held that properly created negative easements are not automatically void under 28-2-703. Haggerty v. Gallatin County, 221 M 109, 717 P2d 550, 43 St. Rep. 674 (1986).

Negative Easement Not a Restraint of Trade: A written agreement in the form of a settlement agreement that creates a negative easement prohibiting the use of property as a restaurant and bar does not constitute a contract in restraint of trade. The agreement is not merely a personal contract between the parties which would fall within the scope of 28-2-703 prohibiting restraint of trade but rather creates a property interest which runs with the land. Reichert v. Weeden, 190 M 95, 618 P2d 1216, 37 St. Rep. 1788 (1980), followed in Haggerty v. Gallatin County, 221 M 109, 717 P2d 550, 43 St. Rep. 674 (1986).

Creation of a Negative Easement Notwithstanding Absence of a Conveyance: A written agreement in the form of a court settlement not to use property as a restaurant and bar creates a valid and enforceable covenant which runs with the land and which is binding on each of the parties and their successors in interest notwithstanding absence of a conveyance of the estate to which the covenant pertains or words to that effect in the settlement agreement. The agreement was expressly intended to constitute a covenant running with the land and to bind the present owners, heirs, and assigns and was entered into voluntarily. A negative easement, as was created here, can be created by a grant (conveyance) or agreement; the agreement being construed as a grant is binding upon purchasers of the servient tenement who have actual or constructive notice of it. Reichert v. Weeden, 190 M 95, 618 P2d 1216, 37 St. Rep. 1788 (1980).

MINERAL OR WATER RIGHT

Ditches Not Necessary for Exercise of Water Right — No Ownership Interest in Ditches: A dispute arose over whether plaintiff with water rights had an ownership interest in two ditches that crossed a neighbor's property. The District Court determined that no ownership interest existed, and plaintiff appealed. The Supreme Court noted that ditches are easements that attach to land and that a transfer of real property also transfers a ditch right in the same manner and to the same extent as at the time that the property was transferred, but also noted that a ditch right and a water right are separate and distinct property rights and that if a water right passes as an appurtenance, the means of conveying the water also passes. In order to determine whether the ditch right was appurtenant to the water right, the court examined necessity and beneficial use. In this case, the ditches in question were not necessary for plaintiff to exercise its water rights. Testimony indicated that no one had used the ditches to irrigate plaintiff's land and that plaintiff was able to exercise its water right through two other ditches, nor did plaintiff recognize a historical ownership interest in or beneficial use of the ditches in question. In addition, because the deeds were ambiguous with respect to which ditch rights were conveyed to each parcel, a search of the chain of title would not have revealed that plaintiff had an easement in the ditches. The District Court weighed the conflicting evidence and did not err in holding that plaintiff did not have an ownership interest in the ditches. The judgment was affirmed. Wills Cattle Co. v. Shaw, 2007 MT 191, 338 M 351, 167 P3d 397 (2007), following Lincoln v. Pieper, 245 M 12, 798 P2d 132 (1990), and Ponderosa Pines Ranch, Inc. v. Hevner, 2002 MT 184, 311 M 82, 53 P3d 381 (2002).

Life Span of Government-Funded Irrigation System Related to Cost-Sharing Involvement, Not Duration of Easement: Quinlan and Cox entered into a pooling agreement and a cost-sharing agreement with the federal government for installation of a permanent irrigation system across their adjoining properties. The agreement defined the life span of the irrigation system as 10 years. Cox eventually lost the property through foreclosure, and Espy purchased it, becoming the successor in interest. In 1997, Quinlan attempted to prohibit Espy's use of the irrigation system, so Espy sued for easement interference. Quinlan filed a permissive counterclaim, alleging that Espy had interfered with Quinlan's road easement over Espy's property. Following trial, the District Court concluded that Espy had a valid easement over Quinlan's property for use and maintenance of the irrigation system, that Quinlan had a valid road easement over Espy's property, and that both parties were entitled to a permanent order restraining the other party from interfering with their respective easements. Quinlan appealed, contending that because the pooling agreement created a contract for a 10-year duration based on the life span of the irrigation system, the District Court erred in holding that Espy had an easement for an indefinite duration. The Supreme Court affirmed. The 10-year life span of the system was related to the government's cost-sharing involvement only, not to a limitation on the duration of the easement. The duration of the easement was indefinite because with proper maintenance and repair, the irrigation system could last indefinitely. Espy v. Quinlan, 2000 MT 193, 300 M 441, 4 P3d 1212, 57 St. Rep. 764 (2000).

Conveyance of Water Right Includes Use of Water System: When use a of water conveyance system was necessary for the plaintiffs to exercise their water rights, it was incidental to the use of and part and parcel of the realty. The easement in the water system necessary for the beneficial enjoyment of the property was appurtenant to the premises conveyed. Lincoln v. Pieper, 245 M 12, 798 P2d 132, 47 St. Rep. 1803 (1990), distinguished in Flaig v. Gramm, 1999 MT 181, 295 M 297, 983 P2d 396, 56 St. Rep. 710 (1999).

Mineral Reservation Right of Entry — Easement Only Does Not Include Property Interest in Minerals: A mineral reservation right of entry is an easement and conveys no interest in the underlying oil, gas, or minerals or in oil, gas, or minerals produced from the land. McDonald v. Unirex, Inc., 221 M 156, 718 P2d 316, 43 St. Rep. 709 (1986).

Sale of a Water Right With Implied Reservation of Another Water Right: Landowner owned two water rights on river and each had a related ditch right; one was called the "McNiven Right" and the other was called the "Grannis Right". He sold part of his land together with part of the McNiven Right and "related ditch rights". The Supreme Court held that the words "related ditch rights" in the deed's water right grant referred only to the McNiven ditch, and further held that since the landowner held two water rights and related ditch rights, the conveyance of the McNiven water and ditch right impliedly reserved to landowner the Grannis water right and related ditch right. Castillo v. Kunnemann, 197 M 190, 642 P2d 1019, 39 St. Rep. 460 (1982); reversing on rehearing, Castillo v. Kunnemann, 38 St. Rep. 1618 (1981) (apparently not reported in Montana Reports).

Water Rights Made Appurtenant by Court Decree and Beneficial Use: Where a prior District Court water rights adjudication decree determined that there was an appropriation of 240 miners' inches on a river, appurtenant to the south half of a certain section of land, and the rancher who sold part of the half section to subdivider, who then sold a parcel to coplaintiff, testified that the 20-acre parcel purchased by coplaintiff had traditionally been irrigated by water from a ditch used to carry the appropriated water to the land, and the rancher's testimony was confirmed by the son of the rancher's predecessor in interest and by a hired hand, clearly, both by decree and by beneficial use, the water and ditch rights were appurtenant to the 20-acre parcel through which the ditch ran. Further, where the rancher testified that he had used the ditch and water to irrigate land south of the 20-acre parcel, coplaintiff had purchased from the subdivider a 9.114-acre parcel south of the 20-acre parcel, the ditch ran through the 9.114-acre parcel, and evidence supported a finding that both parcels would have been irrigated at the same time, the water and ditch rights were also appurtenant to the 9.114-acre parcel. Castillo v. Kunnemann, 38 St. Rep. 1618 (1981) (apparently not reported in Montana Reports), reversed on other grounds on rehearing, 197 M 190, 642 P2d 1019, 39 St. Rep. 460 (1982).

Law Review Articles

Running With the Land in Montana, Natelson, 51 Mont. L. Rev. 17 (1990).

Attorney's Guide to Montana Conservation Easements, Knight & Dye, 42 Mont. L. Rev. 21 (1981).

Easements and Market Value, Cromwell, 17 Mont. L. Rev. 143 (1956).

70-17-102. Servitudes not attached to land.

Case Notes

Valid Easement in Gross Created for Conservation Purpose — Restriction Enforceable Against New Owners — Conservation Easement Laws Not Only Means of Creating Conservation Restriction: A seller of a 40-acre parcel of land imposed restrictions in a deed that prevented usage of the property in a manner that reduced the quality of the stream and the riparian area, in addition to limiting construction to one single-family residence. The purchaser of the property eventually sold it to the plaintiffs. Twelve years after purchasing the property, the plaintiffs filed a complaint in District Court against the trust of the original seller for the purpose of invalidating the property restrictions and going forward with a subdivision of the property. The District Court held that the restrictions were enforceable against the plaintiffs by the trust, despite the fact that the restrictions were not created as a Title 76, ch. 6, conservation easement. On appeal, the Supreme Court affirmed, determining that the restrictions were enforceable against the plaintiffs as an easement in gross and that a conservation restriction is not invalid simply because it was not created under Title 76, ch. 6. The court reasoned that the restrictions were made for conservation purposes within the scope of 70-17-102, the benefit and burden of the easement passed to the successors in interest, the plaintiffs had actual notice of the restrictions, the restrictions were recorded, and there was no language in the deed from the original seller to the original buyer limiting the seller's ability to transfer the easement. The court also reasoned that 76-6-105 allows for restrictions for the purpose of conserving land even if the restrictions are not created under Title 76, ch. 6. Scott v. Lee and Donna Metcalf Charitable Trust, 2015 MT 265, 381 Mont. 64, 358 P.3d 879.

No Right of Hydroelectric Facility to Make Free Appropriation of Water on State-Owned Land: A hydroelectric facility does not have the right to make free appropriation of water on and within state-owned land without paying compensation to the state. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421, distinguishing Smith v. Deniff, 24 Mont. 20, 60 P 398 (1900), U.S. v. Conrad Invest. Co., 156 F 123 (D.C. Mont. 1907), and Mattson v. Mont. Power Co., 2009 MT 286, 352 Mont. 212, 215 P.3d 675. See also Prentice v. McKay, 38 Mont. 114, 98 P 1081 (1909).

Following the Montana Supreme Court's decision, PPL appealed to the United States Supreme Court. The United States Supreme Court reversed the Montana court's ruling, holding that the Montana court had not properly considered the rivers in question on a segment-by-segment basis and had not determined whether they were navigable in fact at the time of statehood. The United States Supreme Court remanded the case for proceedings consistent with its opinion. PPL Montana, LLC v. Montana, 565 US 576, 132 S Ct 1215, 182 L Ed 2d 77 (2012).

No Express Federal Reservation of Public Road Pursuant to Land Patent — Easement by Reference Reversed: The District Court held that the federal government expressly reserved a public road across patented mining claims by referring in an 1896 federal land patent to a mineral survey that depicted a road labeled "ROAD". Citing Leo Sheep Co. v. U.S., 440 US 668 (1979), the Supreme Court disagreed. Plaintiff cited no authority for the proposition that a reference in a federal land patent to a mineral survey that depicts a road labeled "ROAD" qualified as an express reservation under federal law. Rather, the inference prompted by the presence of certain other express reservations in the patent and the absence of an express reservation for a particular right-of-way was that no right-of-way was reserved. The intent to create an easement must be clearly and unmistakably communicated on the referenced plat or certificate of survey, using labeling or other express language, and an easement may not be inferred or implied from an unlabeled or inadequately described swath of land or other depiction appearing on a certificate of survey. Additionally, the Supreme Court has recognized the creation of privately held easements only by reference and has never applied the doctrine to create a public road, and the court declined to do so in this case. Nothing in the field notes or in the patent evidenced an intent by the federal government to reserve a public road across a patented mining claim, and the District Court erred in finding that the road traversing the mining claim was a public road pursuant to an express easement by reservation created in the mining survey and referenced in the conveying documents of the mining claim. The District Court was reversed. Our Lady of the Rockies, Inc. v. Peterson, 2008 MT 110, 342 M 393, 181 P3d 631 (2008).

Distinction Between Servitudes and Easements: While a servitude may by definition be an easement, not all servitudes are easements since not all servitudes are attached to the land as appurtenances. Burlingame v. Marjerrison, 204 M 464, 665 P2d 1136, 40 St. Rep. 1005 (1983).

No Interest Acquired in Property by Possessory Use Without Payment of Taxes: In 1978, Burlingames acquired a parcel of land adjoining Marjerrisons' land. A survey of Burlingames' property indicated that Marjerrisons' fence enclosed 5 acres of Burlingames' property. Since 1935, Marjerrisons had used the 5-acre parcel, along with their property, for cattle grazing, agriculture, and timber harvesting. Burlingames filed an action to quiet title. The District Court ruled that Burlingames possessed title to the 5-acre parcel but that Marjerrisons had acquired prescriptive easements for grazing, agricultural, and timber harvesting purposes. On appeal, the Supreme Court reversed, stating that since an easement is a nonpossessory interest and Marjerrisons had complete possession of the parcel for the statutory period, the only interest they could have acquired was full title. Treating Marjerrisons' claim as one for adverse possession, the court then ruled that although their use was open, notorious, exclusive, adverse, continuous, and uninterrupted for a 5-year period, they had not paid property taxes on the disputed parcel as required by 70-19-411, and thus have acquired no interest in the property. Burlingame v. Marjerrison, 204 M 464, 665 P2d 1136, 40 St. Rep. 1005 (1983).

Alienation and Apportionment of Roadway Easement: In a warranty deed conveying land, the grantor expressly reserved a roadway easement and later conveyed the easement to various landowners. Because there was no language in the deed limiting the grantor's right to alienate or apportion the easement, such action was proper. Lindley v. Maggert, 198 M 197, 645 P2d 430, 39 St. Rep. 876 (1982).

Roadway Easement — No Increase in Burden: In a warranty deed conveying land to the defendant, the grantor expressly reserved a roadway easement and later conveyed the easement to the plaintiffs. The defendant could not claim, on the basis of speculation as to possible future uses, that the plaintiffs' use of the easement would increase the burden on the defendant's land beyond that contemplated when the easement was created. Lindley v. Maggert, 198 M 197, 645 P2d 430, 39 St. Rep. 876 (1982).

Creation of Prescriptive Easement: Testimony in this case shows the use of the road in dispute was originally permissive. To find a prescriptive easement, there must be a distinct and positive assertion of a right to use the road hostile to the owners by those claiming the easement. Claimants must also show the right was brought to the attention of the owners and continued use of the easement for the full statutory period. The record here shows occasional use of the road by hunters, hikers, and neighbors. This type of use is insufficient to raise a presumption of adverse use and does not represent the distinct and positive assertion of a hostile right brought home to the owner of the purportedly servient tenement necessary to transform the originally permissive use into adverse use. Medhus v. Dutter, 184 M 437, 603 P2d 669 (1979).

Water Rights: A water right, legally acquired, is in the nature of an easement in gross which, according to circumstances, may or may not be an easement annexed or attached to certain land as an appurtenance thereto. Smith v. Denniff, 24 M 20, 60 P 398 (1900), distinguished in Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985).

Law Review Articles

Running With the Land in Montana, Natelson, 51 Mont. L. Rev. 17 (1990).

Attorney's Guide to Montana Conservation Easements, Knight & Dye, 42 Mont. L. Rev. 21 (1981).

70-17-103. Dominant and servient tenement.

Case Notes

Certificate of Survey and Deed Together Established Tract as Servient Estate for Depicted Easement — District Court Did Not Improperly Use Extrinsic Evidence. Mary Ellen Duke Trust v. Lee Lou, LLC, 2023 MT 177, 413 Mont. 356, 535 P.3d 1133, following Blazer v. Wall, 2008 MT 145, 343 Mont. 173, 183 P.3d 84.

Agreement Created Easement in Gross — Not Easement Appurtenant — Assignment of Easement Invalid: The plaintiff's and defendants' predecessors in interest had entered into an agreement for the plaintiff's predecessor to secure an easement across the defendants' property for laying irrigation pipe. The agreement provided that the rights in the agreement were not assignable without the written permission of the defendants and that such permission would not be unreasonably withheld. After the plaintiff purchased the easement, the defendants denied the plaintiff permission to assign the easement. The District Court granted the defendants summary judgment, holding that the easement did not run with the land. On appeal, the Supreme Court affirmed, holding that the agreement's provision on assignment contemplated the severing of the right to use the easement from the land and that the grant of summary judgment was therefore proper. Bos Terra, LP v. Beers, 2015 MT 201, 380 Mont. 109, 354 P.3d 572.

Prescriptive Easement Not Created When Original Use Was Permissive: The use of land not owned by plaintiff for a driveway since 1934 does not give rise to a prescriptive easement because the use at its inception was permissive, and although since 1957 the land was owned by another, there was no later distinct assertion of right hostile to the present owner. Justice Sheehy, dissenting: Distinguishing between "permissive use" relied on in the majority opinion, which defeats a prescriptive easement, and "acquiescence" of the original owner, which should be applied here making his land servient to a prescriptive right of plaintiff. Wiedman v. Trinity Evangelical Lutheran Church, 188 M 10, 610 P2d 1149 (1980).

Intent of Grantor to Control Creation of Easement: Before the creation of an easement in a stranger to a conveyance will be recognized, the intent of the grantor to create the easement must clearly be shown. If it appears it is as likely the purpose of the clause in the deed was to protect the grantor's warranty of title as to reserve an easement, the court will not depart from the majority rule and find an easement. The testimony presented indicated that in executing the documents that passed equitable title to the property, the grantor did not intend to create an easement. There was no testimony that any of the grantors received less than full value for the land because of the existence of an easement. Finally, although the language of the deed does locate the easement, it fails to name a dominant tenement. Considering these factors together, as in Wilson v. Chestnut, 164 M 484, 525 P2d 24 (1974), it is as likely the grantors intended to protect their warranty of title as to reserve an easement. Thus, the deeds do not establish an easement of record. Medhus v. Dutter, 184 M 437, 603 P2d 669 (1979), followed in Kelly v. Wallace, 1998 MT 307, 292 M 129, 972 P2d 1117, 55 St. Rep. 1271 (1998).

70-17-104. Who may grant servitude.

Case Notes

Terms of Attempted Easement Too Vague to Enforce — Deed Insufficient to Constitute Easement by Reservation: The founders of plaintiff homeowners' association recorded a declaration of conditions in 1973 that set aside certain undescribed property for parking and that provided that the homeowners' association would be formed after 75% of subdivision lots were sold and if 75% of lot owners voted to form an association. The homeowners' association was finally formed about 33 years later, but the property set aside for parking was never used and was ultimately sold in 1992. When the association eventually required more room for parking, they sought to enforce the declaration, but access to the property was denied by the current owner. The association filed an action to quiet title, but the District Court granted summary judgment for the landowner, so the association appealed. The Supreme Court held that the 1973 declaration and the 1992 deed did not result in an enforceable easement allowing the association to use the property, noting that a grant of an easement may be subject to conditions precedent, but if the uncertain event upon which the obligation hinges does not take place, the obligation does not materialize. The association never used the property for parking, so an easement never materialized. An agreement that requires parties to agree to material terms in the future is not an enforceable agreement. The court also found that the scope and terms of the attempted easement were too vague to be specifically enforced, and the 1992 deed was insufficient to constitute an easement by reservation. Therefore, summary judgment for the landowner was proper and the District Court was affirmed. Holter Lakeshores Homeowners Ass'n, Inc v. Thurston, 2009 MT 146, 350 M 362, 207 P3d 334 (2009).

70-17-105. Who may not hold servitude.

Case Notes

Extinguishment of Easement Upon Ownership of Servient Tenement: Any time that a party who owns an easement right acquires legal ownership of a parcel with a servient tenement, the easement associated with the parcel is extinguished. Tungsten Holdings, Inc. v. Olson, 2002 MT 158, 310 M 374, 50 P3d 1086 (2002), followed in Boyne USA, Inc. v. Spanish Peaks Dev., LLC, 2013 MT 1, 368 Mont. 143, 292 P.3d 432.

70-17-106. Extent of servitude.

Compiler's Comments

2021 Amendment: Chapter 453 in (1) at beginning inserted exception clause; inserted (2) regarding servitudes granted to a local, state, or federal government body for administrative purposes; inserted (3) requiring additional rights and privileges to be specifically provided for in writing in the grant before being granted to a successor or assignee; and made minor changes in style. Amendment effective May 10, 2021.

Severability: Section 4, Ch. 453, L. 2021, was a severability clause.

Case Notes

Existence of Implied Easement by Preexisting Use — Easement by Implication Created by Operation of Law at Time of Severance — Undisputed Facts Established Scope of Easement Providing Ingress and Egress to Owner, Invitees, and Public. Thomas Mann Post No. 81 v. Knudsen Family Ltd. Partnership, 2022 MT 150, 409 Mont. 318, 514 P.3d 409.

Town's Utility Easement Limited to Express Terms of Written Instrument Granting Right-of-Way Only for Water Pipeline — Breadth and Scope of Easement Strictly Determined by Actual Terms of Grant — District Court's Expansion of Written Easement Improper. Thomas Mann Post No. 81 v. Knudsen Family Ltd. Partnership, 2022 MT 150, 409 Mont. 318, 514 P.3d 409.

Use of Extrinsic Evidence to Determine Scope of Servitude: The defendants disputed the plaintiff's right to a private road over their property that stemmed from an "access" easement. The District Court found in favor of the plaintiff, using extrinsic evidence to do so. The Supreme Court affirmed, stating that ambiguity in the plat description necessitated an examination of extrinsic evidence. Whitefish Congregation of Jehovah's Witnesses, Inc. v. Caltabiano, 2019 MT 228, 397 Mont. 284, 449 P.3d 812.

Reasonable Use of General Easements: In a subdivision bordering the Lee Metcalf Wilderness with road easements throughout the subdivision benefiting the landowners, one owner on the border of the wilderness erected a gate to prevent access to the wilderness. The District Court granted summary judgment for parties seeking to use the road to access the wilderness. The Supreme Court affirmed, explaining that an easement granted in general terms includes any purpose reasonably related to the general purpose expressed and that the appellant had not shown an unreasonable burden from the easement. O'Keefe v. Mustang Ranches HOA, 2019 MT 179, 396 Mont. 454, 446 P.3d 509. See also Lewis & Clark County v. Wirth, 2022 MT 105, 409 Mont. 1, 510 P.3d 1206.

Question Whether Scope of Easement Included Residential Use — Conflicting Evidence Presented — Summary Judgment Improper: The parties' predecessors-in-interest entered into a road easement limited to farming and ranching operations. The plaintiff, who was the grantor's successor, alleged that the defendant, the grantee's successor, had violated the easement by placing a mobile home on her land accessed by the easement. The District Court granted summary judgment in favor of the defendant, concluding that the language of the easement was clear and unambiguous as to its scope and that the scope included residential use. On appeal, the Supreme Court reversed, noting that the easement language did not explicitly contemplate residential purposes, and remanded the matter for a trial to determine whether the scope of the easement allowed residential purposes. Quarter Circle JP Ranch, LLC v. Jerde, 2018 MT 68, 391 Mont. 104, 414 P.3d 1277.

Scope of Easement — Property Acquired After Execution of Easement Excluded: The parties' predecessors-in-interest entered into a road easement. Years later, the parties disputed the scope of the easement, and the defendant, the grantee's successor, argued that the easement also provided access to property acquired after execution of the easement. The District Court disagreed and held that the easement applied only to the lands belonging to the parties at the time the easement was executed. On appeal, the Supreme Court affirmed, holding that the easement did not extend to the property acquired after execution. Quarter Circle JP Ranch, LLC v. Jerde, 2018 MT 68, 391 Mont. 104, 414 P.3d 1277.

Determination of Easement Based on Historical Use — Failure to Identify Plaintiffs' Access as Litigation Issue: In a family dispute regarding once commonly held land, the plaintiffs owned the southern half of the property and the defendants owned the northern half. Two roads went through the plaintiffs' land and gave access to the defendants' land and adjacent public land. The defendants eventually constructed a fence at the boundary between the two, and the plaintiffs eventually locked the gates at the southern border of their property, preventing access to the defendants' property. The plaintiffs filed a quiet title action seeking a determination of the location, width, and scope of the defendants' easements. The District Court entered findings determining the location, width, and scope of the defendants' express easement to be limited to one road, and it denied the defendants' claim for a utility easement. On appeal, the Supreme Court found that the District Court erred when it limited the defendants' access to one roadway because the historical record established use of two roadways at the time of the conveyance, that the defendants misconstrued a judicial admission relating to fencing of a new relocated easement, and that the District Court did not err by failing to determine the plaintiffs' easement over the defendants' land because the parties did not identify it as an issue to be litigated. Ganoung v. Stiles, 2017 MT 176, 388 Mont. 152, 398 P.3d 282.

Abuse of Discretion to Restrict Injunction to Light Vehicles Only — Preliminary Injunction Improper: The plaintiffs sought declaratory judgment to have legal access along a road that crossed the defendants' property. The plaintiffs sought a preliminary injunction on the theory that there was an express public easement on that portion of the road. The District Court granted a preliminary injunction enjoining the defendants from barring the plaintiffs' access to the road and allowing the plaintiffs to drive only light vehicles on the road. The plaintiffs appealed, and the Supreme Court reversed the restriction because, the court determined, the status quo had been the plaintiffs driving some heavy equipment across the easement to maintain their property. Flora v. Clearman, 2016 MT 290, 385 Mont. 341, 384 P.3d 448.

Valid Easement in Gross Created for Conservation Purpose — Restriction Enforceable Against New Owners — Conservation Easement Laws Not Only Means of Creating Conservation Restriction: A seller of a 40-acre parcel of land imposed restrictions in a deed that prevented usage of the property in a manner that reduced the quality of the stream and the riparian area, in addition to limiting construction to one single-family residence. The purchaser of the property eventually sold it to the plaintiffs. Twelve years after purchasing the property, the plaintiffs filed a complaint in District Court against the trust of the original seller for the purpose of invalidating the property restrictions and going forward with a subdivision of the property. The District Court held that the restrictions were enforceable against the plaintiffs by the trust, despite the fact that the restrictions were not created as a Title 76, ch. 6, conservation easement. On appeal, the Supreme Court affirmed, determining that the restrictions were enforceable against the plaintiffs as an easement in gross and that a conservation restriction is not invalid simply because it was not created under Title 76, ch. 6. The court reasoned that the restrictions were made for conservation purposes within the scope of 70-17-102, the benefit and burden of the easement passed to the successors in interest, the plaintiffs had actual notice of the restrictions, the restrictions were recorded, and there was no language in the deed from the original seller to the original buyer limiting the seller's ability to transfer the easement. The court also reasoned that 76-6-105 allows for restrictions for the purpose of conserving land even if the restrictions are not created under Title 76, ch. 6. Scott v. Lee and Donna Metcalf Charitable Trust, 2015 MT 265, 381 Mont. 64, 358 P.3d 879.

Express Easement Created by Virtue of Writing — Not Easement by Necessity: The plaintiffs owned land that was subject to a written easement allowing ingress and egress to the defendant's property. The easement was the only access to the defendant's property when it was recorded in 1978, but subsequent access was created and used. The plaintiffs claimed the easement was an implied easement created by necessity, the necessity no longer existed, external evidence should be considered regarding its creation, the defendant's potential use could overburden the estate, and the defendant had abandoned the easement. The District Court granted the defendant's motion to dismiss based on the plaintiffs' failure to state a justiciable claim for relief. On appeal, the Supreme Court affirmed, holding that the easement was an express easement by virtue of being in writing, that the terms of the easement did not require external evidence, that ingress and egress allowed for a road and for vehicle use, and that mere nonuse did not establish abandonment. Woods v. Shannon, 2015 MT 76, 378 Mont. 365, 344 P.3d 413.

Use of Dominant Estate to Determine Easement's Scope: The District Court found that a written instrument creating an easement provided for the easement's general use by the grantee, and it held that although the grantor's property was developed into a residential use, there was no legal justification to limit the grantee's use due to the change in nature of the grantor's property. The Supreme Court reversed, finding that the District Court erred in relying on the historical uses of the easement within the servient estate to determine the easement's scope rather than the historical use of the dominant estate. Whary v. Plum Creek Timberlands, L.P., 2014 MT 71, 374 Mont. 266, 320 P.3d 973.

Use of Public Road Created by Prescriptive Use Extends to All Reasonably Foreseeable Uses: Once a public road is established by prescriptive use, the use of that road is not limited to the adverse usage through which the road was acquired, but rather extends to all reasonably foreseeable uses, including foot travel. Pub. Lands Access Ass'n, Inc. v. Madison County Bd. of Comm'rs, 2014 MT 10, 373 Mont. 277, 321 P.3d 38.

Easement by Reservation — Creation by Reference — Location Description on Plat Sufficient to Establish Burden Imposed by Easement With Reasonable Certainty: The Supreme Court held that an easement by reservation was created when the deed conveying title referred to the plat on file with the County Clerk and Recorder. While the plat did not provide a metes-and-bounds description of the easement's location, the court determined that the plat identified the dominant and servient tenements, the intended use or necessity for the easement, and a description of the easement's location sufficient to establish with reasonable certainty the course of the easement across the property. Yorlum Properties, Ltd. v. Lincoln County, 2013 MT 298, 372 Mont. 159, 311 P.3d 748.

Elements of Implied Easement by Necessity Established — Easement Properly Granted — Interference Claim Properly Dismissed: Plaintiffs sought an easement by necessity across defendants' property. The District Court held that an easement by necessity existed and defined the scope of the easement, and both parties appealed. The Supreme Court affirmed. There was sufficient clear and convincing evidence of both unity of ownership and strict necessity to establish an easement by necessity. Additionally, nothing in the history or condition of the property at the time of severance supported a finding that the extent of the implied easement by necessity across the servient estate should be unlimited, so plaintiffs were entitled to cross defendants' land to reach a public road. However, plaintiffs' claim that defendants interfered with the easement failed. The essential acts that gave rise to the easement by necessity arose in the 1930s, but plaintiffs' right to the easement was not established until 2007, so defendants could not have wrongfully interfered with the easement. Ashby v. Maechling, 2010 MT 80, 356 Mont. 68, 229 P.3d 1210. See also Albert G. Hoyem Trust v. Galt, 1998 MT 300, 292 Mont. 56, 968 P.2d 1135, Watson v. Dundas, 2006 MT 104, 332 Mont. 164, 136 P.3d 973, and Wolf v. Owens, 2007 MT 302, 340 Mont. 74, 172 P.3d 124.

Genuine Issue of Material Fact Whether Dam Operation Damaged Lakeshore Properties — Summary Judgment Improper — Class Action Vacated: Flathead Lake landowners brought a class action suit against defendant operators of Kerr Dam for operating outside the scope of their easements in a manner that continuously eroded and damaged plaintiffs' lakeshore properties. The District Court rejected plaintiffs' argument that the dam operator was not allowed to affect plaintiffs' properties above an elevation of 2,893 feet, concluding instead that defendants' easements covered entire parcels. The court concluded that erosion, including wave action erosion, was within the scope of the easements and held that any duty defendants had to not cause unreasonable damage to plaintiffs' properties applied only to damage unrelated to use of the easement. Therefore, summary judgment was granted to defendants, and plaintiffs appealed. The Supreme Court first agreed that the District Court's contour line theory was correct. The "2,893 feet" clause did not establish the vertical limit argued by plaintiffs because although the dam operators' right to flood, subirrigate, drain, or otherwise affect the shoreline was not unlimited, it was not restricted to a maximum elevation of 2,893 feet at each parcel, but rather extended to whatever part of each parcel was affected when the lake was held at 2,893 feet above mean sea level as measured at the dam. The court also agreed that the right to cause some erosion was necessary to the enjoyment of the right to perpetually flood, subirrigate, and drain and was thus included by implication in the easements. However, further factual development and trial were necessary to address the question of whether the erosion was reasonable, necessary, and within the scope of the easements, which could not be resolved by summary judgment. Additionally, the question of whether defendants breached their obligation to not cause unreasonable damage to the shoreline properties and to not unreasonably interfere with plaintiffs' enjoyment also required further factual development and possibly trial. Therefore, the order certifying the case as a class action was vacated and the case was remanded for further consideration. Mattson v. Mont. Power Co., 2009 MT 286, 352 M 212, 215 P3d 675 (2009).

On remand, the District Court decertified the class as to one defendant and denied the plaintiffs' motion for certification as to another defendant on the basis that the question of whether the erosion caused unreasonable damage to or unreasonably interfered with the plaintiffs' properties required an individual, property-by-property analysis that was improper for class certification. On appeal, the Supreme Court reversed, concluding that class certification to both defendants was proper because the reasonableness of the erosion presents a common question that is incapable of being resolved on a property-by-property basis since an aggregate of the benefits and burdens imposed on all of the shoreline properties must be considered together to determine reasonableness. Mattson v. Mont. Power Co., 2012 MT 318, 368 Mont. 1, 291 P.3d 1209.

Historical Use of Road Not Supportive of Residential Access — Recreational Access Creating Narrower Prescriptive Easement: A dispute arose regarding access to several Whitefish Lake lots. The District Court concluded that a prescriptive easement existed to two lots for year-round recreational and residential use. The Supreme Court noted the testimony of one witness that she had resided permanently at a cabin on one lot for 6 years. Therefore, the District Court did not err in concluding that a prescriptive easement existed to that lot for year-round residential and recreational use. However, the record demonstrated that two adjoining lots were historically used seasonally for recreational purposes, and then only as an extension of the use of the residential lot. Historical use of the road did not support access to the adjoining lots for residential purposes, but the recreational use in conjunction with the residential use provided a heightened notice of the use of the adjoining lots. The recreational use created a discrete historical use of the adjoining lots and established a narrower prescriptive easement, which would not increase the burden on the servient tenement. Therefore, the District Court erred in granting a prescriptive easement to the adjoining lots for residential use. Thus, the District Court was affirmed in finding a prescriptive easement for the residential lot but reversed in the grant of a prescriptive easement to the adjoining lots for residential use. Schmid v. Pastor, 2009 MT 280, 352 M 178, 216 P3d 192 (2009). See also Clark v. Heirs & Devisees of Dwyer, 2007 MT 237, 339 M 197, 170 P3d 927 (2007).

Deed Outside Chain of Title — No Easement Absent Notice That Property Servient to Access Stated in Deed: Nelson's deed for a subdivision lot stated that Nelson would have a roadway easement for access to another lot bordered by Flathead Lake. That lot was subsequently purchased by Barlow. Barlow's deed contained no reference to an easement or reference to Nelson's deed stating that Nelson had a roadway easement to access Barlow's lot. When Barlow began building a cabin on his lot, Nelson sued to enjoin construction, alleging that Nelson's deed entitled him to cross Barlow's lot to access Flathead Lake. The District Court granted Barlow's motion for judgment on the pleadings and dismissed Nelson's claim, so Nelson appealed. The Supreme Court first noted that the language in Nelson's deed was ambiguous and concluded that the District Court erred in holding otherwise. However, the District Court correctly noted that Barlow was not a party to Nelson's deed, and because no similar access provision existed in Barlow's deed, Barlow was not bound by Nelson's deed. Nelson's deed was outside Barlow's chain of title. Even though Nelson's deed was recorded several years prior to Barlow's purchase, that fact was insufficient to impose an easement on Barlow's lot. Barlow was not required to examine the chain of title to Nelson's land to discover an alleged easement across the Barlow property for the benefit of Nelson, and the purported grant of lake access in Nelson's deed did not put Barlow on notice that his property was servient to an easement. The District Court was affirmed. Nelson v. Barlow, 2008 MT 68, 342 M 93, 179 P3d 529 (2008), overruled in part in Earl v. Pavex Corp., 2013 MT 343, 372 Mont. 476, 313 P.3d 154. See also Rigney v. Swingley, 112 M 104, 113 P2d 344 (1941), and Goeres v. Lindey's, Inc., 190 M 172, 619 P2d 1194 (1980).

No Error in Granting Private Prescriptive Roadway Easement for Previously Established Subdivision: When declaring a private prescriptive roadway easement over defendants' property for plaintiffs' use, the District Court also provided that the easement could be used to provide access to tracts owned by plaintiffs that were subdivided in the 1960s but that had never contained residences. Defendants asserted error, but the Supreme Court affirmed. Once established, the owners of a prescriptive easement are limited to the use and frequency of use that were established during the prescriptive period. The property was subdivided prior to the time that the easement was established, which put all owners on notice that the road was intended to service residences. Because an easement attaches to the dominant tenant, the easement attached to each of the subdivision parcels. Even though plaintiffs testified that they had no plans to further subdivide the land, allowing subdivision access to the tracts did not expand the scope of the prescriptive easement beyond what was contemplated at the time of its creation, and the District Court did not err in determining the scope of the easement. Clark v. Heirs & Devisees of Dwyer, 2007 MT 237, 339 M 197, 170 P3d 927 (2007).

Easement Limited to Historical Size and Location of Grant: In 1949, plaintiffs' predecessor in interest granted an easement to defendant's predecessor in interest to allow the construction of radio towers on a portion of a 160-acre parcel, conditioned on location and maintenance of the property. Defendant subsequently notified plaintiffs that he intended to expand the radio facilities beyond the original construction site. Plaintiffs sued, asserting that the expansion would encompass property not included in the original grant, while defendant contended that the easement encompassed the entire 160 acres described in the grant, so the facilities could be expanded onto other portions of the parcel or relocated elsewhere within the parcel. The District Court found for plaintiffs, and on appeal, the Supreme Court affirmed. Under the rules of contract construction, the grant language clearly limited placement of the radio facilities on a portion of the 160-acre parcel to be chosen by defendant's predecessor in interest. Thus, the easement did not encumber the full 160-acre parcel, but rather was limited in size and location to the historical location of the radio facilities. The original grant also required that wires, ground radial antennas, conduits, and transmission lines be buried to a minimum depth of 12 inches, and the District Court did not err in ordering defendant to bury the equipment pursuant to the maintenance portion of the grant. Anderson v. Stokes, 2007 MT 166, 338 M 118, 163 P3d 1273 (2007).

Proper Determination of Legal Access for Subdivision Parcels: Plaintiffs asserted that language in a declaration of a subdivision easement permitting all subdivision owners to use subdivision roads should limit access only to owners of lots that existed at the time that the declaration was executed. The District Court disagreed, and based on the clear and unambiguous language of the declaration, the Supreme Court concurred. Although not all of the subdivision parcels were established at the time that the declaration was executed, the declaration was clear that use of the roads extended to all lot owners, including the parcels yet to be divided. The Board of County Commissioners did not act arbitrarily in finding that legal access existed for the entire subdivision. Fielder v. Bd. of County Comm'rs, 2007 MT 118, 337 M 256, 162 P3d 67 (2007).

Use and Maintenance of Private Dock in Subdivision Communal Area Violative of Subdivision Creation Document — Order for Dock Removal Proper: A subdivision creation document included a provision reserving a community access area for subdivision property owners, including lake frontage for recreational purposes. In an unpublished 2001 opinion, the Supreme Court confirmed the validity of the creation document, affirmed that plaintiff held an irrevocable nonpossessory interest in the common access area, and held that defendant took title to the subdivision property subject to the community access rights. Defendant subsequently constructed a private dock at least partly within the community access area, required other subdivision residents to obtain permission to use the dock, and generally excluded use of the dock except for emergency purposes. In response to the construction and exclusionary use of defendant's dock, a subdivision property owner obtained an injunction prohibiting defendant from using the dock and ordering that the dock be removed. On appeal, defendant contended that the District Court erred by not applying easement law. However, the unpublished opinion did not establish an easement, and the District Court did not err in not applying easement law to determine the respective rights of the parties to use the communal access area. Further, defendant's erection of the dock physically and improperly prevented residents from using the reserved communal area, in violation of the subdivision creation document. Defendant was also precluded from requiring residents to obtain permission to use the dock because the owner of a dominant estate is not required to obtain permission from the owner of the servient estate to do what the owner of the dominant estate is already legally entitled to do. Because defendant's use and maintenance of a private dock violated the subdivision creation document and because pecuniary compensation would not provide an adequate remedy, the District Court properly enjoined defendant's continued use of the dock and ordered removal of the dock. Cravath v. Ellingson, 2005 MT 289, 329 M 280, 124 P3d 141 (2005). See also Ludwig v. Spoklie, 280 M 315, 930 P2d 56 (1996), and Mason v. Garrison, 2000 MT 78, 299 M 142, 998 P2d 531 (2000).

Extent of Public Easement Not Limited to Contested Portion on Defendant's Property — Prescriptive Easement Properly Found as Matter of Law: A part of Boadle Road that crossed a portion of defendant's property had been chained and closed by defendant's predecessor in interest in 1999. Plaintiff land access association sought to have the road declared a public road and have defendant enjoined from prohibiting public access. The trial court found that Boadle Road was in existence since the early 1900s and that open public use without landowner permission continued unabated until the road was closed in 1999. Defendant contended that because the litigated portion of the road began and ended on his property, the road essentially went nowhere and thus it was pointless for the trial court to find a public prescriptive easement. The Supreme Court disagreed. Nothing supported defendant's contention that an easement cannot begin and end on the servient landowner's estate. The portion of the road on defendant's property was part of a much longer public road, and there was sufficient evidence to support the trial court's conclusion that the public was entitled to a prescriptive easement over the portion of the road in dispute. Pub. Lands Access Ass'n, Inc. v. Jones, 2004 MT 394, 325 M 236, 104 P3d 496 (2004). See also Han Farms, Inc. v. Molitor, 2003 MT 153, 316 M 249, 70 P3d 1238 (2003).

Scope of Easement Implied When Easement Exists: Defendant contended that, based on this section, the scope of a prescriptive easement should be limited to the use during the prescriptive period when the easement was acquired. Plaintiff pointed out that the issue was never raised in the pleadings or mentioned in the pretrial order and argued that the issue was therefore not properly before the Supreme Court. The court disagreed. Pursuant to Warnack v. Coneen Family Trust, 266 M 203, 879 P2d 715 (1994), and this section, in an action in which the existence of a prescriptive easement is at issue, it is implied that the scope of the easement, if one exists, is also at issue. The court found that a prescriptive easement existed in this case, so remand was appropriate in order for the trial court to determine the scope of the easement. Han Farms, Inc. v. Molitor, 2003 MT 153, 316 M 249, 70 P3d 1238 (2003).

Easement by Reservation — Showing of Intent to Create Easement in Favor of Stranger to Deed Required: The Loomises contended that an easement by reservation to their property was created by two clauses within an original contract for deed when the Kolbs sold some adjoining property to the Luraskis. The language in the contract for deed purported to reserve a right-of-way and easement over and across the west 30 feet of the Luraski property for the purpose of establishing a public road and an easement for utilities. The District Court concluded that the disputed easement was outside the Loomises' chain of title, making them strangers to the deed, because the express reservation was from the Kolbs to the Luraskis and the Loomises were not parties. The Supreme Court agreed. An easement by reservation in favor of a stranger to a deed can be created only by clearly showing the grantor's intent to do so. In this case, testimony and evidence established that the Kolbs intended to preserve the option for means of access to other property only in the event that property was purchased, but the optional property was never purchased and the road was never constructed. The Supreme Court also disagreed with the Loomises' contention that no one should be considered a stranger to the deed because the reservation was for a public road. No rights are granted to the public prior to a road's actual creation and dedication. The court found it unlikely that a prudent landowner would reserve an easement for the benefit of the public at large, and the burden was on the Loomises, as strangers to the deed, to show the Kolbs' intent to reserve an easement for the Loomises' benefit. The fact that the Kolbs subsequently amended the original certificate of survey to eliminate the disputed easement was further proof that no easement reservation was created for the Loomises. Subsequent acts of the parties that tend to show the construction that they themselves placed upon the writing are also important in determining intent if intent is not clearly expressed in the deed. No easement by reservation was created in favor of the Loomises as a matter of law, and the District Court did not err in so holding. Loomis v. Luraski, 2001 MT 223, 306 M 478, 36 P3d 862 (2001).

Clear and Unambiguous Easement Language — Contract Principles Applied to Interpretation of Easement: After an initial conveyance of property, Tract A-1 was burdened by three easements: (1) an existing driveway; (2) an alternative drainfield easement; and (3) a trapezoid-shaped parcel called the trapezoid easement, which was designated as an easement for access to a seepage pit and alternative drainfield for an adjoining tract entitled "Tract 1". Following the subdivision of Tract 1 into Tract 1-A and Tract 1-B, the Linfords conveyed Tract 1-B to the Bings, but still continued to possess Tract 1-A and continued to benefit from the access easement. When Tract 1-A was later conveyed to the Bings, they acquired the same right to use easements appurtenant to the dominant estate that the Linfords previously enjoyed. A dispute then arose with the Mularonis, the owners of Tract 1-A, who contested the validity of the trapezoid easement, arguing that when the Bings took title to Tract A-1 from the Linfords, a merger of titles occurred that extinguished the easements. The District Court impliedly rejected the merger argument by holding that the easement burdening Tract A-1 benefited both Tract 1-A and Tract 1-B, and the Supreme Court concurred. In order to extinguish an easement by merger, there must be unity of title or ownership, coextensive in validity, quality, and all other circumstances of right. The language describing the trapezoid easement as an easement for access was clear and unambiguous and created a general access easement. Applying principles of contract interpretation to the transfer of property, the Supreme Court held that the incorporation of the certificate of survey into the deeds conveying the tracts to the Bings clearly and effectively described the easements in question and that the District Court did not err in finding that the Bings were entitled to general access across the trapezoid easement. Mularoni v. Bing, 2001 MT 215, 306 M 405, 34 P3d 497 (2001).

Determination That Servient Estate Burdened by Expansion of Easement Based on Credible Evidence — Correct Case Law Properly Applied: Hardy contended that the District Court had insufficient evidence to define the scope of Hardy's easement and to find that Hardy burdened the servient estate by trying to improve an access road for subdivision purposes and that the court failed to apply the correct case law in making its determination. The Supreme Court disagreed on both issues. The District Court had substantial credible evidence upon which to find that Hardy changed the use of the access road to the detriment of the servient owners, who were burdened by Hardy's unreasonable and vexatious use of the easement to the extent that some equitable remedy was required to preserve their right of use and enjoyment and to maintain the status quo. Circumstances dictated that the District Court tailor a precise and restrictive remedy, and the court did so. Further, in arriving at its conclusion, the court properly applied the correct case law in looking beyond the plain language of the unrestricted easement to define the scope and breadth of the servitude. The District Court did not abuse its discretion in enjoining Hardy from any activity other than using the easement for temporary secondary access in the event that his primary access became impaired, based on the conclusion that Hardy was incapable of responsibly exercising his nonpossessory rights associated with repairing and maintaining the easement burdening plaintiffs' property. However, to avoid a potential issue for future dispute, the Supreme Court did remand for a clarification of the injunction for the limited purpose of determining responsibility for the maintenance and repair on the entire easement road. Guthrie v. Hardy, 2001 MT 122, 305 M 367, 28 P3d 467 (2001). See also Laden v. Atkeson, 112 M 302, 116 P2d 881 (1941), and Leffingwell Ranch, Inc. v. Cieri, 276 M 421, 916 P2d 751 (1996).

Obstruction of Easement Properly Enjoined: Burleson filed an action to enjoin defendant from refusing access to an easement across defendant's property, and the District Court granted summary judgment to Burleson, permanently enjoining defendant from obstructing the easement. Defendant appealed, making various overlapping arguments attacking the creation of the easement, contending that the easement did not pass to subsequent purchasers, that the easement was somehow extinguished, and that defendant was not provided notice of the easement. The Supreme Court addressed each argument, noting that an easement is a nonpossessory interest in land creating a right of one person to use the land of another for a specific purpose or a servitude imposed as a burden upon the land and that an easement cannot be created, granted, or transferred except by operation of law, by an instrument in writing, or by prescription. In this case, an easement by reservation was created by the original documents and attached to the property when the dominant tenement was partitioned or subdivided. Summer access roads were clearly defined rights-of-way constituting easements that were attached to the remaining parcels in the subdivision and passed to subsequent purchasers, such as Burleson. Defendant's argument regarding lack of notice failed because each purchaser of land in the subdivision was notified of the easement through specific language in the contracts, deeds, and title insurance and defendant had actual notice of the easement when inspecting the property prior to purchase. The documents were sufficiently clear to indicate that the summer access roads, despite their designation, were intended to be available to subdivision owners for full-time access to their property. Defendant also presented no evidence to satisfy the necessary elements of extinguishment or abandonment. The owner of the servitude and the servient tenement were not the same person; there was no unity of ownership; the servient tenement was not destroyed;

there was no evidence that the owner of the servitude performed or assented to an act that was incompatible with the nature of the easement; and the necessary elements of extinguishment through adverse possession were neither alleged nor satisfied. On the basis of the record, the District Court was affirmed. Burleson v. Kinsey-Cartwright, 2000 MT 278, 302 M 141, 13 P3d 384, 57 St. Rep. 1162 (2000), distinguished in Roland v. Davis, 2013 MT 148, 370 Mont. 327, 302 P.3d 91.

Life Span of Government-Funded Irrigation System Related to Cost-Sharing Involvement, Not Duration of Easement: Quinlan and Cox entered into a pooling agreement and a cost-sharing agreement with the federal government for installation of a permanent irrigation system across their adjoining properties. The agreement defined the life span of the irrigation system as 10 years. Cox eventually lost the property through foreclosure, and Espy purchased it, becoming the successor in interest. In 1997, Quinlan attempted to prohibit Espy's use of the irrigation system, so Espy sued for easement interference. Quinlan filed a permissive counterclaim, alleging that Espy had interfered with Quinlan's road easement over Espy's property. Following trial, the District Court concluded that Espy had a valid easement over Quinlan's property for use and maintenance of the irrigation system, that Quinlan had a valid road easement over Espy's property, and that both parties were entitled to a permanent order restraining the other party from interfering with their respective easements. Quinlan appealed, contending that because the pooling agreement created a contract for a 10-year duration based on the life span of the irrigation system, the District Court erred in holding that Espy had an easement for an indefinite duration. The Supreme Court affirmed. The 10-year life span of the system was related to the government's cost-sharing involvement only, not to a limitation on the duration of the easement. The duration of the easement was indefinite because with proper maintenance and repair, the irrigation system could last indefinitely. Espy v. Quinlan, 2000 MT 193, 300 M 441, 4 P3d 1212, 57 St. Rep. 764 (2000).

Order Prohibiting Interference With Use of Easement Affirmed: Generally, the owner of a servient tenement may make use of the land in any lawful manner, provided that the use is not inconsistent with and does not interfere with the use and right reserved to the dominant tenement or estate. In turn, those for whom the use and right exist are entitled to use the easement area for its intended purposes. Here, Garrison constructed gardens in and fences across the easement and allowed his dogs to run at large on the easement, which unreasonably and materially interfered with the rights of the dominant estate. Thus, the District Court did not err in ordering Garrison to remove the gardens and fences and to restrain the dogs from interfering with easement use. Mason v. Garrison, 2000 MT 78, 299 M 142, 998 P2d 531, 57 St. Rep. 340 (2000). See also Gabriel v. Wood, 261 M 170, 862 P2d 42 (1993).

Scope of Specific Easement Determined by Actual Terms of Grant — Scope of Nonspecific Easement Determined by Reasonable Necessity and Convenience: When an easement is specific in nature, the breadth and scope of the easement are strictly determined by the actual terms of the grant. However, when the granting language is not specific in nature, courts must look beyond the plain language of the grant to whether the easement is reasonably necessary and convenient for the purpose for which it was created, with a view to the situation of the property and the surrounding circumstances. In this case, the District Court looked to historical use in interpreting a nonspecific easement, and because the findings of fact were supported by substantial credible evidence and not clearly erroneous, they were affirmed. Mason v. Garrison, 2000 MT 78, 299 M 142, 998 P2d 531, 57 St. Rep. 340 (2000), followed in Guthrie v. Hardy, 2001 MT 122, 305 M 367, 28 P3d 467 (2001), and Clark v. Pennock, 2010 MT 192, 357 Mont. 338, 239 P.3d 922. See also Strahan v. Bush, 237 M 265, 773 P2d 718, 46 St. Rep. 789 (1989), and Earl v. Pavex Corp., 2013 MT 343, 372 Mont. 476, 313 P.3d 154.

Reservation of Single Right-of-Way Over Existing Private Road — No Ambiguity or Conflict With Intended Access: The District Court determined that a reservation of rights in a 1965 deed was ambiguous because the reservation of rights over a single roadway conflicted with the grantors' intent to reserve as many means as possible to their remaining property in a mountainous area. Ambiguities in a reservation of rights in any grant of property are to be construed in favor of the grantor; however, the breadth and scope of an easement are determined upon the actual terms of the contract. The easement in this case was described as "a right of way" over "an existing private road which extends across" the servient tenement "for the use and benefit of Section 3 and [parts] of Section 34". That language indicated the use to which the easement would be put, not the scope of the easement itself. The Supreme Court found that the reservation of rights was not ambiguous; rather, the language restricting the easement to a single right-of-way over an existing private road did not conflict with the intended use of the easement to benefit the grantors' remaining properties, nor did the grantors' intent override any limitation of the singular use of the word "road" in the reservation. Van Hook v. Jennings, 1999 MT 198, 295 M 409, 983 P2d 995, 56 St. Rep. 767 (1999).

Nature of Enjoyment Inclusive of Frequency of Use: Owners of a prescriptive easement are limited to the use that was established during the prescriptive period. The phrase "nature of enjoyment" includes the frequency with which an easement was enjoyed, so the frequency of use by which owners of an easement by prescription acquire their easement during the prescriptive period may limit the frequency of future use. Kelly v. Wallace, 1998 MT 307, 292 M 129, 972 P2d 1117, 55 St. Rep. 1271 (1998).

Extent and Scope of Implied Easement: The extent and scope of an implied easement from existing use are determined by 70-20-308 and this section and are limited to its historical use at the time that the easement was created. In the present case, prior to severance and for over 50 years since, use of the easement was limited to agricultural and recreational purposes, and there was no evidence that the parties ever considered the easement to be unlimited in scope. Therefore, the District Court did not err when it found that the Hoyem Trust had an implied easement from existing use rather than an implied easement by necessity and that the scope and extent of the easement were limited to agricultural and recreational purposes based on the historical use of the easement at the time of its creation. Albert G. Hoyem Trust v. Galt, 1998 MT 300, 292 M 56, 968 P2d 1135, 55 St. Rep. 1230 (1998), modified in Tungsten Holdings, Inc. v. Kimberlin, 2000 MT 24, 298 M 176, 994 P2d 1114, 57 St. Rep. 125 (2000), requiring that in determining the scope and extent of an implied easement, consideration be given to the intent and reasonable expectations of the parties at the time of severance, and followed in Wolf v. Owens, 2007 MT 302, 340 M 74, 172 P3d 124 (2007). See also Fristoe v. Drapeau, 215 P2d 729 (Calif. 1950), and Restatement of Property 484, comment b (1944). Tungsten Holdings was followed in Waters v. Blagg, 2008 MT 451, 348 M 48, 202 P3d 110 (2008), which was overruled in part in Earl v. Pavex Corp., 2013 MT 343, 372 Mont. 476, 313 P.3d 154.

Informal Apparent Easement — Reasonable Necessity: For a use to give rise to an implied easement from existing use, it must be apparent and continuous at the time that the tract is divided. An easement is apparent when it may be discovered upon reasonable inspection. An apparent easement need not be so formal as to be an improved, paved, or even graveled two-way road but may be as simple as a path, roadway of sorts, trail, or primitive road. In addition to the requirement that the use be apparent and continuous at the time that the tract is divided, an implied easement from existing use must also have a use that is reasonably necessary for the enjoyment of the dominant parcel. An implied easement from existing use passes to all future owners of the property pursuant to 70-20-308. In the present case, the District Court properly held that an easement from existing use, not an implied easement by necessity, existed in favor of the Hoyem Trust over and across Galts' property. The easement by necessity requirement of "strict necessity" did not exist at the time that the property was severed in 1944 because a road existed that provided practical access to a public road for ingress and egress. The presence of an implied easement from existing use necessarily defeats the strict necessity requirement of an easement by necessity. Albert G. Hoyem Trust v. Galt, 1998 MT 300, 292 M 56, 968 P2d 1135, 55 St. Rep. 1230 (1998), following Michaelson v. Wardell, 186 M 278, 607 P2d 100 (1980), and followed in Tungsten Holdings, Inc. v. Kimberlin, 2000 MT 24, 298 M 176, 994 P2d 1114, 57 St. Rep. 125 (2000), and Wolf v. Owens, 2007 MT 302, 340 M 74, 172 P3d 124 (2007). See also Waters v. Blagg, 2008 MT 451, 348 M 48, 202 P3d 110 (2008), wherein the Supreme Court clarified that a connection to a public road is not required when a landowner seeks declaration of an implied easement by preexisting use, overruled in part in Earl v. Pavex Corp., 2013 MT 343, 372 Mont. 476, 313 P.3d 154,

1927 Easement to Ranch for Agricultural Use — Access to Subdivided Ranch and Additional Property Prohibited: Elk Park Ranch's predecessors in interest received warranty deeds in 1927 that included easements for access to the property by Mill Creek Road, a private road that ran through another ranch. The warranty deeds provided that the right-of-way not be fenced, that any gates in place across the grantor's property be kept closed at all times, and that abuse of the terms of the easement would result in the loss of the easements. Elk Park Ranch subdivided its ranch property into 174 parcels and sought to use Mill Creek Road for access to those parcels. Citing Lindley v. Maggert, 198 M 197, 645 P2d 430 (1982), and Strahan v. Bush, 237 M 265, 773 P2d 718 (1989), the Supreme Court held that Elk Park Ranch was limited by the terms of the easement and its historical use, which was only for agricultural purposes. Elk Park Ranch also argued that it now owned additional property that was not owned in 1927 by its predecessors in interest and that Elk Park Ranch should therefore be given access to that additional property.

However, the Supreme Court relied upon DND Neffson Co. v. Galleria Partners, 745 P2d 206 (Ariz. App. 1987), and held that the 1927 easement could not be used to access additional, nonappurtenant property. Leffingwell Ranch, Inc. v. Cieri, 276 M 421, 916 P2d 751, 53 St. Rep. 453 (1996), distinguished in Hitshew v. Butte/Silver Bow County, 1999 MT 26, 293 M 212, 974 P2d 650, 56 St. Rep. 111 (1999).

Right to Build Access Road Determined by Scope of Use of Easement: The Supreme Court found that no easement by grant or reservation had been conveyed to Ruana and Bielby through their chain of title for the use of North Hidden Valley Road. The Supreme Court left undecided and remanded to the District Court the issue of whether Ruana and Bielby enjoyed an easement by implication or by prescription for the use of the road. Ruana and Bielby also claimed an easement for the purpose of an access road called Blue Sky Lane joining North Hidden Valley Road at a right angle. The Supreme Court held that in order for Ruana and Bielby to have an easement for construction of Blue Sky Lane, they must establish either: (1) that construction and use of Blue Sky Lane are encompassed within and do not exceed the scope of their easement on North Hidden Valley Road; or (2) that in addition to their easement on North Hidden Valley Road, they have an easement on Blue Sky Lane either by implication or by prescription. Ruana v. Grigonis, 275 M 441, 913 P2d 1247, 53 St. Rep. 216 (1996).

Extent of Nonspecific Easement Determined by Circumstances: Property owners were permanently enjoined from interfering with their neighbors' ingress and egress to the neighbors' property pursuant to a general easement right granted to the neighbors. If an easement is not specifically defined, as in this case, it need only be as is reasonably necessary and convenient for the purpose for which it was created. The owner of a reserved easement may use it to the full use of the right retained, and the owner of the servient tenement may not interfere with the use and right reserved to the dominant tenement or estate. Strahan v. Bush, 237 M 265, 773 P2d 718, 46 St. Rep. 789 (1989), followed in Gabriel v. Wood, 261 M 171, 862 P2d 42, 50 St. Rep. 1246 (1993), Leffingwell Ranch, Inc. v. Cieri, 276 M 421, 916 P2d 751, 53 St. Rep. 453 (1996), Mason v. Garrison, 2000 MT 78, 299 M 142, 998 P2d 531, 57 St. Rep. 340 (2000), and Guthrie v. Hardy, 2001 MT 122, 305 M 367, 28 P3d 467 (2001).

Use of Private Road Easement for Parking and Storage — Use Not Contemplated at Time Easement Created: Adjoining landowners shared a 12-foot wide "private road" on land owned by defendants. Plaintiff originally had an easement for access but later parked and stored vehicles and camper shells on the road. The District Court abused its discretion by allowing plaintiff to store vehicles on the easement and by requiring defendants to request removal of the vehicles to access their backyard. The Supreme Court reversed the scope of injunctions against the parties, requiring the easement be used only for purposes that did not unreasonably burden the servient tenement and that did not interfere with the use and right reserved to the dominant tenement. Both parties were enjoined from long-term parking and storage. Sampson v. Grooms, 230 M 190, 748 P2d 960, 45 St. Rep. 133 (1988). See also Mason v. Garrison, 2000 MT 78, 299 M 142, 998 P2d 531, 57 St. Rep. 340 (2000).

Unobstructed Use of Right-of-Way: Defendants' predecessors in interest conveyed an easement for right-of-way to plaintiffs. Defendants had actual knowledge of the easement and purchased the property subject to it. The defendants obstructed the easement, first by means of a gate, then by locked chains. The plaintiffs' use of the easement would have been impaired to such an extent as to defeat the purpose of the easement if it were gated, barricaded, chained, or obstructed. The plaintiffs had not abandoned any portion of the easement. Flynn v. Siren, 219 M 359, 711 P2d 1371, 43 St. Rep. 10 (1986).

Duty of Repair Owed to Servient Tenement — FTCA Action: The plaintiffs brought an action under the Federal Tort Claims Act against the United States and its assignee, alleging that the defendants negligently allowed cattle guards located on a highway easement granted by the plaintiffs to the United States to become damaged, rendering the guards useless for livestock control, and the District Court dismissed the complaint for failure to state a claim for relief. The court of appeals reversed, holding that the complaint did in fact state a claim for relief, as Montana courts would hold that in the absence of a specific provision in the documents creating and conveying the easement, the owner of an easement has the duty of repair and maintenance to prevent unreasonable interference with the uses of the servient tenement and is liable for damages proximately caused by failure or neglect to perform that duty. Walsh v. U.S., 672 F2d 746 (9th Cir. 1982).

Nature of Easement — When Deprivation of Property Occurs: A landowner brought an action to prevent the state from opening a fishing access site and from paving a road to the site, based on a claimed fee title to the roadway. The District Court granted the state a summary judgment as a matter of law. The Supreme Court found the landowner's interest was an ordinary easement. The words "private road" did not clearly indicate intent to create in him an "exclusive" easement. The state's use of the road cannot be declared inconsistent with the landowner's on the basis of speculation. Furthermore, under various statutory provisions, the state obtained its land lawfully. The plaintiff had not yet been deprived of his property interest. Any damages remained speculative at the time of the decision. The summary judgment was accordingly affirmed. Titeca v. St., 194 M 209, 634 P2d 1156, 38 St. Rep. 1533 (1981), followed in Bridger v. Lake, 271 M 186, 896 P2d 406, 52 St. Rep. 395 (1995).

Nonexclusive Prescriptive Easement by Nature of the Use: Under the settled principle in Montana that in acquiring a prescriptive easement, the right of the owner of the dominant estate is governed by the character and extent of the use during the period requisite to acquire it, Ferguson v. Standley, 89 M 489, 300 P 245 (1931), the nature of the right of the plaintiffs to a roadway cannot exceed the use which they made of it during the prescriptive period. Thus, where it is shown that other persons have participated in the use of the roadway, plaintiffs cannot establish a private or exclusive easement. Marta v. Smith, 191 M 179, 622 P2d 1011, 38 St. Rep. 28 (1981).

Creation of Prescriptive Easement: Testimony in this case shows the use of the road in dispute was originally permissive. To find a prescriptive easement, there must be a distinct and positive assertion of a right to use the road hostile to the owners by those claiming the easement. Claimants must also show the right was brought to the attention of the owners and continued use of the easement for the full statutory period. The record here shows occasional use of the road by hunters, hikers, and neighbors. This type of use is insufficient to raise a presumption of adverse use and does not represent the distinct and positive assertion of a hostile right brought home to the owner of the purportedly servient tenement necessary to transform the originally permissive use into adverse use. Medhus v. Dutter, 184 M 437, 603 P2d 669 (1979).

Intent of Grantor to Control Creation of Easement: Before the creation of an easement in a stranger to a conveyance will be recognized, the intent of the grantor to create the easement must clearly be shown. If it appears it is as likely the purpose of the clause in the deed was to protect the grantor's warranty of title as to reserve an easement, the court will not depart from the majority rule and find an easement. The testimony presented indicated that in executing the documents that passed equitable title to the property, the grantor did not intend to create an easement. There was no testimony that any of the grantors received less than full value for the land because of the existence of an easement. Finally, although the language of the deed does locate the easement, it fails to name a dominant tenement. Considering these factors together, as in Wilson v. Chestnut, 164 M 484, 525 P2d 24 (1974), it is as likely the grantors intended to protect their warranty of title as to reserve an easement. Thus, the deeds do not establish an easement of record. Medhus v. Dutter, 184 M 437, 603 P2d 669 (1979), followed in Kelly v. Wallace, 1998 MT 307, 292 M 129, 972 P2d 1117, 55 St. Rep. 1271 (1998).

Extent of Servitude — Determined by Terms of Grant: The extent of a servitude is determined by the terms of the grant or the nature of the enjoyment by which it was acquired. The trial court found that the reservation in the warranty deed was only for the one east-west ditch and not for the entire north-south ditch. The findings of the trial court will not be reversed unless there is a clear preponderance of the evidence against such findings. Stout v. Reiter, 182 M 171, 595 P2d 1167 (1979).

Restrictive Covenant in Deed: Road easement which had been purchased from former owners of a portion of subdivision with full knowledge that the building of the road would be in violation of the restrictive covenants of the subdivision did not grant buyer the right to violate the covenants. Sheridan v. Martinsen, 164 M 383, 523 P2d 1392 (1974).

Ditch Rights: While, ordinarily, joint owners of a ditch are tenants in common, each entitled to its use, where such owners of an irrigation system, supplying a subdivided tract, owned an interest in the main canal and the laterals only to such point as was necessary for the conduct of water to their lands, the joint ownership of the canal extended only to the point of diversion to each owner's land and no subsequent owner acquired a greater right or easement therein. Maclay v. Missoula Irrigation District, 90 M 344, 3 P2d 286 (1921).

Water Rights and Ditch Rights Distinguished: Water rights and ditch rights are separate and distinct property rights, i.e., one may own a water right without a ditch right, or a ditch right without a water right. Maclay v. Missoula Irrigation District, 90 M 344, 3 P2d 286 (1921).

Prescriptive Easement — Extent of Use to Determine Extent of Easement: Extent of an easement acquired by adverse user is measured by extent of use. Hence, evidence of amount of water which had been or could be used through a ditch, title to which rested upon prescription, was admissible. Lowry v. Carrier, 55 M 392, 177 P 756 (1918).

Ditch Right-of-Way — Not to Be Changed or Enlarged: Though a person has acquired a right by prescription to maintain a ditch diagonally across the town lots of another, that does not carry with it the right to enlarge the ditch, to change its course materially, or to make a new ditch over such lots. Babcock v. Gregg, 55 M 317, 178 P 284 (1918).

70-17-107. Apportionment of burden upon partition of dominant tenement.

Case Notes

Easement Transferred With Transfer of Portion of Dominant Estate — Subdivision of Dominant Tenement Not Considered Increased Burden on Servient Tenement: The District Court found that the creation of a tract and the subsequent sale to Dabney constituted a transfer of a portion of the dominant estate and that the transfer conveyed all easements attached to the property to Dabney, so Dabney had a prescriptive easement to use a road across Leichtfuss's property to access the Dabney property. The court also concluded that Leichtfuss's parcels were not impermissibly burdened by Dabney's use of the road. On appeal, the Supreme Court affirmed. Although a life tenant or lessee generally cannot impose upon land a burden that passes to a remainderman or reversioner, the termination of a dominant estate held in less than fee simple does not automatically extinguish an appurtenant easement. Rather, it is the intent or expectations of the parties to the servitude that determine its duration. In this case, there was no evidence that the parties intended to abandon Dabney's parcel, so Dabney's use of the road was within the scope of the original easement on the parcel, and the easement was apportioned according to the division of the dominant tenement. In addition, Leichtfuss's contention that the apportionment increased the burden on the servient tenement also failed. "Subdivision and conveying away of portions of a dominant estate does not, in and of itself, mean that an additional burden is imposed upon the servient estate." Dabney's use of the parcel was consistent with the predecessor's historical use, and this was not a case in which the easement was suddenly being used to serve additional land or residences or in which the character of the easement's use was changed, so no increased burden to Leichtfuss's parcel was created. Leichtfuss v. Dabney, 2005 MT 271, 329 M 129, 122 P3d 1220 (2005), distinguishing Leffingwell Ranch, Inc. v. Cieri, 276 M 421, 916 P2d 751 (1996), and following Burleson v. Kinsey-Cartwright, 2000 MT 278, 302 M 141, 13 P3d 384 (2000).

Obstruction of Easement Properly Enjoined: Burleson filed an action to enjoin defendant from refusing access to an easement across defendant's property, and the District Court granted summary judgment to Burleson, permanently enjoining defendant from obstructing the easement. Defendant appealed, making various overlapping arguments attacking the creation of the easement, contending that the easement did not pass to subsequent purchasers, that the easement was somehow extinguished, and that defendant was not provided notice of the easement. The Supreme Court addressed each argument, noting that an easement is a nonpossessory interest in land creating a right of one person to use the land of another for a specific purpose or a servitude imposed as a burden upon the land and that an easement cannot be created, granted, or transferred except by operation of law, by an instrument in writing, or by prescription. In this case, an easement by reservation was created by the original documents and attached to the property when the dominant tenement was partitioned or subdivided. Summer access roads were clearly defined rights-of-way constituting easements that were attached to the remaining parcels in the subdivision and passed to subsequent purchasers, such as Burleson. Defendant's argument regarding lack of notice failed because each purchaser of land in the subdivision was notified of the easement through specific language in the contracts, deeds, and title insurance and defendant had actual notice of the easement when inspecting the property prior to purchase. The documents were sufficiently clear to indicate that the summer access roads, despite their designation, were intended to be available to subdivision owners for full-time access to their property. Defendant also presented no evidence to satisfy the necessary elements of extinguishment or abandonment. The owner of the servitude and the servient tenement were not the same person; there was no unity of ownership; the servient tenement was not destroyed; there was no evidence that the owner of the servitude performed or assented to an act that was incompatible with the nature of the easement; and the necessary elements of extinguishment through adverse possession were neither alleged nor satisfied. On the basis of the record, the District Court was affirmed. Burleson v. Kinsey-Cartwright, 2000 MT 278, 302 M 141, 13 P3d 384, 57 St. Rep. 1162 (2000), distinguished in Roland v. Davis, 2013 MT 148, 370 Mont. 327, 302 P.3d 91.

Implied Equitable Servitude: There can be implied reservations or grants of easement by necessity; where high rise condominium was constructed and apartments therein sold under plan whereby corporate builders sold individual apartments to suitable applicants but management corporation retained ownership of building and deed between the two corporations reserved no easements, an implied equitable servitude attached to transfers of apartments in question, requiring that they be used for residential purposes only. Thisted v. Country Club Tower Corp., 146 M 87, 405 P2d 432 (1965), overruling holding in Simonson v. McDonald, 131 M 494, 311 P2d 982 (1957), that 70-20-304 abolishes all implied covenants except the two enumerated therein and observing that language in Simonson was too broadly put and should have been limited in application to facts of that case, and distinguished in Flaig v. Gramm, 1999 MT 181, 295 M 297, 983 P2d 396, 56 St. Rep. 710 (1999).

Modification of Easement: Where grantor reserved an easement in land conveyed, city purchasing land from grantee could not obtain modification of easement based on need. Missoula v. Mix, 123 M 365, 214 P2d 212 (1950), followed in Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 M 52, 993 P2d 688, 57 St. Rep. 65 (2000).

70-17-109. Who may bring action to enforce easement.

Case Notes

Claim by Occupant of Dominant Tenement for Prescriptive Easement — District Court Improperly Dismissed, Ruling Owner Rather Than Occupant Had Standing — Reversed and Remanded for Further Proceedings. Oberlander v. Hennequin, 2023 MT 45, 411 Mont. 320, 525 P.3d 1176.

Association May Pursue Easement Claims if Requirements for Associated Standing Are Satisfied: Section 70-17-109 does prevent a landowner association from pursuing easement claims on behalf of its members if the requirements of associational standing have been satisfied. JRN Holdings, LLC v. Dearborn Meadows Land Owners Ass'n, 2021 MT 204, 405 Mont. 200, 493 P.3d 340.

Improper for District Court to Look Beyond Language of Amended Judgment Decree When Judgment Not Ambiguous or Obscure: Following remand of Harland v. Anderson, 169 M 447, 548 P2d 613 (1976), which awarded defendant summary judgment on plaintiff's claims for a prescriptive easement across defendant's property, the District Court took up plaintiff's alternative request to condemn an easement across defendant's land for plaintiff's use. In 1983, the court granted plaintiff an unrestricted easement, and defendant moved to amend the judgment to provide compensation for the taking of the easement, but the motion was denied. The parties then entered a stipulation providing $7,500 for defendant's attorney fees and costs, and the parties agreed not to appeal the amended judgment. The stipulation was approved. Almost 20 years later, plaintiffs commenced litigation seeking declaratory and injunctive relief on grounds that defendant had wrongfully interfered with the 1983 unrestricted easement. Defendant claimed that the 1983 right-of-way was limited to agricultural and grazing purposes and moved for summary judgment on grounds of res judicata, judicial estoppel, laches, and waiver. The District Court concluded that the language of the 1983 amended judgment implied that the findings and conclusions were necessary to the judgment, so the court reviewed the 1983 findings and conclusions, concluded that the easement was restricted to agricultural and grazing purposes, granted defendant summary judgment on res judicata grounds, and dismissed plaintiffs' summary judgment motion and claim with prejudice. On appeal, plaintiffs asserted that the District Court erred in looking beyond the plain language of the 1983 amended judgment. The Supreme Court cited Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940), for the holding that a District Court may refer to the entire record in an original case when construing a decree that is obscure or ambiguous, but that when the language of the decree is plain, there is no need to construe it or to resort to pleadings or evidence. In this case, the 1983 decree clearly and unambiguously granted plaintiff an unrestricted easement across defendant's ranch, and it was error for the District Court to look beyond the face of the decree instead of accepting it at face value and speculating as to the reasoning behind the particular result. Thus, summary judgment for defendant was reversed, and the District Court was ordered to enter summary judgment for plaintiffs. Harland v. Anderson Ranch Co., 2004 MT 132, 321 M 338, 92 P3d 1160 (2004).

70-17-110. Action by owner of servient tenement for possession.

Case Notes

Easement by Way of Necessity — Incompatible With Prescriptive Easement: A way of necessity is incompatible with a prescriptive right for the same easement. A prescriptive right never accrues in a way of necessity as long as the necessity continues. There are two basic elements of easements by way of necessity: (1) unity of ownership; and (2) strict necessity. The necessity must exist at the time the unified tracts are severed. The way granted must be over the grantor's land and never over the land of a third party or stranger to the title, and finally there must be strict unity of ownership. Woods v. Houle, 235 M 158, 766 P2d 250, 45 St. Rep. 2273 (1988), followed in Big Sky Hidden Village Owners Ass'n, Inc. v. Hidden Village, Inc., 276 M 268, 915 P2d 845, 53 St. Rep. 379 (1996).

No Implied Easement: Courts are reluctant to find easements by implication because such an action results in depriving a person of the use of his property by imposing a servitude by mere implication. To create an easement by implication from a preexisting use imposed on one part of the property for the benefit of another party, unity of title at the time of the severance thereof is required. Woods v. Houle, 235 M 158, 766 P2d 250, 45 St. Rep. 2273 (1988). However, see Wangen v. Kecskes, 256 M 165, 845 P2d 721, 50 St. Rep. 6 (1993).

Prescriptive Easement Established — Summary Judgment — Burden of Proof: In a quiet title action, once defendant filed affidavits reciting facts that would fulfill the requirements for a prescriptive easement, it became the duty of the plaintiff not to rest upon mere allegations or denials but to respond by affidavit or otherwise, setting forth specific facts showing there was a genuine issue of material fact for trial. It was the plaintiff's burden to show that defendant's use was permissive. Summary judgment for the defendant was proper due to the plaintiff's failure to establish a genuine issue of material fact. Defendant was under no duty to communicate by word of mouth to the plaintiff or his predecessors in interest that she was using the roadway over plaintiff's property under a claim of right and adversely to them. Woods v. Houle, 235 M 158, 766 P2d 250, 45 St. Rep. 2273 (1988).

70-17-111. How servitude extinguished.

Compiler's Comments

2007 Amendment: Chapter 352 in (1) at beginning inserted exception clause; inserted (2) prohibiting extinguishment of conservation easement by taking fee title to land; and made minor changes in style. Amendment effective April 27, 2007.

Case Notes

Private Road Subject to Public Prescriptive Easement Accessible Only by Blocked County Road — Reverse Adverse Possession: A public prescriptive easement was extinguished on Modesty Creek Road's upper branch when the lower branch, a statutorily created public county road not subject to reverse adverse possession, was blocked by continuously locked gates for more than 30 years. Although the gates were blocking a county road on the lower branch, the public acquiesced to the understanding that the upper branch was a private road. Thus, the District Court erred in concluding that the public held a prescriptive easement on the upper branch of Modesty Creek Road, rather than finding that the prescriptive easement had been extinguished by reverse adverse possession. Letica Land Co., LLC v. Anaconda-Deer Lodge County, 2015 MT 323, 381 Mont. 389, 362 P.3d 614.

Express Easement Created by Virtue of Writing — Not Easement by Necessity: The plaintiffs owned land that was subject to a written easement allowing ingress and egress to the defendant's property. The easement was the only access to the defendant's property when it was recorded in 1978, but subsequent access was created and used. The plaintiffs claimed the easement was an implied easement created by necessity, the necessity no longer existed, external evidence should be considered regarding its creation, the defendant's potential use could overburden the estate, and the defendant had abandoned the easement. The District Court granted the defendant's motion to dismiss based on the plaintiffs' failure to state a justiciable claim for relief. On appeal, the Supreme Court affirmed, holding that the easement was an express easement by virtue of being in writing, that the terms of the easement did not require external evidence, that ingress and egress allowed for a road and for vehicle use, and that mere nonuse did not establish abandonment. Woods v. Shannon, 2015 MT 76, 378 Mont. 365, 344 P.3d 413.

Dedication of Public Road — No Extinguishment of Easement: Plaintiffs had an easement over a road that was subsequently declared a public road. Defendants, who later purchased a portion of the dominant estate, claimed the plaintiffs' easement was extinguished by the dedication of the road as a public road. The District Court found for the plaintiffs, and the Supreme Court affirmed. Private and public easement rights in the same road can coexist, and the alteration of the public right does not affect the private easement. Gibson v. Paramount Homes, LLC, 2011 MT 112, 360 Mont. 421, 253 P.3d 903, citing McPherson v. Monegan, 120 Mont. 454, 187 P.2d 542 (1947).

Not Incompatible: Purchase of lots in a subdivision by easement holders was not incompatible with the nature or exercise of the easement, and the plaintiffs failed to show that any act of the easement holders was incompatible with the easement. Steed v. Solso, 2010 MT 264, 358 Mont. 356, 246 P.3d 697.

No Evidence of Incompatible Use — Prescriptive Easement Affirmed: Plaintiffs' tearing down of an encroaching building in a disputed area, their attempted purchase of the easement, and their attempt to negotiate the purchase of an easement did not constitute acts incompatible with a prescriptive easement. Because defendants failed to present evidence that plaintiffs acted in a manner that was incompatible with a claim for a prescriptive easement, the District Court did not err in holding that plaintiffs had acquired a prescriptive easement across defendants' property. Knutson v. Schroeder, 2008 MT 139, 343 M 81, 183 P3d 881 (2008).

Failure to Establish Uninterrupted Possession to Qualify as Extinguished Easement — Summary Judgment Proper: A deed of restriction reserved easements on all existing roads within a subdivision for the scenic views and enjoyment of the property and for the reasonable general use of all subdivision property owners to access public lands. In 1984, defendants bought three subdivision tracts and promptly erected a locking gate across the road that intersected their property. Plaintiff subdivision association requested that defendants remove the gate because it was interfering with property owners' access to public lands. However, defendants refused and threatened legal action, so the association took no immediate action. The association eventually filed a complaint in 2000, accusing defendants of violating the deed of restriction by interfering with the easement. Defendants contended that the association had waived or abandoned any easement by not using the road for over 17 years. The District Court disagreed and granted summary judgment to the association. Defendants appealed on grounds that summary judgment was improper because a material fact existed as to whether the easement had been extinguished, but the Supreme Court affirmed. The association established the existence of a valid recorded easement that encumbered defendants' land, and defendants failed to show that their use of the road was continuous and uninterrupted for 5 years. In fact, the record was replete with admissions that association members continued to use the road, interrupting defendants' attempted adverse possession of the easement. Additionally, defendants testified that the gate was not locked all the time, that they lived outside the state part of the year, during which time they were unable to enforce their claim of right, and that the association had graded and maintained the road during the time in question. Thus, defendants' own testimony contradicted their claim of abandonment and adverse possession. The District Court did not err in finding that defendants' claims failed to establish a genuine issue of material fact that would preclude summary judgment. Meadow Lake Estates Homeowners Ass'n v. Shoemaker, 2008 MT 41, 341 M 345, 178 P3d 81 (2008).

Easement Transferred With Transfer of Portion of Dominant Estate — Subdivision of Dominant Tenement Not Considered Increased Burden on Servient Tenement: The District Court found that the creation of a tract and the subsequent sale to Dabney constituted a transfer of a portion of the dominant estate and that the transfer conveyed all easements attached to the property to Dabney, so Dabney had a prescriptive easement to use a road across Leichtfuss's property to access the Dabney property. The court also concluded that Leichtfuss's parcels were not impermissibly burdened by Dabney's use of the road. On appeal, the Supreme Court affirmed. Although a life tenant or lessee generally cannot impose upon land a burden that passes to a remainderman or reversioner, the termination of a dominant estate held in less than fee simple does not automatically extinguish an appurtenant easement. Rather, it is the intent or expectations of the parties to the servitude that determine its duration. In this case, there was no evidence that the parties intended to abandon Dabney's parcel, so Dabney's use of the road was within the scope of the original easement on the parcel, and the easement was apportioned according to the division of the dominant tenement. In addition, Leichtfuss's contention that the apportionment increased the burden on the servient tenement also failed. "Subdivision and conveying away of portions of a dominant estate does not, in and of itself, mean that an additional burden is imposed upon the servient estate." Dabney's use of the parcel was consistent with the predecessor's historical use, and this was not a case in which the easement was suddenly being used to serve additional land or residences or in which the character of the easement's use was changed, so no increased burden to Leichtfuss's parcel was created. Leichtfuss v. Dabney, 2005 MT 271, 329 M 129, 122 P3d 1220 (2005), distinguishing Leffingwell Ranch, Inc. v. Cieri, 276 M 421, 916 P2d 751 (1996), and following Burleson v. Kinsey-Cartwright, 2000 MT 278, 302 M 141, 13 P3d 384 (2000).

Extinguishment of Easement Upon Ownership of Servient Tenement: Any time that a party who owns an easement right acquires legal ownership of a parcel with a servient tenement, the easement associated with the parcel is extinguished. Tungsten Holdings, Inc. v. Olson, 2002 MT 158, 310 M 374, 50 P3d 1086 (2002), followed in Boyne USA, Inc. v. Spanish Peaks Dev., LLC, 2013 MT 1, 368 Mont. 143, 292 P.3d 432.

Reverse Adverse Possession — Public Prescriptive Easement Extinguished by Relocation of Road and Public Acquiescence With Locked Gates for Thirty Years: Dome Mountain Ranch's predecessor in interest relocated a road in 1965 and installed locked gates and no trespassing signs. Public access was limited to occasional, seasonal recreational use by permission or when the gates were unlocked, until Park County officially declared the road a county road in 1994. Dome Mountain Ranch claimed that the 5-year statutory period of reverse adverse possession concluded in 1970, so it was not required to show a clear intent by the county to abandon the road in proving its claim of reverse adverse possession. Title to a public road may not be obtained by adverse possession, and there must be a clear showing of intent to abandon a county road. Mere nonuse, even for extended periods of time, is generally insufficient in itself to indicate an intent to abandon. Likewise, mere nonuse or lack of maintenance by the county is not sufficient to indicate an intent to abandon, absent notice and a public hearing. To be continuous and uninterrupted, the use of a claimed right in a prescriptive easement must not be abandoned by the user or interrupted by an act of the landowner. Seasonal recreational use, use by neighbors visiting neighbors, and use by persons cutting Christmas trees and gathering firewood are generally not sufficient to establish use by the public over a definite course continuously and uninterruptedly. In this case, the Supreme Court agreed with Dome Mountain Ranch that reverse adverse possession applied. The relocation of the road, coupled with the public's acquiescence with locked gates for almost 30 years, extinguished the county's public prescriptive easement, if one ever existed. Dome Mtn. Ranch, LLC v. Park County, 2001 MT 289, 307 M 420, 37 P3d 710 (2001), following Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525 (1993), and McCauley v. Thompson-Nistler, 2000 MT 215, 301 M 81, 10 P3d 794 (2000).

Clear and Unambiguous Easement Language — Contract Principles Applied to Interpretation of Easement: After an initial conveyance of property, Tract A-1 was burdened by three easements: (1) an existing driveway; (2) an alternative drainfield easement; and (3) a trapezoid-shaped parcel called the trapezoid easement, which was designated as an easement for access to a seepage pit and alternative drainfield for an adjoining tract entitled "Tract 1". Following the subdivision of Tract 1 into Tract 1-A and Tract 1-B, the Linfords conveyed Tract 1-B to the Bings, but still continued to possess Tract 1-A and continued to benefit from the access easement. When Tract 1-A was later conveyed to the Bings, they acquired the same right to use easements appurtenant to the dominant estate that the Linfords previously enjoyed. A dispute then arose with the Mularonis, the owners of Tract 1-A, who contested the validity of the trapezoid easement, arguing that when the Bings took title to Tract A-1 from the Linfords, a merger of titles occurred that extinguished the easements. The District Court impliedly rejected the merger argument by holding that the easement burdening Tract A-1 benefited both Tract 1-A and Tract 1-B, and the Supreme Court concurred. In order to extinguish an easement by merger, there must be unity of title or ownership, coextensive in validity, quality, and all other circumstances of right. The language describing the trapezoid easement as an easement for access was clear and unambiguous and created a general access easement. Applying principles of contract interpretation to the transfer of property, the Supreme Court held that the incorporation of the certificate of survey into the deeds conveying the tracts to the Bings clearly and effectively described the easements in question and that the District Court did not err in finding that the Bings were entitled to general access across the trapezoid easement. Mularoni v. Bing, 2001 MT 215, 306 M 405, 34 P3d 497 (2001).

Prescriptive Easement Established for One of Two Exits on Loop Road — Other Exit Considered Abandoned: Renner accessed his property by crossing Nemitz's property in two different places in order to form a loop driveway at Renner's house. The west easement was not at issue, but both the existence and location of an approximately 100-foot easement over the east side of the loop was contested. A series of interactions between the parties eventually led to Nemitz building a fence across the east side of the loop and Renner filing a claim to establish an easement over the east side of the loop. At trial, both parties presented testimony regarding use of the east side loop, including testimony regarding two possible exits on the loop. The District Court did not distinguish between the two exits, but found a prescriptive easement for the entire east side loop, held that the easement was not abandoned and that Nemitz's activities did not extinguish the easement, and granted Renner an easement for both exits of the east side loop, ordering all obstructions removed. Nemitz appealed. The District Court found clear and convincing evidence that a prescriptive easement existed for the east side loop based on testimony of its use from 1948 to 1974, and after reviewing the record, the Supreme Court affirmed the trial court's findings of open, notorious, exclusive, adverse, continuous, and uninterrupted use of the easement. However, it was not clear from the testimony regarding use between 1948 and 1974 whether both exits met the requirements of a prescriptive easement, and that lack of specificity indicated that it was error for the District Court to find a prescriptive easement for both exits, but the error was harmless based on evidence regarding use from 1975 to 1995. Renner's predecessor in interest during that period continued to use the loop as in prior years and never sought permission and so could not be characterized as having abandoned the east loop easement. Testimony was undisputed that the left exit was used until 1995, but the right exit was not used past 1982, and testimony of Renner's predecessor in interest established that use of the right exit was intended to be subordinate to Nemitz's use, so it was error for the District Court to find that the right exit was not abandoned. The Supreme Court noted that extinguishment did not apply to the left exit because only 3 years passed between the time Renner acquired the property and when the claim was filed. Thus, the Supreme Court affirmed the easement on the left exit and the order requiring removal of the fence across that exit, but reversed the part of the order requiring removal of the fence across the abandoned right exit. Renner v. Nemitz, 2001 MT 202, 306 M 292, 33 P3d 255 (2001), distinguishing Morrison v. Higbee, 204 M 501, 668 P2d 1029 (1983).

Life Span of Government-Funded Irrigation System Related to Cost-Sharing Involvement, Not Duration of Easement: Quinlan and Cox entered into a pooling agreement and a cost-sharing agreement with the federal government for installation of a permanent irrigation system across their adjoining properties. The agreement defined the life span of the irrigation system as 10 years. Cox eventually lost the property through foreclosure, and Espy purchased it, becoming the successor in interest. In 1997, Quinlan attempted to prohibit Espy's use of the irrigation system, so Espy sued for easement interference. Quinlan filed a permissive counterclaim, alleging that Espy had interfered with Quinlan's road easement over Espy's property. Following trial, the District Court concluded that Espy had a valid easement over Quinlan's property for use and maintenance of the irrigation system, that Quinlan had a valid road easement over Espy's property, and that both parties were entitled to a permanent order restraining the other party from interfering with their respective easements. Quinlan appealed, contending that because the pooling agreement created a contract for a 10-year duration based on the life span of the irrigation system, the District Court erred in holding that Espy had an easement for an indefinite duration. The Supreme Court affirmed. The 10-year life span of the system was related to the government's cost-sharing involvement only, not to a limitation on the duration of the easement. The duration of the easement was indefinite because with proper maintenance and repair, the irrigation system could last indefinitely. Espy v. Quinlan, 2000 MT 193, 300 M 441, 4 P3d 1212, 57 St. Rep. 764 (2000).

Easement Not Extinguished by Destruction of Structure Upon Which Easement Operates: Owners of adjoining lots had an easement to use a dock, a swimming deck and swimming areas, and a parking area on the shore of Flathead Lake. After the dock was destroyed by a preceding owner, the present owner of the property claimed that the destruction of the dock signaled the termination of the easement. However, as set out in 25 Am. Jur. 2d Easements and Licenses § 120 (1996), when an easement in an artificial structure is coupled with an interest in land, the easement is not extinguished by the destruction of the structure or the part of the structure upon which the easement operates. Further, denial of a claim of extinguishment by prescription was proper in the absence of adverse use because mere nonuse of a permanent, express easement will not lead to extinguishment by prescription and there was no showing of adverse, hostile actions for the requisite 5-year period. The lot owners possessed a permanent easement to use the existing dock, which implied that they had a right to construct and maintain a new dock in the same location as the original dock as a necessary incident of their perpetual right of lake access. Mason v. Garrison, 2000 MT 78, 299 M 142, 998 P2d 531, 57 St. Rep. 340 (2000). See also Rothschild v. Wolf, 123 P2d 483 (Calif. 1942), and Halverson v. Turner, 268 M 168, 885 P2d 1285 (1994).

Prescriptive Easement — "Clear and Convincing" Evidence Burden Adopted: Overruling Downing v. Grover, 237 M 172, 772 P2d 850 (1989), and earlier decisions requiring that the elements of a prescriptive easement be proved by a preponderance of the evidence, the Supreme Court held that the proper burden of proof is that each element of a prescriptive easement claim be proved by clear and convincing evidence. Wareing v. Schreckendgust, 280 M 196, 930 P2d 37, 53 St. Rep. 1362 (1996), followed in Renner v. Nemitz, 2001 MT 202, 306 M 292, 33 P3d 255 (2001), Harding v. Savoy, 2004 MT 280, 323 M 261, 100 P3d 976 (2004), Combs-DeMaio Living Trust v. Kilby Butte Colony, Inc., 2005 MT 71, 326 M 334, 109 P3d 252 (2005), and Watson v. Dundas, 2006 MT 104, 332 M 164, 136 P3d 973 (2006). See also Steiger v. Brown, 2007 MT 29, 336 M 29, 152 P3d 705 (2007).

Presumption of Adverse Use Established Through Preliminary Requirements for Prescriptive Right: After a claimant has established the preliminary requirements for a prescriptive right, a presumption of adverse use arises. The burden then shifts to the owner of the land on which the prescriptive easement is claimed to establish permissive use or license. If an owner establishes that the use is permissive, no easement can be acquired. In the present case, no genuine issue of material fact existed with regard to defendant's open, notorious, continuous, uninterrupted, and exclusive use of a road access for the statutory period; thus, the presumption of adverse use was applicable. Plaintiff failed to raise material facts regarding whether the use was permissive, including questions of permission or license, control of access by use of a gate, and neighborly accommodation. Defendant was therefore entitled to summary judgment based on adverse use as a matter of law. Lemont Land Corp. v. Rogers, 269 M 180, 887 P2d 724, 51 St. Rep. 1459 (1994), distinguishing Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525 (1993). See also Brown & Brown of MT, Inc. v. Raty, 2012 MT 264, 367 Mont. 67, 289 P.3d 156, Brown & Brown of MT, Inc. v. Raty, 2013 MT 338, 372 Mont. 463, 313 P.3d 179, Lyndes v. Green, 2014 MT 110, 374 Mont. 510, 325 P.3d 1225, and Cremer Rodeo Land & Livestock Co. v. McMullen, 2023 MT 117, 412 Mont. 471, 531 P.3d 566.

Express Easement Not Extinguished by Period of Nonuse: Dahlia Halverson granted an express easement by quitclaim deed that referenced a certificate of survey showing a 30-foot easement for a road upon Turner's property. Turner later constructed fences along two of the boundaries to the property, one of which blocked the use of the road, but the road had not been used. Relying upon Billings v. O.E. Lee Co., 168 M 264, 542 P2d 97 (1975), and Edmond v. Williams, 774 P2d 1241 (Wash. App. 1989), the Supreme Court held that Halverson was not required to make use of the express easement as a condition of retaining it. The Supreme Court also held that fencing of the land would not be considered a sufficiently adverse use to extinguish the express easement by prescriptive use until such time as a need arose to use the easement. Halverson v. Turner, 268 M 168, 885 P2d 1285, 51 St. Rep. 1233 (1994), followed in Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 M 52, 993 P2d 688, 57 St. Rep. 65 (2000).

Reverse Adverse Possession and Inconsistent Use: A landowner's blocking of a road was a hostile act that established reverse adverse possession because the state and local government and the public cooperated and adhered to a walk-in policy that had been in existence on the land for about 17 years. The decision by County Commissioners to deny a petition to establish the disputed road as a county road confirmed acquiescence in the fact that the road was a private road. Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525, 50 St. Rep. 794 (1993), distinguished in Lemont Land Corp. v. Rogers, 269 M 180, 887 P2d 724, 51 St. Rep. 1459 (1994).

Acts Inconsistent With Existence of Private Easement: In a case regarding a prescriptive easement, the plaintiffs had asked the defendant owners for permission to use the road over the defendants' property and the plaintiffs had told others that they did not have an easement over the defendants' property. The Supreme Court ruled that the plaintiffs' actions were inconsistent with a prescriptive easement and, that, additionally, if an easement had existed, it was statutorily extinguished by the plaintiffs' inconsistent acts. Downing v. Grover, 237 M 172, 772 P2d 850, 46 St. Rep. 713 (1989), followed in Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525, 50 St. Rep. 794 (1993), and Greenwalt Family Trust v. Kehler, 267 M 508, 885 P2d 421, 51 St. Rep. 1130 (1994). See also Wareing v. Schreckendgust, 280 M 196, 930 P2d 37, 53 St. Rep. 1362 (1996), which overruled Downing v. Grover, 237 M 172, 772 P2d 850 (1989), with regard to the requirement that prescriptive easement claimant prove elements by a preponderance of the evidence and adopted requirement that claimant prove elements by clear and convincing evidence.

Unobstructed Use of Right-of-Way: Defendants' predecessors in interest conveyed an easement for right-of-way to plaintiffs. Defendants had actual knowledge of the easement and purchased the property subject to it. The defendants obstructed the easement, first by means of a gate, then by locked chains. The plaintiffs' use of the easement would have been impaired to such an extent as to defeat the purpose of the easement if it were gated, barricaded, chained, or obstructed. The plaintiffs had not abandoned any portion of the easement. Flynn v. Siren, 219 M 359, 711 P2d 1371, 43 St. Rep. 10 (1986).

Easement by Prescription Extinguished: Although a landowner's predecessors in interest may have obtained a prescriptive easement to use an irrigation ditch, the landowner's subsequent actions in apparent recognition that his use was permissive are incompatible with the nature of a prescriptive easement and have extinguished any easement by prescription. Robertson v. Hughes, 204 M 515, 668 P2d 1025, 40 St. Rep. 1041 (1983).

Creation of Prescriptive Easement: Testimony in this case shows the use of the road in dispute was originally permissive. To find a prescriptive easement, there must be a distinct and positive assertion of a right to use the road hostile to the owners by those claiming the easement. Claimants must also show the right was brought to the attention of the owners and continued use of the easement for the full statutory period. The record here shows occasional use of the road by hunters, hikers, and neighbors. This type of use is insufficient to raise a presumption of adverse use and does not represent the distinct and positive assertion of a hostile right brought home to the owner of the purportedly servient tenement necessary to transform the originally permissive use into adverse use. Medhus v. Dutter, 184 M 437, 603 P2d 669 (1979).

Servitude Upon Land Extinguished: A servitude is extinguished by the vesting of the right to the servitude and the right to the servient tenement in the same person. The ditch system in question could not have been an appurtenance to defendant's land prior to 1965 because the dominant and servient tenements were part of the same parcel of land. Stout v. Reiter, 182 M 171, 595 P2d 1167 (1979).

Incompatible Act: Purchase by city of an easement which conveyed nothing more than the city already owned under a prior easement was not an act incompatible with the prior easement and did not extinguish the prior easement. Billings v. O. E. Lee Co., 168 M 264, 542 P2d 97 (1975), followed in Wangen v. Kecskes, 256 M 165, 845 P2d 721, 50 St. Rep. 6 (1993), Halverson v. Turner, 268 M 168, 885 P2d 1285, 51 St. Rep. 1233 (1994), and DeVoe v. St., 281 M 356, 935 P2d 256, 54 St. Rep. 207 (1997).

Abandonment and Reconveyance of Easement: Easement acquired for use of land as a public park adjoining highway was abandoned by state's abandonment of the highway and abandonment of its maintenance and dominion over the park area. Park County Rod & Gun Club v. Dept. of Highways, 163 M 372, 517 P2d 352 (1973).

70-17-112. Interference with canal or ditch easements prohibited.

Compiler's Comments

2013 Amendment: Chapter 180 in (1) after "maintain a canal or ditch" inserted "or to operate the appropriation works"; and made minor changes in style. Amendment effective April 12, 2013.

Case Notes

Award of Attorney Fees to Defendant Proper — Failure of Plaintiff to Respond to More Favorable Settlement Offer: The District Court did not err by awarding costs and fees to the defendant hotel in a ditch easement dispute in which the defendant hotel sought to prevent removal of trees and shrubs by the plaintiff easement holder. The District Court recognized that the defendant made, and the plaintiff did not respond to, an offer of settlement under 25-7-105. The District Court properly concluded that because the ruling was less favorable to the plaintiff than the defendant's offer, the plaintiff was responsible for costs and reasonable attorney fees accrued from the time the defendant made the offer of settlement until the conclusion of the matter. Fox v. BHCC II, 2017 MT 218, 388 Mont. 443, 401 P.3d 705.

Ditch Easement — Trees and Shrubs Permissible — No Unreasonable Interference — Ditch Maintained by Owner of Land: The District Court did not err when it determined that the defendant hotel did not unreasonably interfere with the plaintiff easement holder's secondary ditch easement by planting and maintaining trees and shrubs along a ditch. The Supreme Court reasoned that the ditch had been sufficiently, if not excellently, maintained since 1999, when the defendant acquired the property. The plaintiff's sole purpose for accessing the defendant's property was to inspect, repair, and maintain his irrigation ditch. Nothing the defendant (or its predecessors) did in the easement area restricted or inhibited the plaintiff's right to access for inspection purposes. And although the plaintiff could no longer utilize his large farm equipment to maintain the ditch, adequate or better-than-adequate maintenance was regularly performed. Fox v. BHCC II, 2017 MT 218, 388 Mont. 443, 401 P.3d 705.

Duty to Clean Ditch Properly Imposed on Property Owner — Easement Holder's Argument to Have Trees and Shrubs Removed Not Valid: The District Court did not err by imposing a duty on the defendant property owner to clean and maintain a ditch when the plaintiff easement holder held a secondary ditch easement. The plaintiff argued on appeal that the District Court abused its discretion when it imposed the duty to maintain the ditch onto the defendant rather than ordering trees and shrubs to be removed. The Supreme Court disagreed and affirmed, reasoning that the District Court had fashioned a unique, workable, and equitable solution for both parties under the facts and circumstances. Consequently, the District Court's factual findings were not erroneous, its conclusions of law were correct, and it did not abuse its discretion in accepting the defendant's judicial admission and tender of its duty to clean and maintain the plaintiff's irrigation ditch. Fox v. BHCC II, 2017 MT 218, 388 Mont. 443, 401 P.3d 705.

Disputed Location of Point of Diversion — Request for Preliminary Injunction — Court Within Its Authority to Interpret Location: The defendants had placed a dam that diverted water from the plaintiffs' ditch. The plaintiffs sought a preliminary injunction in order to distribute water to their property by installing a headgate on the defendants' land. The defendants countered that the ditch, through which the plaintiffs' water had traveled, was not located on their land. After 4 days of hearings on the location of the ditch, the District Court granted a preliminary injunction allowing the plaintiffs to install a headgate on the defendants' property. The defendants appealed, arguing that the District Court had exceeded its jurisdiction by determining the location of the point of diversion. The Supreme Court affirmed, noting that the District Court has authority to supervise the distribution of established water rights. Mack v. Anderson, 2016 MT 204, 384 Mont. 368, 380 P.3d 730.

Preliminary Injunction Despite Disputed Location of Point of Diversion — Final Determination of Merits Reserved for Trial — Rights to Jury Trial Not Usurped: The defendants had placed a dam that diverted water from the plaintiffs' ditch. The plaintiffs sought a preliminary injunction in order to distribute water to their property by installing a headgate on the defendants' land. The defendants countered that the ditch, through which the plaintiffs' water had traveled, was not located on their land. After 4 days of hearings on the location of the ditch, the District Court granted a preliminary injunction allowing the plaintiffs to install a headgate on the defendants' property. The defendants appealed, arguing that by granting the preliminary injunction the judge had usurped their right to a jury trial. The Supreme Court disagreed and affirmed, noting the language in the order that explicitly provided for a jury to make a final determination of the location of the ditch at trial. Mack v. Anderson, 2016 MT 204, 384 Mont. 368, 380 P.3d 730.

Unreasonable Interference With Ditch Easement: In a ditch easement dispute, the District Court allowed the defendant's culvert and rock bridge to remain in the plaintiff's irrigation ditch. Applying 70-17-112, under which an owner of the ditch easement has the right to enter on the servient tenement to maintain the ditch, the Supreme Court reversed, concluding that the defendant, by constructing permanent encroachments, had unreasonably interfered with the plaintiff's ditch easement. Musselshell Ranch Co. v. Seidel-Joukova, 2011 MT 217, 362 Mont. 1, 261 P.3d 570.

Award of Attorney Fees and Costs Allowed Both for Sanction and as Statutory Fees — Conditions of Dual Award: The District Court awarded attorney fees and costs to defendants as a sanction for plaintiffs' violation of former Rule 11, M.R.Civ.P. (now superseded). Defendants also prevailed on a ditch encroachment claim against plaintiffs and were thus entitled to attorney fees and costs as the prevailing party pursuant to this section. The Supreme Court noted that in this case, the conduct being punished was distinct under each respective authority, so the District Court was allowed to award attorney fees and costs both for a former Rule 11 violation and pursuant to the statute. However, if attorney fees and costs are awarded as a former Rule 11 sanction, the District Court must ensure that the conduct being sanctioned is not the same conduct for which attorney fees and costs are awarded under the statute because litigants are not entitled to duplicate awards for the same conduct. Byrum v. Andren, 2007 MT 107, 337 M 167, 159 P3d 1062 (2007).

Remand for Determination of Appropriate Findings and Damages Related to Ditch Rights — Sanctions Dismissed Absent Specific Findings of Sanctionable Conduct: The parties entered a settlement agreement in 1998 regarding use and maintenance of a ditch that crossed plaintiffs' property and conveyed irrigation water to defendants' property. In 2002, plaintiffs alleged breach of the agreement, nuisance, and trespass. Defendants counterclaimed, alleging breach of the agreement, interference with water rights and easements, and nuisance. The District Court found that plaintiffs' claims were without merit and awarded sanctions against plaintiffs pursuant to former Rule 11, M.R.Civ.P. (now superseded). The court also found that all the counterclaims were unfounded and dismissed the counterclaims with prejudice. Plaintiffs appealed, and defendants cross-appealed. The Supreme Court concluded that the findings of fact regarding plaintiffs' claims were supported by substantial credible evidence and not clearly erroneous, so the trial court's holding that defendants did not breach the agreement was affirmed. Dismissal of defendants' counterclaims, however, was not affirmed. Although claims of plaintiffs' physical interference were not supported by the evidence, under Kephart v. Portmann, 259 M 232, 855 P2d 120 (1993), plaintiffs' filing of the lawsuit and forcing defendants into court to defend their established rights constituted an impairment of defendants' acknowledged ditch rights under this section, so the Supreme Court remanded for a determination of defendants' damages, if any. In addition, the District Court failed to set out specific findings concerning whether plaintiffs breached the settlement agreement, so evaluation of the counterclaims was not possible, and the

Supreme Court directed the District Court to enter appropriate findings on remand. Last, the District Court failed to set out specific findings concerning plaintiffs' acts warranting sanctions, stating only that plaintiffs' case was so strongly without merit that it was frivolous. Without more specific findings as to why sanctions were assessed, the Supreme Court vacated the award and directed the District Court on remand to enter specific findings of fact in support of its determination that plaintiffs violated former Rule 11 and, if so, as to the appropriateness of the choice of sanction imposed (see Akin v. Q-L Investments, Inc., 959 F2d 521 (5th Cir. 1992)). Byrum v. Andren, 2007 MT 107, 337 M 167, 159 P3d 1062 (2007).

Attorney Fees Properly Assessed on Claim for Interference With Ditch Easement: A landslide occurred near one of plaintiff's ditches, and in the process of repairing the damages, defendant filled in about 1,300 feet of another of plaintiff's ditches that was not associated with the landslide. Although presented in the context of the entire suit, plaintiff's encroachment claim for interference with his ditch easement was the only claim brought pursuant to this section, and because plaintiff prevailed on this claim, defendant was properly assessed attorney fees on the issue. Graveley Simmental Ranch Co. v. Quigley, 2003 MT 34, 314 M 226, 65 P3d 225 (2003).

Secondary Easement for Historical Ditch Maintenance — Size of Maintenance Equipment Improperly Limited: Defendant had a secondary easement to enter the property of other landowners to inspect, repair, and maintain a ditch. The right was defined in a 1965 District Court order and affirmed in the present case, wherein the District Court further limited to no greater than 6 feet in width the size of machinery that could be used for ditch maintenance. Defendant appealed. The Supreme Court found that the District Court erred in limiting equipment size. As equipment technology advances, the size and capability of equipment designed for certain uses change. Defendant was therefore allowed to use equipment specifically for ditch maintenance and repair, regardless of its footprint size, and to transport the equipment along the upper level edges of the ditch bank, as long as the equipment did not result in expanding the dimensions of the ditch or negatively impact the property over which it was moved. Graveley Simmental Ranch Co. v. Quigley, 2003 MT 34, 314 M 226, 65 P3d 225 (2003).

Award of One-Half of Attorney Fees in Prescriptive Easement Case Affirmed: Defendants prevailed in a prescriptive easement case and sought attorney fees. The District Court noted that lead counsel were relatively equal as to experience and standing in the legal community, that defendants' counsel rendered more than twice the time and services rendered by plaintiff's counsel, and that defendants' attorneys duplicated some of their work. The court then reduced the award of attorney fees by half. Defendants appealed, but the Supreme Court affirmed. The District Court provided an evidentiary foundation for reaching its conclusion and did not abuse its discretion by reducing the award by one-half. Ray v. Nansel, 2002 MT 191, 311 M 135, 53 P3d 870 (2002).

Life Span of Government-Funded Irrigation System Related to Cost-Sharing Involvement, Not Duration of Easement: Quinlan and Cox entered into a pooling agreement and a cost-sharing agreement with the federal government for installation of a permanent irrigation system across their adjoining properties. The agreement defined the life span of the irrigation system as 10 years. Cox eventually lost the property through foreclosure, and Espy purchased it, becoming the successor in interest. In 1997, Quinlan attempted to prohibit Espy's use of the irrigation system, so Espy sued for easement interference. Quinlan filed a permissive counterclaim, alleging that Espy had interfered with Quinlan's road easement over Espy's property. Following trial, the District Court concluded that Espy had a valid easement over Quinlan's property for use and maintenance of the irrigation system, that Quinlan had a valid road easement over Espy's property, and that both parties were entitled to a permanent order restraining the other party from interfering with their respective easements. Quinlan appealed, contending that because the pooling agreement created a contract for a 10-year duration based on the life span of the irrigation system, the District Court erred in holding that Espy had an easement for an indefinite duration. The Supreme Court affirmed. The 10-year life span of the system was related to the government's cost-sharing involvement only, not to a limitation on the duration of the easement. The duration of the easement was indefinite because with proper maintenance and repair, the irrigation system could last indefinitely. Espy v. Quinlan, 2000 MT 193, 300 M 441, 4 P3d 1212, 57 St. Rep. 764 (2000).

Prevailing Party on Ditch Easement Claim Entitled to Attorney Fees and Costs Despite Loss of Separate Counterclaim Related to Road Easement: Espy sued for easement interference related to an underground irrigation system. Quinlan filed a permissive counterclaim, alleging that Espy had interfered with Quinlan's road easement over Espy's property. Following trial, the District Court concluded that: (1) Espy was successful on his claim because he had a valid easement over

Quinlan's property for use and maintenance of the irrigation system; (2) Quinlan was successful on her counterclaim because she had a valid road easement over Espy's property; (3) both parties were entitled to a permanent order restraining the other party from interfering with their respective easements; and (4) Espy was entitled to attorney fees and costs as the successful party under this section. Quinlan appealed the award of attorney fees, contending that because she prevailed on the counterclaim, neither party could be considered a prevailing party. However, Quinlan's counterclaim was not raised in the context of this section, but was instead related to a road easement. Because Espy successfully prevailed on all claims raised pursuant to this section, he was entitled to attorney fees and costs regardless of the fact that he was not the prevailing party on the counterclaim. Espy v. Quinlan, 2000 MT 193, 300 M 441, 4 P3d 1212, 57 St. Rep. 764 (2000), distinguishing Knudsen v. Taylor, 211 M 459, 685 P2d 354 (1984).

Failure to Enjoin Against Interference With Secondary Easement Rights Not Error: Engel asserted District Court error in failing to enjoin Gampps from interfering with Engel's use of a secondary easement to maintain an irrigation ditch running across the property of both parties. However, there was substantial evidence that Engel's access for routine inspections and maintenance was, and always had been, free and uninterrupted. Although failing to enjoin Gampps, the District Court nevertheless fashioned an order balancing Engel's reserved right for occasional access with Gampps' right not to be unreasonably burdened by Engel's secondary easement, so the District Court was affirmed. Engel v. Gampp, 2000 MT 17, 298 M 116, 993 P2d 701, 57 St. Rep. 96 (2000).

Prevailing Party Must Prevail on All Claims Before Attorney Fees Owing: In order to be considered a prevailing party for purposes of the award of attorney fees under subsection (5) of this section, a party must prevail on all claims raised pursuant to the statute. As a matter of law, the legal conclusion that one party encroached or otherwise impaired another party's easement rights does not necessarily mean that the latter was the prevailing party. In this case, Engel prevailed on only one of three claims and partially prevailed on another. This partial success was insufficient as a matter of law for the determination that Engel was the prevailing party, so the award of attorney fees to Engel was in error. Engel v. Gampp, 2000 MT 17, 298 M 116, 993 P2d 701, 57 St. Rep. 96 (2000), following Sharon v. Hayden, 246 M 186, 803 P2d 1083, 47 St. Rep. 2322 (1990), and followed in Musselshell Ranch Co. v. Seidel-Joukova, 2012 MT 222, 366 Mont. 337, 286 P.3d 1212.

Ditch Right Based on Irrigation Ditch Agreement — Secondary Easement for Ditch Maintenance: In 1960, Kepharts and Portmanns entered into an irrigation ditch agreement that clearly acknowledged Portmanns' superior ditch right to transport water through the ditch over Kepharts' property. Given the known use of the ditch before and after entry of a 1937 adjudication decree, the acts of Portmanns since 1954 in consistently using, cleaning, and maintaining the ditch, as well as the terms of the 1960 agreement itself, equitably estopped Kepharts from challenging the existence of Portmanns' ditch right. Further, it was not error for the District Court to conclude that because Portmanns were owners of an easement in the ditch, they also had a necessary secondary easement to reasonably enter, inspect, repair, and maintain the ditch. Kephart v. Portmann, 259 M 232, 855 P2d 120, 50 St. Rep. 771 (1993).

Permanent Injunction — Attorney Fees and Costs: Plaintiffs sought an injunction requiring defendants to repair damage to an irrigation ditch running through their property. The District Court found a likelihood of future interference by defendants with plaintiffs' irrigation ditch easement. The District Court properly granted plaintiffs a permanent injunction and awarded damages, costs, and attorney fees. Butler v. Germann, 251 M 107, 822 P2d 1067, 48 St. Rep. 1083 (1991).

Failure to Prevail in Any Claims — Attorney Fees Warranted: Plaintiff contended that construction of a pond constituted an unlawful interference with his ditch easement, deprived him of water, and reduced the value of his property, entitling him to actual and punitive damages and injunctive relief. However, because he failed to prevail in any of his claims, defendants were properly considered the prevailing party and were entitled to attorney fees under this section. Boylan v. Van Dyke, 247 M 259, 806 P2d 1024, 48 St. Rep. 188 (1991), distinguishing Knudsen v. Taylor, 211 M 459, 685 P2d 354 (1984).

No Unlawful Interference With Ditch Easement: Plaintiff contended that construction of a pond constituted an unlawful interference with his ditch easement, depriving him of water and reducing the value of his property. The District Court's findings that the pond had nothing to do with plaintiff's water shortage, but rather that the shortage was caused by an upstream user exercising his full right to the water, were not clearly erroneous and were therefore affirmed on appeal. Boylan v. Van Dyke, 247 M 259, 806 P2d 1024, 48 St. Rep. 188 (1991).

Water Rights Inconsequential to Determination of Interference With Ditch Use: Evidence of the nature, priority, and extent of water rights is of no consequence to the determination of whether construction of a pond interfered with use of a ditch and was properly excluded as irrelevant. Boylan v. Van Dyke, 247 M 259, 806 P2d 1024, 48 St. Rep. 188 (1991).

Statutory Provisions Enforced — Attorney Fees Proper: The District Court affirmed defendants' rights to a reasonable secondary easement, thereby preventing plaintiff from encroaching or impairing the easement for the canal or ditch. Having successfully enforced both provisions of this section, defendants were entitled, as the prevailing party, to costs and reasonable attorney fees. Sharon v. Hayden, 246 M 186, 803 P2d 1083, 47 St. Rep. 2322 (1990), followed in Kephart v. Portmann, 259 M 232, 855 P2d 120, 50 St. Rep. 771 (1993), Rieman v. Anderson, 282 M 139, 935 P2d 1122, 54 St. Rep. 286 (1997), and Engel v. Gampp, 2000 MT 17, 298 M 116, 993 P2d 701, 57 St. Rep. 96 (2000).

No Prevailing Party for Award of Attorney Fees: The dominant and servient owners in a controversy over ditch flow had to some extent encroached on the other's rights, causing damages to each other, and an accompanying injunctive order was a victory and a loss for each side. The District Court was correct in not awarding attorney fees under this section on the ground that there was no prevailing party. Knudsen v. Taylor, 211 M 459, 685 P2d 354, 41 St. Rep. 1490 (1984), followed in Musselshell Ranch Co. v. Seidel-Joukova, 2012 MT 222, 366 Mont. 337, 286 P.3d 1212.

Law Review Articles

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, VII. Water Rights, Williams, 46 Mont. L. Rev. 139 (1985).

70-17-113. Prohibited easement.

Compiler's Comments

Effective Date: This section is effective October 1, 2021.

70-17-114. Easement signage.

Compiler's Comments

Effective Date: Section 5, Ch. 453, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 10, 2021.

Severability: Section 4, Ch. 453, L. 2021, was a severability clause.

70-17-115. State acquisition of land subject to prescriptive easement.

Compiler's Comments

Effective Date: This section is effective October 1, 2023.

Part 2

Covenants Running With the Land

Part Case Notes

Broad Restrictive Covenants — Business Use Applicable to Owner as Well as Tenants — Noxious or Offensive Activity — Summary Judgment Improper: A restrictive covenant between two parties, including an assisted living service provider that provided assisted living services to its tenants, prohibited the use of certain real property for business or commercial use and noxious or offensive activity. The District Court found that the complaint failed to state a claim concerning violations of the restrictive covenants by a tenant conducting business on the premises, but the court erred in dismissing the complaint because the plaintiff was asserting that the assisted living service owner, not the tenants, was conducting business on the property in a way that exceeded residential use. Likewise, the District Court erred in dismissing a claim concerning quiet enjoyment because the covenants applied broadly, both to activities and actors covered, and the complaint pleaded sufficient facts to allege a violation. Cossitt v. Flathead Indus., Inc., 2018 MT 82, 391 Mont. 156, 415 P.3d 486.

Servient Estate Not to Unilaterally Change Location of Right-of-Way — Changes in Easement Ordered Altered to Accommodate Historical Use: The plaintiffs had an easement over a road that subsequently was declared a public road. Developers later purchased a portion of the dominant estate and reconfigured the road to convert an "S" curve into two right angles. The changes to the road made it impossible for the plaintiffs to drive their oversized equipment on the road as they had historically. The District Court ordered the servient estate to increase the radii of the turns in the road to allow the plaintiffs to use the road for their oversized equipment without having to go off the roadway or cross lanes. Gibson v. Paramount Homes, LLC, 2011 MT 112, 360 Mont. 421, 253 P.3d 903.

Covenants Intended to Remain in Effect Until Rejected by Property Owners — Failure of Sufficient Tract Owners to Vote to Amend Covenants: Subdivision property owners entered covenants that would automatically extend for "successive period" of 10 years. The covenants could also be amended by a two-thirds vote of the owners of the original tracts. Some of the owners contended that the covenant extension language was ambiguous because it was not clear if the covenants would be renewed only for a single 10-year period or for successive 10-year periods. The District Court held that the language was not ambiguous, but rather contained a typographical error, and that successive 10-year periods applied. Plaintiffs appealed, but the Supreme Court affirmed. Taken as a whole the covenant language intended that the covenants remain in effect until affirmatively rejected by the property owners. In this case, five of the eight original tract owners voted to amend the covenants, so without the required two-thirds vote, the covenants remained unamended. Brewer v. Hawkinson, 2009 MT 346, 353 M 154, 221 P3d 643 (2009). See also Creveling v. Ingold, 2006 MT 57, 331 M 322, 132 P3d 531 (2006).

Contract Interpretation Applicable to Restrictive Covenants — How Ambiguity Resolved — Restrictive Covenants Strictly Construed: General rules of contract interpretation apply to restrictive covenants, and any person having an interest under a restrictive covenant may seek declaratory relief concerning any question of construction arising under the covenant. When a restrictive covenant has been reduced to writing, the intent of the parties is to be ascertained, when possible, from the writing alone, and when the language of a covenant is clear, a court must apply the language as written. Restrictive covenants are strictly construed, and ambiguities in covenants are resolved to allow free use of property. The determination of whether an ambiguity exists in a restrictive covenant is a question of law for a court to decide, but mere disagreement between the parties as to interpretation of a restrictive covenant does not automatically create an ambiguity. Creveling v. Ingold, 2006 MT 57, 331 M 322, 132 P3d 531 (2006), followed in Czajkowski v. Meyers, 2007 MT 292, 339 M 503, 172 P3d 94 (2007). See also Newman v. Wittmer, 277 M 1, 917 P2d 926 (1996), Toavs v. Sayre, 281 M 243, 934 P2d 165 (1997), and Craig Tracts Homeowners' Ass'n v. Brown Drake, LLC, 2020 MT 305, 402 Mont. 223, 477 P.3d 283.

No Ambiguity in Restrictive Covenant Prohibiting Placement of Trailers and Mobile Homes Upon Property — Development of Recreational Vehicle Park Precluded: A restrictive covenant provided that no trailers or mobile homes were to be placed upon the property conveyed by a deed. The District Court held that the term "placed upon" contemplated permanent placement, and that temporary placement was therefore not precluded. The court also held that the covenant disallowed only trailer houses or mobile homes used for residences. The court thus concluded that the covenant did not disallow development of the property as a campground for recreational vehicles and travel trailers. On appeal, the Supreme Court noted that language in a restrictive covenant should be understood in its ordinary and popular sense. It is not the role of a court to insert modifying language into clearly written and unambiguous written instruments, and the unambiguous language in the covenant contained no words to indicate the parties' intent to allow temporary trailers or mobile homes not used as residences. The District Court erred in modifying the covenant language to allow trailers to be placed on the property, so the conclusion that a campground for recreational vehicles and travel trailers was allowable was reversed. Creveling v. Ingold, 2006 MT 57, 331 M 322, 132 P3d 531 (2006).

Process for Amending Restrictive Covenant to Be Strictly Followed: Myers contended that a subdivision corporation did not follow the proper method for amending a restrictive covenant disallowing the rental of subdivision property for less than 30 days. The District Court disagreed, holding that the amendment was properly adopted and restrained Myers from renting the property for less than 30 days. Myers appealed. The Supreme Court held that because restrictive covenants must be strictly construed, when a covenant is amended to impose an impediment on use of the property, the method prescribed for amending the covenant must also be strictly followed. In this case, Myers established that the prescribed amendment method was not used, so the Supreme Court reversed the judgment. Point Serv. Corp. v. Myers, 2005 MT 322, 329 M 502, 125 P3d 1107 (2005).

Rules for Interpretation of Restrictive Covenants: Restrictive covenants are construed under the same rules of construction as other contracts. Declarations of covenants are read on their four corners as a whole, and terms are construed in their ordinary or popular sense. Bordas v. Virginia City Ranches Ass'n, 2004 MT 342, 324 M 263, 102 P3d 1219 (2004), following Windemere Homeowners Ass'n, Inc. v. McCue, 1999 MT 292, 297 M 77, 990 P2d 769 (1999), and followed in Point Serv. Corp. v. Myers, 2005 MT 322, 329 M 502, 125 P3d 1107 (2005).

Potential Access Rights Merged With Deeds and Extinguished — Applicability of Contract Law Doctrine of Merger: Prior to Gehring's consent to sell 360 acres to APS Corporation (APS) in 1970, they entered an agreement that included a provision on access rights, whereby Gehring purported to grant future purchasers access to other land owned by Gehring for certain recreational purposes. After being told by the Gehring Ranch Corporation that they would not be allowed access to Gehring's land for recreation, the successors in interest to APS sought to enforce the agreement, alleging that they had been improperly excluded from the land and that the agreement created an easement over Gehring's land. The District Court granted summary judgment for the Gehring Ranch Corporation, noting that the agreement did not identify Gehring's other lands upon which an easement was purportedly created. The court also held that any agreement prior to execution of the deeds was merged with the deeds and that because the deeds transferring title did not provide for access, any access rights promised in the agreement were lost. The decision was appealed, and the Supreme Court affirmed. The clause in the agreement was part of a larger agreement to transfer property in the future, and Gehring did not intend to create an easement, but at most intended to provide for potential access privileges if certain conditions, such as creation of a property owners' association and adoption of rules governing the use of the recreational privileges, were met. The Supreme Court cited Urquhart v. Teller, 1998 MT 119, 288 M 497, 958 P2d 714 (1998), in applying the contract law doctrine of merger, holding that the deeds contained all the rights of the parties and that because no access privileges were mentioned in the deeds, any potential access rights referred to in the agreement merged with the deeds and were lost. Richman v. Gehring Ranch Corp., 2001 MT 293, 307 M 443, 37 P3d 732 (2001).

Agricultural-Use Only Covenant Running With the Land — Covenant Enforceable Against Subsequent Owners Who Had Notice of Covenant: The Turners placed an agricultural-use only restrictive covenant on a 12.3-acre parcel of property, which lay within the city limits of Helena, in order to sever it from a 14.5-acre parcel and avoid subdivision review. A private residence was located on the retained parcel. After dividing the property, the Turners sold the retained parcel to another party and quit-claimed the remaining 12.3-acre parcel to the Hamptons. Greg Hampton had owned the parcel prior to its acquisition by the Turners, who had originally agreed to reconvey the parcel to Hampton under an agreement that stemmed from ongoing divorce proceedings between Hampton and his former wife. Hampton had previously sought to divide the property with a restrictive covenant in the same manner as the Turners, but Hampton's certificate of survey was rejected because Hampton was not the titled owner at the time. Shortly after the 12.3-acre parcel was quit-claimed to them, the Hamptons sought to have the county lift the covenant, but the Board of County Commissioners refused to revoke the covenant. It was undisputed that the parcel was never used for any agricultural purposes and that the parcel was in a mostly residential area coupled with undeveloped open space. On appeal, the Hamptons did not question the legality of the process by which the county chose not to lift the covenant, but rather questioned whether the covenant was one that ran with the land, thereby binding the subsequent owners of both the covenantor and covenantee. Despite the fact that Hampton claimed to be unaware of the covenant when it was quit-claimed, the District Court concluded that Hampton was well aware of the covenant and took the property subject to the covenant as would anyone else. A narrow interpretation of the agricultural-use covenant requires a covenantor and a covenantee, and the county does not satisfy that requirement; nevertheless, the Turners' estate in the retained land was benefited in that neither the Turners nor their subsequent grantee was required to undergo subdivision review. Thus, the District Court did not err in determining that the Turners placed a valid agricultural-use only covenant on the 12.3-acre parcel that ran with the land. The Hamptons' argument that no "transaction" occurred, because the conveyance should have been simultaneous with the placement of the covenant, did not comport with the Montana Subdivision and Platting Act, which requires county approval of the exemption prior to the sale and conveyance of any divided property. That the county, as a party to the covenant, may choose to enforce the agricultural-use restriction was a foreseeable event that the Hamptons were willing to risk for the sake of taking title to the parcel. No material facts remained in dispute as to whether the Hamptons had notice of the restrictive covenant, so the covenant was enforceable against them as a matter of law. Hampton v. Lewis & Clark County, 2001 MT 81, 305 M 103, 23 P3d 908 (2001).

No Duty of County to Determine Whether Land Transaction Constituted Attempt to Evade Subdivision Act Review: A county has no affirmative duty to analyze or investigate an exemption claimed under 76-3-207 beyond the duty to accept for review a certificate of survey or other evidence establishing the claimed exemption, nor must any defined threshold of evidence be met in order for the county to accept a claimed exemption. Hampton v. Lewis & Clark County, 2001 MT 81, 305 M 103, 23 P3d 908 (2001).

Lack of Legal Description of Tracts in Covenant Amendment Not Fatal When Landowners Provided Actual Notice of Amendment: A supermajority of subdivision property owners authorized an amendment creating new and unexpected restrictions not contained or contemplated in the original declaration of restrictive covenants. Some landowners who disagreed with the amendment appealed, contending that it was invalid because it did not contain a legal description of the affected property. The District Court found the argument unpersuasive because the amendment referred to a previous amendment that did contain a legal description. The Supreme Court agreed, noting further that none of the appellants denied that they had actual notice of the amendment, so their claims of inadequate notice failed. Windemere Homeowners Ass'n, Inc. v. McCue, 1999 MT 292, 297 M 77, 990 P2d 769, 56 St. Rep. 1173 (1999). See also Poncelet v. English, 243 M 481, 795 P2d 436, 47 St. Rep. 1342 (1990).

Original Declaration of Restrictive Covenants Broad Enough to Authorize New or Unexpected Restrictions: A supermajority of subdivision property owners authorized an amendment creating new and unexpected restrictions not contained or contemplated in the original declaration of restrictive covenants, resulting in assessment against subdivision landowners of the costs of paving a common road. Strictly construing the original amendment language, the District Court ruled that the clause in the covenants allowing amendment was broad enough to authorize new or unexpected restrictions. The Supreme Court agreed. Under the rule of strict construction, covenants should not be extended by implication or enlarged by construction. In this case, the drafters of the original covenants used universal language to describe the kinds of changes that could be made, clearly providing that each aspect of the covenants, conditions, restrictions, and uses was subject to amendment by a supermajority. Further, under the universal language, it was unnecessary that amendments to the restrictive covenants be connected to a provision in the original covenants. Windemere Homeowners Ass'n, Inc. v. McCue, 1999 MT 292, 297 M 77, 990 P2d 769, 56 St. Rep. 1173 (1999), following Sunday Canyon Property Owners Ass'n v. Annett, 978 SW 2d 654 (Tex. App. 1998), and distinguishing Lakeland Property Owners Ass'n v. Larson, 459 NE 2d 1164 (Ill. App. 1984), Caughlin Ranch Homeowners Ass'n v. Caughlin Club, 849 P2d 310 (Nev. 1993), and Boyles v. Hausmann, 517 NW 2d 610 (Nebr. 1994).

Contract Provisions Merged Into Deed — Covenants Not Intended to Be Collateral Extinguished by Unrestricted Deed: A contract for the sale of property can contain a valid covenant running with the land, but generally, all provisions in a sale contract are merged into the warranty deed, founding the purchaser's rights in the deed covenants rather than in the executed contract, unless the parties intend for an agreement in a contract for sale to be collateral. Covenants relating to title, quantity, and possession of land are generally not collateral and thus merge into the deed. In the present case, the parties intended for the contract for deed and attendant restrictions to merge into the warranty deed, so the general rule of merger applied. The District Court did not err in refusing to enforce the covenants contained in the contract for deed. Urquhart v. Teller, 1998 MT 119, 288 M 497, 958 P2d 714, 55 St. Rep. 461 (1998), followed in Richman v. Gehring Ranch Corp., 2001 MT 293, 307 M 443, 37 P3d 732 (2001), and Tungsten Holdings, Inc. v. Olson, 2002 MT 158, 310 M 374, 50 P3d 1086 (2002).

Road Maintenance Assessments Within Scope of Declaration of Covenants — Past-Due Assessments Owing: Jacksons acknowledged that a subdivision declaration of covenants, conditions, and restrictions was in effect when they purchased their property but contended that the articles of incorporation and bylaws, which allowed for assessments for certain purposes, were recorded after the purchase and thus were not binding. Jacksons paid annual assessments for the years 1992-94 for road maintenance and snow removal, but stopped paying in 1995. The District Court's findings that the assessments were in concert with the overall intent of the declaration and were used for road-related purposes were not clearly erroneous. The Supreme Court affirmed the Jacksons' responsibility for past-due assessments plus interest and remanded for a determination of whether the articles of incorporation and bylaws applied to the Jacksons. Stageline Estates Homeowners' Ass'n, Inc. v. Jackson, 1998 MT 98, 288 M 405, 958 P2d 52, 55 St. Rep. 384 (1998).

Restrictive Covenant Prohibiting Mobile Homes — Application to Manufactured Home — "Mobile Home" Used in Ordinary and Popular Sense: Wittmers purchased a 26- by 60-foot manufactured home that was capable of being put on wheels and moved it to a subdivision in Gallatin County. The plaintiffs brought an action to restrain Wittmers from maintaining the home within the subdivision because it was in violation of a restrictive covenant that prohibited the use of "mobile homes". The Supreme Court held that the covenant was not ambiguous and that the term "mobile home", which was undefined in the covenants, should be understood in its ordinary and popular sense. The Supreme Court noted that other statutory definitions of the term "mobile home" could be looked to for guidance in determining the meaning of the term for the purposes of the covenants and that those other definitions include structures such as Wittmers'. The Supreme Court held that the District Court correctly construed the term "mobile home" to include the Wittmers' manufactured home because their home fell within other definitions of the term "mobile home", because the Supreme Court had previously construed the term to include homes such as the Wittmers' in two other cases before the court, and because the Wittmers' home had the characteristics of a mobile home. Newman v. Wittmer, 277 M 1, 917 P2d 926, 53 St. Rep. 516 (1996).

Reasonableness Standard Applicable to Actions of Architectural Committee: The power of approval or disapproval by an architectural committee must be governed by the applicable covenants and guidelines and must be exercised objectively, honestly, and reasonably. A committee may not subjectively impose its whims or aesthetic tastes on lot owners. The determination of whether the power was exercised reasonably or arbitrarily is a factual question to be determined in light of the circumstances. Whether a committee's disapproval of a builder's choice of roofing tile and exterior color was reasonable within the context of the applicable restrictive covenants was a question of fact, precluding summary judgment. Trieweiler v. Spicher, 254 M 321, 838 P2d 382, 49 St. Rep. 711 (1992), citing Gosnay v. Big Sky Owners Ass'n, 205 M 221, 666 P2d 1247 (1983).

No Express Warranties Found in Repair Contracts, Protective Covenants, and Preliminary Declaration: The plaintiffs, a condominium owners' association and its individual members, sued Big Sky of Montana Realty, Inc., the successor in interest of Big Sky of Montana, Inc., for breach of express warranties in failing to originally construct and later repair construction defects in fireplaces in the Deer Lodge Condominiums at Big Sky, Montana, in accordance with applicable fire and building codes. The plaintiffs based their claim of express warranty upon the repair contracts, claiming that the contracts called for the repairs to be done according to applicable plumbing, electrical, and building codes. Plaintiffs also based their claim of express warranty on protective covenants that require compliance with the same codes and on the preliminary declaration for the condominiums that required compliance with those codes. The plaintiffs contended that the declaration ran with the land because it had to be recorded. The District Court granted the defendants' motion for summary judgment, dismissing Big Sky of Montana Realty, Inc. The Supreme Court held that the District Court correctly found that no express warranties existed. Ass'n of Unit Owners of Deer Lodge Condominium v. Big Sky of Mont., Inc., 245 M 64, 798 P2d 1018, 47 St. Rep. 1814 (1990).

Failure to Create Home Owners' Association Not Breach of Protective Covenants: Property buyers claimed sellers breached the contractual protective covenants by failing to establish a home owners' association. The argument was discounted upon finding that: (1) the contractual conditions requiring establishment were not met at the time buyers defaulted on payments; (2) there was no deadline for establishment; (3) the provision for enforcement of covenants did not declare the entire contract terminated in the event of a covenant violation as it did for default on payments; and (4) buyers never gave notice to sellers that they considered failure to establish a home owners' association a violation of the contract. Burgess v. Shiplet, 230 M 387, 750 P2d 460, 45 St. Rep. 293 (1988).

Restrictive Covenant Allowing Disapproval of House Plans Based on "Harmony of External Design" — Specific Objective Standards Required: A restrictive covenant that allowed a design review committee to disapprove house plans and prevent construction based on "harmony of external design" was held to be too vague to be enforceable absent some general plan or scheme defining the standard of approval or an objective standard of design. Town & Country Estates Ass'n v. Slater, 227 M 489, 740 P2d 668, 44 St. Rep. 1257 (1987), contrasted in Jarrett v. Valley Park, Inc., 277 M 333, 922 P2d 485, 53 St. Rep. 671 (1996).

Community Home for Developmentally Disabled as "Single Family Dwelling": Because restrictive covenants are to be strictly construed to allow free use of property, a "community home" for five developmentally disabled children supervised by full-time paid houseparents as defined by 53-20-302 is a single housekeeping unit allowed within the intent of restrictive covenants requiring a subdivision to be composed of homes of "one unit single family dwellings". State ex rel. Child & Family Services, Inc. v. District Court, 187 M 126, 609 P2d 245 (1980).

Breach of Restrictive Covenant — Effect on Default: When lots within a legal subdivision are sold pursuant to a contract for deed, the sellers' breach of a restrictive covenant, occurring prior to the contracted due date, and relating to a 30-foot setback requirement on sellers' adjacent lot, does not excuse the buyer from his duty to make payment by the due date, and his right to recover damages is precluded by his failure to make such payment. Reinke v. Biegel, 185 M 31, 604 P2d 315 (1979).

Part Law Review Articles

Running With the Land in Montana, Natelson, 51 Mont. L. Rev. 17 (1990).

Construction of Restrictive Covenants in Deeds, Safty, 37 Mont. L. Rev. 268 (1976).

Restrictive Covenants and Land Use Control: Private Zoning, Lundberg, 34 Mont. L. Rev. 199 (1973).

70-17-201. Nature and effect.

Case Notes

Process for Amending Restrictive Covenant to Be Strictly Followed: Myers contended that a subdivision corporation did not follow the proper method for amending a restrictive covenant disallowing the rental of subdivision property for less than 30 days. The District Court disagreed, holding that the amendment was properly adopted and restrained Myers from renting the property for less than 30 days. Myers appealed. The Supreme Court held that because restrictive covenants must be strictly construed, when a covenant is amended to impose an impediment on use of the property, the method prescribed for amending the covenant must also be strictly followed. In this case, Myers established that the prescribed amendment method was not used, so the Supreme Court reversed the judgment. Point Serv. Corp. v. Myers, 2005 MT 322, 329 M 502, 125 P3d 1107 (2005).

Rules for Interpretation of Restrictive Covenants: Restrictive covenants are construed under the same rules of construction as other contracts. Declarations of covenants are read on their four corners as a whole, and terms are construed in their ordinary or popular sense. Bordas v. Virginia City Ranches Ass'n, 2004 MT 342, 324 M 263, 102 P3d 1219 (2004), following Windemere Homeowners Ass'n, Inc. v. McCue, 1999 MT 292, 297 M 77, 990 P2d 769 (1999), and followed in Point Serv. Corp. v. Myers, 2005 MT 322, 329 M 502, 125 P3d 1107 (2005).

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Reasonableness Standard Applicable to Actions of Architectural Committee: The power of approval or disapproval by an architectural committee must be governed by the applicable covenants and guidelines and must be exercised objectively, honestly, and reasonably. A committee may not subjectively impose its whims or aesthetic tastes on lot owners. The determination of whether the power was exercised reasonably or arbitrarily is a factual question to be determined in light of the circumstances. Whether a committee's disapproval of a builder's choice of roofing tile and exterior color was reasonable within the context of the applicable restrictive covenants was a question of fact, precluding summary judgment. Trieweiler v. Spicher, 254 M 321, 838 P2d 382, 49 St. Rep. 711 (1992), citing Gosnay v. Big Sky Owners Ass'n, 205 M 221, 666 P2d 1247 (1983).

Covenants to Be Read as Whole: The same rules of construction apply to interpreting protective covenants as apply to interpreting contracts. Therefore, such covenants must be read as a whole in order to ascertain their meaning, rather than reading any one covenant or part of a covenant in isolation. Gosnay v. Big Sky Owners Ass'n, 205 M 221, 666 P2d 1247, 40 St. Rep. 1229 (1983), followed in Jarrett v. Valley Park, Inc., 277 M 333, 922 P2d 485, 53 St. Rep. 671 (1996), and Tipton v. Bennett, 281 M 379, 934 P2d 203, 54 St. Rep. 229 (1997).

District Court's Failure to Enforce Restrictive Covenants Error: Landowners built a fence on their property in violation of a restrictive covenant after they had been denied permission to do so by the subdivision's architectural commission. Landowners had also requested and been denied permission to build a stable and to keep horses on their land. The District Court ruled that landowners were entitled to retain the fence, to build the stable, and to keep horses. The Supreme Court reversed, ruling that the evidence indicated that the architectural committee's actions had been governed by the restrictive covenants and were not an abuse of discretion. Gosnay v. Big Sky Owners Ass'n, 205 M 221, 666 P2d 1247, 40 St. Rep. 1229 (1983). See also Jarrett v. Valley Park, Inc., 277 M 333, 922 P2d 485, 53 St. Rep. 671 (1996).

Evidence of Changes External to Subdivision Relevant to Question of Violation of Restrictive Covenant: In an action by subdivision property owners for a preliminary injunction enjoining the use of a building for any purpose other than as a single-family dwelling pursuant to restrictive covenants, evidence as to changes in the character of the subdivision caused by developments in neighboring land is relevant to the question of whether the restrictions on the use of the dwelling are being violated. The evidence is admissible on the question of whether the character of the neighborhood has changed so radically as to render enforcement of the restrictions inequitable. Porter v. K & S Partnership, 192 M 175, 627 P2d 836, 38 St. Rep 648 (1981).

Creation of a Negative Easement Notwithstanding Absence of a Conveyance: A written agreement in the form of a court settlement not to use property as a restaurant and bar creates a valid and enforceable covenant which runs with the land and which is binding on each of the parties and their successors in interest notwithstanding absence of a conveyance of the estate to which the covenant pertains or words to that effect in the settlement agreement. The agreement was expressly intended to constitute a covenant running with the land and to bind the present owners, heirs, and assigns and was entered into voluntarily. A negative easement, as was created here, can be created by a grant (conveyance) or agreement; the agreement being construed as a grant is binding upon purchasers of the servient tenement who have actual or constructive notice of it. Reichert v. Weeden, 190 M 95, 618 P2d 1216, 37 St. Rep. 1788 (1980).

Restrictive Covenant Waived: Because plaintiffs voluntarily and intentionally waived their right to enforce against defendants a restrictive covenant prohibiting livestock by acquiescence in the presence of horses, they were estopped to assert the covenant against defendants. Kelly v. Lovejoy, 172 M 516, 565 P2d 321 (1977).

Restrictive Covenant as to Mobile Home — Includes Modular Home: Court erred in not granting plaintiff an injunction to prevent defendant from installing a modular home when a grant deed contained a restrictive covenant that provided no trailers or mobile homes could be used as a permanent residence. De Laurentis v. Vainio, 169 M 520, 549 P2d 461 (1976), followed in Newman v. Wittmer, 277 M 1, 917 P2d 926, 53 St. Rep. 516 (1996).

Lease With Right of First Refusal: Clause in lease providing lessee with right of first refusal if lessor should decide to sell was covenant that ran with land during term of lease and was apportioned among heirs of deceased lessor according to their respective interest in whole of property and bound them in same manner as if they had personally entered into covenant. Weintz v. Bumgarner, 150 M 306, 434 P2d 712 (1967), distinguished in Stufft v. Stufft, 276 M 454, 916 P2d 767, 53 St. Rep. 409 (1996).

70-17-203. Covenants that run with land.

Compiler's Comments

2011 Amendments — Composite Section: Chapter 137 inserted (2)(c) concerning dedication of open space; and made minor changes in style. Amendment effective July 1, 2011.

Chapter 249 inserted (2)(d) related to wind easements; and made minor changes in style. Amendment effective April 21, 2011.

Chapter 259 in (1) inserted reference to 70-17-212. Amendment effective April 21, 2011.

Applicability: Section 6, Ch. 259, L. 2011, provided: "[This act] applies to transfer fee covenants filed on or after [the effective date of this act]." Effective April 21, 2011.

Saving Clause: Section 13, Ch. 249, L. 2011, was a saving clause.

Severability: Section 14, Ch. 249, L. 2011, was a severability clause.

2009 Amendment: Chapter 307 at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2009.

2007 Amendment: Chapter 352 inserted (2)(b) regarding conservation easements; and made minor changes in style. Amendment effective April 27, 2007.

Case Notes

Covenants Intended to Remain in Effect Until Rejected by Property Owners — Failure of Sufficient Tract Owners to Vote to Amend Covenants: Subdivision property owners entered covenants that would automatically extend for "successive period" of 10 years. The covenants could also be amended by a two-thirds vote of the owners of the original tracts. Some of the owners contended that the covenant extension language was ambiguous because it was not clear if the covenants would be renewed only for a single 10-year period or for successive 10-year periods. The District Court held that the language was not ambiguous, but rather contained a typographical error, and that successive 10-year periods applied. Plaintiffs appealed, but the Supreme Court affirmed. Taken as a whole the covenant language intended that the covenants remain in effect until affirmatively rejected by the property owners. In this case, five of the eight original tract owners voted to amend the covenants, so without the required two-thirds vote, the covenants remained unamended. Brewer v. Hawkinson, 2009 MT 346, 353 M 154, 221 P3d 643 (2009). See also Creveling v. Ingold, 2006 MT 57, 331 M 322, 132 P3d 531 (2006).

No Ambiguity in Restrictive Covenant Prohibiting Placement of Trailers and Mobile Homes Upon Property — Development of Recreational Vehicle Park Precluded: A restrictive covenant provided that no trailers or mobile homes were to be placed upon the property conveyed by a deed. The District Court held that the term "placed upon" contemplated permanent placement, and that temporary placement was therefore not precluded. The court also held that the covenant disallowed only trailer houses or mobile homes used for residences. The court thus concluded that the covenant did not disallow development of the property as a campground for recreational vehicles and travel trailers. On appeal, the Supreme Court noted that language in a restrictive covenant should be understood in its ordinary and popular sense. It is not the role of a court to insert modifying language into clearly written and unambiguous written instruments, and the unambiguous language in the covenant contained no words to indicate the parties' intent to allow temporary trailers or mobile homes not used as residences. The District Court erred in modifying the covenant language to allow trailers to be placed on the property, so the conclusion that a campground for recreational vehicles and travel trailers was allowable was reversed. Creveling v. Ingold, 2006 MT 57, 331 M 322, 132 P3d 531 (2006).

Recorded Waiver of Annexation Protest by Prior Property Owner — Present Owner Precluded From Protesting Annexation: In 1966, the city of Whitefish adopted a policy that a landowner outside the city boundary had to agree to waive the right to protest future annexation in order to continue to receive city water and sewer services. The waivers were properly recorded and later used by the city to invalidate annexation protests by current landowners in 1998. The District Court concluded that the waivers constituted a covenant running with the land and that the current owners were precluded from protesting the proposed annexation. On appeal, the current owners argued that the right to protest in 7-2-4710 resided with the current property owner and that the statutory consent to annexation authorized by 7-13-4314 only applied to the initiation of services and could not transfer to subsequent purchasers. The Supreme Court disagreed. Under 7-1-113, a self-governing entity may act even when there are controlling state laws as long as the local government's actions are not inconsistent with or lower or less stringent than state requirements. The purpose of 7-13-4314 is to ensure that property owners outside a municipality can request utility services and to ensure that the local government can later require annexation in exchange for utilities. Creating a covenant that runs with the land furthers this purpose. In addition, this section also provides that every covenant made for the direct benefit of the property runs with the land. The waivers directly benefited the property and were allowable, so the District Court was affirmed. Gregg v. Whitefish City Council, 2004 MT 262, 323 M 109, 99 P3d 151 (2004). See also State ex rel. Swart v. Molitor, 190 M 515, 621 P2d 1100 (1981), and St. John v. Lewistown, 2017 MT 126, 387 Mont. 444, 395 P.3d 486.

Agricultural-Use Only Covenant Running With the Land — Covenant Enforceable Against Subsequent Owners Who Had Notice of Covenant: The Turners placed an agricultural-use only restrictive covenant on a 12.3-acre parcel of property, which lay within the city limits of Helena, in order to sever it from a 14.5-acre parcel and avoid subdivision review. A private residence was located on the retained parcel. After dividing the property, the Turners sold the retained parcel to another party and quit-claimed the remaining 12.3-acre parcel to the Hamptons. Greg Hampton had owned the parcel prior to its acquisition by the Turners, who had originally agreed to reconvey the parcel to Hampton under an agreement that stemmed from ongoing divorce proceedings between Hampton and his former wife. Hampton had previously sought to divide the property with a restrictive covenant in the same manner as the Turners, but Hampton's certificate of survey was rejected because Hampton was not the titled owner at the time. Shortly after the 12.3-acre parcel was quit-claimed to them, the Hamptons sought to have the county lift the covenant, but the Board of County Commissioners refused to revoke the covenant. It was undisputed that the parcel was never used for any agricultural purposes and that the parcel was in a mostly residential area coupled with undeveloped open space. On appeal, the Hamptons did not question the legality of the process by which the county chose not to lift the covenant, but rather questioned whether the covenant was one that ran with the land, thereby binding the subsequent owners of both the covenantor and covenantee. Despite the fact that Hampton claimed to be unaware of the covenant when it was quit-claimed, the District Court concluded that Hampton was well aware of the covenant and took the property subject to the covenant as would anyone else. A narrow interpretation of the agricultural-use covenant requires a covenantor and a covenantee, and the county does not satisfy that requirement; nevertheless, the Turners' estate in the retained land was benefited in that neither the Turners nor their subsequent grantee was required to undergo subdivision review. Thus, the District Court did not err in determining that the Turners placed a valid agricultural-use only covenant on the 12.3-acre parcel that ran with the land. The Hamptons' argument that no "transaction" occurred, because the conveyance should have been simultaneous with the placement of the covenant, did not comport with the Montana Subdivision and Platting Act, which requires county approval of the exemption prior to the sale and conveyance of any divided property. That the county, as a party to the covenant, may choose to enforce the agricultural-use restriction was a foreseeable event that the Hamptons were willing to risk for the sake of taking title to the parcel. No material facts remained in dispute as to whether the Hamptons had notice of the restrictive covenant, so the covenant was enforceable against them as a matter of law. Hampton v. Lewis & Clark County, 2001 MT 81, 305 M 103, 23 P3d 908 (2001).

No Duty of County to Determine Whether Land Transaction Constituted Attempt to Evade Subdivision Act Review: A county has no affirmative duty to analyze or investigate an exemption claimed under 76-3-207 beyond the duty to accept for review a certificate of survey or other evidence establishing the claimed exemption, nor must any defined threshold of evidence be met in order for the county to accept a claimed exemption. Hampton v. Lewis & Clark County, 2001 MT 81, 305 M 103, 23 P3d 908 (2001).

District Court's Failure to Enforce Restrictive Covenants Error: Landowners built a fence on their property in violation of a restrictive covenant after they had been denied permission to do so by the subdivision's architectural commission. Landowners had also requested and been denied permission to build a stable and to keep horses on their land. The District Court ruled that landowners were entitled to retain the fence, to build the stable, and to keep horses. The Supreme Court reversed, ruling that the evidence indicated that the architectural committee's actions had been governed by the restrictive covenants and were not an abuse of discretion. Gosnay v. Big Sky Owners Ass'n, 205 M 221, 666 P2d 1247, 40 St. Rep. 1229 (1983).

Creation of a Negative Easement Notwithstanding Absence of a Conveyance: A written agreement in the form of a court settlement not to use property as a restaurant and bar creates a valid and enforceable covenant which runs with the land and which is binding on each of the parties and their successors in interest notwithstanding absence of a conveyance of the estate to which the covenant pertains or words to that effect in the settlement agreement. The agreement was expressly intended to constitute a covenant running with the land and to bind the present owners, heirs, and assigns and was entered into voluntarily. A negative easement, as was created here, can be created by a grant (conveyance) or agreement; the agreement being construed as a grant is binding upon purchasers of the servient tenement who have actual or constructive notice of it. Reichert v. Weeden, 190 M 95, 618 P2d 1216, 37 St. Rep. 1788 (1980).

70-17-204. Who bound by covenant.

Compiler's Comments

2009 Amendment: Chapter 307 at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

District Court's Failure to Enforce Restrictive Covenants Error: Landowners built a fence on their property in violation of a restrictive covenant after they had been denied permission to do so by the subdivision's architectural commission. Landowners had also requested and been denied permission to build a stable and to keep horses on their land. The District Court ruled that landowners were entitled to retain the fence, to build the stable, and to keep horses. The Supreme Court reversed, ruling that the evidence indicated that the architectural committee's actions had been governed by the restrictive covenants and were not an abuse of discretion. Gosnay v. Big Sky Owners Ass'n, 205 M 221, 666 P2d 1247, 40 St. Rep. 1229 (1983).

70-17-205. Nonliability for prior or subsequent breach.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-17-206. Apportionment of burdens and benefits.

Compiler's Comments

2009 Amendment: Chapter 307 at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Lease With Right of First Refusal: Clause in lease providing lessee with right of first refusal if lessor should decide to sell was covenant that ran with land during term of lease and was apportioned among heirs of deceased lessor according to their respective interest in whole of property and bound them in same manner as if they had personally entered into covenant. Weintz v. Bumgarner, 150 M 306, 434 P2d 712 (1967), distinguished in Stufft v. Stufft, 276 M 454, 916 P2d 767, 53 St. Rep. 409 (1996).

70-17-210. Covenant enforcement and abandonment.

Compiler's Comments

2023 Correction: A conference committee amended Senate Bill No. 247 (now Ch. 665, L. 2023). The conference committee report was adopted by both chambers. However, the version of the bill that was transmitted to the Governor and signed by the Governor on May 19, 2023, did not include the conference committee amendments. The corrected version of the bill that included the conference committee amendments was delivered to the Governor on April 23, 2024, and was returned to the Secretary of State on May 3, 2024. The Governor did not sign or veto the corrected version.

Effective Date: Section 4, Ch. 665, L. 2023, provided: "[This act] is effective on passage and approval." Chapter 665 revised through correction May 3, 2024; see 2023 Correction compiler's comment.

70-17-211. Findings — purpose.

Compiler's Comments

Effective Date: Section 5, Ch. 259, L. 2011, provided that this section is effective on passage and approval. Approved April 21, 2011.

Applicability: Section 6, Ch. 259, L. 2011, provided: "[This act] applies to transfer fee covenants filed on or after [the effective date of this act]." Effective April 21, 2011.

70-17-212. Transfer fee covenants — void.

Compiler's Comments

Effective Date: Section 5, Ch. 259, L. 2011, provided that this section is effective on passage and approval. Approved April 21, 2011.

Applicability: Section 6, Ch. 259, L. 2011, provided: "[This act] applies to transfer fee covenants filed on or after [the effective date of this act]." Effective April 21, 2011.

70-17-216. Home-based child care.

Compiler's Comments

Effective Date: Section 4, Ch. 169, L. 2023, provided: "[This act] is effective on passage and approval." Approved April 19, 2023.

Retroactive Applicability — Applicability: Section 5, Ch. 169, L. 2023, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to covenants on residential property in existence before [the effective date of this act] [April 19, 2023] that do not clearly and expressly address child care."

Section 6, Ch. 169, L. 2023, provided: "[This act] applies to covenants on residential property adopted on or after [the effective date of this act] [April 19, 2023] that do not clearly and expressly address child care."

Severability: Section 3, Ch. 169, L. 2023, was a severability clause.

Part 4
Wind Energy Easements

Part Compiler's Comments

Saving Clause: Section 13, Ch. 249, L. 2011, was a saving clause.

Severability: Section 14, Ch. 249, L. 2011, was a severability clause.

Effective Date: Section 15, Ch. 249, L. 2011, provided: "[This act] is effective on passage and approval." Approved April 21, 2011.

Part 9
Restrictions Pertaining to Homeowners' Associations

70-17-901. Homeowners' association restrictions — real property rights.

Compiler's Comments

Effective Date: Section 5, Ch. 339, L. 2019, provided: "[This act] is effective on passage and approval." Approved May 9, 2019.

Severability: Section 4, Ch. 339, L. 2019, was a severability clause.

CHAPTER 18
REAL PROPERTY — ACCESSION FIXTURES AND WATERCOURSES

Part 1
Fixtures

70-18-101. Fixture attached by other — accession by owner.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Rescission of Lease — Claim for Wrongful Retention of Fixtures Properly Dismissed: In an action for damages caused by breach of a lease, the District Court did not err in dismissing the defendants' counterclaim for wrongful retention of certain fixtures added to the property by the defendants. As a matter of law, the plaintiff cannot be unjustly enriched because a fixture, by definition, is a part of real property to be retained by the owner of the premises at the expiration of the lease. Certain fixtures may be removed but only during "the continuance of his [the tenant's] term". As no effort was made by the defendants to remove the fixtures until 9 months after vacating the premises, the defendants' counterclaim was properly rejected. Ragen v. Weston, 191 M 546, 625 P2d 557, 38 St. Rep. 456 (1981).

Apartment Attached to Rented Premises: Where tenant built a small apartment attached to rented premises with the intention that it be permanent and without an agreement with the lessor that he would be allowed to remove any of the items which went into the construction and where the improvement was so attached that removal injured the premises, the property and chattels used in building the apartment became fixtures as a matter of law and lessor who removed them after tenant left the premises was not guilty of conversion. Sanders v. Butte Motor Co., 142 M 524, 385 P2d 263 (1963).

Manner of Attachment: While question of whether personal property has become affixed to the land is one concerning the intention of the affixer, it is presumed that when the property is affixed it is intended to become a part of the realty. Generally, the manner in which the attachment is made, the adaptability of the thing attached to the use to which the realty is applied, together with the intention of the one making the attachment, determine whether the thing attached is realty or personalty. Pritchard Petroleum Co. v. Farmers Co-op Oil & Supply Co., 117 M 467, 161 P2d 526 (1945).

Tanks:

Two 12,000-gallon tanks weighing 4 tons each, installed on realty by owner of the realty for use in connection with oil business and held in place by their weight without being otherwise attached, became part of the realty. Pritchard Petroleum Co. v. Farmers Co-op Oil & Supply Co., 117 M 467, 161 P2d 526 (1945).

Two 15,000-gallon tanks installed by defendant on realty which defendant mistakenly believed that it owned and used by defendant for 5 years in the oil business conducted on the land were part of the realty and became plaintiff's property upon plaintiff's establishing its title to the land. Pritchard Petroleum Co. v. Farmers Co-op Oil & Supply Co., 117 M 467, 161 P2d 526 (1945).

Two 15,000-gallon tanks purchased under conditional sales contract and affixed to realty by owner and used in owner's oil business retained their character of personal property under provisions of conditional sales contract. Pritchard Petroleum Co. v. Farmers Co-op Oil & Supply Co., 117 M 467, 161 P2d 526 (1945).

Fence: Where one places a fence on the land of another without an agreement permitting him to do so, it belongs to the owner of the land unless he chooses to require its removal, the presumption, disputable in nature, being that one in possession of land is also the owner of the fixtures thereon. Schmuck v. Beck, 72 M 606, 234 P 477 (1925).

Railroad: Whether rails furnished by a railroad company to a mining company and laid by the latter upon its property to serve its own purposes were trade fixtures within meaning of this section depended upon relation between the parties at time rails were laid and intention of parties with respect to them. Helena & Livingston Smelting & Reduction Co. v. N. Pac. Ry., 62 M 281, 205 P 224, 21 ALR 1080 (1922).

Bridge: A person who enters upon and voluntarily constructs a bridge so as to connect portions of an existing public highway separated by a river is not the owner of the bridge, because to all intents and purposes it belongs to the public. State ex rel. Donlan v. Bd. of County Comm'rs, 49 M 517, 143 P 984 (1914), followed in Kelly v. Wallace, 1998 MT 307, 292 M 129, 972 P2d 1117, 55 St. Rep. 1271 (1998).

70-18-102. Removal of fixture by tenant.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Bank Claim to Property Alleged as Fixtures — Inferior to Owners' Property Rights: Mills took out a loan to acquire personal property to be used in a roller-skating facility, including a removable heating system, and paid off the loan about 18 months later. Mills later sold the roller-skating facility, including the heating system, to Davises. The transaction was financed through the Little Horn State Bank. The contract provided that in case Davises defaulted, possession of the real and personal property would return to Mills and Davises would retain no further interest. Davises defaulted and entered an agreement and release with the bank whereby the property was deeded to the bank in consideration of the bank satisfying the mortgage debt. Mills later offered to sell the heating system to the bank, but the bank refused and advised Mills that the bank claimed the property as fixtures pursuant to Davises' mortgage, whereupon Mills removed the heating system. However, because Mills were at all times the owners of the personal property, the bank obtained no more interest than that held by Davises. Therefore, the bank's claim to the heating system as fixtures was inferior and subject to the property rights of Mills. Little Horn St. Bank v. Mill, 233 M 372, 760 P2d 91, 45 St. Rep. 1563 (1988).

Ambiguity of Lease Concerning Fixtures — Conformity to General Principles: Kevin Cumiskey leased a restaurant from Elizabeth Bradley. The lease provided that Cumiskey could make improvements and alterations to the premises that were to remain Cumiskey's property. Fixtures were also to be Cumiskey's. Cumiskey was to insure Bradley's interest, which he failed to do. The restaurant was severely damaged through suspected arson. The insurer brought a declaratory judgment action, and Bradley counterclaimed for damages or loss on the basis of the failure to insure. Damages were an issue at trial, but the trial court granted summary judgment for Bradley on the issue of liability. The Supreme Court, on appeal, held that the District Court had properly found the terms on fixtures and improvements in the lease ambiguous and used an appropriate rule of construction to interpret these clauses. The lease was prepared by an attorney for Cumiskey. Cumiskey testified he intended to use the lease to coerce Bradley into selling him the property. The court properly construed the ambiguity against Cumiskey, the person causing it, and found that the specific provision controlled the general provision and that such interpretation was in conformance with general landlord and tenant law in Montana. St. Paul Fire & Marine Ins. Co. v. Cumiskey, 204 M 350, 665 P2d 223, 40 St. Rep. 891 (1983).

Rescission of Lease — Claim for Wrongful Retention of Fixtures Properly Dismissed: In an action for damages caused by breach of a lease, the District Court did not err in dismissing the defendants' counterclaim for wrongful retention of certain fixtures added to the property by the defendants. As a matter of law, the plaintiff cannot be unjustly enriched because a fixture, by definition, is a part of real property to be retained by the owner of the premises at the expiration of the lease. Certain fixtures may be removed but only during "the continuance of his [the tenant's] term". As no effort was made by the defendants to remove the fixtures until 9 months after vacating the premises, the defendants' counterclaim was properly rejected. Ragen v. Weston, 191 M 546, 625 P2d 557, 38 St. Rep. 456 (1981).

Manner of Attachment: Where tenant built a small apartment attached to rented premises with intention that it be permanent and without an agreement with lessor that he would be allowed to remove any of the items which went into the construction and where the apartment was so attached that removal injured the premises, the property and chattels used in building the apartment became fixtures as a matter of law and lessor who removed them after tenant left the premises was not guilty of conversion. Sanders v. Butte Motor Co., 142 M 524, 385 P2d 263 (1963), followed in Pac. Metal Co. v. NW. Bank of Helena, 205 M 323, 667 P2d 958, 40 St. Rep. 1301 (1983).

When This Section Not Controlling: Under the rule that specific statute prevails over general one to extent of any necessary repugnance between them, 70-15-104 is controlling over this section where the question is whether a dredge used in placer mining operations is a fixture. Story Gold Dredging Co. v. Wilson, 106 M 166, 76 P2d 73 (1938).

Part 2

Watercourses

Part Law Review Articles

Riparian Rights, Navigability, and the Equal Footing Doctrine in Montana, Butler, 38 Pub. Land L. Rev. 187 (2017).

70-18-201. Alluvion or accretion — increase of bank.

Case Notes

Property Boundary Properly Established Following Accretion and Avulsion of River: The District Court found that the meander channel of the Sun River between plaintiffs' and one defendant's property moved south by accretion from where it was depicted in a 1906 government survey into a channel depicted in a 1937 aerial photograph and that the channel moved north by avulsion to its present channel in 1916. The court further concluded that the Sun River between plaintiffs' and another defendant's property also moved north by avulsion in 1948. The record amply supported the 1906 accretion that created the lots in question, at which time the property boundary moved with the water line. However, when the river avulsed to its present location in 1916, the property boundary did not move. Likewise, when the river avulsed north in 1948, the property boundary also did not move, so the District Court properly determined the boundaries between the lots after considering the avulsion and accretion of the river, and judgment was affirmed. Harding v. Savoy, 2004 MT 280, 323 M 261, 100 P3d 976 (2004).

Access Right of Riparian Owner Not Destroyed by Changing Water Level: A riparian owner has a right of access to the water, and his access cannot be destroyed by the changing of the water level by gradual recession. He has the right to preserve his contact with the water by appropriating the accretions of the land that form along the shore and are exposed by reliction. Land formed by accretion or reliction becomes part of the shore, and the riparian owner acquires title to the water. He has a share in the land left exposed by the receding of the lake. Stidham v. Whitefish, 229 M 170, 746 P2d 591, 44 St. Rep. 1869 (1987).

Division of Relicted Exposed Shoreline — General Principle: The general principle that governs how a relicted exposed shoreline is divided between lot owners on a lake is that any division must be equitable and proportional so far as to give each owner a share of the land to be divided relative to his portion of the original shoreline. Stidham v. Whitefish, 229 M 170, 746 P2d 591, 44 St. Rep. 1869 (1987).

Severed Mineral Estate — Subject to Accretion and Erosion: The mineral interests in land bordering the Yellowstone River on the east were severed from the surface estate in 1938. The original survey of the area was done in 1884. Since the time of the original survey, the Yellowstone River has gradually moved eastward. In a quiet title action, a question of first impression was presented, viz., whether a severed mineral estate bordering a navigable waterway is subject to the doctrines of accretion and erosion. On appeal, the Supreme Court upheld the District Court's reliance on Nilson v. Tenneco Oil Co., 614 P2d 36 (Okla. 1980). The court held that a severed mineral estate is subject to the doctrines of accretion and erosion, and that prior exception by a riparian owner on one side of a navigable waterway will not work to divest the state (owner of the land underlying the waterway) or another riparian owner of ownership in lands underlying navigable waterways or minerals situated in accreted lands. Jackson v. Burlington N., Inc., 205 M 200, 667 P2d 406, 40 St. Rep. 1214 (1983).

Accretions Included in Conveyance: If a conveyance describes adjoining riparian land, then accretions or the right thereto, unless excepted or reserved, pass to a purchaser although the accretions are not described in the conveyance. Jackson v. St., 181 M 257, 593 P2d 432 (1979), followed in Filler v. McDaniel, 230 M 10, 747 P2d 1365, 44 St. Rep. 2211 (1987).

Large Excess of Land Left Between Shore and Meander Line When Surveyed — Remains Public Domain: Where shown in condemnation action by United States that lands in question were in place when survey made and large body of unsurveyed land in controversy lay between meander line and low watermark of Missouri River, such lands (and accretions thereto) remained and continued to be public domain, and where river subsequently changed its channel, when ice broke up in spring, by cutting across an oxbow loop, the abandoned bed belonged to the state under 70-1-202. U.S. v. Eldredge, 33 F. Supp. 337 (D.C. Mont. 1940).

Accreted Lands — Definition:

Accreted lands are additions to the area of land by reason of the gradual deposit of solid material by water, producing dry land which before was covered by water, along the banks of a stream, whether navigable or not, belonging to the riparian owner. Unless excepted or reserved, accretions to land pass to purchaser although not described in deed. Smith v. Whitney, 105 M 523, 74 P2d 450 (1937).

Under this section and 70-18-204, accreted lands, that is, additions to the area of real estate from the gradual deposit by water of solid material, whether mud, sand, or sediment, producing dry land which before was covered by water along the banks of a navigable or nonnavigable stream, belong to the riparian owner. Bode v. Rollwitz, 60 M 481, 199 P 688 (1921).

Meander Lines — Water the Real Boundary: The general rule is that meander lines run in surveying fractional portions are not run as boundaries of the tract but for defining sinuosities of the banks of stream to ascertain quantity of the upland. The title of the grantee of such land is not limited to the meander line, and the water constitutes the real boundary line. Smith v. Whitney, 105 M 523, 74 P2d 450 (1937).

Tax Sale — Right Acquired by Purchaser: Accreted lands are included in the assessment of lands described in accordance with government survey, even though the assessment is limited by its terms to the number of acres specified in the survey, and the tax deed purchaser acquires the same title to such lands, whether described or not, as he does to the upland adjoining described by the survey. Smith v. Whitney, 105 M 523, 74 P2d 450 (1937).

70-18-203. Island formed in navigable stream.

Case Notes

Title to Minnie Island Vested in State: Minnie Island formed in the channel of the Yellowstone River, a navigable stream under the criteria of Mont. Coalition for Stream Access v. Curran, 210 M 38, 682 P2d 163 (1984), sometime between 1889 and 1916. Although no longer completely surrounded by water, the District Court correctly found that the island was not formed by accretion and therefore was not subject to an adjacent landowner's claim of ownership. Absent title or prescription to the contrary, title to Minnie Island vested in the state. Edwards v. Severin, 241 M 168, 785 P2d 1022, 47 St. Rep. 169 (1990).

70-18-204. Island formed in nonnavigable stream.

Case Notes

Accreted Land — Belongs to Riparian Owner: Under 70-18-201 and this section, accreted lands, that is, additions to the area of real estate from the gradual deposit by water of solid material, whether mud, sand, or sediment, producing dry land which before was covered by water along the banks of a navigable or nonnavigable stream, belong to the riparian owner. Bode v. Rollwitz, 60 M 481, 199 P 688 (1921).

70-18-206. Sudden change in river or stream.

Compiler's Comments

Effective Date: Section 5, Ch. 210, L. 2013, provided: "[This act] is effective on passage and approval." Approved April 15, 2013.

Applicability: Section 6, Ch. 210, L. 2013, provided: "[This act] applies to avulsions occurring on or after [the effective date of this act]." Effective April 15, 2013.

CHAPTER 19
REAL PROPERTY ACTIONS GENERALLY LIMITATIONS AND ADVERSE POSSESSION

Chapter Case Notes

Sufficient Evidence to Support Public Access to Land Via Old County Road: Plaintiff sued to quiet title to any interest in a property that once constituted an old county road right-of-way and that had fallen into disuse. The District Court held that the public, including the state, had access to a particular section of land via the right-of-way, which was never formally abandoned. Plaintiff appealed, but the Supreme Court affirmed. The District Court's ruling was supported by an 1893 petition for the roadway, a 1902 USGS map, a 1915 railroad map, a 1938 aerial photograph, testimony by the state's expert witness, and a viewing of the property by the District Court Judge. The Supreme Court declined to reweigh the evidence, and despite conflicting evidence, the evidence before the District Court was substantial and credible and supported the District Court's ruling. Only A Mile, LLP v. St., 2010 MT 99, 356 Mont. 213, 233 P.3d 320.

Ambiguous Deeds of Conveyance — Intent of Parties Properly Considered: A dispute arose in a quiet title action based on subdivision surveys that differed from the original government survey. The District Court held that the property belonged to defendants, and the Supreme Court affirmed. Inconsistencies between the original plat and the location of the subdivision surveyor's monuments created an ambiguity. References to quarter section lines and quarter corners in the original survey were definite and ascertainable, and the subdivision surveyor's improperly placed monuments were considered false particulars frustrating the conveyance. The District Court properly applied Brown's Boundary Control and Legal Principles (4th Ed. 1995) to determine that the subdivision surveyor's monuments conflicted with the government's original monument and correctly considered the intent of the parties in interpreting the surveys and conveyances. Further, the original plat was part of the deeds of conveyance in defendants' chain of title, so the District Court correctly allowed the certificate of dedication into evidence. Olson v. Jude, 2003 MT 186, 316 M 438, 73 P3d 809 (2003).

Use of Original Survey for Reference — Proper Determination of Tract Boundary: A dispute arose in a quiet title action based on subdivision surveys that differed from the original government survey. When surveyors use corner sections and lines to base measurements and plot tracts, it is essential that they properly identify and authenticate the original monument. Original corners established by a government survey, if those corners can be found, or places where they were originally established, if those places can be definitely determined, are conclusive without regard to whether they were located correctly or not and must remain the true corners or monuments by which to determine the boundaries. The footsteps of the original surveyor should be followed, so far as discoverable on the ground by monuments, and it is immaterial if the lines run by the original surveyor are incorrect. Olson v. Jude, 2003 MT 186, 316 M 438, 73 P3d 809 (2003). See also Vaught v. McClymond, 116 M 542, 155 P2d 612 (1945), and Helehan v. Ueland, 223 M 228, 725 P2d 1192 (1986).

Acceptance of Payments Irrelevant When Service of Notice Insufficient: The real estate contract entered into by the Ahrens and Cottle provided that all notices between the parties be delivered personally or by registered mail. When Cottle failed to make several underlying payments to the bank, the Ahrens made the payments to the bank and subsequently, in November 1993, filed suit to cancel the contract for deed and for possession of the property. In December, Cottle cured the default by making the late payments to the bank. The lower court held that the Ahrens had waived their right to default by allowing Cottle to make payments curing the default. The Supreme Court held that the payments were irrelevant because the Ahrens had never served notice of default on Cottle as required by the contract and therefore could not accelerate the contract and seek to regain possession of the property. Ahrens v. Cottle, 271 M 339, 896 P2d 1127, 52 St. Rep. 485 (1995).

Failure to Comply With Contract Notice Provisions: The real estate contract entered into by the Ahrens and Cottle provided that all notices between the parties be delivered personally or by registered mail. When Cottle failed to make several underlying payments to the bank, the Ahrens posted a notice of default on Cottle's back door. The Supreme Court held that although Montana case law has held that failure to adhere to technical requirements of notice is immaterial if an individual has knowledge of the notice, in the present case, the posting of the notice was a material flaw in service. Ahrens v. Cottle, 271 M 339, 896 P2d 1127, 52 St. Rep. 485 (1995), distinguishing Hares v. Nelson, 195 M 463, 637 P2d 19 (1981), and LeClair v. Reitner, 233 M 332, 760 P2d 740 (1988).

Landowner Testimony — Value of Property: In this action involving the sale of commercial real estate, the purchaser was allowed to estimate the value of the resort he purchased from the defendant seller. A landowner has the right to testify as to the value of his property. Zugg v. Ramage, 239 M 292, 779 P2d 913, 46 St. Rep. 1693 (1989).

Conflicting Surveys: At a trial between two adjacent landowners over the exact location of the boundary, conflicting findings of several surveyors were submitted into evidence. The District Court accepted the defendant's survey, and the Supreme Court affirmed, finding substantial credible evidence that defendant's surveyor was not only experienced but also an experienced surveyor of the property in question, having surveyed the same section line in 1949 and 1976. Helehan v. Ueland, 223 M 228, 725 P2d 1192, 43 St. Rep. 1679 (1986).

Part 1
General Provisions

70-19-101. Action defined.

Case Notes

Release of Real Estate Commission Dependent Upon Outcome of Property Dispute — No Cause of Action Absent Actual Interest in Property: Goodman Realty placed its $10,000 real estate commission in escrow to indemnify Smiths in the event that a particular drainfield easement did not exist. Because release of the commission depended on the resolution of the easement dispute between Smiths and Monson, Goodman Realty argued that its pecuniary interest in the outcome of the dispute created a cause of action between Goodman Realty and Monson. However, Goodman Realty alleged no interest in the property of either Smiths or Monson, its only interest being the release of the indemnification sum, which was wholly unrelated to the property interests at issue. Goodman Realty's complaint did not allege that any legal duty was breached by Monson. Dismissal of the complaint for failure to clearly state a cause of action was proper. Goodman Realty, Inc. v. Monson, 267 M 228, 883 P2d 121, 51 St. Rep. 1074 (1994).

70-19-102. Action affecting title or possession — filing as constructive notice.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Lis Pendens Not Unconstitutional Taking: The filing of a lis pendens does not constitute an unconstitutional taking because a lis pendens does not create substantive rights; it only serves to put prospective purchasers of real property on notice of a pending lawsuit involving a title issue. LeMond v. Yellowstone Dev., LLC, 2014 MT 181, 375 Mont. 402, 336 P.3d 345.

Lis Pendens Action Not Affecting Title Inappropriate: A lis pendens action that does not affect the possession of, title to, or interest in real property is not authorized pursuant to this section. West v. The Club at Spanish Peaks, LLC, 2008 MT 183, 343 M 434, 186 P3d 1228 (2008), following Paulson v. Lee, 229 M 164, 745 P2d 359 (1987), and followed in LeMond v. Yellowstone Dev., LLC, 2014 MT 181, 375 Mont. 402, 336 P.3d 345.

Authorized Notice of Lis Pendens Not Subject to Slander of Title Action: Where the underlying action affected title to or possession of property, notice of lis pendens was proper. Because the notice was authorized, it was privileged and not subject to a slander of title action. The defense of privilege in filing the notice was improperly denied. Paulson v. Lee, 229 M 164, 745 P2d 359, 44 St. Rep. 1864 (1987).

Claim of Title or Right of Possession Not Required if Title or Right of Possession Affected — Lis Pendens Authorized: In an action to stop construction, sale, or lease of a four-unit dwelling, the party filing a notice of lis pendens was not required to show an actual claim of title to or right of possession of the property. The relief sought would have affected title to or right of possession of the property; therefore, the notice of lis pendens was authorized under this section. Paulson v. Lee, 229 M 164, 745 P2d 359, 44 St. Rep. 1864 (1987).

Lis Pendens — Purpose — Application: The purpose underlying lis pendens statutes is to provide a better form of notice of pending litigation to those interested in the subject property. The doctrine applies to all persons acquiring an interest in the subject of the litigation during the pendency of the action. Fox v. Clarys, 227 M 194, 738 P2d 104, 44 St. Rep. 1004 (1987), followed in Baston v. Baston, 2010 MT 207, 357 Mont. 470, 240 P.3d 643, and LeMond v. Yellowstone Dev., LLC, 2014 MT 181, 375 Mont. 402, 336 P.3d 345.

Assignability of Judgment on Appeal: The Supreme Court rejected appellants' contention that since a judgment on appeal is not final, it is not assignable. The court distinguished Montana's lis pendens statute from that of other states which specifically prohibit assignment of an interest in the subject matter of a case on appeal. Janke v. Smyk, 210 M 206, 683 P2d 942, 41 St. Rep. 1011 (1984).

Publication of Lis Pendens Absolutely Privileged: Where plaintiff sought specific performance against a corporation to perform a written option to lease land and filed a lis pendens, it was error for the court not to grant plaintiff summary judgment on defendant's cross-complaint requesting damages for slander of title because the filing of a lis pendens is absolutely privileged without reference to the merits of the underlying action. Hauptman v. Edwards, Inc., 170 M 310, 553 P2d 975 (1976).

Affirmative Defenses: Affirmative defenses are not necessarily claims for affirmative relief as contemplated by this section. White v. Connor, 138 M 1, 354 P2d 722 (1960).

Part 2
Actions Relating to Mining Claims

Part Law Review Articles

Grazing Permit Holder Liable for Trespass of Animals on Unpatented Mining Claim, Corontzos, 22 Mont. L. Rev. 87 (1960).

70-19-201. Actions concerning mining claims governed by local rules.

Case Notes

Conflict With Statute: A custom among miners in a certain district that 20 days' labor should constitute $100 worth of work is in conflict with section 2324, Revised Statutes of the United States (30 U.S.C. 28); the test is not the number of days' work performed but the worth or reasonable value of the labor performed or improvements made. Penn v. Oldhauber, 24 M 287, 61 P 649 (1900).

70-19-202. Abuse of property held jointly or in common — action — mining property.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Breach of Joint Venture Fiduciary Trust — Award of Investment Plus Interest Affirmed: Kelly and Rust agreed to purchase land, subdivide it, and sell it at a profit. Rust advanced Kelly $4,000 as one-half the purchase price. Kelly paid the $4,000 balance and recorded the deed, but did not include Rust on the recorded deed. Rust moved from the area and later attempted, through his agent, to purchase Kelly's interest in the land. The agent was told the land was already sold, so Rust brought an action to recover his investment plus interest. The trial court properly held that: (1) the parties had entered into a joint venture; (2) Kelly was required in equity to hold the property in a constructive trust; (3) Kelly breached the joint venture fiduciary duty and attempted to deprive Rust of his interest in the property; and (4) Rust was entitled to return of his $4,000 investment plus interest. Rust v. Kelly, 228 M 220, 741 P2d 786, 44 St. Rep. 1471 (1987).

Unlawful Detainer by Tenant in Common — Amendment of Pleading Properly Denied: Where the plaintiff and her sister leased farmland they owned as tenants in common to the defendant for a 6-year period and the sister conveyed her interest in the property to the defendant shortly before the expiration of the lease, the court did not err, in an action by the plaintiff brought in 1974 for an accounting of rents and profits from the defendant, in refusing to allow the plaintiff to plead and prove an unlawful detainer against the defendant. Leave of court should not be granted to allow amendments that present theories totally inapplicable to the case. As a tenant in common is an owner of an undivided interest in the property, a claim of unlawful detainer may not be asserted against a cotenant, but only against a tenant for a term less than life. A cotenant is allowed to possess and use commonly held property, and an action will lie for waste but not unpermitted use. Fry v. Heble, 191 M 272, 623 P2d 963, 38 St. Rep. 228 (1981).

Willful and Malicious Deprivation of Use of Property — Damages: In an action for actual and punitive damages for removal of a gate and approach to property of which plaintiff was a cotenant with defendant's wife, the Supreme Court found substantial evidence to support the findings of fact and conclusions of law determining the existence of a willful and malicious deprivation of the use of the property as well as the amount of damages (actual damages of $230 and punitive damages of $1000). Toeckes v. Baker, 188 M 109, 611 P2d 609 (1980).

Redemption From Tax Sale: Where a mining company neglected to pay its taxes, a cotenant, having a right to operate the mining property and pay all expenses of such operation and account to other cotenants, under 15-18-101 (repealed, 1987), had sufficient interest in patented mining claims, separately assessed to the mining company, to permit her to redeem the property from a tax sale. Dudley v. Higgins, 141 M 140, 375 P2d 689 (1962), followed in Kneedler v. League Wide, Inc., 1999 MT 80, 294 M 101, 979 P2d 163, 56 St. Rep. 334 (1999).

Action for Profits: An action for the reasonable value of the use and occupation of a city lot is maintainable by one cotenant against another as to the net profits resulting from such occupation, whether they be the result of rents received from third persons holding under one cotenant or from a profitable use of the common property by the cotenant himself. Ayotte v. Nadeau, 32 M 498, 81 P 145 (1905).

Contracts Between Tenants: Tenants in common may contract with reference to the use of the common property. This is particularly the case under the statute, since their respective interests partake in great measure of the nature of estates in severalty. Ayotte v. Nadeau, 32 M 498, 81 P 145 (1905).

Retroactive Application:

This act is inapplicable to a cotenancy created prior to its passage. Ayotte v. Nadeau, 32 M 498, 81 P 145 (1905).

The provisos of this act apply to cotenants whose estates were in existence when the law was passed, and as to such estates, the act is an attempt to disturb or destroy vested rights and is therefore inoperative and void. Butte & Boston Consol. Min. Co. v. Mont. Ore Purchasing Co., 25 M 41, 63 P 825 (1901).

Mining Property:

Each tenant in common has the right to have mining property stand as it is until it is finally partitioned, and there must be a clear showing to justify a court in invading this right and mining the property through a receiver. Heinze v. Kleinschmidt, 25 M 89, 63 P 927 (1901).

To be excepted from liabilities for injury under this section, a cotenant, entering upon mining property and enjoying the rights given by the proviso, must comply strictly with the obligations attached to the privilege of such entry. Butte & Boston Consol. Min. Co. v. Mont. Ore Purchasing Co., 24 M 125, 60 P 1039 (1900).

Unless a working cotenant brings himself squarely within the provisos of this act, the law preserves to his nonworking cotenant exactly the same actions against such working cotenant as he had before the act was in force. Butte & Boston Consol. Min. Co. v. Mont. Ore Purchasing Co., 24 M 125, 60 P 1039 (1900).

Where one cotenant occupies mining property in compliance with the provisions of this act, the statute does not always give to another cotenant an equal right to mine elsewhere on the same claim. Butte & Boston Consol. Min. Co. v. Mont. Ore Purchasing Co., 24 M 125, 60 P 1039 (1900).

Injunction:

A cotenant not joining in the operation of a mine and suing for damages for the removal of ore therefrom through another mine owned by his tenant in common, to which plaintiff had no right of access, was entitled to an injunction pendente lite to restrain such removal, though defendant offered to account for ore extracted therefrom. Butte & Boston Consol. Min. Co. v. Mont. Ore Purchasing Co., 24 M 125, 60 P 1039 (1900).

A cotenant, whose estate was created before the 1899 amendment to this section became operative, is entitled to restrain by injunction such mining and removal of ore from the common property by his cotenant as is therein prohibited, provided that the remedy at law is inadequate and the threatened injury irreparable. Butte & Boston Consol. Min. Co. v. Mont. Ore Purchasing Co., 24 M 125, 60 P 1039 (1900).

70-19-203. Adverse claims under acts of congress.

Compiler's Comments

Federal Statute — Adverse Claims: 30 U.S.C. 30, 17 Stat. 93.

Case Notes

Res Judicata: Where in an adverse suit arising out of a patent proceeding to mining ground, the subject matter was land—millsites—and in a later one the question was whether mill tailings deposited on such sites were personal property, a judgment of dismissal on the merits entered in the former on failure of plaintiff to plead further after demurrer to the complaint had been sustained was not res judicata in the second suit, the subject matter in litigation of the two suits not having been the same. Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939).

Pleadings: This section applies especially to adverse claims in patent proceedings and seems to contemplate a special action, equitable in its nature. It has not, however, changed the rule of pleading established by previous decisions, and the fact of the filing of the claim in the land office within the prescribed time and the bringing of the action within the prescribed limitation must be alleged or the complaint will not support the judgment. Thornton v. Kaufman, 35 M 181, 88 P 796 (1907).

Quiet Title Action Distinguished: By the adoption of this section, the Legislature recognized the distinction between ordinary actions to determine adverse claims, authorized by the statute in relation to suits to quiet title, and adverse claims to determine the right of the contestant to a patent. Thornton v. Kaufman, 35 M 181, 88 P 796 (1907).

Amendment of Complaint: An action under this section proceeds to judgment as other actions, and the court may permit amendments to the complaint so as to make it state a cause of action, even after the 30 days prescribed in the federal statute have expired. Woody v. Hinds, 30 M 189, 76 P 1 (1904).

Equitable Action: Where the complaint in an action to determine an adverse claim to a mining location set up the filing of plaintiff's adverse claim, as provided by this section, after defendant had applied for a patent, and prayed that defendant be required to set forth the nature of his claim to the ground and that all adverse claims of defendant might be determined by the judgment of the court and the answer denied plaintiff's ownership and possession and prayed that defendant be adjudged to be the owner and entitled to possession of the premises sued for, the suit was one of equitable cognizance and not an action at law. Mares v. Dillon, 30 M 117, 75 P 963 (1904).

Land Office Proceedings Required: This section clearly implies that in an action to determine an adverse claim to a mining location, it is useless for the court to proceed to judgment, unless it appears that an application for patent has been made and that an adverse claim has been filed and allowed in the proper land office. Hopkins v. Butte Copper Co., 29 M 390, 74 P 1081 (1904).

Intervention: One who has not filed his adverse claim under the act of Congress cannot intervene in an action to determine adverse claims to a location, though he claims an interest in the premises adverse to plaintiff and defendant. Murray v. Polglase, 23 M 401, 59 P 439 (1899), explained in Poore v. Kaufman, 44 M 248, 119 P 785 (1911).

Possession Not Required: One who has made an agreement to convey and has given possession to the party to whom conveyance is to be made can maintain action, despite state law limiting actions to parties in possession or their tenants. Wolverton v. Nichols, 119 US 485, 30 L Ed 474, 7 S Ct 289 (1886), reversing 5 M 89, 2 P 308 (1883).

Specific Statutory Provisions: Where there are specific limitations concerning placer mines and quartz lodes, these control the general provisions relating to real estate. Davis v. Clark, 2 M 310 (1875).

70-19-204. Order for inspection or survey.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Arbitrarily Fixed Cost Erroneous: An order granting an inspection of the underground workings of mining property in controversy, which arbitrarily fixed the amount to be paid by plaintiff to defendant for lowering and hoisting plaintiff's agents engaged in such inspection at a certain sum, without hearing any evidence as to the actual cost, was erroneous. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. District Court, 30 M 206, 76 P 206 (1904).

Failure of Order to Provide for Compensation Defective: An order granting an inspection is a defective order which fails to provide for the compensation contemplated by this section. State ex rel. Heinze v. District Court, 29 M 105, 74 P 132 (1903).

Adjudication of Costs: A finding that an inspection and survey were necessary to enable a party to properly present his case was an adjudication of costs attendant on procuring the order for the survey. King v. Allen, 29 M 5, 73 P 1107 (1903).

Witness Fees as Proper Costs: Under this section and 25-10-201, fees paid a witness testifying on the hearing for an order of inspection and survey, fees paid a witness at the hearing of an order to show cause, fees for summoning such witness, and the expense of preparing a map are prima facie proper items of costs. King v. Allen, 29 M 5, 73 P 1107 (1903).

Costs of Survey and Inspection — Paid by Petitioner: The costs of obtaining the order under this section, as well as the costs of the survey and inspection, should be paid by the petitioner. State ex rel. Anaconda Copper Min. Co. v. District Court, 26 M 396, 68 P 570, 69 P 103 (1902).

Equitable Jurisdiction: Equity has no jurisdiction, independent of statute and in the absence of a suit to order inspection of property. State ex rel. Anaconda Copper Min. Co. v. District Court, 26 M 396, 68 P 570, 69 P 103 (1902).

Facilities Used for Inspection: In an order granted under this section, the court may provide that all appliances in use to facilitate ingress and egress be made available to the person making the inspection, the additional expense being paid by the petitioner. State ex rel. Anaconda Copper Min. Co. v. District Court, 26 M 396, 68 P 570, 69 P 103 (1902).

Interest in Property Required: This section is not applicable where the petitioner asserts no interest in the property of which inspection is sought or through which entry is necessary to inspect adjoining property. State ex rel. Anaconda Copper Min. Co. v. District Court, 26 M 396, 68 P 570; 26 M 412, 68 P 1134, rehearing denied, 69 P 103 (1902); State ex rel. Geyman v. District Court, 26 M 433, 68 P 797 (1902).

Necessity for Inspection: Inspection should not be granted of a mine not described in the petition, and the order for inspection and survey of a mine for protection of petitioner's interest therein or in another mine should be limited to the necessities of the case and explicitly state how far it may go. State ex rel. Anaconda Copper Min. Co. v. District Court, 26 M 396, 68 P 570, 69 P 103 (1902).

Owner's Right to Follow a Lode Into Another Claim Not an Interest in the Other Claim: To entitle one under this section to an inspection of a claim for the purpose of ascertaining or enforcing his right or interest in another claim, he must have an interest in the first claim, and the right of one owning a claim to follow a lode having its apex therein into another claim is not such an interest in the latter claim as to authorize his inspection and survey of it. State ex rel. Anaconda Copper Min. Co. v. District Court, 26 M 396, 68 P 570, 69 P 103 (1902).

Constitutionality: The authority bestowed by this section does not empower the District Court to grant an order that may be made unjust or oppressive, nor does it deprive the adverse party of his property without due process of law. Therefore it is not unconstitutional, even though it does not require the interest of the petitioner to be defined and permits such examination before the commencement of any action by the parties, without bond, since such proceeding is the proper mode of securing the best evidence, and even though it does not provide for an appeal from such order, as the proceedings may be reviewed by the Writ of Certiorari. St. Louis Min. & Mill. Co. v. Mont. Co., 9 M 288, 23 P 510 (1890), affirmed in 152 US 160, 38 L Ed 398, 14 S Ct 506 (1894).

Part 3
Provisions and Limitations Relating to the State of Montana

70-19-301. Application to lands conveyed by state.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-19-302. Statute of limitations for state actions concerning real property.

Case Notes

Application of Statutes to State: Speaking generally, the Statutes of Limitations of Montana have application to the state. Newton v. Weiler, 87 M 164, 286 P 133 (1930).

70-19-303. Statute of limitations for actions by grantee — joinder of state.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-19-304. Statute of limitations for action for recovery of property under void conveyance from state.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

When Statute Begins to Run: The Statute of Limitations provided for in 70-19-304 starts to run only after a competent court declares the letters patent or the grants void. It does not begin to run on the date of the issuance of the void letters or grants. King v. Rosebud County, 193 M 268, 631 P2d 711, 38 St. Rep. 1145 (1981).

70-19-305. Certificate of purchase from state or United States prima facie evidence of ownership.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

No Express Federal Reservation of Public Road Pursuant to Land Patent — Easement by Reference Reversed: The District Court held that the federal government expressly reserved a public road across patented mining claims by referring in an 1896 federal land patent to a mineral survey that depicted a road labeled "ROAD". Citing Leo Sheep Co. v. U.S., 440 US 668 (1979), the Supreme Court disagreed. Plaintiff cited no authority for the proposition that a reference in a federal land patent to a mineral survey that depicts a road labeled "ROAD" qualified as an express reservation under federal law. Rather, the inference prompted by the presence of certain other express reservations in the patent and the absence of an express reservation for a particular right-of-way was that no right-of-way was reserved. The intent to create an easement must be clearly and unmistakably communicated on the referenced plat or certificate of survey, using labeling or other express language, and an easement may not be inferred or implied from an unlabeled or inadequately described swath of land or other depiction appearing on a certificate of survey. Additionally, the Supreme Court has recognized the creation of privately held easements only by reference and has never applied the doctrine to create a public road, and the court declined to do so in this case. Nothing in the field notes or in the patent evidenced an intent by the federal government to reserve a public road across a patented mining claim, and the District Court erred in finding that the road traversing the mining claim was a public road pursuant to an express easement by reservation created in the mining survey and referenced in the conveying documents of the mining claim. The District Court was reversed. Our Lady of the Rockies, Inc. v. Peterson, 2008 MT 110, 342 M 393, 181 P3d 631 (2008).

Failure to Establish Public Use: Plaintiff failed to establish use by the public of the exact route claimed over public land for the 10-year period prior to 1927, when a U.S. patent was issued to defendant. The District Court erred in finding that the road was in place, was in use, and was a granted public road pursuant to 43 U.S.C. 932 (repealed 1976). Parker v. Elder, 233 M 75, 758 P2d 292, 45 St. Rep. 1305 (1988).

Receipt From Land Office: In an action of ejectment to recover possession of a mining claim, a receipt issued by the receiver of the U.S. land office, which failed to show that plaintiff had made the purchase or was entitled to patent, was not such a certificate as is referred to in this section and was valueless as evidence, but its admission in evidence was without prejudice where plaintiff's title was amply sustained by other proof. Consol. Gold & Sapphire Min. Co. v. Struthers, 41 M 565, 111 P 152 (1910).

Part 4
Limitations and Adverse Possession

Part Case Notes

Criteria for Adverse Possession Met — Property Claimed Under Color of Title — Taxes Paid — Evidence That Cotenant Was Ousted Established by Recorded Deed and Exclusive Use of Property. Hart v. Hale, 2022 MT 82, 408 Mont. 258, 508 P.3d 877.

Prescriptive Easement — Evidence of Long-Term Adverse Use Sufficient: The plaintiffs claimed that they had a prescriptive easement across the defendants' road and testified that their family had used the road without permission for at least 90 years. The defendants claimed that the plaintiffs had requested permission to use the road after the defendants purchased the land. However, the District Court did not find the defendants' claim credible and ruled that the plaintiffs had a prescriptive easement. On appeal, the Supreme Court affirmed, holding that the evidence at trial supported the District Court's finding that the road had been used without permission for nearly 90 years. Meine v. Hren Ranches, Inc., 2015 MT 21, 378 Mont. 100, 342 P.3d 22.

Accrual of Adverse Use Prohibited When Property Owned by Government: Because a private party cannot obtain a prescriptive easement against the federal government, a private party's adverse use of property did not begin to run until the federal government conveyed title to the property to a private entity. Burcalow Family, LLC v. Corral Bar, Inc., 2013 MT 345, 372 Mont. 498, 313 P.3d 182.

Permission to Use Dock Granted by Prior Owner — Whether Permission Carries Over to Subsequent Owners to Be Evaluated on Case-by-Case Basis — No Prescriptive Easement: In urging the Supreme Court to find that they had established an easement by prescription to a dock owned by the plaintiff, the defendants urged the court to follow the rule outlined in Han Farms, Inc. v. Molitor, 2003 MT 153, 316 Mont. 249, 70 P.3d 1238, which declared that one owner's grant of permission does not continue by default to the next owner. After reviewing significant case law regarding the transferability of permission for use, the court declined to adopt the defendants' argument and overruled the proposition in Han Farms that permission can never carry over from one owner to another after the sale of the servient property. Rather, the court reiterated that based on a thorough reading of its permissive use cases, the court will always consider the nature of the initial permission and attendant circumstances to analyze whether permission exists. Pedersen v. Ziehl, 2013 MT 306, 372 Mont. 223, 311 P.3d 765.

Adequate Showing of Prescriptive Easement — No Showing of Permissive Use Absent Owner's Knowledge of Ownership: Bertelsen owned two parcels of property adjacent to a county road that he leased to a propane business beginning in 1987. The county road was subsequently abandoned, so all that separated Bertelsen's property from a federal highway was a triangular piece of land upon which the state Department of Transportation held an easement but which was otherwise undeveloped. The propane company constructed some improvements on the triangular parcel. While researching property in the area, Slauson discovered that the triangular parcel was owned by a third party, Edwards, who was not even aware that she owned it. Slauson acquired the property from Edwards and had the state discharge its easement and then approached Bertelsen and the propane company and offered to lease the parcel to Bertelsen. Bertelsen asserted the right to continued use of the property, and Slauson sued to enforce his property rights and to recover compensation and damages from Bertelsen. At trial, Bertelsen argued that he had acquired the property through adverse possession or that he had a prescriptive easement that allowed the propane company to continue using the property. The District Court found that Bertelsen had not paid taxes on the parcel, so there was no adverse possession, but held that Bertelsen and the propane company had established a prescriptive easement to maintain the improvements and to transact the company's business on the parcel. Slauson appealed, questioning whether the use was open, notorious, and adverse. The Supreme Court found that the company used the property for public access and as a parking lot, which adequately provided previous owner Edwards with notice of use. Having established open, notorious, exclusive, continuous, and uninterrupted use for the statutorily required 5-year period, Bertelsen was entitled to the presumption of adverse use, and Slauson was required to prove that the use was permissive in order to overcome the presumption. Slauson could not prove permissive use because Edwards did not know that she owned the parcel and thus could not have granted permission for its use. Bertelsen therefore established a prescriptive easement, and the District Court was affirmed. Slauson v. Bertelsen Family Trust, 2006 MT 314, 335 M 43, 151 P3d 866 (2006).

Following the 2006 decision, a dispute arose between Slauson and the plumbing company that used the prescriptive easement. Slauson asserted that the company trespassed and used

Slauson's property in unauthorized ways, and the company countersued for interference with the scope of the easement. The District Court granted the company $418.60 for landscaping that Slauson had removed and awarded Slauson $430 for costs of removing snow that the company piled on Slauson's property outside the easement. Both parties appealed, but the Supreme Court held that neither party established any error in the District Court's rulings and affirmed. Slauson v. Marozzo Plumb. & Heating, LLC, 2009 MT 333, 353 M 75, 219 P3d 509 (2009).

Incorrect Finding of Prescriptive Easement for Road and Residence — Moving of Residence Not Required: The District Court found that a prescriptive easement had been established for a road that strayed into an adjoining parcel and for a residence, the corner of which also extended into the adjoining parcel. The Supreme Court found the record full of contradictory assertions and findings, but noted that because the actual location of the road was concealed from the owner by way of maps and misrepresentations as to its true location, the record did not come close to establishing the elements of hostility or open and notorious use by clear and convincing evidence to establish a prescriptive easement for the road. Further, the owner of the residence conceded that the corner of the foundation and eaves encroached onto the adjoining parcel. Never having paid taxes on the land in question, the owner could not prevail on a claim of adverse possession to obtain title to the ground under the encroachment, so a finding of a prescriptive easement for the residence was also in error. However, because the property owner indicated at trial and in appeal briefs that he was willing to work something out regarding the encroachment, the Supreme Court concluded that to require removal of the encroachment would be extreme and declined to order that the residence be moved from its foundation. Gelderloos v. Duke, 2004 MT 94, 321 M 1, 88 P3d 814 (2004).

No Public Prescriptive Use of Mining Road Never Declared Public Road — Prescriptive Easement Established and Not Extinguished by Reverse Adverse Possession: Owners of a road used since 1936 for mining access claimed a public prescriptive use. The road was never formally declared a public road or used for the statutorily required period of time sufficient to establish a prescriptive easement. Thus, the existence of a public prescriptive easement depended on the exploratory use that took place when the mine was not in full operation, recreational use by the public, and county road maintenance. However, even taken together, this evidence did not rise to the level of public prescriptive use. The District Court did not err in finding that no public prescriptive easement existed over the road. However, while the evidence did not qualify as a public easement, it did qualify as a private easement in plaintiff's favor. Virtually unrestricted use of the road between 1936 and 1961 met the requirements of open, notorious, exclusive, adverse, continuous, uninterrupted use for the required statutory period. Further, defendant's act of locking a gate across the road and providing plaintiff a key and access with permission was not a distinct and positive assertion unequivocally hostile and adverse to plaintiff sufficient to extinguish plaintiff's easement by reverse adverse possession. Brimstone Min., Inc. v. Glaus, 2003 MT 236, 317 M 236, 77 P3d 175 (2003). See also Granite County v. Komberec, 245 M 252, 800 P2d 166 (1990).

Retaining Wall and Dock Not Considered Substantial Enclosure to Establish Possessory Adverse Use: The Jameses built a dock and retaining wall on property that a later survey revealed was on Habel's property. Habel filed a quiet title action, and the Jameses counterclaimed that they had acquired a prescriptive easement for the dock and retaining wall by adverse use for the statutory period. The District Court agreed and ruled that a nonpossessory prescriptive easement existed for the dock and retaining wall. Habel appealed, arguing that the dock and retaining wall were permanent structures that clearly marked the boundaries of the land enclosed by the structures and that the Jameses had thus acquired a possessory interest in the enclosed land. The Supreme Court noted that 70-19-410 does not specify what kind of structure satisfies the requirement to "protect by substantial enclosure" in order to consider the property to be possessed and occupied for purposes of adverse possession, but concluded that a structure or fixture may constitute a substantial enclosure if it indicates the boundaries of the adverse occupancy in a manner that clearly demonstrates the extent of the use of the property. The District Court's findings that the land was only partially enclosed by the dock and retaining wall and did establish a possessory use of the property itself were not clearly erroneous. A complete possession or occupation of the land was not present in this case because the Jameses' construction and maintenance of the dock and retaining wall were limited uses consistent with a nonpossessory interest, which constituted a burden on Habel's property, not a complete possession or occupation. The District Court was affirmed. Habel v. James, 2003 MT 99, 315 M 249, 68 P3d 743 (2003), distinguishing Burlingame v. Marjerrison, 204 M 464, 665 P2d 1136 (1983).

Reverse Adverse Possession — Public Prescriptive Easement Extinguished by Relocation of Road and Public Acquiescence With Locked Gates for Thirty Years: Dome Mountain Ranch's predecessor in interest relocated a road in 1965 and installed locked gates and no trespassing signs. Public access was limited to occasional, seasonal recreational use by permission or when the gates were unlocked, until Park County officially declared the road a county road in 1994. Dome Mountain Ranch claimed that the 5-year statutory period of reverse adverse possession concluded in 1970, so it was not required to show a clear intent by the county to abandon the road in proving its claim of reverse adverse possession. Title to a public road may not be obtained by adverse possession, and there must be a clear showing of intent to abandon a county road. Mere nonuse, even for extended periods of time, is generally insufficient in itself to indicate an intent to abandon. Likewise, mere nonuse or lack of maintenance by the county is not sufficient to indicate an intent to abandon, absent notice and a public hearing. To be continuous and uninterrupted, the use of a claimed right in a prescriptive easement must not be abandoned by the user or interrupted by an act of the landowner. Seasonal recreational use, use by neighbors visiting neighbors, and use by persons cutting Christmas trees and gathering firewood are generally not sufficient to establish use by the public over a definite course continuously and uninterruptedly. In this case, the Supreme Court agreed with Dome Mountain Ranch that reverse adverse possession applied. The relocation of the road, coupled with the public's acquiescence with locked gates for almost 30 years, extinguished the county's public prescriptive easement, if one ever existed. Dome Mtn. Ranch, LLC v. Park County, 2001 MT 289, 307 M 420, 37 P3d 710 (2001), following Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525 (1993), and McCauley v. Thompson-Nistler, 2000 MT 215, 301 M 81, 10 P3d 794 (2000).

No Proof of Adverse Possession Absent Evidence of Property Taxes: The District Court found that plaintiffs had proved their claim to a disputed parcel of property and established an adverse possession claim, based in part on historical payment of property taxes. Defendant 360 Ranch contended that the District Court's conclusion that plaintiffs had paid property taxes on the property was error and that defendant's records showed that defendant had actually paid taxes on the parcel. Plaintiffs maintained that 70-19-411 does not require payment of taxes on all property to which adverse possession is claimed, but only of all taxes legally levied and assessed. The tax assessments indicated that plaintiffs were assessed taxes on property east of "the road", but it was not clear which of two roads through the parcel was indicated. The Supreme Court held that because the record provided insufficient evidence to show that plaintiffs paid taxes on the property in question, the District Court's conclusion that plaintiffs had proved a claim for adverse possession was incorrect and reversible error. Tester v. Tester, 2000 MT 130, 300 M 5, 3 P3d 109, 57 St. Rep. 538 (2000).

Public Use for Statutory Period Coupled With Assumption of Adverse Control — Public Prescriptive Easement Established: An easement by prescription is created by operation of law through open, notorious, exclusive, adverse, continuous, and uninterrupted use for 5 years. Following the same criteria, applied to public prescriptive easements in Granite County v. Komberec, 245 M 252, 800 P2d 166, 47 St. Rep. 2061 (1990), the Supreme Court noted that to establish the existence of a public road by prescription, it must be shown that the public followed a definite course continuously and uninterruptedly for the prescribed statutory period, together with an assumption of control adverse to the owner. To be open and notorious, the use of a claimed right must give the landowner actual knowledge of the claimed right or be of such a character as to raise a presumption of notice. To be continuous and uninterrupted, the use of a claimed right may not be abandoned by the user or interrupted by an act of the landowner. To be adverse, the use or assumption of control of a claimed right must be exercised under a claim of right and not as a mere license revocable at the pleasure of the landowner. Regular maintenance of a roadway by the party asserting a prescriptive easement is evidence of adverse rather than permissive use. Because a public prescriptive easement is "public", the element of exclusivity is not required in establishing the existence of a public prescriptive easement. In the present case, the county presented sufficient evidence establishing the existence of a public prescriptive easement on German Gulch Road, including a history of open public use and county maintenance of the road, an absence of evidence that the public ever abandoned use of the road, and the fact that plaintiff never erected gates, barriers, or signs on the road to create the impression of permissive use or established permissive use through neighborly accommodation. Hitshew v. Butte/Silver Bow County, 1999 MT 26, 293 M 212, 974 P2d 650, 56 St. Rep. 111 (1999), distinguishing Leffingwell Ranch, Inc. v. Cieri, 276 M 421, 916 P2d 751, 53 St. Rep. 453 (1996). However, see Lyndes v. Green, 2014 MT 110, 374 Mont. 510, 325 P.3d 1225.

Transfer of Land to Corporation or Trust in Which Grantor Has Interest — Color of Title Not Created: Relying on St. v. King, 87 SE 167 (W. Va. 1915), and St. v. Altizer Coal Land Co., 128 SE 286 (W. Va. 1925), the Supreme Court held that a grantor cannot create color of title in land in which that grantor has no interest by transferring or deeding the land to a corporation or trust in which that grantor has an interest. Y A Bar Livestock Co. v. Harkness, 269 M 239, 887 P2d 1211, 51 St. Rep. 1517 (1994).

Presumption of Adverse Use Established Through Preliminary Requirements for Prescriptive Right: After a claimant has established the preliminary requirements for a prescriptive right, a presumption of adverse use arises. The burden then shifts to the owner of the land on which the prescriptive easement is claimed to establish permissive use or license. If an owner establishes that the use is permissive, no easement can be acquired. In the present case, no genuine issue of material fact existed with regard to defendant's open, notorious, continuous, uninterrupted, and exclusive use of a road access for the statutory period; thus, the presumption of adverse use was applicable. Plaintiff failed to raise material facts regarding whether the use was permissive, including questions of permission or license, control of access by use of a gate, and neighborly accommodation. Defendant was therefore entitled to summary judgment based on adverse use as a matter of law. Lemont Land Corp. v. Rogers, 269 M 180, 887 P2d 724, 51 St. Rep. 1459 (1994), distinguishing Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525 (1993). See also Brown & Brown of MT, Inc. v. Raty, 2012 MT 264, 367 Mont. 67, 289 P.3d 156, Brown & Brown of MT, Inc. v. Raty, 2013 MT 338, 372 Mont. 463, 313 P.3d 179, Lyndes v. Green, 2014 MT 110, 374 Mont. 510, 325 P.3d 1225, and Cremer Rodeo Land & Livestock Co. v. McMullen, 2023 MT 117, 412 Mont. 471, 531 P.3d 566.

Former Curative Statute Inapplicable When Road Not Laid Out by Public or Dedicated or Abandoned to Public: Former 32-103, R.C.M. (repealed 1965 but in effect when a private road was established) read: "All highways, roads, lanes, streets, alleys, courts, places and bridges laid out or erected by the public or now traveled or used by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such by the partition of real property, are public highways." The District Court inappropriately applied this curative statute in declaring that the road was converted from a public easement into a county road because the road was never laid out or erected by the public or dedicated or abandoned to the public or made such by partition, nor was there ever a public prescriptive easement established through public use. Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525, 50 St. Rep. 794 (1993).

Reverse Adverse Possession and Inconsistent Use: A landowner's blocking of a road was a hostile act that established reverse adverse possession because the state and local government and the public cooperated and adhered to a walk-in policy that had been in existence on the land for about 17 years. The decision by County Commissioners to deny a petition to establish the disputed road as a county road confirmed acquiescence in the fact that the road was a private road. Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525, 50 St. Rep. 794 (1993), distinguished in Lemont Land Corp. v. Rogers, 269 M 180, 887 P2d 724, 51 St. Rep. 1459 (1994).

Adverse Possession Inapplicable to Title to Public Roads: The general rule in Montana law is that title to public roads may not be obtained by adverse possession. Baertsch v. Lewis & Clark County, 256 M 114, 845 P2d 106, 49 St. Rep. 1162 (1992), following Billings v. Pierce Packing Co., 117 M 255, 161 P2d 636 (1945).

No Adverse Possession of Royalty Interest by Color of Title Found — Estoppel Applied: Defendants in an action to quiet title to a royalty interest argued that they held color of title to the interest by virtue of an invalid tax deed and subsequent conveyances. However, defendants also argued that the reservation of a royalty interest by Rosebud County, their ultimate grantor, was invalid. Citing Russell v. Texas Co., 238 F2d 636 (1956), the Supreme Court held that the defendants could not attack a royalty reservation in a title under and through which defendants claimed adverse possession by color of title. The court held that defendants were estopped from attacking Rosebud County's royalty reservation and that because defendants' grant expressly subjects them to the county's reservation of a royalty interest, defendants had no color of title to their royalty. Stanford v. Rosebud County, 251 M 128, 822 P2d 1074, 48 St. Rep. 1124 (1991).

No Adverse Possession of Royalty Interest by Use and Occupancy Found — Burden of Proof Unmet: Defendants in an action to quiet title to certain royalty interests argued that they established adverse possession. Citing Burlingame v. Marjerrison, 204 M 464, 665 P2d 1136 (1983), the Supreme Court noted that adverse possession must rely upon possession that is actual, visible, exclusive, hostile, and continuous for the required statutory period. Because the defendants failed to produce evidence that they possessed or had taken any of the proceeds from the royalty, which was held by the clerk of court, the Supreme Court held that adverse possession did not apply. Stanford v. Rosebud County, 251 M 128, 822 P2d 1074, 48 St. Rep. 1124 (1991).

Elements of Adverse Possession Not Shown: Once the true boundary line became known in 1971, defendants made only one demand for the property in dispute, which was rebuffed, and made no additional claim adverse to plaintiffs until 1983. Defendants never occupied the property prior to 1983, when they built a garage over the survey line, or paid taxes on the property. Plaintiffs brought an action for ejectment and rents in 1985. The District Court correctly held that defendants never occupied the property in a manner establishing adverse possession or an easement. Smithers v. Hagerman, 244 M 182, 797 P2d 177, 47 St. Rep. 1483 (1990), followed in Y A Bar Livestock Co. v. Harkness, 269 M 239, 887 P2d 1211, 51 St. Rep. 1517 (1994).

Failure to Establish Public Use: Plaintiff failed to establish use by the public of the exact route claimed over public land for the 10-year period prior to 1927, when a U.S. patent was issued to defendant. The District Court erred in finding that the road was in place, was in use, and was a granted public road pursuant to 43 U.S.C. 932 (repealed 1976). Parker v. Elder, 233 M 75, 758 P2d 292, 45 St. Rep. 1305 (1988).

When Easement Rights Not Extinguished by Adverse Possession or Prescriptive Easement: Both adverse possession and prescriptive easement require proof of open, notorious, exclusive, adverse, and continuous possession or use for 5 years. The Supreme Court found insufficient evidence of extinguishment of easement rights by adverse possession or prescriptive right to a gate when: (1) there was not consistent testimony that appellant intended to eliminate all access to the easement; (2) he stated he would have given lot owners keys to the gate if they had wished to improve the access road; (3) there was limited entry around the gate by snowmobile, motorcycle, or on foot; (4) the gate was sometimes left open; (5) a declaration of restrictions remained on file stating the easement right; (6) "no trespassing" signs were not placed near the gate for at least 4 years after the gate was installed; and (7) appellant never affirmatively conveyed to the lot owners at any date certain his intention that they not go beyond the gate. Shors v. Branch, 221 M 390, 720 P2d 239, 43 St. Rep. 919 (1986).

Prescriptive Easement — No Proof of Permissive Use: The District Court's finding that a prescriptive easement had been established was proper where testimony of claimant's witnesses indicated open, notorious, exclusive, adverse, continuous, and uninterrupted use of the road and the landowner offered no evidence to establish permissive use other than his uncorroborated assertions. Thomas v. Barnum, 211 M 137, 684 P2d 1106, 41 St. Rep. 1266 (1984).

Water Rights by Prescription — Hostile Use Required: Where the plaintiffs brought an action against the decedent's estate, claiming a prescriptive right to water diverted by the decedent's descendants, the District Court did not err in holding that the requirement of hostile use of the water would be applied to determine whether the water had been acquired by prescription. Without such a requirement, the holder of a water right could be deprived of that right without notice. In the case before the court, use of the water could not be said to be hostile unless the defendants were deprived of the water in question at a time when they actually had need of it. Language in the opinion in Cook v. Hudson, 110 M 263, 103 P2d 137 (1940), appearing to abrogate the requirement of hostile use, is expressly disapproved. Grimsley v. Estate of Spencer, 206 M 184, 670 P2d 85, 40 St. Rep. 1585 (1983).

Easement by Prescription Extinguished: Although a landowner's predecessors in interest may have obtained a prescriptive easement to use an irrigation ditch, the landowner's subsequent actions in apparent recognition that his use was permissive are incompatible with the nature of a prescriptive easement and have extinguished any easement by prescription. Robertson v. Hughes, 204 M 515, 668 P2d 1025, 40 St. Rep. 1041 (1983).

Permissive Use Not Basis for Easement by Prescription: When use of an easement begins as a permissive use, it cannot ripen into a prescriptive right no matter how long it continues, unless there is a distinct and positive assertion of a right hostile to the owner. Robertson v. Hughes, 204 M 515, 668 P2d 1025, 40 St. Rep. 1041 (1983).

Enclosure by Fence — Improper Grant of Land Outside Fence: Since plaintiffs obtained title through adverse possession under a deed by, among other things, enclosing a piece of land with a fence, they could be granted title by the court only to what was enclosed by the fence, and the District Court was ordered to change the award to delete land outside the fence. Castles v. Lawrence, 203 M 421, 662 P2d 589, 40 St. Rep. 545 (1983), rehearing denied, 40 St. Rep. 718 (1983).

Survey Costs in Boundary Disputes: Survey costs for the portion of a party's property not related to the boundary dispute were held not chargeable to the other party to the dispute despite the fact that the survey was prompted by the dispute. Nott v. Booke, 194 M 251, 633 P2d 678, 38 St. Rep. 1507 (1981).

Summary Judgment for Prescriptive Public Easement — Estoppel From Denying County Ownership: Where the purchasers of real property brought an action for breach of contract, misrepresentation, and breach of a statutory and equitable obligation to maintain a county road against the sellers of the property, and the county, the previous property owner, and the sellers in turn filed a cross-complaint for indemnity against the previous owner, the trial court did not err in denying the county's motion for summary judgment and granting the motions of the plaintiffs and sellers for summary judgment. On a motion for summary judgment, the movant has the burden of establishing prima facie the absence of any genuine issue of material fact, and when the movant does so, the party opposing the motion must come forward with substantial evidence raising a genuine issue of material fact. The sellers presented evidence in support of their motion showing a prescriptive public easement and estoppel against the county and former owner. The county failed to present evidence to meet their burden. Riley v. Carl, 191 M 128, 622 P2d 228, 38 St. Rep. 83 (1981).

Plaintiff Losing Quiet Title Action — No Attorneys' Fees: Under 25-10-101 and 25-10-102, attorneys' fees may be awarded as a matter of course to the party receiving a favorable judgment involving real property. Thus, when plaintiff filed a quiet title action and ended up losing possession of the property, he was not entitled to attorneys' fees unless awarded by discretion of the court under 25-10-103, and the court properly decreed that each party pay his own costs. Stimatz v. St., 189 M 179, 615 P2d 228 (1980).

Adverse Possession — Color of Title — Good Faith: The burden of proving adverse possession under color of title is on the defendant in a quiet title action. Under Montana law, an instruction which purports to convey land or the right to its possession is sufficient color of title as a basis for adverse possession if the claim is made in good faith. When a party's "title" was based on a quitclaim deed from an individual who was known by all parties concerned to have no interest whatsoever in the property, the court concluded that there was not a trace of good faith and no color of title. Further, the party asserting adverse possession must succeed on the strength of his own title and cannot rely on the weakness of his adversary. Russell Realty Co. v. Kenneally, 185 M 496, 605 P2d 1107 (1980), followed in Y A Bar Livestock Co. v. Harkness, 269 M 239, 887 P2d 1211, 51 St. Rep. 1517 (1994).

Quiet Title Action — Punitive Damages and Attorney Fees Awards: Lack of good faith in an adverse possession case will not necessarily support a punitive damages award for slander of title. Testimony of failure to recognize the opposing party in a quiet title action from a previous business transaction and of reliance on the Secretary of State's information that the party corporation had no registered agent for service of process, although part of the determination of a lack of good faith, was sufficient to rebut an allegation of malice as required for the award of punitive damages. There being no statutory or contractual provision for attorney fees in this case, a common-law exception would be required for such an award. Without proof that the defendant acted fraudulently, maliciously, or with bad faith toward the plaintiff in a quiet title action, attorney fees will not be awarded. A decision denying attorney fees will not be disturbed absent abuse of discretion by the trial court. Russell Realty Co. v. Kenneally, 185 M 496, 605 P2d 1107 (1980).

Part Law Review Articles

New Prescriptive Easement Law: The Montana Supreme Court Expands Public Access to Private Land in Public Access Ass'n v. Board of County Commissioners of Madison County, Inabnit, 77 Mont. L. Rev. 185 (2016).

Requisites for Adverse Possession in Montana, Olsson, 11 Mont. L. Rev. 89 (1950).

70-19-401. Action for recovery — possession within 5 years required.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

General 186
Mineral and Water Right 192
Time Limit 193

GENERAL

Private Road Subject to Public Prescriptive Easement Accessible Only by Blocked County Road — Reverse Adverse Possession: A public prescriptive easement was extinguished on Modesty Creek Road's upper branch when the lower branch, a statutorily created public county road not subject to reverse adverse possession, was blocked by continuously locked gates for more than 30 years. Although the gates were blocking a county road on the lower branch, the public acquiesced to the understanding that the upper branch was a private road. Thus, the District Court erred in concluding that the public held a prescriptive easement on the upper branch of Modesty Creek Road, rather than finding that the prescriptive easement had been extinguished by reverse adverse possession. Letica Land Co., LLC v. Anaconda-Deer Lodge County, 2015 MT 323, 381 Mont. 389, 362 P.3d 614.

Prescriptive Easement Not Extinguished by Landowner's Temporary Cooperation: The plaintiff filed an action to prevent the defendants, who are neighboring landowners, from crossing his land. The defendants sought a declaration that they had a prescriptive easement to access their ranch across the plaintiff's property. At trial, other adjacent landowners testified that the defendants had never requested permission to cross their land and had crossed the land for decades, and that no landowner had resisted until the plaintiff filed suit. The District Court ruled that the defendants had a prescriptive easement that had been perfected before the plaintiff had purchased his property given the neighboring landowners' testimony that the defendants had always crossed this land to access their ranch without asking for permission. The plaintiff appealed and argued that the District Court had erred. The Supreme Court affirmed and noted that the defendants' temporary cooperation with the plaintiff when he first acquired the property did not extinguish their prescriptive easement. Lyndes v. Green, 2014 MT 110, 374 Mont. 510, 325 P.3d 1225.

Adequate Showing of Prescriptive Easement — No Showing of Permissive Use Absent Owner's Knowledge of Ownership: Bertelsen owned two parcels of property adjacent to a county road that he leased to a propane business beginning in 1987. The county road was subsequently abandoned, so all that separated Bertelsen's property from a federal highway was a triangular piece of land upon which the state Department of Transportation held an easement but which was otherwise undeveloped. The propane company constructed some improvements on the triangular parcel. While researching property in the area, Slauson discovered that the triangular parcel was owned by a third party, Edwards, who was not even aware that she owned it. Slauson acquired the property from Edwards and had the state discharge its easement and then approached Bertelsen and the propane company and offered to lease the parcel to Bertelsen. Bertelsen asserted the right to continued use of the property, and Slauson sued to enforce his property rights and to recover compensation and damages from Bertelsen. At trial, Bertelsen argued that he had acquired the property through adverse possession or that he had a prescriptive easement that allowed the propane company to continue using the property. The District Court found that Bertelsen had not paid taxes on the parcel, so there was no adverse possession, but held that Bertelsen and the propane company had established a prescriptive easement to maintain the improvements and to transact the company's business on the parcel. Slauson appealed, questioning whether the use was open, notorious, and adverse. The Supreme Court found that the company used the property for public access and as a parking lot, which adequately provided previous owner Edwards with notice of use. Having established open, notorious, exclusive, continuous, and uninterrupted use for the statutorily required 5-year period, Bertelsen was entitled to the presumption of adverse use, and Slauson was required to prove that the use was permissive in order to overcome the presumption. Slauson could not prove permissive use because Edwards did not know that she owned the parcel and thus could not have granted permission for its use. Bertelsen therefore established a prescriptive easement, and the District Court was affirmed. Slauson v. Bertelsen Family Trust, 2006 MT 314, 335 M 43, 151 P3d 866 (2006).

Following the 2006 decision, a dispute arose between Slauson and the plumbing company that used the prescriptive easement. Slauson asserted that the company trespassed and used Slauson's property in unauthorized ways, and the company countersued for interference with the scope of the easement. The District Court granted the company $418.60 for landscaping that Slauson had removed and awarded Slauson $430 for costs of removing snow that the company piled on Slauson's property outside the easement. Both parties appealed, but the Supreme Court held that neither party established any error in the District Court's rulings and affirmed. Slauson v. Marozzo Plumb. & Heating, LLC, 2009 MT 333, 353 M 75, 219 P3d 509 (2009).

Failure to Prove Elements of Prescriptive Easement — Effective Easement of No Avail to Nonadjoining Landowner: Sunday claimed a prescriptive easement across Harboways' property based on the existence of an alleged road. However, testimony at trial was conflicting as to the time of use, extent of use, and location of the road at issue, which Harboways claimed was nothing more than an indistinct two-rut trail. The District Court examined the history of the property both before and after its acquisition by Harboways and found that neither Sunday nor Sunday's predecessors in interest established a prescriptive easement on any of the tracts owned by Harboways prior to Harboways' purchase of the property, so absent proof of the statutory elements of a prescriptive easement, Sunday did not have an easement across Harboways' property. The court did find that a 30-foot easement surrounded one of Harboways' parcels, but the parcel did not abut Sunday's land, nor was Sunday's land a dominant tenement with benefit of the easement, so Sunday was not entitled to use the easement. Sunday v. Harboway, 2006 MT 95, 332 M 104, 136 P3d 965 (2006).

Mere Denial of Public Nature of Road Insufficient to Raise Genuine Issue of Material Fact — Public Prescriptive Easement Affirmed: The District Court found that the elements of a prescriptive easement over a road on defendants' property were satisfied and granted summary judgment to plaintiff county. Defendants contended that disputed issues of fact existed regarding proof of a prescriptive easement, but the Supreme Court affirmed. The county proved that use of the road was open, notorious, exclusive, adverse, continuous, and uninterrupted for the statutorily required period. The only evidence in support of defendants' position was a conclusory hearsay statement claiming that the previous owners had indicated that the road was not public. Defendants' mere denial of the public nature of the road was insufficient to raise a genuine issue of material fact sufficient to withstand summary judgment. Powell County v. 5 Rockin' MS Angus Ranch, Inc., 2004 MT 337, 324 M 204, 102 P3d 1210 (2004), following Heller v. Gremaux, 2002 MT 199, 311 M 178, 53 P3d 1259 (2002).

Incorrect Finding of Prescriptive Easement for Road and Residence — Moving of Residence Not Required: The District Court found that a prescriptive easement had been established for a road that strayed into an adjoining parcel and for a residence, the corner of which also extended into the adjoining parcel. The Supreme Court found the record full of contradictory assertions and findings, but noted that because the actual location of the road was concealed from the owner by way of maps and misrepresentations as to its true location, the record did not come close to establishing the elements of hostility or open and notorious use by clear and convincing evidence to establish a prescriptive easement for the road. Further, the owner of the residence conceded that the corner of the foundation and eaves encroached onto the adjoining parcel. Never having paid taxes on the land in question, the owner could not prevail on a claim of adverse possession to obtain title to the ground under the encroachment, so a finding of a prescriptive easement for the residence was also in error. However, because the property owner indicated at trial and in appeal briefs that he was willing to work something out regarding the encroachment, the Supreme Court concluded that to require removal of the encroachment would be extreme and declined to order that the residence be moved from its foundation. Gelderloos v. Duke, 2004 MT 94, 321 M 1, 88 P3d 814 (2004).

Two-Month Lapse in Use of Road Insufficient to Demonstrate Intent of Abandonment — Summary Grant of Prescriptive Easement Reversed: The District Court granted defendant's motion for summary judgment on a prescriptive easement, based on the fact that plaintiffs did not continuously use a road for an entire 5-year period because they were out of state for 2 months, demonstrating an interruption or abandonment of the claimed easement. On appeal, plaintiffs contended that the District Court misinterpreted the meaning of continuous and uninterrupted use, and the Supreme Court agreed. For purposes of a prescriptive easement, continuous use is use that is made often enough to constitute notice of the claim to the potential servient owner. Further, uninterrupted use is not interrupted by the act of the owner of the land or by voluntary abandonment by the party claiming the right. During the 5-year period in question, defendant did nothing to interrupt plaintiffs' use of the roads in question. The fact that plaintiffs were in Missouri for 2 months and did not use the road during that time may have cast some doubt on whether there was continuous use of the road, but a genuine issue of material fact remained as to whether plaintiffs continuously used the road. Because a question of genuine fact remained, summary judgment was improper, and the Supreme Court reversed for further proceedings, including plaintiffs' claims for infliction of emotional distress and punitive damages. Cook v. Hartman, 2003 MT 251, 317 M 343, 77 P3d 231 (2003). See also Restatement (Third) of Property, Servitudes 2.17.

No Public Prescriptive Use of Mining Road Never Declared Public Road — Prescriptive Easement Established and Not Extinguished by Reverse Adverse Possession: Owners of a road used since 1936 for mining access claimed a public prescriptive use. The road was never formally declared a public road or used for the statutorily required period of time sufficient to establish a prescriptive easement. Thus, the existence of a public prescriptive easement depended on the exploratory use that took place when the mine was not in full operation, recreational use by the public, and county road maintenance. However, even taken together, this evidence did not rise to the level of public prescriptive use. The District Court did not err in finding that no public prescriptive easement existed over the road. However, while the evidence did not qualify as a public easement, it did qualify as a private easement in plaintiff's favor. Virtually unrestricted use of the road between 1936 and 1961 met the requirements of open, notorious, exclusive, adverse, continuous, uninterrupted use for the required statutory period. Further, defendant's act of locking a gate across the road and providing plaintiff a key and access with permission was not a distinct and positive assertion unequivocally hostile and adverse to plaintiff sufficient to extinguish plaintiff's easement by reverse adverse possession. Brimstone Min., Inc. v. Glaus, 2003 MT 236, 317 M 236, 77 P3d 175 (2003). See also Granite County v. Komberec, 245 M 252, 800 P2d 166 (1990).

Failure to Prove Unity of Ownership — No Implied Easement by Necessity: As a general rule, creation of an implied easement by necessity requires that the easement be granted over the grantor's land and never over the land of a third party or a stranger to the title. Here, the easement claimed by plaintiffs ran across property not owned by plaintiffs' grantor at the time of the grant, so plaintiffs were unable to prove unity of ownership necessary to establish an implied easement by necessity. Kullick v. Skyline Homeowners Ass'n, Inc., 2003 MT 137, 316 M 146, 69 P3d 225 (2003), following Graham v. Mack, 216 M 165, 699 P2d 590 (1984).

Conflicting Evidence Regarding Prescriptive Easement for Ditch Maintenance — District Court Affirmed: Plaintiff alleged that defendant's access to plaintiff's property for ditch maintenance must be limited to the historic use of the ditch bank. The District Court was presented with conflicting evidence regarding how open defendant's use of plaintiff's property was and determined that plaintiff knew or should have known that defendant was accessing the ditch by various routes across plaintiff's property and that the access was not permissive. The evidence was sufficient to support the finding that defendant had a prescriptive easement, and that finding was not disturbed on appeal. Graveley Simmental Ranch Co. v. Quigley, 2003 MT 34, 314 M 226, 65 P3d 225 (2003).

Prescriptive Easement Properly Granted — Terms Defined: To establish an easement by prescription, the party claiming the easement must show open and notorious, exclusive, continuous, uninterrupted, and adverse use of the claimed easement for a 5-year period. Open and notorious use means a distinct and positive assertion of a right hostile to and brought to the attention of the owner. Exclusive use means that the right of the claimant must rest upon its own foundations and not depend on a like right in any other person. Continuous use means use that is made often enough to constitute notice of the claim to the potential servient owner. Uninterrupted use means use that is not interrupted by the act of the owner of the land or by voluntary abandonment by the party claiming the right. Adverse use means use exercised under a claim of right and not as a mere privilege or license revocable at the pleasure of the owner of the land. A claim must be known to and acquiesced in by the owner of the land. A party claiming the easement has the burden of proving each element of prescription by clear and convincing evidence. If the party claiming easement establishes all of the elements, then the burden falls on the opposing party to show that the use was permissive rather than adverse. In the present case, there was no evidence of concealment of the regular use or maintenance of a road for several decades, which was adequate to provide plaintiffs with notice that there was a claim to use of the road. Because no permissive use was shown, and because the use was sufficiently open and notorious to establish a claim, the District Court did not err in granting defendants a prescriptive easement over plaintiffs' property. Brumit v. Lewis, 2002 MT 346, 313 M 332, 61 P3d 138 (2002), distinguishing Cope v. Cope, 158 M 388, 493 P2d 336 (1971), and Amerimont, Inc. v. Gannett, 278 M 314, 924 P2d 1326 (1996). See also Rappold v. Durocher, 257 M 329, 849 P2d 1017 (1993), and Lemont Land Corp. v. Rogers, 269 M 180, 887 P2d 724 (1994).

Use of Private Road Permissive by Neighborly Accommodation — Public Prescriptive Easement Not Established: Plaintiffs sought an easement of record from defendants regarding the rural road crossing plaintiffs' property, but defendants refused. Plaintiffs then sought a declaratory judgment that the road was a public road established by prescriptive use, asserting that the road was a public thoroughfare established by common-law dedication as evidenced by a 1916 petition for the opening of a school and a 1948 petition to establish a road. The District Court found that the 1916 and 1948 petitions did not establish an offer evidencing an intention to dedicate the road to the public and that use of the road was instead permissive through neighborly accommodation.

Plaintiffs appealed, but the Supreme Court affirmed. All elements of a prescriptive easement must be proved by clear and convincing evidence because one who has legal title should not be forced to give up what is rightfully theirs without the opportunity to know that the title is in jeopardy and to fight for it. Once a claimant establishes the elements of a prescriptive right, a presumption of adverse use arises, and the burden shifts to the landowner to establish that the use was permissive. If permissive use is shown, no easement can be acquired because the theory of prescriptive easement is based on adverse use. Use of a neighbor's land based upon mere neighborly accommodation or courtesy is not adverse and cannot ripen into a prescriptive easement. Rather, in addition to use, generally some circumstance or act tending to indicate that the use was not merely permissive is required. The presence of gates or other obstructions, to be opened and closed by parties passing over the land, has always been considered strong evidence in support of a mere license to the public to pass over the designated way. The facts here showed that use of the road was permissive and at the pleasure of the landowners, so no public prescriptive easement existed. Heller v. Gremaux, 2002 MT 199, 311 M 178, 53 P3d 1259 (2002). See also Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525 (1993), Hitshew v. Butte/Silver Bow County, 1999 MT 26, 293 M 212, 974 P2d 650 (1999), and Pedersen v. Ziehl, 2013 MT 306, 372 Mont. 223, 311 P.3d 765.

Prescriptive Easement Established for One of Two Exits on Loop Road — Other Exit Considered Abandoned: Renner accessed his property by crossing Nemitz's property in two different places in order to form a loop driveway at Renner's house. The west easement was not at issue, but both the existence and location of an approximately 100-foot easement over the east side of the loop was contested. A series of interactions between the parties eventually led to Nemitz building a fence across the east side of the loop and Renner filing a claim to establish an easement over the east side of the loop. At trial, both parties presented testimony regarding use of the east side loop, including testimony regarding two possible exits on the loop. The District Court did not distinguish between the two exits, but found a prescriptive easement for the entire east side loop, held that the easement was not abandoned and that Nemitz's activities did not extinguish the easement, and granted Renner an easement for both exits of the east side loop, ordering all obstructions removed. Nemitz appealed. The District Court found clear and convincing evidence that a prescriptive easement existed for the east side loop based on testimony of its use from 1948 to 1974, and after reviewing the record, the Supreme Court affirmed the trial court's findings of open, notorious, exclusive, adverse, continuous, and uninterrupted use of the easement. However, it was not clear from the testimony regarding use between 1948 and 1974 whether both exits met the requirements of a prescriptive easement, and that lack of specificity indicated that it was error for the District Court to find a prescriptive easement for both exits, but the error was harmless based on evidence regarding use from 1975 to 1995. Renner's predecessor in interest during that period continued to use the loop as in prior years and never sought permission and so could not be characterized as having abandoned the east loop easement. Testimony was undisputed that the left exit was used until 1995, but the right exit was not used past 1982, and testimony of Renner's predecessor in interest established that use of the right exit was intended to be subordinate to Nemitz's use, so it was error for the District Court to find that the right exit was not abandoned. The Supreme Court noted that extinguishment did not apply to the left exit because only 3 years passed between the time Renner acquired the property and when the claim was filed. Thus, the Supreme Court affirmed the easement on the left exit and the order requiring removal of the fence across that exit, but reversed the part of the order requiring removal of the fence across the abandoned right exit. Renner v. Nemitz, 2001 MT 202, 306 M 292, 33 P3d 255 (2001), distinguishing Morrison v. Higbee, 204 M 501, 668 P2d 1029 (1983).

Public Use for Statutory Period Coupled With Assumption of Adverse Control — Public Prescriptive Easement Established: An easement by prescription is created by operation of law through open, notorious, exclusive, adverse, continuous, and uninterrupted use for 5 years. Following the same criteria, applied to public prescriptive easements in Granite County v. Komberec, 245 M 252, 800 P2d 166, 47 St. Rep. 2061 (1990), the Supreme Court noted that to establish the existence of a public road by prescription, it must be shown that the public followed a definite course continuously and uninterruptedly for the prescribed statutory period, together with an assumption of control adverse to the owner. To be open and notorious, the use of a claimed right must give the landowner actual knowledge of the claimed right or be of such a character as to raise a presumption of notice. To be continuous and uninterrupted, the use of a claimed right may not be abandoned by the user or interrupted by an act of the landowner. To be adverse, the use or assumption of control of a claimed right must be exercised under a claim of right and not as a mere license revocable at the pleasure of the landowner. Regular maintenance of a roadway by the party asserting a prescriptive easement is evidence of adverse rather than permissive use. Because a public prescriptive easement is "public", the element of exclusivity is not required in establishing the existence of a public prescriptive easement. In the present case, the county presented sufficient evidence establishing the existence of a public prescriptive easement on German Gulch Road, including a history of open public use and county maintenance of the road, an absence of evidence that the public ever abandoned use of the road, and the fact that plaintiff never erected gates, barriers, or signs on the road to create the impression of permissive use or established permissive use through neighborly accommodation. Hitshew v. Butte/Silver Bow County, 1999 MT 26, 293 M 212, 974 P2d 650, 56 St. Rep. 111 (1999), distinguishing Leffingwell Ranch, Inc. v. Cieri, 276 M 421, 916 P2d 751, 53 St. Rep. 453 (1996). However, see Lyndes v. Green, 2014 MT 110, 374 Mont. 510, 325 P.3d 1225.

Presumption of Adverse Use Under Claim of Right—No Evidence of Neighborly Accommodation: Tanners and others purchased property on Flathead Lake. Tanners and the others obtained access to their property by driving on roads located on Daly's property to the north. When Daly erected a fence across the roads and blocked access to their property, Tanners and the others brought suit, alleging that they had acquired an easement by prescription for the use of several of the roads. The Supreme Court held that Tanners had established a presumption of adverse use under a claim of right based upon the 1932 deed of their predecessors in interest. Because Daly claimed that Tanners' use of the roads was by her permission or neighborly accommodation, the Supreme Court held that Daly had the burden of proving permissive use. The Supreme Court referred to testimony in the record from which the jury could have found that no permission had been granted by Daly. Tanner v. Dream Island, Inc., 275 M 414, 913 P2d 641, 53 St. Rep. 208 (1996).

Presumption of Adverse Use Established Through Preliminary Requirements for Prescriptive Right: After a claimant has established the preliminary requirements for a prescriptive right, a presumption of adverse use arises. The burden then shifts to the owner of the land on which the prescriptive easement is claimed to establish permissive use or license. If an owner establishes that the use is permissive, no easement can be acquired. In the present case, no genuine issue of material fact existed with regard to defendant's open, notorious, continuous, uninterrupted, and exclusive use of a road access for the statutory period; thus, the presumption of adverse use was applicable. Plaintiff failed to raise material facts regarding whether the use was permissive, including questions of permission or license, control of access by use of a gate, and neighborly accommodation. Defendant was therefore entitled to summary judgment based on adverse use as a matter of law. Lemont Land Corp. v. Rogers, 269 M 180, 887 P2d 724, 51 St. Rep. 1459 (1994), distinguishing Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525 (1993). See also Brown & Brown of MT, Inc. v. Raty, 2012 MT 264, 367 Mont. 67, 289 P.3d 156, Brown & Brown of MT, Inc. v. Raty, 2013 MT 338, 372 Mont. 463, 313 P.3d 179, Lyndes v. Green, 2014 MT 110, 374 Mont. 510, 325 P.3d 1225, and Cremer Rodeo Land & Livestock Co. v. McMullen, 2023 MT 117, 412 Mont. 471, 531 P.3d 566.

Reverse Adverse Possession and Inconsistent Use: A landowner's blocking of a road was a hostile act that established reverse adverse possession because the state and local government and the public cooperated and adhered to a walk-in policy that had been in existence on the land for about 17 years. The decision by County Commissioners to deny a petition to establish the disputed road as a county road confirmed acquiescence in the fact that the road was a private road. Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525, 50 St. Rep. 794 (1993), distinguished in Lemont Land Corp. v. Rogers, 269 M 180, 887 P2d 724, 51 St. Rep. 1459 (1994).

No Private Prescriptive Easement When Use Always Permissive: When the use of a road over which a party claimed an easement had always been permissive, no private easement by prescription could exist given the facts that the road was not a county road and that there was no easement by implication or necessity due to a lack of commonality of ownership. Keebler v. Harding, 247 M 518, 807 P2d 1354, 48 St. Rep. 282 (1991), followed in Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525, 50 St. Rep. 794 (1993), Greenwalt Family Trust v. Kehler, 267 M 508, 885 P2d 421, 51 St. Rep. 1130 (1994), and Rafanelli v. Dale, 278 M 28, 924 P2d 242, 53 St. Rep. 746 (1996). However, see Mildenberger v. Galbraith, 249 M 161, 815 P2d 130, 48 St. Rep. 621 (1991).

Acts Inconsistent With Existence of Private Easement: In a case regarding a prescriptive easement, the plaintiffs had asked the defendant owners for permission to use the road over the defendants' property and the plaintiffs had told others that they did not have an easement over the defendants' property. The Supreme Court ruled that the plaintiffs' actions were inconsistent with a prescriptive easement and, that, additionally, if an easement had existed, it was statutorily extinguished by the plaintiffs' inconsistent acts. Downing v. Grover, 237 M 172, 772 P2d 850, 46 St. Rep. 713 (1989), followed in Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525, 50 St. Rep. 794 (1993), and Greenwalt Family Trust v. Kehler, 267 M 508, 885 P2d 421, 51 St. Rep. 1130 (1994).

Strangers to Record Title Barred From Quiet Title Action: The District Court properly barred a quiet title claim after finding that plaintiff and his predecessor in interest were both complete strangers to the record title of an oil and gas lease and thus were not seized of the lease. Bretz v. Ayers, 232 M 132, 756 P2d 1115, 45 St. Rep. 936 (1988).

No Prescriptive Easement, Easement by Implication, or Easement by Necessity: In action by landowner to quiet title to real property he purchased from another, a neighbor sought to establish an easement over the land. The Supreme Court upheld the lower court judgment, ruling: (1) a prescriptive easement was not established because neighbor's use of the land was not continuous; (2) an easement by implication did not arise because unity of ownership did not exist and intent of the parties was not established; and (3) an easement by necessity did not exist because it was not originally under common ownership. Graham v. Mack, 216 M 165, 699 P2d 590, 41 St. Rep. 2521 (1984), followed in Ruana v. Grigonis, 275 M 441, 913 P2d 1247, 53 St. Rep. 216 (1996), Big Sky Hidden Village Owners Ass'n, Inc. v. Hidden Village, Inc., 276 M 268, 915 P2d 845, 53 St. Rep. 379 (1996), Albert G. Hoyem Trust v. Galt, 1998 MT 300, 292 M 56, 968 P2d 1135, 55 St. Rep. 1230 (1998), Tungsten Holdings, Inc. v. Kimberlin, 2000 MT 24, 298 M 176, 994 P2d 1114, 57 St. Rep. 125 (2000), Loomis v. Luraski, 2001 MT 223, 306 M 478, 36 P3d 862 (2001), and Kullick v. Skyline Homeowners Ass'n, Inc., 2003 MT 137, 316 M 146, 69 P3d 225 (2003), and distinguished in Flaig v. Gramm, 1999 MT 181, 295 M 297, 983 P2d 396, 56 St. Rep. 710 (1999).

Prescriptive Easement — Occasional Recreational Use: Occasional use of a road by hunters and campers falls short of the extent and type of use necessary to result in a prescriptive easement. Oates v. Knutson, 182 M 195, 595 P2d 1181 (1979). See also Pub. Land/Water Access Ass'n v. Robbins, 2021 MT 75, 403 Mont. 491, 483 P.3d 1102.

Recordkeeping Insufficient to Establish Prescriptive Easement: The existence of county records to the effect that the road in question was a county road was not sufficient to initiate acquisition of a prescriptive right. Prescriptive easements are acquired by adverse use, not by keeping records. Oates v. Knutson, 182 M 195, 595 P2d 1181 (1979).

Public Highway:

Public highway was established by prescription on evidence that members of public had used road openly for more than 50 years without ever having obtained permission from owners, that previous owner had considered road a public highway, that road had been maintained by county for some 24 years, and that public had never been denied use of road. Kostbade v. Metier, 150 M 139, 432 P2d 382 (1967). See also Johnson v. McMillan, 238 M 393, 778 P2d 395, 46 St. Rep. 1362 (1989).

Under this section and 70-19-404, a prescriptive right can be built upon public use of land for street purposes, jurisdiction having been acquired by the city authorities and maintained for the statutory period. Stettheimer v. Butte, 60 M 111, 198 P 455 (1921).

A public highway may be established by prescription, without color of title, by proof of travel over it by the public as a public highway for the statutory period. Lockey v. Bozeman, 42 M 387, 113 P 286 (1910); Pope v. Alexander, 36 M 82, 92 P 203 (1907); Mont. Ore Purchasing Co. v. Butte & Boston Consol. Min. Co., 25 M 427, 65 P 420 (1901); St. v. Auchard, 22 M 14, 55 P 361 (1898). See Barnard Realty Co. v. Butte, 48 M 102, 136 P 1064 (1913).

Easement by Prescription: Plaintiffs, who acquired prescriptive easement in road across property of defendants by use for 35 years before defendants acquired title to the land and attempted to obstruct use, were entitled to enjoin defendants from interfering with use of right-of-way over road. Scott v. Weinheimer, 140 M 554, 374 P2d 91 (1962).

Elements of Easements by Prescription: To establish the existence of an easement by prescription, the party so claiming must show open, notorious, exclusive, adverse, continuous, and uninterrupted use of the easement claimed for the full statutory period. Scott v. Weinheimer, 140 M 554, 374 P2d 91 (1962).

Title by Prescription: Title to an easement acquired by prescription is as effective as though evidenced by a deed. Scott v. Weinheimer, 140 M 554, 374 P2d 91 (1962).

Fence as Act of Possession: This section applies to a case where a fence was erected prior to the government survey and with intent to claim all within the fence even though a subsequent patent based on the survey lines does not include all to the fence. Thibault v. Flynn, 133 M 461, 325 P2d 914 (1958).

Intermittent Use of Ditch: Title by prescription to a ditch conveying water may be obtained by use thereof whenever water is needed. Te Selle v. Storey, 133 M 1, 319 P2d 218 (1957).

Transfer of Prescriptive Title: Where deed to defendant after describing property by legal subdivisions contained clause: "Together with all the tenements, hereditaments and appurtenances, water rights and water ditches to the same belonging", if defendant's predecessor used the ditch for more than the statutory period, there was title in him by prescription which passed to defendant by deed, and it was of no consequence that the deed did not specifically mention the ditch right as an appurtenance. Te Selle v. Storey, 133 M 1, 319 P2d 218 (1957).

Presumption Based on Legal Title:

Where plaintiff's complaint alleges that "plaintiff is now the owner, entitled to possession", there is a presumption under 70-19-404 that the person establishing a legal title to the property is in possession thereof within the time required by law, and it is up to the other party to overcome the presumption with proof. Warren v. Warren, 127 M 259, 261 P2d 364 (1946).

Where the predecessor of the owner of a ditch right had acquired title to the right-of-way therefor over the public domain by grant from the United States, it will be presumed in the absence of evidence to the contrary, under 70-19-404, in an action to enjoin its use by another, that the owner had been possessed thereof within the time required by law and that the occupation by the other party had been in subordination to the legal title, as against the contention that the right was barred by this section in that neither plaintiff nor his predecessor had been in possession or seized of the ditch within the statutory period next preceding the commencement of the action. Rodda v. Best, 68 M 205, 217 P 669 (1923).

Disability of Minority: In a suit to quiet title commenced in 1927 in which defendants, as heirs of their ancestor, alleged ownership in themselves by cross-complaint, plaintiff bank pleaded the bar by reason of its adverse possession of the property since 1915 under a Sheriff's certificate of sale, at which time defendants' ancestor was living; he died shortly thereafter. The cause of action of defendants having accrued during the lifetime of their ancestor and plaintiff having been in the open, notorious, and unmolested possession from 1915 to the commencement of the action, defendants' cause of action was barred, the fact that defendants were laboring under the disability of minority at the time of the accrual of the action not excusing them from bringing suit within the statutory period after such accrual, the provisions of 70-19-413 in that behalf being inapplicable. Commercial Bank & Trust Co. v. Jordan, 85 M 375, 278 P 832, 65 ALR 968 (1929).

Burden of Proof: In an action to quiet title to a tract of land in which the defense was adverse possession, the defendant had the burden of establishing by a preponderance of evidence that the plaintiff was not possessed of the land for the statutory period or that the defendant had held it adversely for that length of time. Bearmouth Placer Co. v. Passerell, 73 M 306, 236 P 673 (1925).

MINERAL AND WATER RIGHT

Mineral Estate as Dominant Estate — Surface Estate as Subservient Estate: The original owner of the subject property had initially transferred the property and retained the mineral rights. A number of years later, the original owner quitclaimed the mineral rights to "the owner or owners of the land". Fifty years later, the plaintiffs argued that the subsequent transfer of the mineral rights did not merge the two estates because they were equal estates and therefore the plaintiffs did not have to bring their action until extraction began. They had done so within the 5-year period required by statute. The Supreme Court ruled that the mineral estate is the dominant estate and that when it was transferred, the two estates merged. It was at that time that the plaintiffs had to initiate their action. Hunter v. Rosebud County, 240 M 194, 783 P2d 927, 46 St. Rep. 2048 (1989).

Mineral Rights — Insufficient Adverse Possession Evidence: Defendant's daughter testified that in 1975 she and defendant dug holes along creek and panned for gold, and defendant testified that he had been testing for gold since 1975. One witness for plaintiff owners of the surface rights and title testified that those plaintiffs first became aware of mining activity in 1979, another testified that there were no signs of mining prior to 1976, and another testified that he saw no signs of mining prior to 1977. Owners of the surface and mineral rights joined in a quiet title action in 1981 against defendant, who sought to establish adverse possession. The evidence did not establish the required adverse possession for the 5-year period prior to the suit and did not show actual possession of the mineral interest by openly operating the mine for that 5-year period. McGuiness v. Maynard, 202 M 484, 658 P2d 1104, 40 St. Rep. 230 (1983).

Mineral Interest — No Proof of Possession: In an action to quiet title to certain royalty interests claimed by Rosebud County, the county argued that the plaintiffs were barred by the Statute of Limitations from claiming ownership of the royalty interest. The Supreme Court held that the county failed to overcome the presumption created by 70-19-404 that plaintiffs were in possession within the required period. Since the county failed to prove all the elements of adverse possession, the Statutes of Limitations in this section and 70-19-402 are not applicable. King v. Rosebud County, 193 M 268, 631 P2d 711, 38 St. Rep. 1145 (1981).

Mineral and Surface Rights: Where there was a reserved right of entry for mining purposes in another person, the owner of the surface rights could not acquire any right by adverse possession unless he could show possession of the mine independent of the possession of the surface of the land for grazing or other purposes. Lehfeldt v. Adams, 130 M 395, 303 P2d 934 (1956).

Detriment Required for Adverse User of Water: In order to acquire a prescriptive right to the use of water in an adjudicated stream, the use must have been detrimental to the one whose title and right are said to have been destroyed and may not be predicated upon use that had in no way lessened the source of water for other decreed rights or tended to destroy them. Woodward v. Perkins, 116 M 46, 147 P2d 1016 (1944).

Presumption Based on Possession: Where, in a water right suit, one from whom plaintiff's immediate predecessor acquired the possession of land under a squatter's claim, after operating it with plaintiff's predecessor presumably as a partner, left the land and never returned and no one ever appeared to contest plaintiff's right to the water used in connection with the land, the statutory presumptions declared by 26-1-602(8), (11), (12), and (27), relative to ownership of property, were sufficient to sustain plaintiff's title, notwithstanding break in chain from original appropriator. Cook v. Hudson, 110 M 263, 103 P2d 137 (1940).

TIME LIMIT

Lack of Statutory Five-Year Period Renders Question of Adverse Possession Moot: The plaintiffs blocked a road crossing their property in May of 1985 and brought a quiet title action in April 1988. The Supreme Court affirmed the lower court's finding that prior to May 1985, the defendants' use of the road was permissive. The Supreme Court held that the period from May 1985 to April 1988 was less than the statutory 5-year period required to establish a prescriptive easement and that therefore the question of whether the use was permissive or adverse was not relevant. Brown v. Tintinger, 245 M 373, 801 P2d 607, 47 St. Rep. 2179 (1990).

Plaintiffs' Claim to Mineral Estate Barred by Laches: The original owner of the subject property had initially transferred the property and retained the mineral rights. A number of years later, the original owner quitclaimed the mineral rights to "the owner or owners of the land". Fifty years later, the plaintiffs argued that the subsequent transfer of the mineral rights did not merge the two estates because they were equal estates and therefore the plaintiffs did not have to bring their action until extraction began. They had done so within the 5-year period required by statute. The plaintiffs contended that the doctrine of laches could not apply to their interest in the mineral rights. The Supreme Court held that the mineral rights were the dominant estate and that therefore the two estates had merged when the original owner made a second transfer consisting of the mineral rights. The court then stated that in the following 50 years, the plaintiffs had no contact with the property and paid no taxes on the property. The court ruled that the doctrine of laches did apply and that the plaintiffs' suit was barred. Hunter v. Rosebud County, 240 M 194, 783 P2d 927, 46 St. Rep. 2048 (1989).

Statutory Period for Prescriptive Easement: The burden is on the easement claimant to show open, notorious, exclusive, adverse, continuous, and uninterrupted use of the easement claimed for the full statutory period, citing Taylor v. Petranek, 173 M 433, 568 P2d 120 (1977), and Rathbun v. Robson, 203 M 319, 661 P2d 850 (1983). The statutory period is 5 years under this statute. Clemans v. Martin, 221 M 483, 719 P2d 787, 43 St. Rep. 994 (1986). See also Rafanelli v. Dale, 278 M 28, 924 P2d 242, 53 St. Rep. 746 (1996).

Five-Year Occupancy Period — Suspension by Litigation: In 1954, the plaintiff moved to his ailing brother's ranch to care for his brother and the ranch. After his brother's death in 1969, a purported holographic will leaving the ranch to the plaintiff was contested by the deceased brother's personal representative. In 1978, the will was declared invalid. The plaintiff, who had remained in possession of the ranch during this time, then brought a quiet title action based on adverse possession. However, the period for adverse possession had not run because the personal representative had contested the plaintiff's right to the ranch through the litigation process, and during the pendency of that litigation, the period for adverse possession was suspended. Craddock v. Berryman, 198 M 155, 645 P2d 399, 39 St. Rep. 835 (1982).

Partition Statute Not Statute of Limitations — Real Property Statute Applicable: Two brothers were partners in a ranching operation. One brother died and the surviving brother purchased the deceased brother's interest from his estate in 1940. In 1973 the deceased partner's sons found a note from their mother stating they had a one-third interest in the property. In April, 1978, they instituted action for partition of the property, claiming they were cotenants. Plaintiffs contended that 70-29-101, which states no time limit, was the applicable Statute of Limitations. Section 70-29-101 is not a Statute of Limitations but merely sets forth the right of a cotenant in possession to file a partition action. Section 70-19-401 is the applicable Statute of Limitations, a 5-year period for the recovery of an interest in real property. The action was barred by 70-19-401. Glennie v. Glennie Ranches, 184 M 77, 601 P2d 699 (1979).

Action for Quiet Title: Plaintiffs were not barred from commencing an action for quiet title even though they were not possessed of the premises during the 5 years before commencement. It was sufficient for plaintiffs to have been in legal seisin by having a perfect and complete title for those years. Stephens v. Hurly, 172 M 269, 563 P2d 546 (1977), followed in Gue v. Olds, 245 M 117, 799 P2d 543, 47 St. Rep. 1906 (1990).

Permissive Use: Where the original use of an easement for a ditch was by permission of the landowner, the statutory period prescribed by this section did not start to run without some specific indication of a use adverse or hostile to the landowner's title. Drew v. Burggraf, 141 M 405, 378 P2d 232 (1963).

Statute of Limitations:

In an action to quiet title, the fact that a county, which was named party defendant several months after the action was commenced, may have been entitled to assert the Statute of Limitations as a defense did not make the same defense available to the plaintiff against a cross-complaint filed before the lapse of the statutory period following the plaintiff's acquisition of a tax title. Marek v. Smith, 132 M 73, 314 P2d 864 (1957).

Where new parties are brought into a case and between the commencement of the suit and the time when they are brought in the period of limitations has expired, the new parties may plead the Statute of Limitations for themselves, but the plea is not available to the original defendants. Marek v. Smith, 132 M 73, 314 P2d 864 (1957).

Ejectment and Mesne Profits: The period of limitation for an action in ejectment, with claim for mesne profits—the value and use of the property during the period of its wrongful withholding—was 10 years, under this section and 27-2-214. Kurth v. Le Jeune, 83 M 100, 269 P 408 (1928).

Action Barred: Under this section and 70-19-402, where it appeared in an action to quiet title that plaintiff had not been seized or in possession of the land in question for the statutory period prior to the commencement of the action, his right to maintain it was barred. Thompson v. Chicago, Burlington & Quincy R.R., 78 M 170, 253 P 313 (1927).

70-19-402. Action or defense arising out of title to property or profits — possession within 5 years required.

Case Notes

Adverse Possession Claim Not Interrupted by Suit Seeking Establishment of Easement: Parker maintained an adverse possession claim for 5 years. Tungsten Holdings, Inc. (Tungsten), argued that its prior lawsuit interrupted the 5-year period and tolled the adverse possession action. In that suit, Tungsten requested that title to an easement over a portion of the property be quieted in its favor, and the suit remained pending for 1½ years during the adverse possession period. The Supreme Court agreed that the 5-year period is tolled during the pendency of an action to establish title to the property that conflicts with the title claimed by the adverse claimant. However, in this case, Tungsten did not challenge Parker's title to the property, but rather sought to establish an easement over it, so the prior action did not interrupt the 5-year adverse possession period. Tungsten Holdings, Inc. v. Parker, 2001 MT 117, 305 M 329, 27 P3d 429 (2001), distinguishing Flathead Lumber Corp. v. Everett, 127 M 291, 263 P2d 376 (1953), Brown v. Cartwright, 163 M 139, 515 P2d 684 (1973), and Craddock v. Berryman, 198 M 155, 645 P2d 399 (1982).

Payment of Taxes Not Yet Due Not Required to Sustain Adverse Possession Claim: Pursuant to 70-19-411, a party claiming adverse possession must occupy the property continuously for 5 years and must have paid all legally levied and assessed taxes on the property. Parker received notice for property taxes due on October 31, 1997, but the taxes were not paid. The 5-year period of adverse possession commenced when Parker received the defective tax deeds on November 24, 1992, so the 5-year adverse possession period would have expired on November 24, 1997. The District Court held that because the 1997 taxes were assessed prior to November 24, 1997, and were unpaid, Parker's claim for adverse possession failed. Parker maintained that the adverse possession language in 70-19-411 should be interpreted in combination with the statutory provisions for levy, notice, and payment of taxes in the tax code in Title 15. The Supreme Court agreed. Pursuant to 15-10-305, real estate taxes are levied and assessed on the second Monday in October, while 15-16-102 provides that one-half of each year's property taxes is payable on or before November 30 and the other one-half is payable on or before May 31 of the following year. Therefore, although the 1997 taxes were levied prior to the expiration of the 5-year adverse possession period on November 25, 1997, the taxes were not delinquent until November 30, 1997, 1 week after the adverse possession period ended. The Supreme Court concluded that 70-19-411 does not require the payment of taxes that are not yet due in order to sustain a claim of adverse possession. Thus, the District Court erred in concluding that Parker did not meet the requirements of 70-19-411, and the decision was reversed. Tungsten Holdings, Inc. v. Parker, 2001 MT 117, 305 M 329, 27 P3d 429 (2001).

Elements of Adverse Possession Not Shown: Once the true boundary line became known in 1971, defendants made only one demand for the property in dispute, which was rebuffed, and made no additional claim adverse to plaintiffs until 1983. Defendants never occupied the property prior to 1983, when they built a garage over the survey line, or paid taxes on the property. Plaintiffs brought an action for ejectment and rents in 1985. The District Court correctly held that defendants never occupied the property in a manner establishing adverse possession or an easement. Smithers v. Hagerman, 244 M 182, 797 P2d 177, 47 St. Rep. 1483 (1990), followed in Y A Bar Livestock Co. v. Harkness, 269 M 239, 887 P2d 1211, 51 St. Rep. 1517 (1994).

Strangers to Record Title Barred From Quiet Title Action: The District Court properly barred a quiet title claim after finding that plaintiff and his predecessor in interest were both complete strangers to the record title of an oil and gas lease and thus were not seized of the lease. Bretz v. Ayers, 232 M 132, 756 P2d 1115, 45 St. Rep. 936 (1988).

Quiet Title Action — Limitation of Actions: Some causes of action do not clearly fall within the provisions of the specific Statutes of Limitation found in this Code. Normally, the residual Statute of Limitations in 27-2-215 (renumbered 27-2-231) would then be applicable. This is not the case, however, when the cause concerns real estate. Under 70-19-402, it appears that seizure or possession within the 5 years prior to the commencement of the action is the only limitation imposed by statute on plaintiff in this case, who sued to quiet title. Since she was seized of a mineral interest during that period, she was entitled to wait until her title was questioned before filing suit. The running of time (here, more than 25 years) tends to strengthen rather than destroy title determined by decree. Peterson v. Hopkins, 210 M 429, 684 P2d 1061, 41 St. Rep. 1140 (1984).

Mineral Interest — No Proof of Possession: In an action to quiet title to certain royalty interests claimed by Rosebud County, the county argued that the plaintiffs were barred by the Statute of Limitations from claiming ownership of the royalty interest. The Supreme Court held that the county failed to overcome the presumption created by 70-19-404 that plaintiffs were in possession within the required period. Since the county failed to prove all the elements of adverse possession, the Statutes of Limitations in this section and 70-19-401 are not applicable. King v. Rosebud County, 193 M 268, 631 P2d 711, 38 St. Rep. 1145 (1981).

Action for Quiet Title: Plaintiffs were not barred from commencing an action for quiet title even though they were not possessed of the premises during the 5 years before commencement. It was sufficient for plaintiffs to have been in legal seisin by having a perfect and complete title for those years. Stephens v. Hurly, 172 M 269, 563 P2d 546 (1977).

Proving Title by Adverse Possession — Burden Upon Claimant: Where defendants establish they are successors to owner of legal title, burden of producing evidence is then cast upon plaintiffs to establish their adverse possession. Horacek v. Hudson, 167 M 394, 538 P2d 1019 (1975).

Mineral and Surface Rights: Where there was a reserved right of entry for mining purposes in another person, the owner of the surface rights could not acquire any rights by adverse possession unless he could show possession of the mine independently of the possession of the surface of the land for grazing or other purposes. Lehfeldt v. Adams, 130 M 395, 303 P2d 934 (1956).

Tolling of Statute by Action:

Since a person in adverse possession can acquire no new right as against the plaintiffs by the mere fact that they remain in possession during the pendency of the action, it follows that a pleading of adverse possession by defendants for the statutory period is insufficient to constitute a defense unless it is alleged that the period was complete before the commencement of the action, and the trial court erred in sustaining a motion for judgment on the pleadings and in entering judgment thereon for defendants. Flathead Lumber Corp. v. Everett, 127 M 291, 263 P2d 376 (1953).

The bringing of an action against one in adverse possession disputing his title arrests the running of the statute. Flathead Lumber Corp. v. Everett, 127 M 291, 263 P2d 376 (1953).

Conveyance in Trust: Where daughter deeded property to mother to be held in trust for her and later mother deeded property to another daughter with the understanding that it was to be held for the benefit of the first daughter, the possession of the mother and the second daughter was the possession of and for the first daughter and therefore an action by the first daughter to recover the property was not barred. Opp v. Boggs, 121 M 131, 193 P2d 379 (1948), distinguished in Barrett v. Zenisek, 132 M 229, 315 P2d 1001 (1957).

70-19-404. Presumption of possession within prescribed period — adverse possession as exception.

Case Notes

Amended Complaint Permitted When Second, Related Road in Prescriptive Easement Dispute Already Subject of Extensive Discovery and Testimony — Opposing Party Granted Opportunity to Conduct Further Discovery — No Undue Prejudice to Opposing Party. Cremer Rodeo Land & Livestock Co. v. McMullen, 2023 MT 117, 412 Mont. 471, 531 P.3d 566.

No Error by District Court When Determining Amended Complaint Related Back to Filing Date of Original Complaint — Dispute Outlined in Amended Complaint Interrelated and Arose Out of Same Conduct, Transactions, and Occurrences as Original Complaint. Cremer Rodeo Land & Livestock Co. v. McMullen, 2023 MT 117, 412 Mont. 471, 531 P.3d 566.

Summary Judgment Not Appropriate When Entire Record Demonstrates Genuine Issue of Material Fact — "Cherry-Picked Quotes" From Depositions Insufficient to Prove Permissive Use in Prescriptive Easement Dispute. Cremer Rodeo Land & Livestock Co. v. McMullen, 2023 MT 117, 412 Mont. 471, 531 P.3d 566.

Prescriptive Easement Not Extinguished by Landowner's Temporary Cooperation: The plaintiff filed an action to prevent the defendants, who are neighboring landowners, from crossing his land. The defendants sought a declaration that they had a prescriptive easement to access their ranch across the plaintiff's property. At trial, other adjacent landowners testified that the defendants had never requested permission to cross their land and had crossed the land for decades, and that no landowner had resisted until the plaintiff filed suit. The District Court ruled that the defendants had a prescriptive easement that had been perfected before the plaintiff had purchased his property given the neighboring landowners' testimony that the defendants had always crossed this land to access their ranch without asking for permission. The plaintiff appealed and argued that the District Court had erred. The Supreme Court affirmed and noted that the defendants' temporary cooperation with the plaintiff when he first acquired the property did not extinguish their prescriptive easement. Lyndes v. Green, 2014 MT 110, 374 Mont. 510, 325 P.3d 1225.

Accrual of Adverse Use Prohibited When Property Owned by Government: Because a private party cannot obtain a prescriptive easement against the federal government, a private party's adverse use of property did not begin to run until the federal government conveyed title to the property to a private entity. Burcalow Family, LLC v. Corral Bar, Inc., 2013 MT 345, 372 Mont. 498, 313 P.3d 182.

Permission to Use Dock Granted by Prior Owner — Whether Permission Carries Over to Subsequent Owners to Be Evaluated on Case-by-Case Basis — No Prescriptive Easement: In urging the Supreme Court to find that they had established an easement by prescription to a dock owned by the plaintiff, the defendants urged the court to follow the rule outlined in Han Farms, Inc. v. Molitor, 2003 MT 153, 316 Mont. 249, 70 P.3d 1238, which declared that one owner's grant of permission does not continue by default to the next owner. After reviewing significant case law regarding the transferability of permission for use, the court declined to adopt the defendants' argument and overruled the proposition in Han Farms that permission can never carry over from one owner to another after the sale of the servient property. Rather, the court reiterated that based on a thorough reading of its permissive use cases, the court will always consider the nature of the initial permission and attendant circumstances to analyze whether permission exists. Pedersen v. Ziehl, 2013 MT 306, 372 Mont. 223, 311 P.3d 765.

Continuous, Not Constant, Use for Statutory Period Sufficient to Establish Prescriptive Easement — Prescription Elements Satisfied: Defendant asserted that the District Court erred in holding that plaintiffs had established a prescriptive easement across defendant's property, arguing that the use was not hostile and that the use did not meet the continuous use requirement because it was sporadic and infrequent. The Supreme Court affirmed on both issues. Plaintiffs testified that defendant threatened in various conversations to fence off the property, indicating that defendant considered plaintiffs' use to be hostile to his property interest. Additionally, use does not need to be constant in order to satisfy the continuous use requirement. Plaintiffs used the right-of-way whenever they desired, without interference by defendant, for at least 30 years, so the use was considered continuous and uninterrupted. Plaintiffs satisfied the statutory requirements and were properly granted a prescriptive easement. Wolf v. Owens, 2007 MT 302, 340 M 74, 172 P3d 124 (2007).

No Harm in Reference in Findings of Fact to Historic Public Use of Disputed Road Over Which Private Easement at Issue: In determining whether a prescriptive easement existed across defendants' property, the District Court referenced the fact that the road in question had been used for certain public purposes for many years. Defendants contended that because this case did not present a public easement issue, the court erred by entering findings of fact related to public use of the disputed road. The Supreme Court held that because the public use findings were not addressed in the conclusions of law and judgment, served only to give credibility to plaintiffs' private claim, and had no other legal effect, there was no harm in referencing evidence of historic public use of a road over which the private easement was at issue. Clark v. Heirs & Devisees of Dwyer, 2007 MT 237, 339 M 197, 170 P3d 927 (2007).

Failure to Prove Elements of Prescriptive Easement — Effective Easement of No Avail to Nonadjoining Landowner: Sunday claimed a prescriptive easement across Harboways' property based on the existence of an alleged road. However, testimony at trial was conflicting as to the time of use, extent of use, and location of the road at issue, which Harboways claimed was nothing more than an indistinct two-rut trail. The District Court examined the history of the property both before and after its acquisition by Harboways and found that neither Sunday nor Sunday's predecessors in interest established a prescriptive easement on any of the tracts owned by Harboways prior to Harboways' purchase of the property, so absent proof of the statutory elements of a prescriptive easement, Sunday did not have an easement across Harboways' property. The court did find that a 30-foot easement surrounded one of Harboways' parcels, but the parcel did not abut Sunday's land, nor was Sunday's land a dominant tenement with benefit of the easement, so Sunday was not entitled to use the easement. Sunday v. Harboway, 2006 MT 95, 332 M 104, 136 P3d 965 (2006).

State Law Controlling as to Ownership for Purposes of Federal Drug Forfeiture of Real Property — Right, Title, and Interest Found in Daughter of Convicted Drug Dealer — Daughter's Forfeiture Reversed: Victor "Big Vic" Nava was convicted in federal court of federal criminal offenses based upon his dealing in methamphetamines. The government also obtained forfeiture of two pieces of real estate under 21 U.S.C. 853, based upon the jury's conclusion that the property was used in the drug dealing and the District Court's conclusion that Victoria, daughter of Big Vic, who was record owner of the two properties, had failed to establish by a preponderance of the evidence that she had held right, title, and interest to the properties. For this reason, the District Court denied Victoria's motion to set aside the forfeiture. The court of appeals held that title must be determined by state law and not federal common law or else ownership for state law purposes would be thrown into question and "havoc" at the state courthouse (with the recordation of property rights) would be the result. The court of appeals held that Victoria's evidence that she had received the property in a purchase or a gift from her father, held record title to the property, lived at the property, and taken out a second mortgage on the property was sufficient against the evidence by the government that Victoria was unemployed, that some witnesses thought her father owned the property, that Victor had made a statement in a plea bargain that he owned it, and that Victor had made some tax payments on the property for Victoria. The court of appeals therefore reversed the forfeiture order of the District Court. U.S. v. Nava, 404 F3d 1119 (9th Cir. 2005).

Incorrect Finding of Prescriptive Easement for Road and Residence — Moving of Residence Not Required: The District Court found that a prescriptive easement had been established for a road that strayed into an adjoining parcel and for a residence, the corner of which also extended into the adjoining parcel. The Supreme Court found the record full of contradictory assertions and findings, but noted that because the actual location of the road was concealed from the owner by way of maps and misrepresentations as to its true location, the record did not come close to establishing the elements of hostility or open and notorious use by clear and convincing evidence to establish a prescriptive easement for the road. Further, the owner of the residence conceded that the corner of the foundation and eaves encroached onto the adjoining parcel. Never having paid taxes on the land in question, the owner could not prevail on a claim of adverse possession to obtain title to the ground under the encroachment, so a finding of a prescriptive easement for the residence was also in error. However, because the property owner indicated at trial and in appeal briefs that he was willing to work something out regarding the encroachment, the Supreme Court concluded that to require removal of the encroachment would be extreme and declined to order that the residence be moved from its foundation. Gelderloos v. Duke, 2004 MT 94, 321 M 1, 88 P3d 814 (2004).

No Public Prescriptive Use of Mining Road Never Declared Public Road — Prescriptive Easement Established and Not Extinguished by Reverse Adverse Possession: Owners of a road used since 1936 for mining access claimed a public prescriptive use. The road was never formally declared a public road or used for the statutorily required period of time sufficient to establish a prescriptive easement. Thus, the existence of a public prescriptive easement depended on the exploratory use that took place when the mine was not in full operation, recreational use by the public, and county road maintenance. However, even taken together, this evidence did not rise to the level of public prescriptive use. The District Court did not err in finding that no public prescriptive easement existed over the road. However, while the evidence did not qualify as a public easement, it did qualify as a private easement in plaintiff's favor. Virtually unrestricted use of the road between 1936 and 1961 met the requirements of open, notorious, exclusive, adverse, continuous, uninterrupted use for the required statutory period. Further, defendant's act of locking a gate across the road and providing plaintiff a key and access with permission was not a distinct and positive assertion unequivocally hostile and adverse to plaintiff sufficient to extinguish plaintiff's easement by reverse adverse possession. Brimstone Min., Inc. v. Glaus, 2003 MT 236, 317 M 236, 77 P3d 175 (2003). See also Granite County v. Komberec, 245 M 252, 800 P2d 166 (1990).

Conflicting Evidence Regarding Prescriptive Easement for Ditch Maintenance — District Court Affirmed: Plaintiff alleged that defendant's access to plaintiff's property for ditch maintenance must be limited to the historic use of the ditch bank. The District Court was presented with conflicting evidence regarding how open defendant's use of plaintiff's property was and determined that plaintiff knew or should have known that defendant was accessing the ditch by various routes across plaintiff's property and that the access was not permissive. The evidence was sufficient to support the finding that defendant had a prescriptive easement, and that finding was not disturbed on appeal. Graveley Simmental Ranch Co. v. Quigley, 2003 MT 34, 314 M 226, 65 P3d 225 (2003).

Prescriptive Easement Properly Granted — Terms Defined: To establish an easement by prescription, the party claiming the easement must show open and notorious, exclusive, continuous, uninterrupted, and adverse use of the claimed easement for a 5-year period. Open and notorious use means a distinct and positive assertion of a right hostile to and brought to the attention of the owner. Exclusive use means that the right of the claimant must rest upon its own foundations and not depend on a like right in any other person. Continuous use means use that is made often enough to constitute notice of the claim to the potential servient owner. Uninterrupted use means use that is not interrupted by the act of the owner of the land or by voluntary abandonment by the party claiming the right. Adverse use means use exercised under a claim of right and not as a mere privilege or license revocable at the pleasure of the owner of the land. A claim must be known to and acquiesced in by the owner of the land. A party claiming the easement has the burden of proving each element of prescription by clear and convincing evidence. If the party claiming easement establishes all of the elements, then the burden falls on the opposing party to show that the use was permissive rather than adverse. In the present case, there was no evidence of concealment of the regular use or maintenance of a road for several decades, which was adequate to provide plaintiffs with notice that there was a claim to use of the road. Because no permissive use was shown, and because the use was sufficiently open and notorious to establish a claim, the District Court did not err in granting defendants a prescriptive easement over plaintiffs' property. Brumit v. Lewis, 2002 MT 346, 313 M 332, 61 P3d 138 (2002), distinguishing Cope v. Cope, 158 M 388, 493 P2d 336 (1971), and Amerimont, Inc. v. Gannett, 278 M 314, 924 P2d 1326 (1996). See also Rappold v. Durocher, 257 M 329, 849 P2d 1017 (1993), and Lemont Land Corp. v. Rogers, 269 M 180, 887 P2d 724 (1994).

Use of Private Road Permissive by Neighborly Accommodation — Public Prescriptive Easement Not Established: Plaintiffs sought an easement of record from defendants regarding the rural road crossing plaintiffs' property, but defendants refused. Plaintiffs then sought a declaratory judgment that the road was a public road established by prescriptive use, asserting that the road was a public thoroughfare established by common-law dedication as evidenced by a 1916 petition for the opening of a school and a 1948 petition to establish a road. The District Court found that the 1916 and 1948 petitions did not establish an offer evidencing an intention to dedicate the road to the public and that use of the road was instead permissive through neighborly accommodation. Plaintiffs appealed, but the Supreme Court affirmed. All elements of a prescriptive easement must be proved by clear and convincing evidence because one who has legal title should not be forced to give up what is rightfully theirs without the opportunity to know that the title is in jeopardy and to fight for it. Once a claimant establishes the elements of a prescriptive right, a presumption of adverse use arises, and the burden shifts to the landowner to establish that the use was permissive. If permissive use is shown, no easement can be acquired because the theory of prescriptive easement is based on adverse use. Use of a neighbor's land based upon mere neighborly accommodation or courtesy is not adverse and cannot ripen into a prescriptive easement. Rather, in addition to use, generally some circumstance or act tending to indicate that the use was not merely permissive is required. The presence of gates or other obstructions, to be opened and closed by parties passing over the land, has always been considered strong evidence in support of a mere license to the public to pass over the designated way. The facts here showed that use of the road was permissive and at the pleasure of the landowners, so no public prescriptive easement existed. Heller v. Gremaux, 2002 MT 199, 311 M 178, 53 P3d 1259 (2002). See also Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525 (1993), Hitshew v. Butte/Silver Bow County, 1999 MT 26, 293 M 212, 974 P2d 650 (1999), and Pedersen v. Ziehl, 2013 MT 306, 372 Mont. 223, 311 P.3d 765.

Failure to Show Adverse Use — No Prescriptive Easement Established: Ray sued Bromenshenk and Zimmerman to quiet title to a prescriptive easement across their properties. The District Court found that Ray did not have a prescriptive easement across either property and granted defendants an injunction restraining Ray from running wastewater across the properties. Ray appealed. The Supreme Court examined the record and concluded that Ray's use of Bromenshenk's property was not adverse, so no prescriptive easement existed across that property. Further, Zimmerman's blockage of the ditch running across the Zimmerman property resulted in an interruption of Ray's adverse use, so Ray's use of the ditch was not continuous and uninterrupted for the requisite 5-year period. Thus, no prescriptive easement existed regarding the Zimmerman property either. The District Court was affirmed. Ray v. Nansel, 2002 MT 191, 311 M 135, 53 P3d 870 (2002). See also Hays v. De Atley, 65 M 558, 212 P 296 (1923), Te Selle v. Storey, 133 M 1, 319 P2d 218 (1957), and Albert v. Hastetter, 2002 MT 123, 310 M 82, 48 P3d 749 (2002).

Limited Prescriptive Easement Established — Obvious Use Viewed as Open and Notorious: Albert filed an action to determine a claim for a prescriptive easement and quiet title to a road across Hastetter's property. Hastetter raised the affirmative defense of estoppel, claiming that Albert recognized Hastetter's legitimate title to the road by requesting an easement in an earlier letter and that the use was permissive and subject to Hastetter's consent. The trial court found that Albert had a prescriptive easement that was limited to the historical use of providing access and moving cattle to and from Albert's pasture. Hastetter appealed, but the Supreme Court affirmed. Albert established the elements for a prescriptive easement during the statutory 5-year period, and thus enjoyed the presumption that his use was adverse to Hastetter's interest. Although the servient landowner must know about and acquiesce to the user's claim of right, Montana law does not require that a prescriptive easement claimant verbally communicate a hostile intent. Open and notorious use can be established by showing that the condition of use was so obvious that the owner was not deceived and should have known of the claimant's use. Further, Albert had used the road to move cattle periodically since 1958 and had used the road to check the condition of fences and gates. Given the obvious use of the gates to control livestock, the District Court did not abuse its discretion when it refrained from scrutinizing the gates as evidence of permissive use. Albert v. Hastetter, 2002 MT 123, 310 M 82, 48 P3d 749 (2002), followed in Harding v. Savoy, 2004 MT 280, 323 M 261, 100 P3d 976 (2004).

Public Use for Statutory Period Coupled With Assumption of Adverse Control — Public Prescriptive Easement Established: An easement by prescription is created by operation of law through open, notorious, exclusive, adverse, continuous, and uninterrupted use for 5 years. Following the same criteria, applied to public prescriptive easements in Granite County v. Komberec, 245 M 252, 800 P2d 166, 47 St. Rep. 2061 (1990), the Supreme Court noted that to establish the existence of a public road by prescription, it must be shown that the public followed a definite course continuously and uninterruptedly for the prescribed statutory period, together with an assumption of control adverse to the owner. To be open and notorious, the use of a claimed right must give the landowner actual knowledge of the claimed right or be of such a character as to raise a presumption of notice. To be continuous and uninterrupted, the use of a claimed right may not be abandoned by the user or interrupted by an act of the landowner. To be adverse, the use or assumption of control of a claimed right must be exercised under a claim of right and not as a mere license revocable at the pleasure of the landowner. Regular maintenance of a roadway by the party asserting a prescriptive easement is evidence of adverse rather than permissive use. Because a public prescriptive easement is "public", the element of exclusivity is not required in establishing the existence of a public prescriptive easement. In the present case, the county presented sufficient evidence establishing the existence of a public prescriptive easement on German Gulch Road, including a history of open public use and county maintenance of the road, an absence of evidence that the public ever abandoned use of the road, and the fact that plaintiff never erected gates, barriers, or signs on the road to create the impression of permissive use or established permissive use through neighborly accommodation. Hitshew v. Butte/Silver Bow County, 1999 MT 26, 293 M 212, 974 P2d 650, 56 St. Rep. 111 (1999), distinguishing Leffingwell Ranch, Inc. v. Cieri, 276 M 421, 916 P2d 751, 53 St. Rep. 453 (1996). However, see Lyndes v. Green, 2014 MT 110, 374 Mont. 510, 325 P.3d 1225.

Public Road by Prescription — Adversity Satisfied by County Newspaper Publication — Intermittent Maintenance and Neighborly Accommodation Not Substantiated: Swandal Ranch Company (SRC) brought an action to quiet title to a stretch of roadway, known as Wallrock Road, running through the ranch. The District Court held that Park County had established a public easement by prescription. The Supreme Court held that Park County had satisfied the requirements for a prescriptive easement, noting that declaration by the county in 1950 of its intent to create a public road by statutory process and subsequent newspaper publication of the minutes of the County Commissioners' meeting put SRC on notice of the county's interest in Wallrock Road, even though the intent of the Commissioners had been to create the public road by a different process. The Supreme Court also found that county maintenance of the road had not been intermittent and that there was sufficient evidence that use of the road was not by neighborly accommodation. Swandal Ranch Co. v. Hunt, 276 M 229, 915 P2d 840, 53 St. Rep. 361 (1996), followed in Rafanelli v. Dale, 278 M 28, 924 P2d 242, 53 St. Rep. 746 (1996).

Possession of Real Property Insufficient to Grant Title Against Good Faith Purchasers — No Adverse Possession Shown: In 1989, the Luloffs bought part of a ranch from the Manweilers by a deed that excluded "Tract B". The Luloffs mistakenly assumed that Tract B was the part of the ranch that had been occupied by the Blackburns for approximately 4 years. When the Luloffs later discovered that Tract B was another part of the ranch, they brought an action to have the Blackburns evicted, and the District Court granted summary judgment. The Supreme Court held that summary judgment was correctly granted because there was no contract between the Manweilers and the Blackburns satisfying the statute of frauds for the sale of the property to the Blackburns. The Supreme Court held that the Blackburns' mere possession was insufficient against the Luloffs, who had purchased the ranch as bona fide purchasers in good faith, because they were without notice of any claim of title by the Blackburns. The Supreme Court noted that the Blackburns could not make a claim of title because they had mere possession, which did not satisfy the requirements for adverse possession because the Blackburns had not paid taxes upon the property. Luloff v. Blackburn, 274 M 64, 906 P2d 189, 52 St. Rep. 1124 (1995).

Easement by Way of Necessity — Incompatible With Prescriptive Easement: A way of necessity is incompatible with a prescriptive right for the same easement. A prescriptive right never accrues in a way of necessity as long as the necessity continues. There are two basic elements of easements by way of necessity: (1) unity of ownership; and (2) strict necessity. The necessity must exist at the time the unified tracts are severed. The way granted must be over the grantor's land and never over the land of a third party or stranger to the title, and finally there must be strict unity of ownership. Woods v. Houle, 235 M 158, 766 P2d 250, 45 St. Rep. 2273 (1988), followed in Big Sky Hidden Village Owners Ass'n, Inc. v. Hidden Village, Inc., 276 M 268, 915 P2d 845, 53 St. Rep. 379 (1996).

No Implied Easement: Courts are reluctant to find easements by implication because such an action results in depriving a person of the use of his property by imposing a servitude by mere implication. To create an easement by implication from a preexisting use imposed on one part of the property for the benefit of another party, unity of title at the time of the severance thereof is required. Woods v. Houle, 235 M 158, 766 P2d 250, 45 St. Rep. 2273 (1988).

Prescriptive Easement Established — Summary Judgment — Burden of Proof: In a quiet title action, once defendant filed affidavits reciting facts that would fulfill the requirements for a prescriptive easement, it became the duty of the plaintiff not to rest upon mere allegations or denials but to respond by affidavit or otherwise, setting forth specific facts showing there was a genuine issue of material fact for trial. It was the plaintiff's burden to show that defendant's use was permissive. Summary judgment for the defendant was proper due to the plaintiff's failure to establish a genuine issue of material fact. Defendant was under no duty to communicate by word of mouth to the plaintiff or his predecessors in interest that she was using the roadway over plaintiff's property under a claim of right and adversely to them. Woods v. Houle, 235 M 158, 766 P2d 250, 45 St. Rep. 2273 (1988).

No Prescriptive Use of Water Found: The Water Court was correct in holding that Merrimac did not prove its claim of prescriptive use to the waters of Martin Creek and Davis Creek from the 1800s through 1980. Merrimac did not acquire adverse possession through 1973 since the water use was based on an accommodation between the parties. In 1973, the Water Use Act eliminated the right to acquire a water-use right by prescription. Merrimac was not entitled to a fractional share of water on the ground that Merrimac had always used one-third of the waters of Martin Creek and Davis Creek since Merrimac never deprived Hill of his water supply. There was no adverse taking. Hill v. Merrimac Cattle Co., Inc., 211 M 479, 687 P2d 59, 41 St. Rep. 1504 (1984).

No Interest Acquired in Property by Possessory Use Without Payment of Taxes: In 1978, Burlingames acquired a parcel of land adjoining Marjerrisons' land. A survey of Burlingames' property indicated that Marjerrisons' fence enclosed 5 acres of Burlingames' property. Since 1935, Marjerrisons had used the 5-acre parcel, along with their property, for cattle grazing, agriculture, and timber harvesting. Burlingames filed an action to quiet title. The District Court ruled that Burlingames possessed title to the 5-acre parcel but that Marjerrisons had acquired prescriptive easements for grazing, agricultural, and timber harvesting purposes. On appeal, the Supreme Court reversed, stating that since an easement is a nonpossessory interest and Marjerrisons had complete possession of the parcel for the statutory period, the only interest they could have acquired was full title. Treating Marjerrisons' claim as one for adverse possession, the court then ruled that although their use was open, notorious, exclusive, adverse, continuous, and uninterrupted for a 5-year period, they had not paid property taxes on the disputed parcel as required by 70-19-411, and thus have acquired no interest in the property. Burlingame v. Marjerrison, 204 M 464, 665 P2d 1136, 40 St. Rep. 1005 (1983).

Prescriptive Easement — Intent as Central Element: Plaintiffs own a farm surrounded on three sides by the Flathead River and Flathead Lake. After Kerr Dam was built in 1939, the water table in the area began to rise. In 1960 plaintiffs filed suit claiming inverse condemnation of their land and damages due to the rising of the water table. The complaint was amended four times over the years and was finally tried in 1979. Defendant claimed that the cause was barred by prescription and the Statute of Limitations. Defendant failed to establish prescription. Defendant did not show "open and notorious" occupation of the land for any period of time and had consistently denied occupation of the land. Defendant also failed to show an intention to occupy the land. Intention is a central element of prescriptive easements. Blasdel v. Mont. Power Co., 196 M 417, 640 P2d 889, 39 St. Rep. 219 (1982).

Mineral Interest — No Proof of Possession: In an action to quiet title to certain royalty interests claimed by Rosebud County, the county argued that the plaintiffs were barred by the Statute of Limitations from claiming ownership of the royalty interest. The Supreme Court held that the county failed to overcome the presumption created by this section that plaintiffs were in possession within the required period. Since the county failed to prove all the elements of adverse possession, the Statutes of Limitations in 70-19-401 and 70-19-402 are not applicable. King v. Rosebud County, 193 M 268, 631 P2d 711, 38 St. Rep. 1145 (1981).

Establishment of Prescriptive Easement by the Public — Road Across Private Land: Plaintiffs owned land through which a road ran. The public used that road in a continuous and uninterrupted way for over 25 years without objection by the plaintiffs. Plaintiffs sought unsuccessfully to close the road to public use. The plaintiffs' assertion of error in this case concerned only the last element for establishing a prescriptive easement, the exercise of control adverse to the owner. Adverse control is presumed when all other elements have been proved. The undisputed facts supported rather than rebutted this presumption. For example, most members of the public never asked for permission to use the road, and the county graded and maintained the road and laid gravel on the road without the plaintiffs' permission. McClurg v. Flathead County Comm'rs, 179 M 518, 610 P2d 1153 (1980), followed in Rasmussen v. Fowler, 245 M 308, 800 P2d 1053, 47 St. Rep. 2134 (1990), and Hitshew v. Butte/Silver Bow County, 1999 MT 26, 293 M 212, 974 P2d 650, 56 St. Rep. 111 (1999), and distinguished in Leffingwell Ranch, Inc. v. Cieri, 276 M 421, 916 P2d 751, 53 St. Rep. 453 (1996).

Use for Less Than Statutory Period: Adverse use for less than full statutory period of 5 years confers no right or interest upon the adverse user, so that there was no consideration for an alleged contract granting an easement over another route. Larson v. Burnett, 158 M 421, 492 P2d 921 (1972).

Easement Established Even When Owner Paid Taxes — Highway: Where county adversely paved and maintained a highway over the land of a private party for a period of more than 10 years, such county acquired an easement by prescription over the land even though the private owner was assessed for and paid taxes on the property during the running of the statutory period. Brannon v. Lewis & Clark County, 143 M 200, 387 P2d 706 (1963).

Burden of Proof: In action by mortgagor to quiet title to grazing lands, burden of proving adverse possession was upon the plaintiff. Bell v. Gussenhoven, 132 M 346, 318 P2d 251 (1957).

Default Judgment Attacked: Upon a motion to set aside a default judgment wherein the person in his affidavit of merits alleged that he was the record owner of the real estate, he set up a prima facie defense to the original action because of the presumption of this section that the person who has legal title is in possession. Holen v. Phelps, 131 M 146, 308 P2d 624 (1957).

Contract as Basis for Occupancy: Possession under contract for deed was subordinate to title of owner. Hinton v. Staunton, 124 M 534, 228 P2d 461 (1951).

Tax Deed Claimant in Occupancy: In action by holder of tax deed to quiet title to mining claim, admitted facts and evidence did not support claim of adverse possession by plaintiff or laches or abandonment by holders of legal title. Co-owners who established legal title to property were presumed to have been in possession within the time required by law, as against claim of adverse possession by other co-owners, and where tax deed was declared void on its face or on ground of defect in affidavit by purchaser and failure to comply with jurisdictional requirements, defense of Statute of Limitations was not available against holders of right to redeem. Fariss v. Anaconda Copper Min. Co., 31 F. Supp. 571 (D.C. Mont. 1940).

Tax Payment Required: When plaintiff, under this section, shows he is the owner of the record title, he has proved a prima facie case in a suit to quiet title, the burden then being cast upon defendant relying upon adverse possession to prove, inter alia, that he or his predecessor paid all the taxes upon the property (70-19-411). His failure to furnish such proof deprives him of the right to relief. Smith v. Whitney, 105 M 523 74 P2d 450 (1937).

Rebuttal of Presumption: Where plaintiff in attempting affirmatively to prove his possession of lands in dispute in his action in ejectment, in which defendant asserted title by adverse possession, testified that he was last in possession more than 10 years prior to the commencement of the action and then not by reason of ownership but by sufferance of the owner thereof, he by proof to the contrary overcame the presumption that he was in possession "within the time required by law" and destroyed his vital allegation that he was ejected by defendant, and judgment of nonsuit was proper. Miner v. Cook, 87 M 500, 288 P 1016 (1930), distinguished in Smith v. Whitney, 105 M 523, 74 P2d 450 (1937).

Easement Based on Legal Title: Where the predecessor of the owner of a ditch right had acquired title to the right-of-way therefor over the public domain by grant from the United States, it will be presumed in the absence of evidence to the contrary, under this section, in an action to enjoin its use by another, that the owner had been possessed thereof within the time required by law and that the occupation by the other party had been in subordination to the legal title, as against the contention that the right was barred by 70-19-401, in that neither plaintiff nor his predecessor had been in possession or seized of the ditch within the statutory period next preceding the commencement of the action. Rodda v. Best, 68 M 205, 217 P 669 (1923).

Deed as Basis for Occupancy: Where possession of land is held under a deed it is presumed that the grantee entered into possession under it, claiming title only to the land described therein, and that his possession was restricted to the premises granted. N. Pac. Ry. v. Cash, 67 M 585, 216 P 782 (1923).

Occupation Considered Subordinate to Legal Title: Under this section, the occupation of property by one not the owner is considered to have been under and in subordination to the legal title. Blackfoot Land Dev. Co. v. Burks, 60 M 544, 199 P 685 (1921).

Continuation of Title Presumed: The law presumes that a thing once proved to exist continues as long as is usual with things of that nature, and this presumption controls an occupant of land who, as defendant in an action for possession brought by the record owner, admits that the plaintiff obtained title by deed 15 years before; in such an action, it is proper to deny a motion for a nonsuit made at the close of plaintiff's case. Collins v. Thode, 54 M 405, 170 P 940 (1918).

Ejectment Action: Plaintiff in an action in ejectment having shown legal title in himself, it will be presumed that defendant held possession of the disputed ground in subordination to such legal title. Rude v. Marshall, 54 M 27, 166 P 298 (1917); Peter v. Stephens, 11 M 115, 27 P 403 (1891); Lamme v. Dodson, 4 M 560, 2 P 298 (1883).

Public Highway:

Proof of the establishment of a highway by prescription overcomes the presumption which would otherwise prevail, namely, that the use by the public for a long period of years has been in subordination to the legal title. Lockey v. Bozeman, 42 M 387, 113 P 286 (1910).

This section appears to recognize the doctrine that adverse use by the public for the period named in the Statute of Limitations will establish a highway by prescription, but the title will be confined to the very way traveled during the period, unless an attempt has been made by the proper authorities to erect a highway, when the extent of the title will be measured by the claim exhibited by the proceedings. A highway by prescription does not exist unless the proof establishes that the general public has used the way, without substantial interruption, for the time fixed by the Statutes of Limitation applicable to lands. St. v. Auchard, 22 M 14, 55 P 361 (1898). See also Parker v. Elder, 233 M 75, 758 P2d 292, 45 St. Rep. 1305 (1988).

70-19-405. Title by prescription.

Compiler's Comments

1985 Amendment: At beginning inserted "Except as provided in 23-2-322" (applicable only to a prescriptive easement that has not been perfected prior to April 19, 1985; sec. 10, Ch. 556, L. 1985).

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GENERAL

No Easement by Necessity Absent Showing of Strict Necessity to Access Property: Plaintiff claimed an implied easement by necessity to a road that burdened two properties adjoining that of plaintiff. The District Court applied the criteria in Albert G. Hoyem Trust v. Galt, 1998 MT 300, 292 M 56, 968 P2d 1135 (1998), for establishing an easement by necessity: (1) unity of ownership; and (2) strict necessity at the time that the tracts are severed. The court held that plaintiff failed to establish unity of ownership and held that no easement by necessity existed. On appeal, plaintiff argued that there was unity of ownership based on original ownership of the tracts by the federal government in 1906 and that when the government granted odd-numbered sections of land to the railroad, the government reserved an implied easement over the odd-numbered sections in order to reach the even-numbered sections, citing Leo Sheep Co. v. U.S., 440 US 668 (1979). The Supreme Court questioned citation of Leo Sheep because that case explicitly held that the doctrine of implied easement by necessity did not apply in that case and that the federal government could not claim an easement by necessity. Nevertheless, even if it was agreed that unity of ownership existed at one time through federal ownership, plaintiff failed to satisfy the second prong of the Hoyem Trust test, in that plaintiff could not prove that strict necessity to access existed in 1906 because no one lived on the property when the tracts were severed, so there was no necessity to reach the property. The District Court was affirmed. Leisz v. Avista Corp., 2007 MT 347, 340 M 294, 174 P3d 481 (2007). The Hoyem Trust criteria for determining the existence of an implied easement by necessity were also applied in McKay v. Wilderness Dev., LLC, 2009 MT 410, 353 M 471, 221 P3d 1184 (2009).

Failure to Prove Elements of Prescriptive Easement — Effective Easement of No Avail to Nonadjoining Landowner: Sunday claimed a prescriptive easement across Harboways' property based on the existence of an alleged road. However, testimony at trial was conflicting as to the time of use, extent of use, and location of the road at issue, which Harboways claimed was nothing more than an indistinct two-rut trail. The District Court examined the history of the property both before and after its acquisition by Harboways and found that neither Sunday nor Sunday's predecessors in interest established a prescriptive easement on any of the tracts owned by Harboways prior to Harboways' purchase of the property, so absent proof of the statutory elements of a prescriptive easement, Sunday did not have an easement across Harboways' property. The court did find that a 30-foot easement surrounded one of Harboways' parcels, but the parcel did not abut Sunday's land, nor was Sunday's land a dominant tenement with benefit of the easement, so Sunday was not entitled to use the easement. Sunday v. Harboway, 2006 MT 95, 332 M 104, 136 P3d 965 (2006).

Public Highway Established Pursuant to 1895 Law — Mere Nonuse by County Not Considered Abandonment — Inapplicability of Prescriptive Easement and Reverse Adverse Possession: The District Court found that the Tucker Gulch Road was clearly defined and in use by the public for at least 27 years prior to enactment of sec. 2600, The Codes and Statutes of Montana (1895), which declared all highways and roads then used by the public as public highways. However, the court went on to hold that it was not a petitioned county road and that there was a prescriptive easement by the public over the road that had been lost through abandonment and by reverse adverse possession when a new road was relocated near the old one. The District Court properly found that Tucker Gulch Road was a public highway; however, mere nonuse or lack of maintenance by the county was insufficient to indicate a clear intent to abandon the road without notice and a public hearing. Moreover, the county's failure to respond to several quiet title actions in which the county was not served and the county's adoption of a resolution naming the road did not indicate an intent to abandon. Abandonment cannot be established by mere implication. The Supreme Court cited Baertsch v. Lewis & Clark County, 256 M 114, 845 P2d 106 (1992), for the general rule that title to a public road may not be obtained by adverse possession. The Supreme Court also cited Granite County v. Komberec, 245 M 252, 800 P2d 166 (1990), and affirmed the District Court's finding that there was not a public prescriptive easement along the relocated new road because most of the nonpermissive use of the new road was by occasional recreationists. The District Court's conclusion that creation of the easement was not specific and that the easements were designed for the access of the owners for activities associated with residential living was in error, however, absent evidence in the access agreement or survey establishing such a restriction. Thus, the grant of unrestricted access to landowners who had owned a mine adjoining the property in question was not in error. McCauley v. Thompson-Nistler, 2000 MT 215, 301 M 81, 10 P3d 794, 57 St. Rep. 855 (2000), distinguishing Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525 (1993), and followed in Lee v. Musselshell County, 2004 MT 64, 320 M 294, 87 P3d 423 (2004). The Supreme Court clarified its ruling in McCauley on abandonment of a public highway in Soup Creek, LLC v. Gibson, 2019 MT 58, 395 Mont. 105, 439 P.3d 369.

Public Use for Statutory Period Coupled With Assumption of Adverse Control — Public Prescriptive Easement Established: An easement by prescription is created by operation of law through open, notorious, exclusive, adverse, continuous, and uninterrupted use for 5 years. Following the same criteria, applied to public prescriptive easements in Granite County v. Komberec, 245 M 252, 800 P2d 166, 47 St. Rep. 2061 (1990), the Supreme Court noted that to establish the existence of a public road by prescription, it must be shown that the public followed a definite course continuously and uninterruptedly for the prescribed statutory period, together with an assumption of control adverse to the owner. To be open and notorious, the use of a claimed right must give the landowner actual knowledge of the claimed right or be of such a character as to raise a presumption of notice. To be continuous and uninterrupted, the use of a claimed right may not be abandoned by the user or interrupted by an act of the landowner. To be adverse, the use or assumption of control of a claimed right must be exercised under a claim of right and not as a mere license revocable at the pleasure of the landowner. Regular maintenance of a roadway by the party asserting a prescriptive easement is evidence of adverse rather than permissive use. Because a public prescriptive easement is "public", the element of exclusivity is not required in establishing the existence of a public prescriptive easement. In the present case, the county presented sufficient evidence establishing the existence of a public prescriptive easement on German Gulch Road, including a history of open public use and county maintenance of the road, an absence of evidence that the public ever abandoned use of the road, and the fact that plaintiff never erected gates, barriers, or signs on the road to create the impression of permissive use or established permissive use through neighborly accommodation. Hitshew v. Butte/Silver Bow County, 1999 MT 26, 293 M 212, 974 P2d 650, 56 St. Rep. 111 (1999), distinguishing Leffingwell Ranch, Inc. v. Cieri, 276 M 421, 916 P2d 751, 53 St. Rep. 453 (1996). However, see Lyndes v. Green, 2014 MT 110, 374 Mont. 510, 325 P.3d 1225.

Witness Not Party to Judgment and Not Entitled to Prescriptive Easement: A person who is not a party to the action cannot be a party to the judgment. Therefore, in a prescriptive easement action, witnesses who lived in the area of the disputed road and testified as to their use of the road could not be granted a prescriptive easement because they were not parties to the action. Kessinger v. Matulevich, 278 M 450, 925 P2d 864, 53 St. Rep. 1002 (1996), followed in Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 M 52, 993 P2d 688, 57 St. Rep. 65 (2000).

Adverse Possession — Quiet Title Action Barred by Laches and Statutes of Limitations: In 1954, Clayton obtained a patent from the United States government for a piece of property. A railroad right-of-way ran through the property, but the patent did not refer to the right-of-way. The railroad had acquired the right-of-way by deed in 1892. The railroad tracks were used by at least one train a day both before and after 1954. Railroad work crews used the right-of-way system during this time. In 1983, Clayton filed an action to quiet title to the right-of-way and a tort claim for trespass and damages. The railroad defended on the grounds of adverse possession, prescription, laches, estoppel, and Statutes of Limitations. The railroad also filed a counterclaim to quiet title to its right-of-way. The District Court granted summary judgment for the railroad, ruling that Clayton's claim was barred by laches and all applicable Statutes of Limitations. The Supreme Court affirmed. The railroad acquired a prescriptive easement either based on a written instrument, under 70-19-407, or by enclosing the land and meeting the other requirements of 70-19-408. Murphy v. Atl. Richfield Co., 221 M 166, 717 P2d 558, 43 St. Rep. 717 (1986), distinguished in Gue v. Olds, 245 M 117, 799 P2d 543, 47 St. Rep. 1906 (1990). See also Johnson v. Estate of Shelton, 232 M 85, 754 P2d 828, 45 St. Rep. 887 (1988).

Quiet Title Action — Record Taken as a Whole: A landowner filed an action to quiet title to a county road established 80 years earlier, claiming that defects in the 1902 proceedings prevented establishment of a statutorily created 60-foot-wide public highway and that the existing public road was acquired by prescriptive use and was limited to the greatest width actually used. The record contained the actual petition to establish a road, signed by more than 20 residents of the area, including the appellant's predecessor in interest. The District Court decreed the road to be a 60-foot-wide declared county right-of-way, and the Supreme Court affirmed. The county is not required to prove on the face of the record that public officials had jurisdiction to create a public road if the record, taken as a whole, shows that a public road was created. Sheldon v. Flathead County, 218 M 270, 707 P2d 540, 42 St. Rep. 1573 (1985).

Doctrine of Agreed Boundary — No Boundary Proven: In 1920, a tenant of Christie's predecessor in interest built a fence which served as the boundary between two adjoining parcels now owned by Christie and Papke. In 1976, Christie had the property surveyed and learned that the fence had been improperly placed and that part of his property had been fenced out. Christie destroyed the 1920 fence and built a new one on the actual boundary line. Papke then destroyed that fence and built another where the 1920 fence had been. Under the doctrine of agreed boundary, Papke brought an action to quiet title in him to the portion in dispute. The Supreme Court affirmed the District Court's ruling that Papke had not established a claim under the agreed boundary doctrine because in order to establish an agreed boundary line, the evidence must show more than mere acquiescence and occupancy for the statutory period. The evidence must also show that there was uncertainty in the location of the line and that the coterminous owners fixed the line by express or implied agreement. The court ruled that Christie's long acquiescence in the existence of the 1920 fence did not create an implied agreement establishing a boundary. Christie v. Papke, 201 M 200, 657 P2d 88, 39 St. Rep. 2054 (1982), followed in Smithers v. Hagerman, 244 M 182, 797 P2d 177, 47 St. Rep. 1483 (1990).

Adverse Possession — Sufficiency of Damages: The appellants in an adverse possession case alleged there was insufficient evidence of the amount of damages to sustain the verdict against them. The Supreme Court considered delay rental receipts and lost profits. A judgment for damages must be supported by substantial evidence that it is not the product of mere guess or speculation. Substantial damages exist whenever the owner of property is deprived of the use of that property. Recovery of damages would not be denied provided the evidence was sufficient to afford a reasonable basis for determining the specific amount awarded. The court held that there was no uncertainty about the existence of substantial damages here. Cremer v. Cremer Rodeo Land & Livestock Co., 192 M 208, 627 P2d 1199, 38 St. Rep. 574 (1981).

Adverse Possession — Failure to Instruct on Permissive Use: In a case involving alleged adverse possession, one issue on appeal was the failure of the trial court to instruct the jury on permissive use in conjunction with adverse possession. The Supreme Court noted case law that implied acquiescence is not the same as permission. Possession may be adverse even though the owner does not interfere with entry and the possessor understands that there will be no future interference with his possession. Upon review of the trial evidence, the Supreme Court found no evidence of permissive use. It noted that the testator on whose behalf the case was brought had treated the land he possessed as his own, paid taxes on the property, and improved it. In the absence of any evidence supporting this portion of the defendant's case, the Supreme Court found no reversible error could have occurred as a result of the District Court's refusal to give a permissive use instruction. Cremer v. Cremer Rodeo Land & Livestock Co., 192 M 208, 627 P2d 1199, 38 St. Rep. 574 (1981).

Doctrine of Agreed Boundary — Burden of Proof: The standard of proof necessary to invoke the doctrine of agreed boundary is clear and convincing. Where, as here, the evidence does not show more than mere acquiescence by property owners as to placement of a fence and occupancy, petitioner/owner does not adequately establish that he and the other owner agreed to a boundary line. Therefore, the doctrine that adjacent landowners may move the boundary line of their respective parcels by agreement does not apply. Huggans v. Weer, 189 M 334, 615 P2d 922 (1980), following Townsend v. Koukol, 148 M 1, 416 P2d 532 (1966).

Burden of Proof: When the claimant has shown an open, visible, continuous, and unmolested use of the land of another for the period of time sufficient to acquire title by adverse possession, the use will be presumed to be under a claim of right and not by license of the owner. In order to overcome this presumption, the burden is upon the owner to show that the use was permissive. Luoma v. Donohoe, 179 M 359, 588 P2d 523 (1978).

Damages: The District Court did not err in finding a defendant who had claimed a prescriptive easement guilty of intentional trespass and in awarding damages to the plaintiff. Ordinarily a defendant is liable for trespass even though he has acted in good faith, believing he has the legal privilege of entry. Luoma v. Donohoe, 179 M 359, 588 P2d 523 (1978).

Evidence: The presence of jointly maintained gates is generally considered to be strong evidence of a mere personal license to pass over a right-of-way. However, the presumption attending the presence of gates has only been applied to roads used, in effect, by the general public. Luoma v. Donohoe, 179 M 359, 588 P2d 523 (1978).

Acquiescence: Landowners and their predecessors in interest acquired by prescription an easement for the diversion and conveyance of water validly appropriated from adjoining land where water system had been in existence prior to 1908, had been in continuous use since that time, and had been regularly repaired and maintained with knowledge of and without complaint by previous owners of the adjoining land. The easement encompassed both the waterline and the diversion system. Circumstances of adverse possession were sufficient to put a prudent man upon inquiry since a casual inspection of premises would have disclosed fenced inclosure with intake system and attached underground waterline. Failure of former owners of adjoining land to object to water system raised inference of acquiescence rather than license. O'Connor v. Brodie, 153 M 129, 454 P2d 920 (1969).

Secondary Easements: Landowners who acquired an easement by prescription for maintenance of waterline and diversion system on adjoining property had right, under doctrine of secondary easement, to fence the diversion work to protect it from livestock and pollution. O'Connor v. Brodie, 153 M 129, 454 P2d 920 (1969).

Transfer of Servient Estate: Prescriptive title once established is not divested by the subsequent transfer of the servient estate. O'Connor v. Brodie, 153 M 129, 454 P2d 920 (1969).

Water Rights:

Defendants failed to establish a prescriptive water right regardless of priority of rights, where depositions which were self-serving declarations were not admissible as ancient documents or public records as exceptions to hearsay rule and no other satisfactory proof of possession or use of the water was shown. King v. Schultz, 141 M 94, 375 P2d 108 (1962).

In order to acquire a prescriptive right to use of water in an adjudicated stream, the use must have been detrimental to the one whose title and right are said to have been destroyed and may not be predicated upon fact that use had in no way lessened source of water for other decreed rights or tended to destroy them. One claiming a right under a decree where his predecessor in interest was a party to the action is estopped from claiming a right by prescription as against any of the decreed rights. Woodward v. Perkins, 116 M 46, 147 P2d 1016 (1944), appeal dismissed in 119 M 11, 171 P2d 997 (1946).

Nature of Title:

The title to an easement acquired by prescription is as effective as though evidenced by a deed. Scott v. Weinheimer, 140 M 554, 374 P2d 91 (1962); Ferguson v. Standley, 89 M 489, 300 P 245 (1931); Stetson v. Youngquist, 76 M 600, 248 P 196 (1926). See also Groshean v. Dillmont Realty Co., 92 M 227, 12 P2d 273 (1932).

A title by prescription is as effective as though evidenced by a deed. Te Selle v. Storey, 133 M 1, 319 P2d 218 (1957).

Owner of Prescriptive Easement — May Enjoin Interference: Plaintiffs, who acquired prescriptive easement in road across property of defendants by use for 35 years before defendants acquired title to the land and attempted to obstruct use, were entitled to enjoin defendants from interfering with use of right-of-way over road. Scott v. Weinheimer, 140 M 554, 374 P2d 91 (1962).

Change From Permissive to Hostile Possession:

While a permissive possession may subsequently become hostile, to make it so there must have been a repudiation of the permissive possession brought home to the owner by actual notice. "Hostile" possession, within this rule, means an invasion of the owner's possession by the claimant without the owner's permission and in violation of the latter's right of property. "Adverse" possession means having opposing interests, having interests for the preservation of which opposition is essential. Price v. W. Life Ins. Co., 115 M 509, 146 P2d 165 (1944).

Possession of real property by permission of the owner and with knowledge of title in him cannot be made the basis of a title by prescription, and though permissive possession may subsequently become hostile, to make it so there must be a repudiation of the permissive possession and of the recognition of ownership implicit therein and the repudiation must be brought home to the owner by actual notice or at least by acts of hostility so manifest and notorious that actual notice must be presumed. Kelly v. Grainey, 113 M 520, 129 P2d 619 (1942).

When Law Presumes a Grant: Where possession of land has been adverse for the statutory period of 10 years, the law raises a presumption of a grant, the presumption arising only, however, where the occupancy would otherwise have been unlawful. If use was permissive in the beginning, it can be changed into a hostile and adverse one only by the most unequivocal conduct on the part of the user. The evidence of adverse possession must be strictly construed against the adverse user, and every reasonable intendment should be made in favor of the true owner. Price v. W. Life Ins. Co., 115 M 509, 146 P2d 165 (1944).

Presumption: Where claimant of a ditch right by prescription has shown an open, visible, continuous, and unmolested use of lands for a period sufficient to acquire title by adverse possession, his use will be presumed to have been adverse and under a claim of right and not by license, the burden of overcoming such presumption being upon the owner of the servient estate. Glantz v. Gabel, 66 M 134, 212 P 858 (1923), followed in Renner v. Nemitz, 2001 MT 202, 306 M 292, 33 P3d 255 (2001).

Pleading: In an action to quiet title to an easement by prescription in a ditch across defendant's land, the complaint alleging, inter alia, continuous and exclusive possession for more than 10 years was sufficient as against objection that it did not allege peaceful possession, the words "continuous and exclusive" comprehending the meaning of "peaceable". Hays v. De Atley, 65 M 558, 212 P 296 (1923).

ELEMENTS

Retaining Wall and Dock Not Considered Substantial Enclosure to Establish Possessory Adverse Use: The Jameses built a dock and retaining wall on property that a later survey revealed was on Habel's property. Habel filed a quiet title action, and the Jameses counterclaimed that they had acquired a prescriptive easement for the dock and retaining wall by adverse use for the statutory period. The District Court agreed and ruled that a nonpossessory prescriptive easement existed for the dock and retaining wall. Habel appealed, arguing that the dock and retaining wall were permanent structures that clearly marked the boundaries of the land enclosed by the structures and that the Jameses had thus acquired a possessory interest in the enclosed land. The Supreme Court noted that 70-19-410 does not specify what kind of structure satisfies the requirement to "protect by substantial enclosure" in order to consider the property to be possessed and occupied for purposes of adverse possession, but concluded that a structure or fixture may constitute a substantial enclosure if it indicates the boundaries of the adverse occupancy in a manner that clearly demonstrates the extent of the use of the property. The District Court's findings that the land was only partially enclosed by the dock and retaining wall and did establish a possessory use of the property itself were not clearly erroneous. A complete possession or occupation of the land was not present in this case because the Jameses' construction and maintenance of the dock and retaining wall were limited uses consistent with a nonpossessory interest, which constituted a burden on Habel's property, not a complete possession or occupation. The District Court was affirmed. Habel v. James, 2003 MT 99, 315 M 249, 68 P3d 743 (2003), distinguishing Burlingame v. Marjerrison, 204 M 464, 665 P2d 1136 (1983).

Burden of Each Party as to Notice to Other Party of Type of Right: Warnack was not required to notify Coneen that Warnack was using a road easement under a claim or right and adversely to Coneen in order to establish a prescriptive easement. Warnack had to show only that the claim and use were known to and acquiesced in by Coneen, at which point Coneen had the burden of showing that the use was permissive. Coneen's assertion that the use was a neighborly accommodation and evidence of a local custom of neighborly accommodation or courtesy relating to many facets of the agricultural endeavors in the area did not meet Coneen's burden, and Warnack's use was based more on an assertion of the user's respective rights than on a neighborly accommodation. Warnack v. Coneen Family Trust, 278 M 80, 923 P2d 1087, 53 St. Rep. 812 (1996).

Uses to Which Easement May Be Put — Established by Uses During Period Easement Is Perfected: The extent of the use of an easement is governed by the character and extent of the use during the period of time necessary to establish the easement. Under the rule, Warnack was entitled to use the road by foot, horseback, and all ordinary modern means of transportation for access and construction of a residence and outbuildings as necessary for agricultural purposes and for hunting, fishing, camping, and other recreation. Montana has not adopted sections 478 and 479 of the Restatement of Property allowing greater use of a prescriptive easement over time. Warnack v. Coneen Family Trust, 278 M 80, 923 P2d 1087, 53 St. Rep. 812 (1996).

Mixed or Common Possession of Land — Possession to Person With Legal Title — No Adverse Possession as Against Legal Title: In reversing a District Court grant of a first priority water right for irrigation on the basis of adverse use, the Supreme Court adopted the rule that in case of a mixed or common possession of land by both parties to a suit, the law adjudges the rightful possession to the party who holds legal title, and no length of time of possession can give title by adverse possession as against the legal title. Mielke v. Daly Ditches Irrigation District, 225 M 172, 731 P2d 927, 44 St. Rep. 129 (1987).

Permissive Use Not Basis for Easement by Prescription: When use of an easement begins as a permissive use, it cannot ripen into a prescriptive right no matter how long it continues, unless there is a distinct and positive assertion of a right hostile to the owner. Robertson v. Hughes, 204 M 515, 668 P2d 1025, 40 St. Rep. 1041 (1983).

No Interest Acquired in Property by Possessory Use Without Payment of Taxes: In 1978, Burlingames acquired a parcel of land adjoining Marjerrisons' land. A survey of Burlingames' property indicated that Marjerrisons' fence enclosed 5 acres of Burlingames' property. Since 1935, Marjerrisons had used the 5-acre parcel, along with their property, for cattle grazing, agriculture, and timber harvesting. Burlingames filed an action to quiet title. The District Court ruled that Burlingames possessed title to the 5-acre parcel but that Marjerrisons had acquired prescriptive easements for grazing, agricultural, and timber harvesting purposes. On appeal, the Supreme Court reversed, stating that since an easement is a nonpossessory interest and Marjerrisons had complete possession of the parcel for the statutory period, the only interest they could have acquired was full title. Treating Marjerrisons' claim as one for adverse possession, the court then ruled that although their use was open, notorious, exclusive, adverse, continuous, and uninterrupted for a 5-year period, they had not paid property taxes on the disputed parcel as required by 70-19-411, and thus have acquired no interest in the property. Burlingame v. Marjerrison, 204 M 464, 665 P2d 1136, 40 St. Rep. 1005 (1983).

Prescriptive Easement — Use to Be Adverse: The District Court found that a prescriptive easement existed across defendants' land. The evidence presented established that several of the defendant's neighbors used the road across defendant's land but also testified that defendants had consented to the use. Evidence was also presented that there were gates across the road posted with "No Trespassing" signs. This kind of use is not adverse and does not create a public prescriptive easement. Madison County v. Elford, 203 M 293, 661 P2d 1266, 40 St. Rep. 457 (1983).

Prescriptive Easement — Intent as Central Element: Plaintiffs own a farm surrounded on three sides by the Flathead River and Flathead Lake. After Kerr Dam was built in 1939, the water table in the area began to rise. In 1960 plaintiffs filed suit claiming inverse condemnation of their land and damages due to the rising of the water table. The complaint was amended four times over the years and was finally tried in 1979. Defendant claimed that the cause was barred by prescription and the Statute of Limitations. Defendant failed to establish prescription. Defendant did not show "open and notorious" occupation of the land for any period of time and had consistently denied occupation of the land. Defendant also failed to show an intention to occupy the land. Intention is a central element of prescriptive easements. Blasdel v. Mont. Power Co., 196 M 417, 640 P2d 889, 39 St. Rep. 219 (1982).

Doctrine of Agreed Boundary: The standard of proof necessary to invoke the doctrine of agreed boundary is clear and convincing. When, as here, the evidence does not show more than mere acquiescence by property owners as to placement of a fence and occupancy, petitioner/owner does not adequately establish that he and the other owner agreed to a boundary line. Therefore, the doctrine that adjacent landowners may move the boundary line of their respective parcels by agreement does not apply. Huggans v. Weer, 189 M 334, 615 P2d 922 (1980), following Townsend v. Koukol, 148 M 1, 416 P2d 532 (1966).

Construction of Gate Insufficient to Rebut Presumption of Adverse Use: Construction of a gate through which claimant could pass, which was apparently for the purpose of providing a convenient method of holding sheep after the claimant passed through, is not enough to rebut the presumption that the claimant's use was adverse. Garrett v. Jackson, 183 M 505, 600 P2d 1177 (1979). See also Brown & Brown of MT, Inc. v. Raty, 2012 MT 264, 367 Mont. 67, 289 P.3d 156, and Brown & Brown of MT, Inc. v. Raty, 2013 MT 338, 372 Mont. 463, 313 P.3d 179.

Cutting of Fence Indication of Hostile Use: Cutting a fence in order to cross a servient tenement, even when the claimant rewired the fence after passing through, was a distinct and positive assertion of a right hostile to the rights of the owner. The concern of the claimant that livestock may escape is not inconsistent with his claim of right-of-way. Where the fence was cut without seeking permission and the owner of the servient tenement was only later informed, the District Court was justified in concluding that the use was adverse and hostile. Garrett v. Jackson, 183 M 505, 600 P2d 1177 (1979).

Elements Required to Prove Prescriptive Easement: To establish a prescriptive easement, the owner of the purported dominant tenement must establish open, notorious, exclusive, adverse, continuous, and unmolested use of the servient tenement for the full statutory period of 5 years required to acquire title by adverse possession. Garrett v. Jackson, 183 M 505, 600 P2d 1177 (1979).

Presumption of Adverse Use When Other Elements Demonstrated — Burden on Servient Owner: The claimant of a prescriptive easement is entitled to rely upon a presumption that his use was adverse to the servient owner's title if he demonstrates by his evidence the other elements of his claim. When the dominant owner makes this preliminary showing of open, notorious, continuous, and unmolested use for the statutory period, the burden falls on the owner of the servient tenement to show that the use was not adverse but merely permissive. Garrett v. Jackson, 183 M 505, 600 P2d 1177 (1979), following Luoma v. Donohoe, 179 M 359, 588 P2d 523 (1978). See also Rappold v. Durocher, 257 M 329, 849 P2d 1017, 50 St. Rep. 293 (1993), Unruh v. Tash, 271 M 246, 896 P2d 433, 52 St. Rep. 425 (1995), and Rafanelli v. Dale, 278 M 28, 924 P2d 242, 53 St. Rep. 746 (1996). Unruh was followed in Glenn v. Grosfield, 274 M 192, 906 P2d 201, 52 St. Rep. 1150 (1995).

Possession Alone Not Sufficient: Mere possession of real property, no matter how exclusive and complete, is not sufficient to create a title by prescription; to create such a title the possession must have been adverse; otherwise it will be deemed to have been in subordination to the legal title. The possession of realty, to be "adverse", must be actual and visible, exclusive, hostile, and continued for a period of 10 years. It must be open and notorious or be of such a character as to raise a presumption of notice or so patent that the owner could not be deceived. The claim of the possessor must be so brought home to the owner as to enable the latter to institute action for possession at all times during the running of the Statute of Limitations. Le Vasseur v. Roullman, 93 M 552, 20 P2d 250 (1933), followed in Y A Bar Livestock Co. v. Harkness, 269 M 239, 887 P2d 1211, 51 St. Rep. 1517 (1994), and in Nelson v. Davis, 2018 MT 113, 391 Mont. 280, 417 P.3d 333, but ruling that an out-of-possession cotenant is charged with knowledge of the hostile character of a cotenant's possession if the cotenant in possession entered under color of title.

Exclusive Use:

No clear and convincing evidence of exclusive use was established when the parties presented evidence they both had used the disputed property to access a creek. Ethen Revocable Trust v. River Resource Outfitters, LLC, 2011 MT 143, 361 Mont. 57, 256 P.3d 913.

Occupancy of land under claim to easement does not divest servient owner of title to land over which it extends and need be continuous only in the same sense that the claimant exercise his right without interference at such times as he has need of the use. It need not be exclusive so long as the right does not depend upon a like right in others. Ferguson v. Standley, 89 M 489, 300 P 245 (1931).

The fact that plaintiff in his complaint claimed the right to use the ditch to the extent of one-half of its capacity only, conceding to defendants the right to use the other half, did not have the effect of destroying his allegation that his use was exclusive, the word "exclusive" in such a case meaning not that others had no rights in it but that his right to its use was not dependent on the like right in others and that their use did not interfere with his. Hays v. De Atley, 65 M 558, 212 P 296 (1923), followed in Wareing v. Schreckendgust, 280 M 196, 930 P2d 37, 53 St. Rep. 1362 (1996).

Generally: The occupancy of land for the period of 10 years which under this section ripens into title by prescription must be such as will constitute adverse possession, i.e., actual, visible, hostile, and continuous possession for the full period. The claim of the possessor must invade the title of the owner and be so brought home to him that he is in a position to institute action for possession at all times during the entire 10-year period. Otherwise, the possession is considered to have been under and in subordination to the legal title. Ferguson v. Standley, 89 M 489, 300 P 245 (1931).

Break in Use: One claiming a ditch right over another's land by adverse use must not only be able to show an open, notorious, exclusive, and hostile possession of the easement claimed but also that his possession was continued and uninterrupted for the full statutory period of 10 years. If possession is broken it ceases to be effectual, since, as soon as a break occurs, the law restores the constructive possession of the owner. Scott v. Jardine Gold Min. & Mill. Co., 79 M 485, 257 P 406 (1927).

Continuous Use: Adverse use of an irrigating ditch whenever use of it was necessary, uninterrupted by the owner of the servient estate, was continuous and uninterrupted, continuous use not necessarily implying constant use and continuity of use depending altogether upon the nature and character of the right claimed. Hays v. De Atley, 65 M 558, 212 P 296 (1923).

TACKING OF PRESCRIPTIVE PERIODS

Permissive Use: Permission to use right-of-way granted to former owners of defendant's land is not transferable, and the evidence the court must consider in determining defendant's claim of a prescriptive easement is limited to the defendant's use since acquiring the property. The trial court's findings will not be reversed unless there is a clear preponderance of the evidence against such findings. There was substantial evidence before the court justifying the finding that the use by the defendant and his predecessors was permissive. Luoma v. Donohoe, 179 M 359, 588 P2d 523 (1978).

Title by Prescription Passing by Deed: Where deed to defendant after describing property by legal subdivisions contained clause: "Together with all the tenements, hereditaments and appurtenances, water rights and water ditches to the same belonging", if defendant's predecessor used the ditch for more than 10 years there was title in him by prescription which was passed to defendant by deed and it was of no consequence that the deed did not specifically mention the ditch right as an appurtenance. Te Selle v. Storey, 133 M 1, 319 P2d 218 (1957).

Easements — Tacking Applicable: Fact that deeds made no mention of claimed right to easement did not render doctrine of "tacking" inapplicable, the doctrine being permissible when there is a privity between the successive users of the easement, and there is a sufficient privity as to the inchoate easement if the enjoyment thereof was continuous and under the same claim of title. Groshean v. Dillmont Realty Co., 92 M 227, 12 P2d 273 (1932).

Prove Adverse Possession in Himself and in His Predecessor: If a defendant in ejectment proves adverse possession in himself and in his predecessor for the required statutory period, he shows a title absolutely in himself to the disputed land. Rude v. Marshall, 54 M 27, 166 P 298 (1917).

EASEMENT BY PRESCRIPTION

Amended Complaint Permitted When Second, Related Road in Prescriptive Easement Dispute Already Subject of Extensive Discovery and Testimony — Opposing Party Granted Opportunity to Conduct Further Discovery — No Undue Prejudice to Opposing Party. Cremer Rodeo Land & Livestock Co. v. McMullen, 2023 MT 117, 412 Mont. 471, 531 P.3d 566.

No Error by District Court When Determining Amended Complaint Related Back to Filing Date of Original Complaint — Dispute Outlined in Amended Complaint Interrelated and Arose Out of Same Conduct, Transactions, and Occurrences as Original Complaint. Cremer Rodeo Land & Livestock Co. v. McMullen, 2023 MT 117, 412 Mont. 471, 531 P.3d 566.

Summary Judgment Not Appropriate When Entire Record Demonstrates Genuine Issue of Material Fact — "Cherry-Picked Quotes" From Depositions Insufficient to Prove Permissive Use in Prescriptive Easement Dispute. Cremer Rodeo Land & Livestock Co. v. McMullen, 2023 MT 117, 412 Mont. 471, 531 P.3d 566.

Prescriptive Easement Not Extinguished by Landowner's Temporary Cooperation: The plaintiff filed an action to prevent the defendants, who are neighboring landowners, from crossing his land. The defendants sought a declaration that they had a prescriptive easement to access their ranch across the plaintiff's property. At trial, other adjacent landowners testified that the defendants had never requested permission to cross their land and had crossed the land for decades, and that no landowner had resisted until the plaintiff filed suit. The District Court ruled that the defendants had a prescriptive easement that had been perfected before the plaintiff had purchased his property given the neighboring landowners' testimony that the defendants had always crossed this land to access their ranch without asking for permission. The plaintiff appealed and argued that the District Court had erred. The Supreme Court affirmed and noted that the defendants' temporary cooperation with the plaintiff when he first acquired the property did not extinguish their prescriptive easement. Lyndes v. Green, 2014 MT 110, 374 Mont. 510, 325 P.3d 1225.

Use of Public Road Created by Prescriptive Use Extends to All Reasonably Foreseeable Uses: Once a public road is established by prescriptive use, the use of that road is not limited to the adverse usage through which the road was acquired, but rather extends to all reasonably foreseeable uses, including foot travel. Pub. Lands Access Ass'n, Inc. v. Madison County Bd. of Comm'rs, 2014 MT 10, 373 Mont. 277, 321 P.3d 38.

Width of Public Right-of-Way Established by Prescription — Portion of Right-of-Way Necessary to Maintain County Road for Public Use — Not Reserved to County: Plaintiff association sued the county because property owners had erected fences along the county road to the ends of a bridge, thereby preventing the public from using the right-of-way access to the river. The parties stipulated that the right-of-way for this portion of the road had been established by prescriptive use. The plaintiff argued that the public's right-of-way extended not only to the road, but to portions along the road necessary to maintain it. The District Court disagreed and ruled that only the county had an easement that exceeded the fences for the purpose of maintaining and repairing the road. The plaintiff appealed and the Supreme Court reversed, holding that the width of a public road right-of-way established by prescriptive easement includes the areas necessary to support and maintain the road and that those areas are not reserved for the county. The Supreme Court therefore remanded the matter to the District Court to determine the actual width of the right-of-way in accordance with its guidelines. Pub. Lands Access Ass'n, Inc. v. Madison County Bd. of Comm'rs, 2014 MT 10, 373 Mont. 277, 321 P.3d 38.

Accrual of Adverse Use Prohibited When Property Owned by Government: Because a private party cannot obtain a prescriptive easement against the federal government, a private party's adverse use of property did not begin to run until the federal government conveyed title to the property to a private entity. Burcalow Family, LLC v. Corral Bar, Inc., 2013 MT 345, 372 Mont. 498, 313 P.3d 182.

Permission to Use Dock Granted by Prior Owner — Whether Permission Carries Over to Subsequent Owners to Be Evaluated on Case-by-Case Basis — No Prescriptive Easement: In urging the Supreme Court to find that they had established an easement by prescription to a dock owned by the plaintiff, the defendants urged the court to follow the rule outlined in Han Farms, Inc. v. Molitor, 2003 MT 153, 316 Mont. 249, 70 P.3d 1238, which declared that one owner's grant of permission does not continue by default to the next owner. After reviewing significant case law regarding the transferability of permission for use, the court declined to adopt the defendants' argument and overruled the proposition in Han Farms that permission can never carry over from one owner to another after the sale of the servient property. Rather, the court reiterated that based on a thorough reading of its permissive use cases, the court will always consider the nature of the initial permission and attendant circumstances to analyze whether permission exists. Pedersen v. Ziehl, 2013 MT 306, 372 Mont. 223, 311 P.3d 765.

Prescriptive Easement Determined by Use During Prescriptive Period: During easement litigation concerning Boadle Bridge, the original bridge burned down and was rebuilt by the defendant with privately owned materials. The Supreme Court found that there was a public prescriptive easement burdening the defendant's land that was not limited to the bridge's physical structure. In 2011, the defendant removed the bridge, asserting that it was his private property, and built a new bridge accessing a private road. The plaintiffs claimed that the defendant had destroyed the bridge in violation of the Supreme Court's decision. The District Court dismissed the case, ruling that the public's easement to a specific bridge included only the one that burned down, although the public retained the right to use any future bridge at the same site. The Supreme Court reversed, noting that although the defendant may own the bridge, a prescriptive easement is not determined by ownership of the property but by use during the prescriptive period. Therefore, the defendant could not remove the bridge or interfere in the public access to it. Pub. Land/Water Access Ass'n, Inc. v. Jones, 2013 MT 31, 368 Mont. 390, 300 P.3d 675.

Private Use of Access Road Not Unexplained — Remand for Findings on Whether Private Use Constituted Prescriptive Easement: The District Court found that private use of an access road was both periodic and unexplained, and the court declined to analyze that use any further. The Supreme Court disagreed that use of the road was unexplained. Two long-time residents testified that persons previously lived on property accessed by that road and that the road was maintained by the early residents and used by them to access the property. Because the use was explained, the question was whether that use satisfied the elements of a prescriptive easement, and the case was remanded for further findings and conclusions. Leisz v. Avista Corp., 2007 MT 347, 340 M 294, 174 P3d 481 (2007).

Sporadic, Infrequent Public Use of Road — Insufficient Evidence of Public Prescriptive Easement or Easement by Grant or Reservation: Citing Granite County v. Komberec, 245 M 252, 800 P2d 166 (1990), plaintiff contended that public use of an access road for logging, cattle grazing, hay harvesting, recreation, and search and rescue operations established a public prescriptive easement or an easement by grant or reservation. The Supreme Court noted that public use of the road was sporadic, infrequent, and of limited duration and thus the use did not meet the requirement in Granite County that the public followed a definite course continuously and uninterruptedly for the prescribed statutory period together with an assumption of control adverse to the owner. Plaintiff's claim of a public prescriptive easement was properly denied. Because no public easement existed, an easement by grant or reservation likewise did not exist. Leisz v. Avista Corp., 2007 MT 347, 340 M 294, 174 P3d 481 (2007). See also Lewis & Clark County v. Schroeder, 2014 MT 106, 374 Mont. 477, 323 P.3d 207, which held that there was no prescriptive easement when use of public funds to maintain a road was intermittent and equivocal.

On remand, the District Court determined that the prescriptive easement was abandoned, and Leisz appealed. The Supreme Court noted that abandonment must be proven with words or acts that indicate a clear intent to abandon and that mere nonuse does not establish abandonment. In this case, Leisz's predecessors took no actions demonstrating a manifestation not to resume beneficial use of the easement or an intent to relinquish possession of the easement, but rather they simply stopped using the easement in favor of a different access. Therefore, the District Court erred in finding abandonment, and that decision was reversed and judgment was entered for Leisz allowing Leisz a prescriptive easement. Leisz v. Avista Corp., 2010 MT 105, 356 Mont. 259, 232 P.3d 419.

Predecessors in Interest Aware of Encroachment — Prescriptive Easement Affirmed: The open and notorious use element necessary to establish a prescriptive easement cannot be satisfied if the owner of the property was deceived as to the location of the alleged easement, but open and notorious use raises a presumption of actual knowledge of the hostile claim to the owner of the servient estate if it is of such character as to be obvious because the owner could not then be deceived. Here, plaintiffs asserted that the statutory period could begin to run only after plaintiffs completed a property survey because no one knew about the encroachment before that time. However, plaintiffs acknowledged that they became immediately aware of the encroachment from the appraisal received upon purchase of the property and admitted that therefore the previous owners must also have known about the encroachment. Absent any evidence that plaintiffs or their predecessors in interest were ever deceived regarding the existence of the encroachment, the District Court did not err in holding that use of the easement was open and notorious. Steiger v. Brown, 2007 MT 29, 336 M 29, 152 P3d 705 (2007).

Adequate Showing of Prescriptive Easement — No Showing of Permissive Use Absent Owner's Knowledge of Ownership: Bertelsen owned two parcels of property adjacent to a county road that he leased to a propane business beginning in 1987. The county road was subsequently abandoned, so all that separated Bertelsen's property from a federal highway was a triangular piece of land upon which the state Department of Transportation held an easement but which was otherwise undeveloped. The propane company constructed some improvements on the triangular parcel. While researching property in the area, Slauson discovered that the triangular parcel was owned by a third party, Edwards, who was not even aware that she owned it. Slauson acquired the property from Edwards and had the state discharge its easement and then approached Bertelsen and the propane company and offered to lease the parcel to Bertelsen. Bertelsen asserted the right to continued use of the property, and Slauson sued to enforce his property rights and to recover compensation and damages from Bertelsen. At trial, Bertelsen argued that he had acquired the property through adverse possession or that he had a prescriptive easement that allowed the propane company to continue using the property. The District Court found that Bertelsen had not paid taxes on the parcel, so there was no adverse possession, but held that Bertelsen and the propane company had established a prescriptive easement to maintain the improvements and to transact the company's business on the parcel. Slauson appealed, questioning whether the use was open, notorious, and adverse. The Supreme Court found that the company used the property for public access and as a parking lot, which adequately provided previous owner Edwards with notice of use. Having established open, notorious, exclusive, continuous, and uninterrupted use for the statutorily required 5-year period, Bertelsen was entitled to the presumption of adverse use, and Slauson was required to prove that the use was permissive in order to overcome the presumption. Slauson could not prove permissive use because Edwards did not know that she owned the parcel and thus could not have granted permission for its use. Bertelsen therefore established a prescriptive easement, and the District Court was affirmed. Slauson v. Bertelsen Family Trust, 2006 MT 314, 335 M 43, 151 P3d 866 (2006).

Following the 2006 decision, a dispute arose between Slauson and the plumbing company that used the prescriptive easement. Slauson asserted that the company trespassed and used Slauson's property in unauthorized ways, and the company countersued for interference with the scope of the easement. The District Court granted the company $418.60 for landscaping that Slauson had removed and awarded Slauson $430 for costs of removing snow that the company piled on Slauson's property outside the easement. Both parties appealed, but the Supreme Court held that neither party established any error in the District Court's rulings and affirmed. Slauson v. Marozzo Plumb. & Heating, LLC, 2009 MT 333, 353 M 75, 219 P3d 509 (2009).

Easement Transferred With Transfer of Portion of Dominant Estate — Subdivision of Dominant Tenement Not Considered Increased Burden on Servient Tenement: The District Court found that the creation of a tract and the subsequent sale to Dabney constituted a transfer of a portion of the dominant estate and that the transfer conveyed all easements attached to the property to Dabney, so Dabney had a prescriptive easement to use a road across Leichtfuss's property to access the Dabney property. The court also concluded that Leichtfuss's parcels were not impermissibly burdened by Dabney's use of the road. On appeal, the Supreme Court affirmed. Although a life tenant or lessee generally cannot impose upon land a burden that passes to a remainderman or reversioner, the termination of a dominant estate held in less than fee simple does not automatically extinguish an appurtenant easement. Rather, it is the intent or expectations of the parties to the servitude that determine its duration. In this case, there was no evidence that the parties intended to abandon Dabney's parcel, so Dabney's use of the road was within the scope of the original easement on the parcel, and the easement was apportioned according to the division of the dominant tenement. In addition, Leichtfuss's contention that the apportionment increased the burden on the servient tenement also failed. "Subdivision and conveying away of portions of a dominant estate does not, in and of itself, mean that an additional burden is imposed upon the servient estate." Dabney's use of the parcel was consistent with the predecessor's historical use, and this was not a case in which the easement was suddenly being used to serve additional land or residences or in which the character of the easement's use was changed, so no increased burden to Leichtfuss's parcel was created. Leichtfuss v. Dabney, 2005 MT 271, 329 M 129, 122 P3d 1220 (2005), distinguishing Leffingwell Ranch, Inc. v. Cieri, 276 M 421, 916 P2d 751 (1996), and following Burleson v. Kinsey-Cartwright, 2000 MT 278, 302 M 141, 13 P3d 384 (2000).

Extent of Public Easement Not Limited to Contested Portion on Defendant's Property — Prescriptive Easement Properly Found as Matter of Law: A part of Boadle Road that crossed a portion of defendant's property had been chained and closed by defendant's predecessor in interest in 1999. Plaintiff land access association sought to have the road declared a public road and have defendant enjoined from prohibiting public access. The trial court found that Boadle Road was in existence since the early 1900s and that open public use without landowner permission continued unabated until the road was closed in 1999. Defendant contended that because the litigated portion of the road began and ended on his property, the road essentially went nowhere and thus it was pointless for the trial court to find a public prescriptive easement. The Supreme Court disagreed. Nothing supported defendant's contention that an easement cannot begin and end on the servient landowner's estate. The portion of the road on defendant's property was part of a much longer public road, and there was sufficient evidence to support the trial court's conclusion that the public was entitled to a prescriptive easement over the portion of the road in dispute. Pub. Lands Access Ass'n, Inc. v. Jones, 2004 MT 394, 325 M 236, 104 P3d 496 (2004). See also Han Farms, Inc. v. Molitor, 2003 MT 153, 316 M 249, 70 P3d 1238 (2003), and Pub. Land/Water Access Ass'n, Inc. v. Jones, 2013 MT 31, 368 Mont. 390, 300 P.3d 675.

Neighborly Accommodation as to Use of Gated and Locked Strip of Land for Road Access Was Permissive Use Not Ripening Into Prescriptive Easement: Testimony for both plaintiff and defendant showed that until 1999, there was never any dispute or hostility over defendant's use of a strip of land over plaintiff's property to gain access from a road to defendant's property, that defendant never asked for or was given permission to use the access strip, that the strip had gates at each end that were locked at various times to keep the public out, and that both parties shared the keys to or combinations for the gates' locks. In 1999, an expansion of defendant's use occurred and a dispute arose over the extent of defendant's use. Plaintiff attempted to get defendant to agree in writing to the allowed use, and after failing to do so, plaintiff chained and locked the gate at the road and told defendant that he must get permission to use the access. After each party replaced the locks with its own, plaintiff sued. The Supreme Court ruled that there had been a neighborly accommodation, which is a form of permissive use that is not adverse and cannot ripen into a prescriptive easement, and upheld the District Court's finding to that effect and grant of a permanent injunction against defendant's use of the property. Tomlin Enterprises, Inc. v. Althoff, 2004 MT 383, 325 M 99, 103 P3d 1069 (2004).

Mere Denial of Public Nature of Road Insufficient to Raise Genuine Issue of Material Fact — Public Prescriptive Easement Affirmed: The District Court found that the elements of a prescriptive easement over a road on defendants' property were satisfied and granted summary judgment to plaintiff county. Defendants contended that disputed issues of fact existed regarding proof of a prescriptive easement, but the Supreme Court affirmed. The county proved that use of the road was open, notorious, exclusive, adverse, continuous, and uninterrupted for the statutorily required period. The only evidence in support of defendants' position was a conclusory hearsay statement claiming that the previous owners had indicated that the road was not public. Defendants' mere denial of the public nature of the road was insufficient to raise a genuine issue of material fact sufficient to withstand summary judgment. Powell County v. 5 Rockin' MS Angus Ranch, Inc., 2004 MT 337, 324 M 204, 102 P3d 1210 (2004), following Heller v. Gremaux, 2002 MT 199, 311 M 178, 53 P3d 1259 (2002).

Incorrect Finding of Prescriptive Easement for Road and Residence — Moving of Residence Not Required: The District Court found that a prescriptive easement had been established for a road that strayed into an adjoining parcel and for a residence, the corner of which also extended into the adjoining parcel. The Supreme Court found the record full of contradictory assertions and findings, but noted that because the actual location of the road was concealed from the owner by way of maps and misrepresentations as to its true location, the record did not come close to establishing the elements of hostility or open and notorious use by clear and convincing evidence to establish a prescriptive easement for the road. Further, the owner of the residence conceded that the corner of the foundation and eaves encroached onto the adjoining parcel. Never having paid taxes on the land in question, the owner could not prevail on a claim of adverse possession to obtain title to the ground under the encroachment, so a finding of a prescriptive easement for the residence was also in error. However, because the property owner indicated at trial and in appeal briefs that he was willing to work something out regarding the encroachment, the Supreme Court concluded that to require removal of the encroachment would be extreme and declined to order that the residence be moved from its foundation. Gelderloos v. Duke, 2004 MT 94, 321 M 1, 88 P3d 814 (2004).

No Public Prescriptive Use of Mining Road Never Declared Public Road — Prescriptive Easement Established and Not Extinguished by Reverse Adverse Possession: Owners of a road used since 1936 for mining access claimed a public prescriptive use. The road was never formally declared a public road or used for the statutorily required period of time sufficient to establish a prescriptive easement. Thus, the existence of a public prescriptive easement depended on the exploratory use that took place when the mine was not in full operation, recreational use by the public, and county road maintenance. However, even taken together, this evidence did not rise to the level of public prescriptive use. The District Court did not err in finding that no public prescriptive easement existed over the road. However, while the evidence did not qualify as a public easement, it did qualify as a private easement in plaintiff's favor. Virtually unrestricted use of the road between 1936 and 1961 met the requirements of open, notorious, exclusive, adverse, continuous, uninterrupted use for the required statutory period. Further, defendant's act of locking a gate across the road and providing plaintiff a key and access with permission was not a distinct and positive assertion unequivocally hostile and adverse to plaintiff sufficient to extinguish plaintiff's easement by reverse adverse possession. Brimstone Min., Inc. v. Glaus, 2003 MT 236, 317 M 236, 77 P3d 175 (2003). See also Granite County v. Komberec, 245 M 252, 800 P2d 166 (1990).

Creation of County Road — Applicability of Curative Statute of 1895: Garrison brought an action against Lincoln County, alleging that the county had no right or interest in a road that crossed Garrison's property. The District Court held that the road was a county road or, alternatively, that even if the road was not a county road, the public had obtained a prescriptive easement covering the road. Garrison appealed, arguing that County Commissioners in 1912 and 1913 failed to strictly comply with the statutory requirements for creating a county road, rendering the road private property, despite the fact that the road was declared public in 1913 and had been used extensively by the public and maintained by the county for over 50 years. The District Court properly relied on Reid v. Park County, 192 M 231, 627 P2d 1210 (1981), to conclude that the record taken as a whole presented clear evidence that despite discrepancies in its description or location, a county road was created and that any defects in the procedure used to create the road were remedied by the curative statute 2600 of the Political Code of 1895 that provided that all roads laid out, traveled, or used by the public were considered public highways. Garrison v. Lincoln County, 2003 MT 227, 317 M 190, 77 P3d 163 (2003), distinguishing Pederson v. Dawson County, 2000 MT 339, 303 M 158, 17 P3d 393 (2000).

Burden of Rebutting Claim of Prescriptive Easement by Showing Permissive Use: There was no dispute that plaintiff's use of a road was open, notorious, exclusive, continuous, and uninterrupted, but the parties did dispute whether use of the road was hostile. The District Court held that the use was hostile and granted plaintiff a prescriptive easement. On appeal, defendant contended that her predecessor in interest gave permission to plaintiff's predecessor in interest to use the road and cited Morrison v. Higbee, 204 M 515, 668 P2d 1025 (1983), for the proposition that if use of a road begins as a permissive use, it cannot ripen into a prescriptive right unless there is a distinct and positive assertion of a hostile right to the owner. Defendant pointed out that plaintiff did nothing to make a distinct and positive assertion of a right hostile to defendant. The Supreme Court noted that under Rettig v. Kallevig, 282 M 189, 936 P2d 807 (1997), permissive use is not transferable and distinguished Morrison because in that case, there was ample evidence that the use of the road was permissive. The court then cited Wareing v. Schreckendgust, 280 M 196, 930 P2d 37 (1996), for the rule that once a claimant has established the elements of a prescriptive right, a presumption of adverse use arises and the burden shifts to the owner affected by the claim to establish that the claimant's use was permissive. Thus, the burden was not on plaintiff to show that use of the road was hostile, but rather on defendant to show that the use was permissive. Defendant did not meet the burden, and the District Court's conclusion that a prescriptive easement existed across defendant's land was affirmed. Han Farms, Inc. v. Molitor, 2003 MT 153, 316 M 249, 70 P3d 1238 (2003), overruled, to the extent that Han Farms held that permissive use is never transferable, by Pedersen v. Ziehl, 2013 MT 306, 372 Mont. 223, 311 P.3d 765. See also Brown & Brown of MT, Inc. v. Raty, 2012 MT 264, 367 Mont. 67, 289 P.3d 156, and Brown & Brown of MT, Inc. v. Raty, 2013 MT 338, 372 Mont. 463, 313 P.3d 179.

Conflicting Evidence Regarding Prescriptive Easement for Ditch Maintenance — District Court Affirmed: Plaintiff alleged that defendant's access to plaintiff's property for ditch maintenance must be limited to the historic use of the ditch bank. The District Court was presented with conflicting evidence regarding how open defendant's use of plaintiff's property was and determined that plaintiff knew or should have known that defendant was accessing the ditch by various routes across plaintiff's property and that the access was not permissive. The evidence was sufficient to support the finding that defendant had a prescriptive easement, and that finding was not disturbed on appeal. Graveley Simmental Ranch Co. v. Quigley, 2003 MT 34, 314 M 226, 65 P3d 225 (2003).

Prescriptive Easement Properly Granted — Terms Defined: To establish an easement by prescription, the party claiming the easement must show open and notorious, exclusive, continuous, uninterrupted, and adverse use of the claimed easement for a 5-year period. Open and notorious use means a distinct and positive assertion of a right hostile to and brought to the attention of the owner. Exclusive use means that the right of the claimant must rest upon its own foundations and not depend on a like right in any other person. Continuous use means use that is made often enough to constitute notice of the claim to the potential servient owner. Uninterrupted use means use that is not interrupted by the act of the owner of the land or by voluntary abandonment by the party claiming the right. Adverse use means use exercised under a claim of right and not as a mere privilege or license revocable at the pleasure of the owner of the land. A claim must be known to and acquiesced in by the owner of the land. A party claiming the easement has the burden of proving each element of prescription by clear and convincing evidence. If the party claiming easement establishes all of the elements, then the burden falls on the opposing party to show that the use was permissive rather than adverse. In the present case, there was no evidence of concealment of the regular use or maintenance of a road for several decades, which was adequate to provide plaintiffs with notice that there was a claim to use of the road. Because no permissive use was shown, and because the use was sufficiently open and notorious to establish a claim, the District Court did not err in granting defendants a prescriptive easement over plaintiffs' property. Brumit v. Lewis, 2002 MT 346, 313 M 332, 61 P3d 138 (2002), distinguishing Cope v. Cope, 158 M 388, 493 P2d 336 (1971), and Amerimont, Inc. v. Gannett, 278 M 314, 924 P2d 1326 (1996). See also Rappold v. Durocher, 257 M 329, 849 P2d 1017 (1993), and Lemont Land Corp. v. Rogers, 269 M 180, 887 P2d 724 (1994).

"Prudent Man Test" Properly Applied to Alert Landowner of Existence of Prescriptive Easement for Power Lines and Equipment: Applying the "prudent man test" established in O'Connor v. Brodie, 153 M 129, 454 P2d 920 (1969), and applied in Riddock v. Helena, 212 M 390, 687 P2d 1386 (1984), the District Court did not err in concluding that the existence of transformers and Montana Power Company's open and notorious maintenance of the transformers for overhead utility lines over a 20-year period were sufficient notice to alert the landowner living directly

across the street of the open and notorious use necessary for the existence of a prescriptive easement for the utility's underground and overhead power lines and accompanying equipment. Taylor v. Mont. Power Co., 2002 MT 247, 312 M 134, 58 P3d 162 (2002).

No Establishment of Public Road by Common-Law Dedication When Use of Road Permissive: Two elements are required to establish a common-law dedication of a roadway: (1) an offer by the owner evidencing an intention to dedicate the roadway; and (2) an acceptance by the public. The intent of an offer to dedicate must be clear, satisfactory, and unequivocal, and evidence of mere permissive use does not prove an intention to dedicate. In this case, plaintiffs failed to clearly and unequivocally demonstrate defendants' intention to dedicate a private road to the public. A 1916 petition for the opening of a school and a 1948 petition to establish a road did not establish that the owners intended to dedicate the road to the public; rather, use of the road was shown to be permissive, so no common-law dedication was established. Heller v. Gremaux, 2002 MT 199, 311 M 178, 53 P3d 1259 (2002), following Descheemaeker v. Anderson, 131 M 322, 310 P2d 587 (1957), and Richter v. Rose, 1998 MT 165, 289 M 379, 962 P2d 583 (1998).

Use of Private Road Permissive by Neighborly Accommodation — Public Prescriptive Easement Not Established: Plaintiffs sought an easement of record from defendants regarding the rural road crossing plaintiffs' property, but defendants refused. Plaintiffs then sought a declaratory judgment that the road was a public road established by prescriptive use, asserting that the road was a public thoroughfare established by common-law dedication as evidenced by a 1916 petition for the opening of a school and a 1948 petition to establish a road. The District Court found that the 1916 and 1948 petitions did not establish an offer evidencing an intention to dedicate the road to the public and that use of the road was instead permissive through neighborly accommodation. Plaintiffs appealed, but the Supreme Court affirmed. All elements of a prescriptive easement must be proved by clear and convincing evidence because one who has legal title should not be forced to give up what is rightfully theirs without the opportunity to know that the title is in jeopardy and to fight for it. Once a claimant establishes the elements of a prescriptive right, a presumption of adverse use arises, and the burden shifts to the landowner to establish that the use was permissive. If permissive use is shown, no easement can be acquired because the theory of prescriptive easement is based on adverse use. Use of a neighbor's land based upon mere neighborly accommodation or courtesy is not adverse and cannot ripen into a prescriptive easement. Rather, in addition to use, generally some circumstance or act tending to indicate that the use was not merely permissive is required. The presence of gates or other obstructions, to be opened and closed by parties passing over the land, has always been considered strong evidence in support of a mere license to the public to pass over the designated way. The facts here showed that use of the road was permissive and at the pleasure of the landowners, so no public prescriptive easement existed. Heller v. Gremaux, 2002 MT 199, 311 M 178, 53 P3d 1259 (2002). See also Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525 (1993), Hitshew v. Butte/Silver Bow County, 1999 MT 26, 293 M 212, 974 P2d 650 (1999), and Pedersen v. Ziehl, 2013 MT 306, 372 Mont. 223, 311 P.3d 765.

Failure to Show Adverse Use — No Prescriptive Easement Established: Ray sued Bromenshenk and Zimmerman to quiet title to a prescriptive easement across their properties. The District Court found that Ray did not have a prescriptive easement across either property and granted defendants an injunction restraining Ray from running wastewater across the properties. Ray appealed. The Supreme Court examined the record and concluded that Ray's use of Bromenshenk's property was not adverse, so no prescriptive easement existed across that property. Further, Zimmerman's blockage of the ditch running across the Zimmerman property resulted in an interruption of Ray's adverse use, so Ray's use of the ditch was not continuous and uninterrupted for the requisite 5-year period. Thus, no prescriptive easement existed regarding the Zimmerman property either. The District Court was affirmed. Ray v. Nansel, 2002 MT 191, 311 M 135, 53 P3d 870 (2002). See also Hays v. De Atley, 65 M 558, 212 P 296 (1923), Te Selle v. Storey, 133 M 1, 319 P2d 218 (1957), and Albert v. Hastetter, 2002 MT 123, 310 M 82, 48 P3d 749 (2002).

Reverse Adverse Possession — Public Prescriptive Easement Extinguished by Relocation of Road and Public Acquiescence With Locked Gates for Thirty Years: Dome Mountain Ranch's predecessor in interest relocated a road in 1965 and installed locked gates and no trespassing signs. Public access was limited to occasional, seasonal recreational use by permission or when the gates were unlocked, until Park County officially declared the road a county road in 1994. Dome Mountain Ranch claimed that the 5-year statutory period of reverse adverse possession concluded in 1970, so it was not required to show a clear intent by the county to abandon the road in proving its claim of reverse adverse possession. Title to a public road may not be obtained by adverse possession, and there must be a clear showing of intent to abandon a county road. Mere nonuse, even for extended periods of time, is generally insufficient in itself to indicate an intent to abandon. Likewise, mere nonuse or lack of maintenance by the county is not sufficient to indicate an intent to abandon, absent notice and a public hearing. To be continuous and uninterrupted, the use of a claimed right in a prescriptive easement must not be abandoned by the user or interrupted by an act of the landowner. Seasonal recreational use, use by neighbors visiting neighbors, and use by persons cutting Christmas trees and gathering firewood are generally not sufficient to establish use by the public over a definite course continuously and uninterruptedly. In this case, the Supreme Court agreed with Dome Mountain Ranch that reverse adverse possession applied. The relocation of the road, coupled with the public's acquiescence with locked gates for almost 30 years, extinguished the county's public prescriptive easement, if one ever existed. Dome Mtn. Ranch, LLC v. Park County, 2001 MT 289, 307 M 420, 37 P3d 710 (2001), following Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525 (1993), and McCauley v. Thompson-Nistler, 2000 MT 215, 301 M 81, 10 P3d 794 (2000).

Prescriptive Easement Established for One of Two Exits on Loop Road — Other Exit Considered Abandoned: Renner accessed his property by crossing Nemitz's property in two different places in order to form a loop driveway at Renner's house. The west easement was not at issue, but both the existence and location of an approximately 100-foot easement over the east side of the loop was contested. A series of interactions between the parties eventually led to Nemitz building a fence across the east side of the loop and Renner filing a claim to establish an easement over the east side of the loop. At trial, both parties presented testimony regarding use of the east side loop, including testimony regarding two possible exits on the loop. The District Court did not distinguish between the two exits, but found a prescriptive easement for the entire east side loop, held that the easement was not abandoned and that Nemitz's activities did not extinguish the easement, and granted Renner an easement for both exits of the east side loop, ordering all obstructions removed. Nemitz appealed. The District Court found clear and convincing evidence that a prescriptive easement existed for the east side loop based on testimony of its use from 1948 to 1974, and after reviewing the record, the Supreme Court affirmed the trial court's findings of open, notorious, exclusive, adverse, continuous, and uninterrupted use of the easement. However, it was not clear from the testimony regarding use between 1948 and 1974 whether both exits met the requirements of a prescriptive easement, and that lack of specificity indicated that it was error for the District Court to find a prescriptive easement for both exits, but the error was harmless based on evidence regarding use from 1975 to 1995. Renner's predecessor in interest during that period continued to use the loop as in prior years and never sought permission and so could not be characterized as having abandoned the east loop easement. Testimony was undisputed that the left exit was used until 1995, but the right exit was not used past 1982, and testimony of Renner's predecessor in interest established that use of the right exit was intended to be subordinate to Nemitz's use, so it was error for the District Court to find that the right exit was not abandoned. The Supreme Court noted that extinguishment did not apply to the left exit because only 3 years passed between the time Renner acquired the property and when the claim was filed. Thus, the Supreme Court affirmed the easement on the left exit and the order requiring removal of the fence across that exit, but reversed the part of the order requiring removal of the fence across the abandoned right exit. Renner v. Nemitz, 2001 MT 202, 306 M 292, 33 P3d 255 (2001), distinguishing Morrison v. Higbee, 204 M 501, 668 P2d 1029 (1983).

Establishment of Public Highway Under United States Revised Statutes Section 2477 — Use Alone Insufficient Under State Law — State Declaration of Existence of Public Highways Inapplicable: The Richters brought an action in District Court to condemn an easement across the land of a neighbor that surrounded their property on three sides, claiming that a public highway had been established, pursuant to United States Revised Statutes section 2477 (R.S. 2477), across public land before that land ultimately passed to their neighbor. The Supreme Court reviewed the purpose of R.S. 2477, as described in Butte v. Mikosowitz, 39 M 350, 102 P 593 (1909), and noted that it had earlier held in St. v. Nolan, 58 M 167, 191 P 150 (1920), that R.S. 2477, later codified as 43 U.S.C. 932, was only an offer by the United States to convey land but that state law determined how that offer was accepted and, in that case, held that at that time there were four ways in which a public highway could be established under Montana law. The Supreme Court then reviewed the history of the Montana statutes governing how the R.S. 2477 offer was accepted by the state and pointed out that in 1895, section 2603 of the Political Code of Montana was adopted providing that use alone was insufficient to establish a public road over private land, although section 2603 was amended in 1913 to delete the prohibition against creating a public highway by use alone. Therefore, between 1895 and 1913, a public road could be established by use only if public authorities with jurisdiction over the property on which the road was claimed took an act tantamount to a declaration that a particular road was a public road. Because the Richters presented no evidence that the County Commissioners with jurisdiction over the road that they claimed to exist upon their neighbor's property had taken any action to declare that road to be a public highway, the Supreme Court held that as a matter of law, the Richters' evidence of use alone was insufficient to establish a public right-of-way upon that land between 1903 and 1907. The Supreme Court also held that section 2600, Political Code of Montana, enacted in 1895, declaring that highways used by the public are public highways, did not create a public highway across what became their neighbor's property because that statute applied only to existing uses at the time of the statute's enactment and Richters' evidence did not demonstrate any use of the road until 1902. Richter v. Rose, 1998 MT 165, 289 M 379, 962 P2d 583, 55 St. Rep. 663 (1998). See also McCauley v. Thompson-Nistler, 2000 MT 215, 301 M 81, 10 P3d 794, 57 St. Rep. 855 (2000), and Watson v. Dundas, 2006 MT 104, 332 M 164, 136 P3d 973 (2006).

Evidence Insufficient to Prove Common-Law Dedication of Public Right-of-Way Across Private Property: The Richters brought an action in District Court to condemn an easement across the land of a neighbor that surrounded their property on three sides, claiming that a public highway had been established across what became their neighbor's land after the United States had sold the property to its first private owner. The Supreme Court noted that it had previously held in Kaufman v. Butte, 48 M 400, 138 P 770 (1914), that Montana law required that both an offer by the owner of the land evidencing the owner's intent to dedicate the land for a public right-of-way and an acceptance of that offer by the public had to be demonstrated to prove a common-law easement. Distinguishing McKey v. Hyde Park, 134 US 84 (1890), the Supreme Court held that because the Richters presented no evidence that the first private owner of the land took any action demonstrating an intent to dedicate a public right-of-way across her property, the Richters failed to prove the existence of that right-of-way. Richter v. Rose, 1998 MT 165, 289 M 379, 962 P2d 583, 55 St. Rep. 663 (1998).

Neighborly Accommodation Use of Road for Recreational Purposes — No Public Easement: Use of a road for recreational purposes by defendants and their witnesses under a neighbor's accommodation does not create a public prescriptive easement or a private prescriptive easement. Kessinger v. Matulevich, 278 M 450, 925 P2d 864, 53 St. Rep. 1002 (1996).

Recreational Use of Road — No Presumption of Adverse Use: In a suit to establish prescriptive easement over a road, as a matter of law, use of the road for recreational purposes only could not raise the presumption of adverse use. Kessinger v. Matulevich, 278 M 450, 925 P2d 864, 53 St. Rep. 1002 (1996).

Public Road by Prescription — Adversity Satisfied by County Newspaper Publication — Intermittent Maintenance and Neighborly Accommodation Not Substantiated: Swandal Ranch Company (SRC) brought an action to quiet title to a stretch of roadway, known as Wallrock Road, running through the ranch. The District Court held that Park County had established a public easement by prescription. The Supreme Court held that Park County had satisfied the requirements for a prescriptive easement, noting that declaration by the county in 1950 of its intent to create a public road by statutory process and subsequent newspaper publication of the minutes of the County Commissioners' meeting put SRC on notice of the county's interest in Wallrock Road, even though the intent of the Commissioners had been to create the public road by a different process. The Supreme Court also found that county maintenance of the road had not been intermittent and that there was sufficient evidence that use of the road was not by neighborly accommodation. Swandal Ranch Co. v. Hunt, 276 M 229, 915 P2d 840, 53 St. Rep. 361 (1996), followed in Rafanelli v. Dale, 278 M 28, 924 P2d 242, 53 St. Rep. 746 (1996).

Presumption of Adverse Use Under Claim of Right — No Evidence of Neighborly Accommodation: Tanners and others purchased property on Flathead Lake. Tanners and the others obtained access to their property by driving on roads located on Daly's property to the north. When Daly erected a fence across the roads and blocked access to their property, Tanners and the others brought suit, alleging that they had acquired an easement by prescription for the use of several of the roads. The Supreme Court held that Tanners had established a presumption of adverse use under a claim of right based upon the 1932 deed of their predecessors in interest. Because Daly claimed that Tanners' use of the roads was by her permission or neighborly accommodation, the Supreme Court held that Daly had the burden of proving permissive use. The Supreme Court referred to testimony in the record from which the jury could have found that no permission had been granted by Daly. Tanner v. Dream Island, Inc., 275 M 414, 913 P2d 641, 53 St. Rep. 208 (1996).

No Relocation of Prescriptive Easement by Consent of Parties: For nearly 100 years, access to Glenn's property was across the "old road" that crossed Grosfields' land. The parties agreed that Glenn and her neighbors had established a prescriptive easement by use of the "old road". After 1992, Glenn quit using part of the old road and began using a "new road" across another part of Grosfields' land. All of the property owners, including Grosfields, used the new road for approximately 2 years, until Grosfields placed barbed wire across it. Glenn brought an action to enjoin Grosfields from placing the fence across the new road. The Supreme Court held that the location of a prescriptive easement cannot be changed by mutual consent of the parties, tacit or otherwise, and that because Glenn did not otherwise satisfy the requirements for a prescriptive easement on the new road, the District Court erred in granting the injunction. The court overruled Scott v. Weinheimer, 140 M 554, 374 P2d 91(1962), to the extent that it suggested that a prescriptive easement can be relocated by verbal or tacit consent. Glenn v. Grosfield, 274 M 192, 906 P2d 201, 52 St. Rep. 1150 (1995), followed in Rafanelli v. Dale, 278 M 28, 924 P2d 242, 53 St. Rep. 746 (1996), and Leisz v. Avista Corp., 2007 MT 347, 340 M 294, 174 P3d 481 (2007).

Presumption of Adverse Use Established Through Preliminary Requirements for Prescriptive Right: After a claimant has established the preliminary requirements for a prescriptive right, a presumption of adverse use arises. The burden then shifts to the owner of the land on which the prescriptive easement is claimed to establish permissive use or license. If an owner establishes that the use is permissive, no easement can be acquired. In the present case, no genuine issue of material fact existed with regard to defendant's open, notorious, continuous, uninterrupted, and exclusive use of a road access for the statutory period; thus, the presumption of adverse use was applicable. Plaintiff failed to raise material facts regarding whether the use was permissive, including questions of permission or license, control of access by use of a gate, and neighborly accommodation. Defendant was therefore entitled to summary judgment based on adverse use as a matter of law. Lemont Land Corp. v. Rogers, 269 M 180, 887 P2d 724, 51 St. Rep. 1459 (1994), distinguishing Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525 (1993). See also Brown & Brown of MT, Inc. v. Raty, 2012 MT 264, 367 Mont. 67, 289 P.3d 156, Brown & Brown of MT, Inc. v. Raty, 2013 MT 338, 372 Mont. 463, 313 P.3d 179, Lyndes v. Green, 2014 MT 110, 374 Mont. 510, 325 P.3d 1225, and Cremer Rodeo Land & Livestock Co. v. McMullen, 2023 MT 117, 412 Mont. 471, 531 P.3d 566.

Right to Use Common Road Established by Express Grant in Deed — Prescriptive Easement Inapplicable: Appellants contended that they were entitled to an injunction because the presence of a gate across a common road changed the nature of their easement from prescriptive to permissive. However, because their right to use the common road was obtained by express grant in their deed pursuant to an agreement under 82-2-203 that allows owners of certain mining claims to obtain a right-of-way by agreement, there was no prescriptive use and no basis for appellants' argument that the presence of the gate diminished their right to use the common road. The fact that appellants did not use the easement to any significant extent, coupled with the trial court's setting of standards regarding the gate, affirmed that the court did not abuse its discretion in denying appellants' request for an injunction to prevent maintenance of a locked gate across the common road. Gabriel v. Wood, 261 M 170, 862 P2d 42, 50 St. Rep. 1246 (1993), distinguishing Finley v. Rutherford, 151 M 488, 444 P2d 306 (1968), Cope v. Cope, 158 M 388, 493 P2d 336 (1971), and Larson v. Burnett, 158 M 421, 492 P2d 921 (1972), and followed in Engel v. Gampp, 2000 MT 17, 298 M 116, 993 P2d 701, 57 St. Rep. 96 (2000), and Tungsten Holdings, Inc. v. Kimberlin, 2000 MT 24, 298 M 176, 994 P2d 1114, 57 St. Rep. 125 (2000).

Right-of-Way Established by Prescriptive Easement: A holding that plaintiff had a road right-of-way by reason of prescriptive easement was affirmed despite defendant's claims that use was permissive because of neighborhood use of the road, family control of access and improvements, the presence of gates, and change of road location. Parker v. Elder, 233 M 75, 758 P2d 292, 45 St. Rep. 1305 (1988).

No Prescriptive Easement Against Own Land: A person who is an equal owner of an undivided life estate in property may not acquire an easement by prescription on that property. It is elementary that one cannot acquire a prescriptive easement against oneself as owner. Zavarelli v. Might, 230 M 288, 749 P2d 524, 45 St. Rep. 211 (1988).

When Easement Rights Not Extinguished by Adverse Possession or Prescriptive Easement: Both adverse possession and prescriptive easement require proof of open, notorious, exclusive, adverse, and continuous possession or use for 5 years. The Supreme Court found insufficient evidence of extinguishment of easement rights by adverse possession or prescriptive right to a gate when: (1) there was not consistent testimony that appellant intended to eliminate all access to the easement; (2) he stated he would have given lot owners keys to the gate if they had wished to improve the access road; (3) there was limited entry around the gate by snowmobile, motorcycle, or on foot; (4) the gate was sometimes left open; (5) a declaration of restrictions remained on file stating the easement right; (6) "no trespassing" signs were not placed near the gate for at least 4 years after the gate was installed; and (7) appellant never affirmatively conveyed to the lot owners at any date certain his intention that they not go beyond the gate. Shors v. Branch, 221 M 390, 720 P2d 239, 43 St. Rep. 919 (1986).

Easement by Prescription for City Water Pipeline — Prescriptive Right Not Extinguished by Transfer of Servient Estate: City openly and visibly constructed a water supply line across land owned by plaintiff's predecessor in interest outside the easement granted to the city. The Supreme Court found the city's use was sufficiently open and notorious to support the District Court's finding of a prescriptive easement. Prescriptive title once established is not divested by transfer of the servient estate, and the fact that plaintiff's title search and title insurance policy and visual inspection of the property did not indicate the presence of the pipeline was immaterial. Riddock v. Helena, 212 M 390, 687 P2d 1386, 41 St. Rep. 1817 (1984).

Prescriptive Easement — No Proof of Permissive Use: The District Court's finding that a prescriptive easement had been established was proper where testimony of claimant's witnesses indicated open, notorious, exclusive, adverse, continuous, and uninterrupted use of the road and the landowner offered no evidence to establish permissive use other than his uncorroborated assertions. Thomas v. Barnum, 211 M 137, 684 P2d 1106, 41 St. Rep. 1266 (1984).

No Prescriptive Easement — Use Consented to Despite Signs: The District Court found that a prescriptive easement existed across defendants' land. The evidence presented established that several of the defendants' neighbors used the road across defendants' land but also testified that defendants had consented to the use. Evidence was also presented that there were gates across the road posted with "No Trespassing" signs. This kind of use is not adverse and does not create a public prescriptive easement. Madison County v. Elford, 203 M 293, 661 P2d 1266, 40 St. Rep. 457 (1983).

Prescriptive Easement — Use to Be Adverse: The District Court found that a prescriptive easement existed across defendants' land. The evidence presented established that several of the defendant's neighbors used the road across defendant's land but also testified that defendants had consented to the use. Evidence was also presented that there were gates across the road posted with "No Trespassing" signs. This kind of use is not adverse and does not create a public prescriptive easement. Madison County v. Elford, 203 M 293, 661 P2d 1266, 40 St. Rep. 457 (1983).

Custom and Gates — Prescriptive Easement Defeated: Plaintiff attempted to establish western access to his land by means of a prescriptive easement. The District Court found use of the route permissive, thereby defeating a prescriptive easement. Evidence was introduced to show it was customary in homesteading days to allow the neighbors access across another's land. Permission was automatic if the individual closed the gates and respected the property. Several gates were established and maintained across the access. The evidence of local custom coupled with the existence of gates clearly supported the trial court's conclusion that use of the western access was always permissive. Rathbun v. Robson, 203 M 319, 661 P2d 850, 40 St. Rep. 475 (1983), followed in Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525, 50 St. Rep. 794 (1993), Greenwalt Family Trust v. Kehler, 267 M 508, 885 P2d 421, 51 St. Rep. 1130 (1994), Kessinger v. Matulevich, 278 M 450, 925 P2d 864, 53 St. Rep. 1002 (1996), and Rettig v. Kallevig, 282 M 189, 936 P2d 807, 54 St. Rep. 307 (1997). Rathbun and Pub. Lands Access Ass'n, Inc., were followed in Swandal Ranch Co. v. Hunt, 276 M 229, 915 P2d 840, 53 St. Rep. 361 (1996). Pub. Lands Access Ass'n, Inc. and Rettig were followed in Hitshew v. Butte/Silver Bow County, 1999 MT 26, 293 M 212, 974 P2d 650, 56 St. Rep. 111 (1999). However, evidence that gates were used to control cattle rather than traffic was insufficient to rebut the presumption of adverse use. Parker v. Elder, 233 M 75, 758 P2d 292, 45 St. Rep. 1305 (1988).

Prescriptive Right to Use of Road Established by Public Use: Evidence showing heavy public use of a road and maintenance of the road by the county overwhelmingly supports a ruling that, by the time the plaintiff-landowner locked the gate and later barricaded the road for his own use, the public had long since established its right to use the road as a public road. Reid v. Park County, 192 M 231, 627 P2d 1210, 38 St. Rep. 631 (1981), followed in Jefferson County v. McCauley Ranches, 1999 MT 333, 297 M 392, 994 P2d 11, 56 St. Rep. 1329 (1999).

Prescriptive Easement Not Extinguished by Transfer of Servient Estate: Where claimant's prescriptive easement had fully ripened, it was not necessary to once again establish the claim after transfer of the servient tenement. Prescriptive title once established is not divested by transfer of the servient estate. Garrett v. Jackson, 183 M 505, 600 P2d 1177 (1979), following Ferguson v. Standley, 89 M 489, 300 P2d 245 (1931).

Prescriptive Easement — Occasional Recreational Use: Occasional use of a road by hunters and campers falls short of the extent and type of use necessary to result in a prescriptive easement. Oates v. Knutson, 182 M 195, 595 P2d 1181 (1979). See also Pub. Land/Water Access Ass'n v. Robbins, 2021 MT 75, 403 Mont. 491, 483 P.3d 1102.

Recordkeeping Insufficient to Establish Prescriptive Easement: The existence of county records to the effect that the road in question was a county road was not sufficient to initiate acquisition of a prescriptive right. Prescriptive easements are acquired by adverse use, not by keeping records. Oates v. Knutson, 182 M 195, 595 P2d 1181 (1979).

Showing Required for Easement by Prescription:

A party claiming to have acquired an easement by prescription must show open, notorious, exclusive, adverse, continuous, and uninterrupted use of the easement claimed for the full statutory period. Luoma v. Donohoe, 179 M 359, 588 P2d 523 (1978).

To establish the existence of an easement by prescription, the party so claiming must show open, notorious, exclusive, adverse, continuous, and uninterrupted use of the easement claimed for the full statutory period. Scott v. Weinheimer, 140 M 554, 374 P2d 91 (1962), followed in Thomas v. Barnum, 211 M 137, 684 P2d 1106, 41 St. Rep. 1266 (1984).

Evidence Supports Easement: In an action to enjoin defendants from further trespassing by use of a road across plaintiff's property, the Supreme Court found sufficient evidence to support granting of easements to the defendants and the public with certain limitations. St. v. Cronin, 179 M 481, 587 P2d 395 (1978).

Testimony Establishing Necessary Requirements: The testimony clearly established the necessary requirements of a prescriptive easement as set forth in Scott v. Weinheimer, 140 M 554, 374 P2d 91 (1962), including "open, notorious, exclusive, adverse, continuous and uninterrupted use without permission". Staudinger v. DeVries, 177 M 189, 581 P2d 1 (1978).

No Triable Issue: The evidence established existence of an easement by prescription, and defendant failed to meet his burden of showing that a triable issue of fact remained. Yecny v. Day, 174 M 442, 571 P2d 386 (1977).

No Easement — Use Permissive: There was substantial evidence supporting the court's determination that neither the general public nor the defendants individually acquired an easement by prescription across plaintiff's land because a use permissive in its inception did not ripen into a prescriptive right. Taylor v. Petranek, 173 M 433, 568 P2d 120 (1977).

Use — Must Be Exclusive: Trial court properly held for defendant when plaintiff claimed a prescriptive easement to right-of-way because plaintiff shared use of claimed land with former neighboring tenants. Thus, use was not exclusive or adverse and hostile and did not create an easement by prescription or implication but only a permissive use. Ingels v. Mickalson, 170 M 1, 549 P2d 459 (1976).

Presence of Gates — Presumption of Permissive Use: Summary judgment for defendant was proper where plaintiff failed to establish an easement by prescription to a road crossed at several points by fences with closed gates owned and controlled by defendant. The presence of gates which must be opened by the user was strong evidence of permissive rather than adverse use since it tended to establish "total dominion" over the roadway by defendant. Harland v. Anderson, 169 M 447, 548 P2d 613 (1976), followed in Kessinger v. Matulevich, 278 M 450, 925 P2d 864, 53 St. Rep. 1002 (1996).

Permissive Use Not Hostile or Adverse: Since prescriptive easement must be by hostile or adverse use, no use of a road with permission of the owner can ripen into prescriptive easement. Wilson v. Chestnut, 164 M 484, 525 P2d 24 (1974), followed in Thomas v. Barnum, 211 M 137, 684 P2d 1106, 41 St. Rep. 1266 (1984), Tacke v. Wynia, 258 M 405, 853 P2d 87, 50 St. Rep. 587 (1993), and Greenwalt Family Trust v. Kehler, 267 M 508, 885 P2d 421, 51 St. Rep. 1130 (1994).

Section Applicable to Easements: This section applies to an easement in real property as well as to the fee. O'Connor v. Brodie 153 M 129, 454 P2d 920 (1969); St. v. Portmann, 149 M 91, 423 P2d 56 (1967); Groshean v. Dillmont Realty Co., 92 M 227, 12 P2d 273 (1932).

Highway Established by Prescription:

Public highway was established by prescription on evidence that members of public had used road openly for more than 50 years without ever having obtained permission from owners, that previous owner had considered road to be public highway, that the road had been maintained by the county for some 24 years, and that public had never been denied use of road. Kostbade v. Metier, 150 M 139, 432 P2d 382 (1967).

Road running down center line separating two properties and used by each owner was easement created by prescriptive use within meaning of word "occupancy" as used in statute, but width of road could never exceed greatest use made of land for full prescriptive period. St. v. Portmann, 149 M 91, 423 P2d 56 (1967).

Where county adversely paved and maintained a highway over land of a private party for more than 10 years, the county acquired an easement by prescription over the land even though the private owner was assessed for and paid taxes on the property during the running of the statutory period. Brannon v. Lewis & Clark County, 143 M 200, 387 P2d 706 (1963).

This section appears to recognize the doctrine that adverse use by the public for the period named in the Statute of Limitations will establish a highway by prescription, but the title will be confined to the very way traveled during the period, unless an attempt has been made by the proper authorities to erect a highway, when the extent of the title will be measured by the claim exhibited by the proceedings. St. v. Auchard, 22 M 14, 55 P 361 (1898).

Ditch Right: Title by prescription to a ditch conveying water may be obtained by use thereof whenever water is needed. TeSelle v. Storey, 133 M 1, 319 P2d 218 (1957).

70-19-406. Simple occupancy.

Case Notes

Possession of Real Property Insufficient to Grant Title Against Good Faith Purchasers — No Adverse Possession Shown: In 1989, the Luloffs bought part of a ranch from the Manweilers by a deed that excluded "Tract B". The Luloffs mistakenly assumed that Tract B was the part of the ranch that had been occupied by the Blackburns for approximately 4 years. When the Luloffs later discovered that Tract B was another part of the ranch, they brought an action to have the Blackburns evicted, and the District Court granted summary judgment. The Supreme Court held that summary judgment was correctly granted because there was no contract between the Manweilers and the Blackburns satisfying the statute of frauds for the sale of the property to the Blackburns. The Supreme Court held that the Blackburns' mere possession was insufficient against the Luloffs, who had purchased the ranch as bona fide purchasers in good faith, because they were without notice of any claim of title by the Blackburns. The Supreme Court noted that the Blackburns could not make a claim of title because they had mere possession, which did not satisfy the requirements for adverse possession because the Blackburns had not paid taxes upon the property. Luloff v. Blackburn, 274 M 64, 906 P2d 189, 52 St. Rep. 1124 (1995).

Undisturbed Possession of Water Right: The undisturbed possession of a water right (which is property) for a period of time in excess of the time necessary to acquire title by prescription, standing alone, is sufficient under this section to vest clear title in the one having possession. Cook v. Hudson, 110 M 263, 103 P2d 137 (1940).

Law Review Articles

Requisites for Adverse Possession in Montana, Olsson, 11 Mont. L. Rev. 89 (1950).

70-19-407. Occupancy under claim founded on instrument or judgment — when considered adverse.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Criteria for Adverse Possession Met — Property Claimed Under Color of Title — Taxes Paid — Evidence That Cotenant Was Ousted Established by Recorded Deed and Exclusive Use of Property. Hart v. Hale, 2022 MT 82, 408 Mont. 258, 508 P.3d 877.

Adversity of Claim Against Cotenants — No Physical Ouster Required When Cotenant Provides Notice of Hostile and Exclusive Interest: The defendants in an adverse possession action argued that the claimants' adverse possession claim failed on the merits, reasoning that in order to extinguish the interests of fellow cotenants, a cotenant must not only meet the elements of adverse possession but also physically "oust" fellow cotenants from the property. The District Court quieted title in favor of the claimants, finding that entry under color of title constitutes ouster. The Supreme Court affirmed. Nelson v. Davis, 2018 MT 113, 391 Mont. 280, 417 P.3d 333.

Adverse Possession Claim Not Interrupted by Suit Seeking Establishment of Easement: Parker maintained an adverse possession claim for 5 years. Tungsten Holdings, Inc. (Tungsten), argued that its prior lawsuit interrupted the 5-year period and tolled the adverse possession action. In that suit, Tungsten requested that title to an easement over a portion of the property be quieted in its favor, and the suit remained pending for 1½ years during the adverse possession period.

The Supreme Court agreed that the 5-year period is tolled during the pendency of an action to establish title to the property that conflicts with the title claimed by the adverse claimant. However, in this case, Tungsten did not challenge Parker's title to the property, but rather sought to establish an easement over it, so the prior action did not interrupt the 5-year adverse possession period. Tungsten Holdings, Inc. v. Parker, 2001 MT 117, 305 M 329, 27 P3d 429 (2001), distinguishing Flathead Lumber Corp. v. Everett, 127 M 291, 263 P2d 376 (1953), Brown v. Cartwright, 163 M 139, 515 P2d 684 (1973), and Craddock v. Berryman, 198 M 155, 645 P2d 399 (1982).

No Proof of Adverse Possession Absent Evidence of Property Taxes: The District Court found that plaintiffs had proved their claim to a disputed parcel of property and established an adverse possession claim, based in part on historical payment of property taxes. Defendant 360 Ranch contended that the District Court's conclusion that plaintiffs had paid property taxes on the property was error and that defendant's records showed that defendant had actually paid taxes on the parcel. Plaintiffs maintained that 70-19-411 does not require payment of taxes on all property to which adverse possession is claimed, but only of all taxes legally levied and assessed. The tax assessments indicated that plaintiffs were assessed taxes on property east of "the road", but it was not clear which of two roads through the parcel was indicated. The Supreme Court held that because the record provided insufficient evidence to show that plaintiffs paid taxes on the property in question, the District Court's conclusion that plaintiffs had proved a claim for adverse possession was incorrect and reversible error. Tester v. Tester, 2000 MT 130, 300 M 5, 3 P3d 109, 57 St. Rep. 538 (2000).

Transfer of Land to Corporation or Trust in Which Grantor Has Interest — Color of Title Not Created: Relying on St. v. King, 87 SE 167 (W. Va. 1915), and St. v. Altizer Coal Land Co., 128 SE 286 (W. Va. 1925), the Supreme Court held that a grantor cannot create color of title in land in which that grantor has no interest by transferring or deeding the land to a corporation or trust in which that grantor has an interest. Y A Bar Livestock Co. v. Harkness, 269 M 239, 887 P2d 1211, 51 St. Rep. 1517 (1994).

Claim of Adverse Possession Defeated by Loan of Title Agreement: Johnson agreed to loan Anderson the title to several lots that Johnson owned on Flathead Lake so that Anderson could mortgage the lots and use the proceeds for a business venture. Johnson and Anderson both executed deeds to the property, and Anderson occupied the property pursuant to a lease agreement. Later, the agreement was breached when Anderson conveyed his interest to a third party and cut trees from the property. Anderson claimed title to the property by adverse possession. The Supreme Court held that Anderson had not satisfied the statutory prerequisites because he held possession of the land by virtue of a lease and because Anderson's rights were not exclusive of Johnson's right to repossess the lot as a result of the other deed and the oral agreement. Anderson v. Johnson, 264 M 66, 870 P2d 59, 51 St. Rep. 149 (1994).

Statutory Requirements of Adverse Possession Met: Plaintiffs and their predecessors had possession of the property in question for over 50 years, evidenced by the fact that they improved and fenced the area. They paid all taxes legally assessed and levied against the property and acquired all claims of right, title, and interest by quitclaim deed. They were entitled to surface rights by adverse possession despite the fact that defendant may also have paid improperly assessed taxes on the same property. Perusich v. Meier, 229 M 458, 747 P2d 857, 44 St. Rep. 2132 (1987).

Mixed or Common Possession of Land — Possession to Person With Legal Title — No Adverse Possession as Against Legal Title: In reversing a District Court grant of a first priority water right for irrigation on the basis of adverse use, the Supreme Court adopted the rule that in case of a mixed or common possession of land by both parties to a suit, the law adjudges the rightful possession to the party who holds legal title, and no length of time of possession can give title by adverse possession as against the legal title. Mielke v. Daly Ditches Irrigation District, 225 M 172, 731 P2d 927, 44 St. Rep. 129 (1987).

Adverse Possession — Quiet Title Action Barred by Laches and Statutes of Limitations: In 1954, Clayton obtained a patent from the United States government for a piece of property. A railroad right-of-way ran through the property, but the patent did not refer to the right-of-way. The railroad had acquired the right-of-way by deed in 1892. The railroad tracks were used by at least one train a day both before and after 1954. Railroad work crews used the right-of-way system during this time. In 1983, Clayton filed an action to quiet title to the right-of-way and a tort claim for trespass and damages. The railroad defended on the grounds of adverse possession, prescription, laches, estoppel, and Statutes of Limitations. The railroad also filed a counterclaim to quiet title to its right-of-way. The District Court granted summary judgment for the railroad, ruling that Clayton's claim was barred by laches and all applicable Statutes of Limitations. The Supreme Court affirmed. The railroad acquired a prescriptive easement either based on a written instrument, under 70-19-407, or by enclosing the land and meeting the other requirements of 70-19-408. Murphy v. Atl. Richfield Co., 221 M 166, 717 P2d 558, 43 St. Rep. 717 (1986), distinguished in Gue v. Olds, 245 M 117, 799 P2d 543, 47 St. Rep. 1906 (1990). See also Johnson v. Estate of Shelton, 232 M 85, 754 P2d 828, 45 St. Rep. 887 (1988).

Enclosure by Fence — Improper Grant of Land Outside Fence: Since plaintiffs obtained title through adverse possession under a deed by, among other things, enclosing a piece of land with a fence, they could be granted title by the court only to what was enclosed by the fence, and the District Court was ordered to change the award to delete land outside the fence. Castles v. Lawrence, 203 M 421, 662 P2d 589, 40 St. Rep. 545 (1983), rehearing denied, 40 St. Rep. 718 (1983).

Possession for Five Years Under Deed: Plaintiffs had adverse possession under this section, since court found they had possessed the land for more than 5 years under a claim of title arising from a deed and the evidence supporting the findings was not rebutted. Castles v. Lawrence, 203 M 421, 662 P2d 589, 40 St. Rep. 545 (1983), rehearing denied, 40 St. Rep. 718 (1983).

Adverse Possession — Color of Title — Good Faith: The burden of proving adverse possession under color of title is on the defendant in a quiet title action. Under Montana law, an instruction which purports to convey land or the right to its possession is sufficient color of title as a basis for adverse possession if the claim is made in good faith. When a party's "title" was based on a quitclaim deed from an individual who was known by all parties concerned to have no interest whatsoever in the property, the court concluded that there was not a trace of good faith and no color of title. Further, the party asserting adverse possession must succeed on the strength of his own title and cannot rely on the weakness of his adversary. Russell Realty Co. v. Kenneally, 185 M 496, 605 P2d 1107 (1980), followed in Y A Bar Livestock Co. v. Harkness, 269 M 239, 887 P2d 1211, 51 St. Rep. 1517 (1994).

Tolling of Statute: Statute of Limitations did not toll during period when Indian plaintiff was attempting to persuade the United States to bring action against vendee of Indian's land on grounds that sale was fraudulent. Dillon v. Antler Land Co., 341 F. Supp. 734 (D.C. Mont. 1972), affirmed in 507 F2d 940 (9th Cir. 1974), certiorari denied, 421 US 992, 44 L Ed 2d 482, 95 S Ct 1998 (1975).

Possession Under Color of Title: Rancher, who received administrator's deed purporting to convey land, which deed was reviewed by two attorneys who failed to note the discrepancy in the deed and which deed also misled the right-of-way department for a power company which paid the rancher $800 for an underground pipeline easement across the tract, occupied the land under claim or color of title within meaning of this section. Brown v. Cartwright, 163 M 139, 515 P2d 684 (1973).

Void Tax Deed Ample as Color of Title:

Where county leased property, which it obtained by tax deed in 1930, to persons in 1940 and entered into a contract for sale in 1941, the occupant had "color of title" under the tax deeds and contracts for deeds to support adverse possession even though such tax deeds to the county were void for failure to comply with all of the requirements. Long v. Pawlowski, 131 M 91, 307 P2d 1079 (1957), explained in Steen v. Rustad, 132 M 96, 313 P2d 1014 (1957).

A tax deed, though void, is ample as color of title to sustain the claim of adverse possession. Hentzy v. Mandan Loan & Inv. Co., 129 M 324, 286 P2d 325 (1955), explained in Steen v. Rustad, 132 M 96, 313 P2d 1014 (1957).

Evidence of Color of Title: Color of title may be evidenced by a contract for the sale of land. An instrument which purports to convey the land or the right to its possession is sufficient color of title as a basis for adverse possession if the claim is made in good faith. Hentzy v. Mandan Loan & Inv. Co., 129 M 324, 286 P2d 325 (1955), explained in Steen v. Rustad, 132 M 96, 313 P2d 1014 (1957).

Tacking Possession: A wife may tack her possession onto that of her husband prior to his death, and it is not necessary that the relationship of husband and wife be established by probate proceedings before this can be done where the relationship is admitted by the pleadings. Barcus v. Galbreath, 122 M 537, 207 P2d 559 (1949).

Claim of Title Meaning Color of Title:

The term "claim of title" as used in this section is synonymous with "color of title", which is title in appearance but not in reality, a title that is imperfect but not so obviously so that it would be apparent to one not skilled in the law. As a basis of claim by adverse possession, color of title may be shown by any instrument purporting to convey the land or the right to its possession, provided such claim is made in good faith, as for instance, by a quitclaim deed. Sullivan v. Neel, 105 M 253, 73 P2d 206 (1937).

The term "claim of title" used in this section means "color of title", which is title in appearance but not in reality, and color of title may be shown by any instrument purporting to convey the land or the right to its possession, provided claim is made thereunder in good faith. Fitschen Bros. Commercial Co. v. Noyes' Estate, 76 M 175, 246 P 773 (1926), followed in Y A Bar Livestock Co. v. Harkness, 269 M 239, 887 P2d 1211, 51 St. Rep. 1517 (1994), and Nelson v. Davis, 2018 MT 113, 391 Mont. 280, 417 P.3d 333.

Quitclaim Deed: Where a purchaser of a tract of land held by a county under tax deed obtained possession under a quitclaim deed which correctly described only a portion thereof but later was given a correction deed accurately describing the whole tract, such latter deed was sufficient to give the purchaser color of title to the land under this section in his action to quiet title upon adverse possession. Sullivan v. Neel, 105 M 253, 73 P2d 206 (1937).

Sheriff's Certificate of Sale — Claim of Title: A Sheriff's certificate of sale constitutes a "claim of title", within the meaning of this section, to real property under which title by adverse possession may be established. Commercial Bank & Trust Co. v. Jordan, 85 M 375, 278 P 832, 65 ALR 968 (1929).

Tax Deed: Where, in an action of ejectment, the defense is adverse possession, based on a tax deed not formal enough to convey full title by its own force, the validity of which possession is claimed to have been acquiesced in by the plaintiff, and the latter offers proof that this tax deed was taken for him by the grantees therein and under his instructions, there is a conflict in the evidence and the jury should determine the question of adverse possession. Horsky v. McKennan, 53 M 50 162 P 376 (1916).

Claim of Title: As used to characterize adverse possession, "claim of title" means nothing more than the claim asserted by the disseizor of his intention to appropriate and use the land in question as his own, to the exclusion of the rights of all persons, and which may serve, irrespective of any semblance of color or right or title, as the foundation of his claim. Morrison v. Linn, 50 M 396, 147 P 166 (1915).

Color of Title: One holding land under a written instrument, a statute, or a judgment or decree of court which appears to convey to or confirm title in him but does not do so in fact holds under "color of title". Morrison v. Linn, 50 M 396, 147 P 166 (1915).

No Constructive Possession Under Claim of Title: While the adverse claimant under color of title for the statutory period obtains title to the entire tract described in his muniment, if it has been subjected to proper use, the one who relies upon claim of title secures only so much as he actually possesses. There cannot be constructive possession under mere claim of title, and this is the doctrine of the decided cases and the meaning of this section, 70-19-408, 70-19-409, and 70-19-410. Morrison v. Linn, 50 M 396, 147 P 166 (1915).

70-19-408. Claim founded on instrument or judgment — what considered possession and occupation.

Case Notes

Payment of Taxes Not Yet Due Not Required to Sustain Adverse Possession Claim: Pursuant to 70-19-411, a party claiming adverse possession must occupy the property continuously for 5 years and must have paid all legally levied and assessed taxes on the property. Parker received notice for property taxes due on October 31, 1997, but the taxes were not paid. The 5-year period of adverse possession commenced when Parker received the defective tax deeds on November 24, 1992, so the 5-year adverse possession period would have expired on November 24, 1997. The District Court held that because the 1997 taxes were assessed prior to November 24, 1997, and were unpaid, Parker's claim for adverse possession failed. Parker maintained that the adverse possession language in 70-19-411 should be interpreted in combination with the statutory provisions for levy, notice, and payment of taxes in the tax code in Title 15. The Supreme Court agreed. Pursuant to 15-10-305, real estate taxes are levied and assessed on the second Monday in October, while 15-16-102 provides that one-half of each year's property taxes is payable on or before November 30 and the other one-half is payable on or before May 31 of the following year. Therefore, although the 1997 taxes were levied prior to the expiration of the 5-year adverse possession period on November 25, 1997, the taxes were not delinquent until November 30, 1997, 1 week after the adverse possession period ended. The Supreme Court concluded that 70-19-411 does not require the payment of taxes that are not yet due in order to sustain a claim of adverse possession. Thus, the District Court erred in concluding that Parker did not meet the requirements of 70-19-411, and the decision was reversed. Tungsten Holdings, Inc. v. Parker, 2001 MT 117, 305 M 329, 27 P3d 429 (2001).

Statutory Requirements of Adverse Possession Met: Plaintiffs and their predecessors had possession of the property in question for over 50 years, evidenced by the fact that they improved and fenced the area. They paid all taxes legally assessed and levied against the property and acquired all claims of right, title, and interest by quitclaim deed. They were entitled to surface rights by adverse possession despite the fact that defendant may also have paid improperly assessed taxes on the same property. Perusich v. Meier, 229 M 458, 747 P2d 857, 44 St. Rep. 2132 (1987).

Payment of Taxes Required: When the claim to property is founded upon an instrument, adverse possession requires the payment of taxes in addition to the other requirements of 70-19-408. Peterson v. Taylor, 226 M 400, 735 P2d 1120, 44 St. Rep. 754 (1987).

Adverse Possession — Quiet Title Action Barred by Laches and Statutes of Limitations: In 1954, Clayton obtained a patent from the United States government for a piece of property. A railroad right-of-way ran through the property, but the patent did not refer to the right-of-way. The railroad had acquired the right-of-way by deed in 1892. The railroad tracks were used by at least one train a day both before and after 1954. Railroad work crews used the right-of-way system during this time. In 1983, Clayton filed an action to quiet title to the right-of-way and a tort claim for trespass and damages. The railroad defended on the grounds of adverse possession, prescription, laches, estoppel, and Statutes of Limitations. The railroad also filed a counterclaim to quiet title to its right-of-way. The District Court granted summary judgment for the railroad, ruling that Clayton's claim was barred by laches and all applicable Statutes of Limitations. The Supreme Court affirmed. The railroad acquired a prescriptive easement either based on a written instrument, under 70-19-407, or by enclosing the land and meeting the other requirements of 70-19-408. Murphy v. Atl. Richfield Co., 221 M 166, 717 P2d 558, 43 St. Rep. 717 (1986), distinguished in Gue v. Olds, 245 M 117, 799 P2d 543, 47 St. Rep. 1906 (1990). See also Johnson v. Estate of Shelton, 232 M 85, 754 P2d 828, 45 St. Rep. 887 (1988).

Substantial Enclosure — Lake Boundary Constitutes: Possessors of land under a deed constructed a fence around all parts of the land not bordered by lake. The lake boundary was a substantial enclosure within the meaning of that term as it is used in this section. Castles v. Lawrence, 203 M 421, 662 P2d 589, 40 St. Rep. 545 (1983), rehearing denied, 40 St. Rep. 718 (1983).

Maintaining Land Identical to Adjoining Property — Not an Improvement: Possessor, not claiming on an instrument, did not satisfy requirements of 70-19-410 of improvement of the claimed land by merely maintaining the land in the same condition as surrounding property, because that standard found at 70-19-408 is applicable only to a claim founded on an instrument. Stimatz v. St., 189 M 179, 615 P2d 228 (1980).

Possession Under Color of Title:

Certificate of assignment given to person paying delinquent taxes on realty did not give that person color of title and did not bring him within ambit of this section. Magelssen v. Atwell, 152 M 409, 451 P2d 103 (1969).

The character of the possession that will satisfy the requirements is determined by this section where the lands are claimed under color of title and by 70-19-410 where the claim of adverse possession is not founded upon a written instrument, judgment, or decree. Thus the foundation of the claim and the character of the land in question determine the degree and character of possession or occupancy necessary to satisfy the statutes. Sullivan v. Neel, 105 M 253, 73 P2d 206 (1937).

Mortgagor's Possession: This section was inapplicable to claim of adverse title to grazing lands by plaintiff who contended that he had color of title by virtue of his patent, where proof disclosed that mortgage foreclosure proceedings divested him of title, leaving him with privilege of redemption which was not exercised. Upon the issuance of Sheriff's certificate of sale, title vested in purchaser. Bell v. Gussenhoven, 132 M 346, 318 P2d 251 (1957).

Acts Showing Possession:

Where defendant paid taxes on land for more than the statutory period, staked out the land in lots and leased it at various times for different purposes, and the land was in defendant's name in the tax records, evidence was sufficient to show adverse possession. Kenney v. Bridges, 123 M 95, 208 P2d 475 (1949).

Where plaintiffs inclosed the land with barbed wire fence, cultivated the land, executed an oil and gas lease on the land, and mortgaged the land, there were sufficient facts to show adverse possession. Laas v. All Persons, 121 M 43, 189 P2d 670 (1948).

Grazing of Land: Where plaintiff in an action to quiet title to a tract of land used it only for grazing and placer mining purposes for limited periods each year, under a claim of adverse possession based on color of title evidenced by quitclaim deed (70-19-407), the fact that the land was not inclosed did not defeat his claim, since under this section, for the purpose of constituting adverse possession, such land is considered to have been possessed and occupied, although not inclosed, if used, inter alia, for pasturage. Sullivan v. Neel, 105 M 253, 73 P2d 206 (1937).

70-19-409. Actual occupancy under claim of title not founded on instrument or judgment — adverse.

Case Notes

Amended Complaint Permitted When Second, Related Road in Prescriptive Easement Dispute Already Subject of Extensive Discovery and Testimony — Opposing Party Granted Opportunity to Conduct Further Discovery — No Undue Prejudice to Opposing Party. Cremer Rodeo Land & Livestock Co. v. McMullen, 2023 MT 117, 412 Mont. 471, 531 P.3d 566.

No Error by District Court When Determining Amended Complaint Related Back to Filing Date of Original Complaint — Dispute Outlined in Amended Complaint Interrelated and Arose Out of Same Conduct, Transactions, and Occurrences as Original Complaint. Cremer Rodeo Land & Livestock Co. v. McMullen, 2023 MT 117, 412 Mont. 471, 531 P.3d 566.

Summary Judgment Not Appropriate When Entire Record Demonstrates Genuine Issue of Material Fact — "Cherry-Picked Quotes" From Depositions Insufficient to Prove Permissive Use in Prescriptive Easement Dispute. Cremer Rodeo Land & Livestock Co. v. McMullen, 2023 MT 117, 412 Mont. 471, 531 P.3d 566.

Limited Prescriptive Easement Established — Obvious Use Viewed as Open and Notorious: Albert filed an action to determine a claim for a prescriptive easement and quiet title to a road across Hastetter's property. Hastetter raised the affirmative defense of estoppel, claiming that Albert recognized Hastetter's legitimate title to the road by requesting an easement in an earlier letter and that the use was permissive and subject to Hastetter's consent. The trial court found that Albert had a prescriptive easement that was limited to the historical use of providing access and moving cattle to and from Albert's pasture. Hastetter appealed, but the Supreme Court affirmed. Albert established the elements for a prescriptive easement during the statutory 5-year period, and thus enjoyed the presumption that his use was adverse to Hastetter's interest. Although the servient landowner must know about and acquiesce to the user's claim of right, Montana law does not require that a prescriptive easement claimant verbally communicate a hostile intent. Open and notorious use can be established by showing that the condition of use was so obvious that the owner was not deceived and should have known of the claimant's use. Further, Albert had used the road to move cattle periodically since 1958 and had used the road to check the condition of fences and gates. Given the obvious use of the gates to control livestock, the District Court did not abuse its discretion when it refrained from scrutinizing the gates as evidence of permissive use. Albert v. Hastetter, 2002 MT 123, 310 M 82, 48 P3d 749 (2002), followed in Harding v. Savoy, 2004 MT 280, 323 M 261, 100 P3d 976 (2004).

Mixed or Common Possession of Land — Possession to Person With Legal Title — No Adverse Possession as Against Legal Title: In reversing a District Court grant of a first priority water right for irrigation on the basis of adverse use, the Supreme Court adopted the rule that in case of a mixed or common possession of land by both parties to a suit, the law adjudges the rightful possession to the party who holds legal title, and no length of time of possession can give title by adverse possession as against the legal title. Mielke v. Daly Ditches Irrigation District, 225 M 172, 731 P2d 927, 44 St. Rep. 129 (1987).

Enclosure by Fence — Improper Grant of Land Outside Fence: Since plaintiffs obtained title through adverse possession under a deed by, among other things, enclosing a piece of land with a fence, they could be granted title by the court only to what was enclosed by the fence, and the District Court was ordered to change the award to delete land outside the fence. Castles v. Lawrence, 203 M 421, 662 P2d 589, 40 St. Rep. 545 (1983), rehearing denied, 40 St. Rep. 718 (1983).

Insufficient Evidence to Fulfill Statute: The court erred when it failed to determine that this statute had been fulfilled to support a decree of adverse possession. In viewing the record the evidence did not fulfill the requirements. Martin v. Randono, 175 M 321, 573 P2d 1156 (1978).

Inclosure of Land: Protection of the land by a substantial inclosure with intent to claim to the inclosure is sufficient for adverse possession under this section even though not based on a written instrument. Thibault v. Flynn, 133 M 461, 325 P2d 914 (1958).

Character of Initial Entry: While it is indispensable to defeat the holder of the legal title that the disseizor shall maintain his adverse possession throughout the entire statutory period, under either color of title or claim of title, it is not necessary that his initial entry into possession should be made under any pretense of right or title. Morrison v. Linn, 50 M 396, 147 P 166 (1915).

70-19-410. Claim of title not founded on instrument or judgment — what considered occupation.

Case Notes

Retaining Wall and Dock Not Considered Substantial Enclosure to Establish Possessory Adverse Use: The Jameses built a dock and retaining wall on property that a later survey revealed was on Habel's property. Habel filed a quiet title action, and the Jameses counterclaimed that they had acquired a prescriptive easement for the dock and retaining wall by adverse use for the statutory period. The District Court agreed and ruled that a nonpossessory prescriptive easement existed for the dock and retaining wall. Habel appealed, arguing that the dock and retaining wall were permanent structures that clearly marked the boundaries of the land enclosed by the structures and that the Jameses had thus acquired a possessory interest in the enclosed land. The Supreme Court noted that this section does not specify what kind of structure satisfies the requirement to "protect by substantial enclosure" in order to consider the property to be possessed and occupied for purposes of adverse possession, but concluded that a structure or fixture may constitute a substantial enclosure if it indicates the boundaries of the adverse occupancy in a manner that clearly demonstrates the extent of the use of the property. The District Court's findings that the land was only partially enclosed by the dock and retaining wall and did establish a possessory use of the property itself were not clearly erroneous. A complete possession or occupation of the land was not present in this case because the Jameses' construction and maintenance of the dock and retaining wall were limited uses consistent with a nonpossessory interest, which constituted a burden on Habel's property, not a complete possession or occupation. The District Court was affirmed. Habel v. James, 2003 MT 99, 315 M 249, 68 P3d 743 (2003), distinguishing Burlingame v. Marjerrison, 204 M 464, 665 P2d 1136 (1983).

Substantial Enclosure — Lake Boundary Constitutes: Possessors of land under a deed constructed a fence around all parts of the land not bordered by lake. The lake boundary was a substantial enclosure within the meaning of that term as it is used in this section. Castles v. Lawrence, 203 M 421, 662 P2d 589, 40 St. Rep. 545 (1983), rehearing denied, 40 St. Rep. 718 (1983).

Maintaining Land Identical to Adjoining Property — Not an Improvement: Possessor, not claiming on an instrument, did not satisfy requirements of 70-19-410 of improvement of the claimed land by merely maintaining the land in the same condition as surrounding property, because that standard found at 70-19-408 is applicable only to a claim founded on an instrument. Stimatz v. St., 189 M 179, 615 P2d 228 (1980).

Adverse Possession — Parol Grant: A parol grant of real property can serve as a foundation for a claim of title by adverse possession, notwithstanding the Statute of Frauds. Swecker v. Dorn, 181 M 436, 593 P2d 1055 (1979).

Adverse Possession — Substantial Enclosure Sufficient: Adverse claimant need only prove his possession has been evidenced by a substantial enclosure and need not prove any further occupation, cultivation, or use. Plaintiff's assertion of undisputed possession from 1967-77 sufficiently establishes continuous and exclusive dominion over the property, and her uncontroverted payment of property taxes on the parcel during the same period satisfies 70-19-411. Swecker v. Dorn, 181 M 436, 593 P2d 1055 (1979).

Insufficient Evidence to Fulfill Statute: The court erred when it failed to determine that this statute had been fulfilled to support a decree of adverse possession. In viewing the record the evidence did not fulfill the requirements. Martin v. Randono, Inc., 175 M 321, 573 P2d 1156 (1978).

Necessary Intent: No adverse possession was established where plaintiff did not by any actions show requisite intent to possess adversely, particularly in view of letter in which plaintiff admitted that defendants owned the disputed land. Magelssen v. Atwell, 152 M 409, 451 P2d 103 (1969).

Conflicting Evidence: Finding of District Court that adverse possession was not established was affirmed, in light of record disclosing conflicting testimony on question of existence and upkeep of fences and conflicting testimony on question whether and who ran livestock on property during the prescriptive period. Johnson v. Silver Bow County, 151 M 283, 443 P2d 6 (1968).

Inclosure of Land: Protection of the land by a substantial inclosure with intent to claim to the inclosure is sufficient for adverse possession under this section even though not based on a written instrument. Thibault v. Flynn, 133 M 461, 325 P2d 914 (1958).

Grazing of Land: This section was inapplicable where plaintiff did not claim grazing land on any title except adverse usage and there was no testimony in the record that the land had been protected by a substantial inclosure, nor had it been cultivated or improved. Bell v. Gussenhoven, 132 M 346, 318 P2d 251 (1957).

Claim of Title: The character of the possession that will satisfy the requirements is determined by this section where the claim of adverse possession is not founded upon a written instrument, judgment, or decree and by 70-19-408 where the lands are claimed under color of title. Thus the foundation of the claim and the character of the land in question determine the degree and character of possession or occupancy necessary to satisfy the statutes. Sullivan v. Neel, 105 M 253, 73 P2d 206 (1937).

70-19-411. Occupancy and payment of taxes necessary to prove adverse possession.

Case Notes

Adequate Showing of Prescriptive Easement — No Showing of Permissive Use Absent Owner's Knowledge of Ownership: Bertelsen owned two parcels of property adjacent to a county road that he leased to a propane business beginning in 1987. The county road was subsequently abandoned, so all that separated Bertelsen's property from a federal highway was a triangular piece of land upon which the state Department of Transportation held an easement but which was otherwise undeveloped. The propane company constructed some improvements on the triangular parcel. While researching property in the area, Slauson discovered that the triangular parcel was owned by a third party, Edwards, who was not even aware that she owned it. Slauson acquired the property from Edwards and had the state discharge its easement and then approached Bertelsen and the propane company and offered to lease the parcel to Bertelsen. Bertelsen asserted the right to continued use of the property, and Slauson sued to enforce his property rights and to recover compensation and damages from Bertelsen. At trial, Bertelsen argued that he had acquired the property through adverse possession or that he had a prescriptive easement that allowed the propane company to continue using the property. The District Court found that Bertelsen had not paid taxes on the parcel, so there was no adverse possession, but held that Bertelsen and the propane company had established a prescriptive easement to maintain the improvements and to transact the company's business on the parcel. Slauson appealed, questioning whether the use was open, notorious, and adverse. The Supreme Court found that the company used the property for public access and as a parking lot, which adequately provided previous owner Edwards with notice of use. Having established open, notorious, exclusive, continuous, and uninterrupted use for the statutorily required 5-year period, Bertelsen was entitled to the presumption of adverse use, and Slauson was required to prove that the use was permissive in order to overcome the presumption. Slauson could not prove permissive use because Edwards did not know that she owned the parcel and thus could not have granted permission for its use. Bertelsen therefore established a prescriptive easement, and the District Court was affirmed. Slauson v. Bertelsen Family Trust, 2006 MT 314, 335 M 43, 151 P3d 866 (2006).

Following the 2006 decision, a dispute arose between Slauson and the plumbing company that used the prescriptive easement. Slauson asserted that the company trespassed and used Slauson's property in unauthorized ways, and the company countersued for interference with the scope of the easement. The District Court granted the company $418.60 for landscaping that Slauson had removed and awarded Slauson $430 for costs of removing snow that the company piled on Slauson's property outside the easement. Both parties appealed, but the Supreme Court held that neither party established any error in the District Court's rulings and affirmed. Slauson v. Marozzo Plumb. & Heating, LLC, 2009 MT 333, 353 M 75, 219 P3d 509 (2009).

Incorrect Finding of Prescriptive Easement for Road and Residence — Moving of Residence Not Required: The District Court found that a prescriptive easement had been established for a road that strayed into an adjoining parcel and for a residence, the corner of which also extended into the adjoining parcel. The Supreme Court found the record full of contradictory assertions and findings, but noted that because the actual location of the road was concealed from the owner by way of maps and misrepresentations as to its true location, the record did not come close to establishing the elements of hostility or open and notorious use by clear and convincing evidence to establish a prescriptive easement for the road. Further, the owner of the residence conceded that the corner of the foundation and eaves encroached onto the adjoining parcel. Never having paid taxes on the land in question, the owner could not prevail on a claim of adverse possession to obtain title to the ground under the encroachment, so a finding of a prescriptive easement for the residence was also in error. However, because the property owner indicated at trial and in appeal briefs that he was willing to work something out regarding the encroachment, the Supreme Court concluded that to require removal of the encroachment would be extreme and declined to order that the residence be moved from its foundation. Gelderloos v. Duke, 2004 MT 94, 321 M 1, 88 P3d 814 (2004).

Limited Prescriptive Easement Established — Obvious Use Viewed as Open and Notorious: Albert filed an action to determine a claim for a prescriptive easement and quiet title to a road across Hastetter's property. Hastetter raised the affirmative defense of estoppel, claiming that Albert recognized Hastetter's legitimate title to the road by requesting an easement in an earlier letter and that the use was permissive and subject to Hastetter's consent. The trial court found that Albert had a prescriptive easement that was limited to the historical use of providing access and moving cattle to and from Albert's pasture. Hastetter appealed, but the Supreme Court affirmed. Albert established the elements for a prescriptive easement during the statutory 5-year period, and thus enjoyed the presumption that his use was adverse to Hastetter's interest. Although the servient landowner must know about and acquiesce to the user's claim of right, Montana law does not require that a prescriptive easement claimant verbally communicate a hostile intent. Open and notorious use can be established by showing that the condition of use was so obvious that the owner was not deceived and should have known of the claimant's use. Further, Albert had used the road to move cattle periodically since 1958 and had used the road to check the condition of fences and gates. Given the obvious use of the gates to control livestock, the District Court did not abuse its discretion when it refrained from scrutinizing the gates as evidence of permissive use. Albert v. Hastetter, 2002 MT 123, 310 M 82, 48 P3d 749 (2002), followed in Harding v. Savoy, 2004 MT 280, 323 M 261, 100 P3d 976 (2004).

Adverse Possession Claim Not Interrupted by Suit Seeking Establishment of Easement: Parker maintained an adverse possession claim for 5 years. Tungsten Holdings, Inc. (Tungsten), argued that its prior lawsuit interrupted the 5-year period and tolled the adverse possession action. In that suit, Tungsten requested that title to an easement over a portion of the property be quieted in its favor, and the suit remained pending for 1½ years during the adverse possession period. The Supreme Court agreed that the 5-year period is tolled during the pendency of an action to establish title to the property that conflicts with the title claimed by the adverse claimant. However, in this case, Tungsten did not challenge Parker's title to the property, but rather sought to establish an easement over it, so the prior action did not interrupt the 5-year adverse possession period. Tungsten Holdings, Inc. v. Parker, 2001 MT 117, 305 M 329, 27 P3d 429 (2001), distinguishing Flathead Lumber Corp. v. Everett, 127 M 291, 263 P2d 376 (1953), Brown v. Cartwright, 163 M 139, 515 P2d 684 (1973), and Craddock v. Berryman, 198 M 155, 645 P2d 399 (1982).

Payment of Taxes Not Yet Due Not Required to Sustain Adverse Possession Claim: Pursuant to this section, a party claiming adverse possession must occupy the property continuously for 5 years and must have paid all legally levied and assessed taxes on the property. Parker received notice for property taxes due on October 31, 1997, but the taxes were not paid. The 5-year period of adverse possession commenced when Parker received the defective tax deeds on November 24, 1992, so the 5-year adverse possession period would have expired on November 24, 1997. The District Court held that because the 1997 taxes were assessed prior to November 24, 1997, and were unpaid, Parker's claim for adverse possession failed. Parker maintained that the adverse possession language in this section should be interpreted in combination with the statutory provisions for levy, notice, and payment of taxes in the tax code in Title 15. The Supreme Court agreed. Pursuant to 15-10-305, real estate taxes are levied and assessed on the second Monday in October, while 15-16-102 provides that one-half of each year's property taxes is payable on or before November 30 and the other one-half is payable on or before May 31 of the following year. Therefore, although the 1997 taxes were levied prior to the expiration of the 5-year adverse possession period on November 25, 1997, the taxes were not delinquent until November 30, 1997, 1 week after the adverse possession period ended. The Supreme Court concluded that this section does not require the payment of taxes that are not yet due in order to sustain a claim of adverse possession. Thus, the District Court erred in concluding that Parker did not meet the requirements of this section, and the decision was reversed. Tungsten Holdings, Inc. v. Parker, 2001 MT 117, 305 M 329, 27 P3d 429 (2001).

No Proof of Adverse Possession Absent Evidence of Property Taxes: The District Court found that plaintiffs had proved their claim to a disputed parcel of property and established an adverse possession claim, based in part on historical payment of property taxes. Defendant 360 Ranch contended that the District Court's conclusion that plaintiffs had paid property taxes on the property was error and that defendant's records showed that defendant had actually paid taxes on the parcel. Plaintiffs maintained that this section does not require payment of taxes on all property to which adverse possession is claimed, but only of all taxes legally levied and assessed. The tax assessments indicated that plaintiffs were assessed taxes on property east of "the road", but it was not clear which of two roads through the parcel was indicated. The Supreme Court held that because the record provided insufficient evidence to show that plaintiffs paid taxes on the property in question, the District Court's conclusion that plaintiffs had proved a claim for adverse possession was incorrect and reversible error. Tester v. Tester, 2000 MT 130, 300 M 5, 3 P3d 109, 57 St. Rep. 538 (2000).

Elements of Adverse Possession Not Shown: Once the true boundary line became known in 1971, defendants made only one demand for the property in dispute, which was rebuffed, and made no additional claim adverse to plaintiffs until 1983. Defendants never occupied the property prior to 1983, when they built a garage over the survey line, or paid taxes on the property. Plaintiffs brought an action for ejectment and rents in 1985. The District Court correctly held that defendants never occupied the property in a manner establishing adverse possession or an easement. Smithers v. Hagerman, 244 M 182, 797 P2d 177, 47 St. Rep. 1483 (1990).

No Interest Acquired in Property by Possessory Use Without Payment of Taxes: Plaintiff may not claim title to land by adverse possession if he did not pay the taxes thereon. Zavarelli v. Might, 230 M 288, 749 P2d 524, 45 St. Rep. 211 (1988).

When the claim to property is founded upon an instrument, adverse possession requires the payment of taxes in addition to the other requirements of 70-19-408. Peterson v. Taylor, 226 M 400, 735 P2d 1120, 44 St. Rep. 754 (1987).

In 1978, Burlingames acquired a parcel of land adjoining Marjerrisons' land. A survey of Burlingames' property indicated that Marjerrisons' fence enclosed 5 acres of Burlingames' property. Since 1935, Marjerrisons had used the 5-acre parcel, along with their property, for cattle grazing, agriculture, and timber harvesting. Burlingames filed an action to quiet title. The District Court ruled that Burlingames possessed title to the 5-acre parcel but that Marjerrisons had acquired prescriptive easements for grazing, agricultural, and timber harvesting purposes. On appeal, the Supreme Court reversed, stating that since an easement is a nonpossessory interest and Marjerrisons had complete possession of the parcel for the statutory period, the only interest they could have acquired was full title. Treating Marjerrisons' claim as one for adverse possession, the court then ruled that although their use was open, notorious, exclusive, adverse, continuous, and uninterrupted for a 5-year period, they had not paid property taxes on the disputed parcel as required by 70-19-411, and thus have acquired no interest in the property. Burlingame v. Marjerrison, 204 M 464, 665 P2d 1136, 40 St. Rep. 1005 (1983), followed in Luloff v. Blackburn, 274 M 64, 906 P2d 189, 52 St. Rep. 1124 (1995).

Statutory Requirements of Adverse Possession Met: Plaintiffs and their predecessors had possession of the property in question for over 50 years, evidenced by the fact that they improved and fenced the area. They paid all taxes legally assessed and levied against the property and acquired all claims of right, title, and interest by quitclaim deed. They were entitled to surface rights by adverse possession despite the fact that defendant may also have paid improperly assessed taxes on the same property. Perusich v. Meier, 229 M 458, 747 P2d 857, 44 St. Rep. 2132 (1987).

When Easement Rights Not Extinguished by Adverse Possession or Prescriptive Easement: Both adverse possession and prescriptive easement require proof of open, notorious, exclusive, adverse, and continuous possession or use for 5 years. The Supreme Court found insufficient evidence of extinguishment of easement rights by adverse possession or prescriptive right to a gate when: (1) there was not consistent testimony that appellant intended to eliminate all access to the easement; (2) he stated he would have given lot owners keys to the gate if they had wished to improve the access road; (3) there was limited entry around the gate by snowmobile, motorcycle, or on foot; (4) the gate was sometimes left open; (5) a declaration of restrictions remained on file stating the easement right; (6) "no trespassing" signs were not placed near the gate for at least 4 years after the gate was installed; and (7) appellant never affirmatively conveyed to the lot owners at any date certain his intention that they not go beyond the gate. Shors v. Branch, 221 M 390, 720 P2d 239, 43 St. Rep. 919 (1986).

Prescriptive Easement — Claimant Not Required to Pay Taxes: Payment of taxes is not required to establish a prescriptive easement. Murphy v. Atl. Richfield Co., 221 M 166, 717 P2d 558, 43 St. Rep. 717 (1986).

Doctrine of Agreed Boundary — No Boundary Proven: In 1920, a tenant of Christie's predecessor in interest built a fence which served as the boundary between two adjoining parcels now owned by Christie and Papke. In 1976, Christie had the property surveyed and learned that the fence had been improperly placed and that part of his property had been fenced out. Christie destroyed the 1920 fence and built a new one on the actual boundary line. Papke then destroyed that fence and built another where the 1920 fence had been. Under the doctrine of agreed boundary, Papke brought an action to quiet title in him to the portion in dispute. The Supreme Court affirmed the District Court's ruling that Papke had not established a claim under the agreed boundary doctrine because in order to establish an agreed boundary line, the evidence must show more than mere acquiescence and occupancy for the statutory period. The evidence must also show that there was uncertainty in the location of the line and that the coterminous owners fixed the line by express or implied agreement. The court ruled that Christie's long acquiescence in the existence of the 1920 fence did not create an implied agreement establishing a boundary. Christie v. Papke, 201 M 200, 657 P2d 88, 39 St. Rep. 2054 (1982), followed in Smithers v. Hagerman, 244 M 182, 797 P2d 177, 47 St. Rep. 1483 (1990).

Five-Year Occupancy Period — Suspension by Litigation: In 1954, the plaintiff moved to his ailing brother's ranch to care for his brother and the ranch. After his brother's death in 1969, a purported holographic will leaving the ranch to the plaintiff was contested by the deceased brother's personal representative. In 1978, the will was declared invalid. The plaintiff, who had remained in possession of the ranch during this time, then brought a quiet title action based on adverse possession. However, the period for adverse possession had not run because the personal representative had contested the plaintiff's right to the ranch through the litigation process, and during the pendency of that litigation, the period for adverse possession was suspended. Craddock v. Berryman, 198 M 155, 645 P2d 399, 39 St. Rep. 835 (1982).

Payment of Taxes When Dispute Settled by Agreement: When a boundary line has been agreed upon or fixed because of the uncertainty of the parties as to the true boundary and the deed description does not include the disputed land, the payment of taxes according to the deed description does constitute a payment upon such land for the purpose of satisfying this section. Nott v. Booke, 194 M 251, 633 P2d 678, 38 St. Rep. 1507 (1981), following Townsend v. Koukol, 148 M 1, 416 P2d 532 (1966).

Property Held Prior to Enactment of Tax Payment Requirement — No Adverse Possession Established: Plaintiffs were properly denied adverse possession of yard space on the basis of nonpayment of taxes even though no finding was made regarding whether the property was held prior to enactment of the statute requiring payment of taxes to establish adverse possession. The District Court's judgment is presumed correct, and the Supreme Court will draw every legitimate inference to support that presumption. Marta v. Smith, 191 M 179, 622 P2d 1011, 38 St. Rep. 28 (1981).

Payment of Taxes According to Survey Not Including Claimed Property: Petitioner does not have a valid claim of adverse possession of property where, even though petitioner paid taxes for 5 continuous years, taxes were assessed and paid according to a survey that did not include property petitioner was attempting to adversely claim. Huggans v. Weer, 189 M 334, 615 P2d 922 (1980).

Fact Issue as to Boundary Line Agreement in Adverse Possession Case — Summary Judgment Improper: In a case involving a contention of adverse possession, a genuine issue of material fact existed, namely, whether an agreement existed between the parties which extended the boundary line between their properties to include the disputed portion of land. Therefore, the motion for a summary judgment was granted in error. Nott v. Booke, 183 M 260, 598 P2d 1137 (1979).

Adverse Possession — Substantial Enclosure Sufficient: Adverse claimant need only prove his possession has been evidenced by a substantial enclosure and need not prove any further occupation, cultivation, or use. Plaintiff's assertion of undisputed possession from 1967-77 sufficiently establishes continuous and exclusive dominion over the property, and her uncontroverted payment of property taxes on the parcel during the same period satisfies 70-19-411. Swecker v. Dorn, 181 M 436, 593 P2d 1055 (1979).

From Permissive to Adverse Possession: Plaintiffs sought to convert permissive possession into adverse possession but failed to establish the requisite elements of exclusive and hostile possession as evidenced by admissions that they did not pay taxes year by year or object to the owners' occasional use of the property for fear of putting the latter on notice of plaintiffs' intent to acquire the land. Martin v. Randono, 175 M 321, 573 P2d 1156 (1978).

Payment of Taxes on Improvements: The court was correct in ruling that defendants in a quiet title action had not paid taxes on the disputed strip of property although they had paid taxes on improvements there. Therefore, the elements of adverse possession had not been established. Stephens v. Hurly, 172 M 269, 563 P2d 546 (1977), followed in Gue v. Olds, 245 M 117, 799 P2d 543, 47 St. Rep. 1906 (1990).

Taxes as Lease Payment: Where plaintiff's antecedent occupied property in question continuously for at least 15 years, enclosed and cultivated land, and paid all property taxes, this did not establish adverse possession where defendants were successors of title holders and payment of taxes was held to be agreed lease payment for use of land. Horacek v. Hudson, 167 M 394, 538 P2d 1019 (1975).

Payment of Back Taxes After Action Commenced: Since filing of a quiet title action freezes the respective rights of the parties at the time of the commencement of the action, party who sought to quiet title to land in himself was unable to establish his right to title by paying back taxes on land after commencement of the action where the adverse possessor had, prior to commencement of the action, occupied and claimed the land for a period of 5 years continuously and had paid all taxes assessed upon the land during that period. Brown v. Cartwright, 163 M 139, 515 P2d 684 (1973).

Sufficiency of Possession: In quiet title action, plaintiff's knowledge of adverse claimant's acceptance of consideration from power company for the granting of an easement, plaintiff's lack of dispute of ownership upon adverse claimant's offer to sell him the tract involved, adverse claimant's continued use of the tract, his employment of a surveyor and erection of a fence on the premises, and plaintiff's allowing adverse claimant to pay taxes on the tract for 5 years sufficiently established adverse claimant's possession during statutory period. Brown v. Cartwright 163 M 139, 515 P2d 684 (1973).

Burden of Proof: The burden of proving all the essential elements of adverse possession is upon the party alleging it, and he must prove that no taxes were levied or assessed against the land or that he has paid all taxes which were levied thereon. Townsend v. Koukol, 148 M 1, 416 P2d 532 (1966).

Essential Elements: To constitute adverse possession, the possession must be actual, feasible, exclusive, hostile, and continuous for the full period of years, and the party asserting adverse possession must have paid all the taxes levied and assessed upon the property during the statutory period. Townsend v. Koukol, 148 M 1, 416 P2d 532 (1966).

Easements:

Where the county maintained and paved a highway over the land of a private party for a period of more than 10 years, such county acquired an easement by prescription over the land and it was not necessary that the county pay taxes on the property during the statutory period. Brannon v. Lewis & Clark County, 143 M 200, 387 P2d 706 (1963).

The provision of this section that one claiming title to land by prescription must have paid taxes thereon during the statutory period has no application to the acquisition of such a title to an easement, an easement being merely appurtenant to the dominant estate and not taxable separate and apart from it. Ferguson v. Standley, 89 M 489, 300 P 245 (1931).

An easement for a ditch appurtenant to land is not subject to taxation independently of the land. Hence, the provision of this section has no application where the subject of the adverse possession alleged is a right-of-way for a ditch. Stetson v. Youngquist, 76 M 600, 248 P 196 (1926).

Prospective Operation:

This section does not apply to a claim perfected by adverse possession for the statutory period prior to 1917, the date of enactment of this section. Thibault v. Flynn, 133 M 461, 325 P2d 914 (1958).

This section is prospective and not retroactive in its operation. Verwolf v. Low Line Irrigation Co., 70 M 570, 227 P 68 (1924).

Burden of Proof: One claiming water rights by virtue of adverse possession has the burden of proving every element of the claim. Havre Irrigation Co. v. Majerus, 132 M 410, 318 P2d 1076 (1957).

Improvements Taxed: Where plaintiff and his predecessor had remained in open, exclusive, notorious, and adverse possession of an abandoned river channel for the statutory period and had paid taxes on improvements thereon but not on the real property because none had been assessed, it was sufficient for adverse possession. Helland v. Custer County, 127 M 23, 256 P2d 1085 (1953).

Contract as Basis for Possession: Person holding possession of land under contract for deed could not establish title by adverse possession. Hinton v. Staunton, 124 M 534, 228 P2d 461 (1951).

Nonpayment of Taxes:

This section requires the payment of taxes only if there are any to be paid. Barcus v. Galbreath, 122 M 537, 207 P2d 559 (1949).

Under this section, in no case of alleged adverse possession shall such possession be considered as established unless the claimant, his predecessor, and grantor shall have paid all taxes on the property for the statutory period. Hence, where an adverse claimant had not paid or offered to pay any taxes, the court properly found against him. Anderson v. Mace, 99 M 421, 45 P2d 771 (1935); Bearmouth Placer Co. v. Passerell, 73 M 306, 236 P 673 (1925).

Time of Payment of Taxes:

It is not necessary that the taxes be paid each year as assessed to meet the requirements of this section. Barcus v. Galbreath, 122 M 537, 207 P2d 559 (1949).

All that is required under this section is that the claimant shall have claimed the land for the statutory period continuously and that he has paid all taxes levied during that period, but it is not necessary that each year's taxes should have been paid when due. Laas v. All Persons, 121 M 43, 189 P2d 670 (1948).

Family Relationships: Where a son deeded residence property to his parents to create a life estate, they recording the deed and in the same transaction reconveying to him by deed which he held without recording, the actual title remained in him, and when they without his knowledge deeded the property to his sister who knew of the transaction, she paying the taxes, renting the premises to tenants, and collecting the rents, did not give notice to the son of a change of the sister's possession from a permissive to a hostile one to warrant the sister's grantee in claiming the property on the strength of the adverse possession of her grantor. Kelly v. Grainey, 113 M 520, 129 P2d 619 (1942).

Accretion Land: Where neither defendant nor his predecessor in interest had ever paid or offered to pay taxes on a tract of land formed by accretion and the subject of a suit to quiet title, he was in no position under this section to assert the defense of adverse possession. Smith v. Whitney, 105 M 523, 74 P2d 450 (1937).

Taxes Assessed to Owner: The fact that real property, title to which was claimed by adverse possession, had been at all times assessed to the record owner, the taxes, however, being paid by the adverse claimant during the entire statutory period, did not affect the right of the latter, in view of 15-8-201, declaring that a mistake in the name of the owner does not render the assessment invalid, and 15-8-201, to the effect that no assessment or collection of taxes is illegal on account of informality. Anderson v. Mace, 99 M 421, 45 P2d 771 (1935).

Water Rights: While a water right partakes of the nature of real estate, it is not such in any sense, and when considered alone and for the purpose of taxation it is personal property. Therefore this section, which deals with real property, has no application where title by prescription to a water right, independent of the land to which it was appurtenant, is asserted. Verwolf v. Low Line Irrigation Co., 70 M 570, 227 P 68 (1924).

70-19-412. Relation of landlord and tenant as affecting adverse possession.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Purpose of Section: This section was designed to prevent the lessee from questioning the title of his landlord. Johnstone v. Sanborn, 138 M 467, 358 P2d 399 (1960).

Waiver of Benefits: The benefits of this section may be waived by the terms of the lease. Johnstone v. Sanborn, 138 M 467, 358 P2d 399 (1960).

Lease Supporting Landlord's Claim: Evidence that claimant of land by adverse possession leased the land to others for grazing and allowed others to prospect for gold thereon and leased the land to a mining company supported his claim, for under this section possession by a tenant is the possession of his landlord. Sullivan v. Neel, 105 M 253, 73 P2d 206 (1937).

Redelivery to Landlord: Where it is shown that the relation of landlord and tenant has been terminated by redelivery of possession of a water right, it is error to give this section as an instruction for the reason that it applies only when the tenant is holding possession of property obtained under a lease. Talbott v. Butte City Water Co., 29 M 17, 73 P 1111 (1903).

70-19-413. Certain disabilities to suspend running of statutory period.

Compiler's Comments

1997 Amendment: Chapter 490 in (1)(b) substituted "committed pursuant to 53-21-127" for "seriously mentally ill"; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 40, Ch. 490, L. 1997, was a saving clause.

1981 Amendment: Deleted "or for dower" after "possession thereof" in (1).

Case Notes

Time for Action After Majority: Where the youngest of the heirs attained his majority more than the statutory period before action to establish title to land and they brought no action within that time, they could not defend such suit by party holding under tax deed and by adverse possession, on the ground that the heirs were minors at the time the tax deed was procured. Laas v. All Persons, 121 M 43, 189 P2d 670 (1948).

Minority of Heirs to Claim: Where the Statute of Limitations has commenced to run against a claim, its operation is not suspended by the subsequent death of the claimant because of the minority of his heirs. The Statute will continue to run notwithstanding such minority, and the heirs are bound to sue before the expiration of the statutory period just as decedent would have been had he lived. Commercial Bank & Trust Co. v. Jordan, 85 M 375, 278 P 832, 65 ALR 968 (1929).

70-19-426. Residential construction disputes — definitions.

Compiler's Comments

Preamble: The preamble attached to Ch. 412, L. 2003, provided: "WHEREAS, the Legislature finds that Montana needs an alternative method to resolve legitimate construction disputes that would reduce the need for litigation while adequately protecting the rights of homeowners; and

WHEREAS, the Legislature determines that an effective alternative dispute resolution mechanism in certain construction defect matters should require the claimant to file a notice of claim with the construction professional that the claimant asserts is responsible for the defect and providing the construction professional with the opportunity to resolve the claim without litigation."

Saving Clause: Section 6, Ch. 412, L. 2003, was a saving clause.

Severability: Section 7, Ch. 412, L. 2003, was a severability clause.

Effective Date: This section is effective October 1, 2003.

70-19-427. Residential construction disputes — limitation on consumer protection actions — notice and opportunity to repair — tolling of statute of limitations — presumption of compliance with construction standards.

Compiler's Comments

2021 Amendment: Chapter 46 in (1) inserted last sentence providing that a claim brought under this section precludes a claim from being brought under 30-14-133. Amendment effective October 1, 2021.

Saving Clause: Section 6, Ch. 412, L. 2003, was a saving clause.

Severability: Section 7, Ch. 412, L. 2003, was a severability clause.

Effective Date: This section is effective October 1, 2003.

70-19-428. Construction defect disputes — damages.

Compiler's Comments

Saving Clause: Section 6, Ch. 412, L. 2003, was a saving clause.

Severability: Section 7, Ch. 412, L. 2003, was a severability clause.

Effective Date: This section is effective October 1, 2003.

CHAPTER 20
TRANSFER OF REAL PROPERTY

Chapter Case Notes

Revision to Deed to Reflect Zoning Classification — Summary Judgment Proper: After the plaintiff purchased a condominium, the title company changed the deed to reflect the zoning classification of the building. The plaintiff argued that changing the deed made it impossible for her to secure financing for the property and sued the title company. The District Court granted the title company summary judgment, concluding that the zoning classification, not the change to the deed, had made traditional financing impossible. The plaintiff appealed and the Supreme Court affirmed, agreeing that while a deed contains a legal description of the property subject to transfer, it does not alter the zoning of the property. McCulley v. Amer. Land Title Co., 2013 MT 89, 369 Mont. 433, 300 P.3d 679.

Summary Judgment Properly Awarded — No Issue of Material Fact Demonstrated in Claim for Loss of Sale: A seller alleged that a potential sale fell through because the previous owners and their insurance company erroneously reported a claim for water damage, but the Supreme Court held that the District Court did not err in administering the proceedings or in awarding summary judgment when the seller failed to demonstrate any issue of fact about the reason the buy-sell was terminated and when the buy-sell expressly allowed the potential buyers to terminate the agreement. Ternes v. State Farm Fire & Cas. Co., 2011 MT 156, 361 Mont. 129, 257 P.3d 352.

Specific Performance of Property Buyout Proper: In 1960, four couples entered a property agreement regarding the use and maintenance of a vacation cabin on Holter Lake. Each couple received an undivided one-fourth interest in the property. The agreement contained a provision allowing cotenants to buy out a couple's interest for $1,000. Over the years, all the parties died except Berger, who in 1991 tendered $1,334 to Baker's estate for her interest in the property, which by then constituted a one-third share. Because good consideration was part of the original agreement and the parties entered the agreement with free and equal bargaining powers, knowing that they could predecease the other couples and leave the surviving couple or spouse with full ownership of the property, specific performance of the original agreement was proper despite the fact that the property had increased in value significantly over time. Baker v. Berger, 265 M 21, 873 P2d 940, 51 St. Rep. 389 (1994).

Application of Procuring Cause Doctrine to Exclusive Listing Agreements: The procuring cause doctrine, which permits a broker to show that the broker's part of the contract was performed and that the principal reaped a benefit from the efforts, is not confined to consideration of nonexclusive listing agreements. It applies in all situations unless the parties agree otherwise in the listing contract. Lane v. Smith, 255 M 218, 841 P2d 1143, 49 St. Rep. 974 (1992), clarifying Flinders v. Gilbert, 141 M 442, 378 P2d 385 (1963), and followed in Hall & Hall, Inc. v. Hyde, 264 M 190, 870 P2d 1362, 51 St. Rep. 257 (1994).

Contract for Deed — No Right of Buyer to Suspend Performance for Failure of Consideration Not Attributable to Sellers: Petty made the downpayment on a contract for deed that called for conveyance of part of the property to Petty upon downpayment. Petty assumed the property was unzoned. The contract stated that Petty would use the property for a recreational vehicle park and that if after Petty's due diligence Petty could not obtain zoning approval within 30 months after the contract was signed, the purchase price would be reduced by $25,000. The bank that held a preexisting mortgage on the property told Petty it would not release the property until he brought current his payments to the sellers and the bank. Over 30 months passed from the time of the downpayment until the sellers filed suit, during which time Petty made no payments to the sellers or the bank and did not obtain zoning approval. Petty did not request a deed until 27 months after making the downpayment. Petty was not entitled to suspend performance for failure of delivery of the deed and transfer of the property because he was accountable, not the sellers. The award of damages to the sellers was affirmed. Liddle v. Petty, 249 M 442, 816 P2d 1066, 48 St. Rep. 779 (1991), followed in Norwood v. Serv. Distrib., Inc., 2000 MT 4, 297 M 473, 994 P2d 25, 57 St. Rep. 8 (2000).

Contract for Deed — Time for Providing Marketable Title: Unless the contract provides otherwise, a seller need not provide marketable title to real property sold under a contract for deed until the date set for final payment and tender of the deed. Liddle v. Petty, 249 M 442, 816 P2d 1066, 48 St. Rep. 779 (1991).

Default in Payment as Material Breach of Contract for Deed: If a party materially breaches a contract for deed, the injured party is entitled to suspend his performance. Default in payment of any installment is a distinct breach and gives the seller the right to declare a forfeiture. Determination of whether the breach is material is a question of fact. Liddle v. Petty, 249 M 442, 816 P2d 1066, 48 St. Rep. 779 (1991), distinguished in Eschenbacher v. Anderson, 2001 MT 206, 306 M 321, 34 P3d 87 (2001).

Suspension of Performance Upon Material Breach of Contract: As part of a contract for sale of real property, seller agreed to obtain release of mortgage within 1 year, and failure to do so constituted a material breach entitling buyer to suspend performance. Sjoberg v. Kravik, 233 M 33, 759 P2d 966, 45 St. Rep. 1270 (1988).

Consent to Contractual Assignment Refused — Breach of Contract: A contract for sale of real property provided that assignment could be accomplished only with written consent of the seller and that such consent could not be unreasonably withheld. The District Court properly found that the contract was breached by the seller's failure to provide a sufficient reason for refusing to consent to an assignment and that seller was therefore responsible for damages. Erban v. Monforton, 227 M 531, 740 P2d 677, 44 St. Rep. 1290 (1987).

Illegally Acknowledged Assignment Document: Since a broker altered an assignment document after it was signed by taping the acknowledgment paragraph to the document and illegally presenting it to a notary for an acknowledgment and the notary illegally acknowledged the purchasers' signatures without requiring their presence, the assignment was invalid and could not convey a security interest in the contract for deed to secure performance of the promissory note signed by the purchasers. Hoefer v. Wilckens, 210 M 218, 684 P2d 468, 41 St. Rep. 1019 (1984).

Bank's Fiduciary Duty to Customers It Gives Financial Advice — Real Estate Sales: Wife, whose husband had recently died, signed a contract for a deed to her ranch with Dittman, who signed as "trustee". There were two other purchasers, who did not sign: a person to whom, according to the evidence, wife would not have knowingly sold and the marketing officer of the bank used by the wife and husband for some 24 years. Wife was unfamiliar with real estate and financial affairs and relied upon the advice of various bank officers with regard to the sale of the ranch. This put the bank in a prima facie fiduciary relationship as to the wife. The relationship and its attendant duties extended to the advising officers in their dealings with the wife in regard to sale of the ranch. The marketing officer thus had a duty to fully inform the wife and protect her interests. This duty he breached, and the breach amounted to constructive fraud, where evidence showed that: (1) the contract price and terms were disadvantageous to the wife; (2) the true purchasers were not disclosed to her either by the contract or the marketing officer; (3) the purchasers intended to and began to subdivide and sell the ranch, though the marketing officer knew wife apparently did not wish this, having refused an earlier offer to purchase with right to subdivide; (4) the marketing officer had extensive financial interests involving loans to him from his bank, and an audit of the bank recommended that in view of this his lending authority should be eliminated or curtailed; and (5) the lower court was unimpressed with the way in which wife's attorney in the negotiations represented her interests. The lower court properly ordered the contract for deed rescinded. Deist v. Wachholz, 208 M 207, 678 P2d 188, 41 St. Rep. 286 (1984).

Specific Performance of Contract for Deed: Plaintiffs, purchasers under contract for deed, tendered the balance due under the contract. Sellers were unable to provide clear and merchantable title. The Supreme Court held plaintiffs entitled to summary judgment granting specific performance against the assignee of a previous buyer. Pond v. Lindell, 194 M 240, 632 P2d 1107, 38 St. Rep. 1276 (1981).

Real Estate Listing — Capability of Performance — Sale by Cotenant: Plaintiff and defendant entered into a real estate listing agreement. Defendant was a cotenant in the property with her husband. The defendant contended that listing contained an erroneous asking price, did not adequately describe the property to be sold, and was signed only by the defendant. A cotenant in a joint tenancy has a right and ability to sell her interest. Defendant was free to act and capable of acting without her husband, even though the husband knew at all times that she had put the property up for sale. Because she was capable of entering and performing contracts and was legally responsible for her acts, the contract was fully capable of being performed. Barrett v. Ballard, 191 M 39, 622 P2d 180, 37 St. Rep. 2038 (1980).

Sale Without Authority: Because it holds land in public trust and it failed to comply with statutory requirements for land sales, the Department of Highways (now Department of Transportation) was without authority to make the sale of land. The deed derived from the sale without authority was held void. Therefore, the Department of Highways (now Department of Transportation) cannot be estopped from denying the validity of the deed. Norman v. St., 182 M 439, 597 P2d 715 (1979).

Chapter Law Review Articles

Hidden But Discoverable Defects: Resolving the Conflicts Between Real Estate Buyers and Brokers, Culum, 50 Mont. L. Rev. 331 (1989).

Breach of an Executory Agreement to Convey Real Property, Burnham, 44 Mont. L. Rev. 29 (1983).

The Montana Real Estate Agent: An Overview of the Law and a Proposed Listing Agreement, Schaplow, 44 Mont. L. Rev. 197 (1983).

The Default Clause in the Installment Land Contract, Isham, 42 Mont. L. Rev. 110 (1981).

Toward Abolishing Installment Land Sale Contracts, Lohn, 36 Mont. L. Rev. 110 (1975).

Part 1
Method of Transfer

Part Case Notes

Limitation on Tax-Free Exchange Clause: Defendants contacted plaintiff to sell their ranch. The agreement allowed for a multiple listing. An interested buyer was found. Later a tax-free property exchange clause was inserted in the contract. Defendants located property in Arizona, but the buyer would not purchase it for exchange because of a defect in defendants' title. The Arizona property was sold before defendants cleared their title. Defendants eventually sold their property to the buyer. Defendants refused to pay the realtor commission, and a suit was filed. Defendants counterclaimed against the buyer for refusing to purchase the Arizona property pursuant to the exchange clause. The District Court refused defendants' offered instructions on alleged breach of the exchange clause. On appeal, the Supreme Court upheld the District Court, saying that as drafted the exchange clause placed an unreasonable burden on the buyer. the buyer could have been forced to exchange for an unmerchantable title. The court held the exchange clause in the contract invalid. The court did not reject the use of exchange clauses in real estate contracts but said they should be conditioned so as to require merchantability to be proven before the buyer must obligate himself to purchase exchange property. Adams v. Cheney, 203 M 187, 661 P2d 434, 40 St. Rep. 383 (1983).

Part Attorney General's Opinions

Use of Quitclaim Deed When Grantor Does Not Own Entire Block of Property: When a grantor proposes to transfer a quarter-section block of property (160 acres) that has within its boundaries two smaller parcels (10 and 15 acres in size) that the grantor does not own, he is not barred from using a quitclaim deed transferring the entire block, but that action is inadvisable and subject to potential liability. 42 A.G. Op. 121 (1988).

70-20-101. Transfer to be in writing — statute of frauds.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: Near beginning, after "1 year", deleted "or any trust over or power concerning it or in any manner relating thereto".

Case Notes

Unsigned Correction Certificate Sufficient to Establish Easement: The defendant gated a common driveway on property acquired subject to conveyance documents with an unsigned correction certificate documenting an easement for the driveway. The District Court ruled that the plaintiffs had an express private road easement and a prescriptive easement to travel across the defendant's land. On appeal, the Supreme Court affirmed, finding that the unsigned correction certificate did not violate the statute of frauds and gave notice of the reserved easement. Walker v. Phillips, 2018 MT 237, 393 Mont. 46, 427 P.3d 92.

Substantial Evidence of Validity of Deed — No Conversion of Funds: The plaintiff brought suit against the defendants alleging that the defendants' claim to the land in question was based on a falsified notarized signature on a warranty deed and that the defendants had wrongfully converted funds from the plaintiff's bank account to make payments for the property. During the bench trial, the parties provided conflicting testimony about the circumstances surrounding the deed, and the District Court concluded that without clear and convincing evidence of forgery, the plaintiff was unable to overcome the presumption of the notarized document's authenticity. The District Court also determined that the plaintiff had delivered the checks used by the defendants to make payments for the property, which defeated his argument that the defendants had wrongfully exerted dominion over the funds in that bank account. On appeal, the Supreme Court upheld the decision, noting that the District Court was in the best position to evaluate the credibility of the witnesses and to give the testimony its proper weight. Substantial evidence supported the court's finding that the deed from the plaintiff to the defendants was valid and properly notarized. Likewise, the District Court resolved the conflicting accounts regarding the funds when it found the defendants' testimony more credible. Willis v. Fertterer, 2013 MT 282, 372 Mont. 108, 310 P.3d 544.

Representation of Contract to Another Party — Use of Statute of Frauds to Later Deny Contract in Real Estate Transaction Precluded: The Kluvers and McRaes commenced a lawsuit alleging that several power companies had contaminated their ground water. A mediation session between the parties ended with an e-mail detailing a memorandum of understanding for a settlement agreement from the Kluvers' attorney to an attorney for the power companies, including the transfer of real estate between the parties. Although Karson Kluver expressed relief to the McRaes that the case was over, the Kluvers later claimed that the settlement agreement was tentative and invalid. Although there was no signed writing to show the Kluvers assented to the agreement prepared by their attorney at the mediation conference, because Karson Kluver later represented that a settlement had been reached to another party, he could not invoke the statute of frauds to deny the agreement. Kluver v. PPL Montana, LLC, 2012 MT 321, 368 Mont. 101, 293 P.3d 817.

Purchase of Property — Statute of Frauds — Claim Regarding Interest in Property Dismissed: Plaintiffs contended they had an oral agreement to lease and purchase real property from the defendants and demanded a portion of insurance proceeds paid to the defendants after a fire destroyed the real property at issue. The parties stipulated that there was no written contract between them to enter a lease for a period longer than 1 year or to purchase the property. Because the statute of frauds requires both leases for a period longer than 1 year and agreements to purchase the property to be in writing, the Supreme Court affirmed the District Court's grant of summary judgment in favor of the defendants. Hinebauch v. McRae, 2011 MT 270, 362 Mont. 358, 264 P.3d 1098.

Building Restriction Line on Subdivision Plat Creating Negative Easement Precluding Building in Restricted Portion of Lot: Defendant constructed a garage that was located on both sides of a building restriction line marked on a subdivision plat. Plaintiffs sought removal of the portion of the garage that crossed the building restriction line. Although defendant was aware of the building restriction line when purchasing the subdivision property, defendant contended that an easement was not created because the deed failed to have express language of the grantor's request to create an easement and because the deed did not identify the dominant and servient tenement or give the servient tenement knowledge of the building restriction line's use and necessity. The District Court found that defendant was aware of the building restriction by virtue of the recorded plat and a special exception to the title policy obtained upon purchase of the property, and defendant was ordered to remove the garage. Defendant appealed, but the Supreme Court affirmed. The description of the building restriction line on the subdivision plat clearly created a negative easement in plaintiffs' favor, restricting any building on a portion of defendant's lot, so the District Court did not err in prohibiting defendant from building in that area. Plaintiffs' easement was thus enforceable and removal of the garage was proper. Conway v. Miller, 2010 MT 103, 356 Mont. 231, 232 P.3d 390, following Halverson v. Turner, 268 Mont. 168, 885 P.2d 1285 (1994), and Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 Mont. 52, 993 P.2d 688, and distinguishing Blazer v. Wall, 2008 MT 145, 343 Mont. 173, 183 P.3d 84. See also Lewis & Clark County v. Wirth, 2022 MT 105, 409 Mont. 1, 510 P.3d 1206.

No Improper Reliance on Extrinsic Evidence in Finding of Valid and Enforceable Express 60-Foot Easement for Subdivision: Defendant acquired certain property after an express easement across the property was created by the former owner. Defendant refused to allow the building of an access road across the property, contending that the easement agreement was invalid on several grounds. The District Court examined the agreement and concluded that the easement was valid and enforceable and granted summary judgment for plaintiffs. On appeal, defendant asserted that the District Court erroneously relied on facts outside the agreement, making summary judgment inappropriate, but the Supreme Court affirmed. For purposes of interpreting a writing granting an interest in real property, evidence of the surrounding circumstances, including the situation of the property and the context of the parties' agreement, may be shown so that the judge is placed in the position of those whose language the judge is to interpret. However, to comply with the statute of frauds and the recording system, the writing itself must ultimately stand on its own and meet the formal requirements for granting a property interest. In this case, the District Court was allowed to consider various facts not contained in the easement agreement for purposes of understanding the situation, but the court's analysis of the easement's validity apparently was limited to the face of the agreement, so the court did not erroneously rely on extrinsic facts. The easement agreement satisfied the formal requirements for expressly granting an easement and created a valid 60-foot emergency public access and utility easement that was enforceable against defendant. Additionally, the District Court properly concluded that because there was no dominant tenement, the easement was in gross and could be used by members of the public to travel between the subdivision and the public highway for emergency purposes and to provide utility services. There being no questions of material fact, summary judgment was proper. Broadwater Dev., LLC v. Nelson, 2009 MT 317, 352 M 401, 219 P3d 492 (2009), distinguishing Blazer v. Wall, 2008 MT 145, 343 M 173, 183 P3d 84 (2008). See also Kuhlman v. Rivera, 216 M 353, 701 P2d 982 (1985).

Ratification of Void Deeds — Authority of Agent to Convey Property — Title Properly Quieted: Defendant third party raised three challenges to a District Court's conclusion that deeds voided by forgery during transfer were nevertheless ratified by subsequent actions of the parties and contended that the court erred by quieting title to plaintiff. The first argument dealt with the fact that one of the parties never received proper written authority to convey the property to plaintiff, so ratification was voided under the statute of frauds. The Supreme Court noted that an agreement to sell an interest in property must be in writing and that an agent's authority to sell property must also be in writing. However, the agency relationship may arise either by precedent authorization or by subsequent ratification. In this case, the warranty deeds constituted subsequent written authority for conveyance of the property, so the statute of frauds was not violated for want of written authorization. The second argument was that the criteria for ratification were not satisfied, but after examining the chain of title, the Supreme Court found that the personal actions of the principal ratified the deed and that the criteria for ratification were satisfied. The third argument was that defendant was prejudiced as a third party by ratification, but that argument did not prevail because defendant could not have been prejudiced since defendant's interest in the property was invalid both prior to and after ratification and defendant could have become aware of the void deeds by conducting a title check and avoiding the problem. Lastly, title was properly quieted in plaintiff because defendants with prior interests in the property stipulated that they no longer claimed any right, title, or interest in the property. Plaintiff's deed was superior because it was the first to be recorded and had been ratified, and plaintiff was therefore entitled to have quiet title to the property. The District Court was affirmed. Erler v. Creative Fin. & Inv., LLC, 2009 MT 36, 349 M 207, 203 P3d 744 (2009). See also U.S. v. Heinszen, 206 US 370 (1907), Audit Serv., Inc. v. Francis Tindall Constr., 183 M 474, 600 P2d 811 (1979), Safeco Ins. Co. v. Lovely Agency, 200 M 447, 652 P2d 1160 (1982), and Moore v. Adolph, 242 M 221, 789 P2d 1239 (1990).

Lack of Standing of Stranger to Contract to Bring Action to Enforce Contract: A stranger to a contract who is not an intended third-party beneficiary lacks standing to bring an action based on a violation of the contract, including compliance with the statute of frauds. Palmer v. Bahm, 2006 MT 29, 331 M 105, 128 P3d 1031 (2006), followed in Dick Anderson Constr., Inc. v. Monroe Constr. Co., LLC, 2009 MT 416, 353 M 534, 221 P3d 675 (2009). See also Ludwig v. Spoklie, 280 M 315, 930 P2d 56 (1996).

Use of Shared Access Easement Following Amendment of Plat — Statute of Frauds Inapplicable: Two neighbors signed an agreement in the form of an amended plat to relocate a common boundary and share an access easement. Both parties used the access road after executing the agreement, so part performance occurred. A dispute arose, and the District Court concluded that the amended plat constituted an instrument in writing sufficient to satisfy the statute of frauds. On appeal, the parties questioned whether the memorialized amended plat was a sufficient instrument in writing to comply with the statute of frauds. The Supreme Court did not reach the question, concluding that because the parties performed their obligations under the agreement and because part performance occurred at least for a time, the statute of frauds could not defeat the parties' agreement to share the access easement. Although the District Court did not reach its conclusion on the same grounds, the conclusion was nevertheless correct, and the Supreme Court affirmed. Morton v. Lanier, 2002 MT 214, 311 M 301, 55 P3d 380 (2002).

Statement of Present Intent to Perform or Not Perform Not Considered Contract — Lease Not Altered by Gratuitous Promise: Defendants had a 99-year lease on a ranch owned by Earl. The lease provided that in case of need, it was subject to recall on demand by Earl. When Earl had to be placed in a nursing home without the assets to bear her expenses and needed to liquidate the property in order to qualify for federal benefits, defendants were notified that the lease was being terminated. Defendants objected, citing a letter from Earl purporting to gift to them all interest in the ranch. However, to be a gift, a transfer of property must be irrevocable, complete, without adequate or full consideration, and unmistakably intended to divest the donor of title, dominion, and control over the property. The District Court concluded that sufficient need existed to terminate the lease and denied defendants' motion to resolve any effect that the letter had on the original lease. The Supreme Court affirmed, finding that the letter was a mere statement by Earl of present intent to perform or not perform an act in the future and that such a gratuitous promise did not constitute a valid written modification of the original lease. Earl v. Beager, 2001 MT 44, 304 M 258, 20 P3d 788 (2001).

Deed Left Blank as to Legal Description Void to Convey Title Unless Authority to Complete Deed Given in Writing: McCormick executed two deeds, one warranty and the other quitclaim, and gave them to Brevig. The deeds were both dated and notarized, but McCormick did not fill in the legal description of the property to be conveyed. Brevig later took the deeds to his attorney and had the legal descriptions completed and subsequently filed the deeds without notifying McCormick. The District Court concluded that the warranty deed was invalid because Brevig did not have written permission from McCormick to fill in the legal descriptions. In a case of first impression, the Supreme Court agreed. Pursuant to the statute of frauds, a conveyance of an interest in real property must be in writing, and it would be a violation of the statute to permit modification of a deed after delivery solely upon oral authority. Therefore, the authority to complete the legal description of property to be conveyed in a deed must be given in writing by the grantor if the legal description is blank. McCormick v. Brevig, 1999 MT 86, 294 M 144, 980 P2d 603, 56 St. Rep. 355 (1999). See also Boyd Lumber Co. v. Mills, 92 SE 534 (Ga. 1917), Jones v. Coulter, 243 P 487 (Calif. Dist. Ct. App. 1925), Barth v. Barth, 143 P2d 542 (Wash. 1943), and Dahlberg v. Johnson's Estate, 211 P2d 764 (Idaho 1949).

Statute of Frauds and Statute of Limitations Not Applicable to Constructive Trust: The husband argued that the statute of frauds and the statute of limitations for agreements not in writing barred his wife's claim to marital property. However, in this case, a constructive trust should have been created for the property. Constructive trusts arise by operation of law, so this section did not bar the wife's claim because under 70-20-102, this section may not be construed to prevent creation of a trust. Further, because the wife was not attempting to directly enforce a verbal agreement, the requirement in 27-2-202 that an action based on a contract, account, or promise not founded on an instrument in writing be brought within 5 years also did not apply. In re Marriage of Moss, 1999 MT 62, 293 M 500, 977 P2d 322, 56 St. Rep. 257 (1999).

Possession of Real Property Insufficient to Grant Title Against Good Faith Purchasers — No Adverse Possession Shown: In 1989, the Luloffs bought part of a ranch from the Manweilers by a deed that excluded "Tract B". The Luloffs mistakenly assumed that Tract B was the part of the ranch that had been occupied by the Blackburns for approximately 4 years. When the Luloffs later discovered that Tract B was another part of the ranch, they brought an action to have the Blackburns evicted, and the District Court granted summary judgment. The Supreme Court held that summary judgment was correctly granted because there was no contract between the Manweilers and the Blackburns satisfying the statute of frauds for the sale of the property to the Blackburns. The Supreme Court held that the Blackburns' mere possession was insufficient against the Luloffs, who had purchased the ranch as bona fide purchasers in good faith, because they were without notice of any claim of title by the Blackburns. The Supreme Court noted that the Blackburns could not make a claim of title because they had mere possession, which did not satisfy the requirements for adverse possession because the Blackburns had not paid taxes upon the property. Luloff v. Blackburn, 274 M 64, 906 P2d 189, 52 St. Rep. 1124 (1995).

Transfer of Property Without Written Document Constituting Inheritance — Included in Marital Estate: Husband appealed from a District Court decision that distributed as part of the marital estate to the wife a home built for the couple by the husband's father, who had died without executing a written document transferring the property to the couple. The Supreme Court affirmed the lower court's decision, holding that without a writing signed by the father to effect the inter vivos transfer to the couple, the home was inherited by the husband through the father's will. The inherited property was properly included as part of the marital estate. In re Marriage of Isaak, 257 M 176, 848 P2d 1014, 50 St. Rep. 219 (1993), overruled, with regard to a District Court's ability to distribute inheritance property without strict application of the factors in 40-4-202, in In re Marriage of Smith, 264 M 306, 871 P2d 884, 51 St. Rep. 277 (1994), and followed in Luloff v. Blackburn, 274 M 64, 906 P2d 189, 52 St. Rep. 1124 (1995). Smith was expressly overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Negative Easement Based on Oral Agreement — Statute of Frauds Inapplicable: Appellants claimed an oral agreement made in 1967 subjected land known as the Base Area Chalet to a negative easement that restricted the property to noncommercial activities. The Supreme Court found that a written 1971 agreement only contracted to convey property described as "sellers' land" which had been "subject to ski easement"; however, the chalet property was conveyed away by appellants in 1967 and had never been subject to the ski easement. Since the Base Area Chalet did not belong to "sellers" and was not subject to the easement in 1971, the 1971 agreement had no effect on the chalet property. For the same reason, the 1971 agreement could not satisfy the Statute of Frauds for any alleged oral agreement that would create a negative easement on the chalet property. Haggerty v. Gallatin County, 221 M 109, 717 P2d 550, 43 St. Rep. 674 (1986).

Oral Contract for Purchase of House — Part Performance — Statute of Frauds Inapplicable — No Refund to Purchasers on Default: Defendant agreed to sell home to friends upon a $10,000 downpayment and assumption of defendant's loan. Plaintiffs did not qualify for assumption, so defendant prepared lease for plaintiffs' signature. They refused to sign because it was not a contract for deed. Defendant allowed plaintiffs to take occupancy, and they made sporadic payments for 4 years. Defendant's patience waned when the bank exercised acceleration provision for delinquencies. Plaintiffs sued for refund of payments. The court found an oral contract for deed. The Statute of Frauds was inapplicable because defendant was, at all times, willing to effect sale and transfer of the home. He was not required to refund plaintiffs' payments. Since no lease was ever signed and no rental relationship created, landlord and tenant law was inapplicable. Hayes v. Hartelius, 215 M 391, 697 P2d 1349, 42 St. Rep. 457 (1985).

Validity of Typewritten Signature — Real Estate Contract: The seller of a tract of land negotiated with and made offers to one party, then withdrew the offers and negotiated with a second party. The second party made the seller an offer which the seller accepted by telegram. The first party sued the seller who then made an agreement with the first party and sent a notice of rescission to the second party. The second party then sued both the first party and the seller. On appeal, the narrow issue was whether the typewritten name at the bottom of the telegram of acceptance of a buyer's offer was a sufficient subscription to satisfy the Statute of Frauds. Because the seller must have intended to authenticate her written name on the telegram to satisfy the Statute of Frauds, the court looked to the wording of the acceptance. It found the words "Please consider this my written acceptance . . ." on the telegram, words suggested by the buyer, indicative of a mutual interest to be bound. Hillstrom v. Gosnay, 188 M 388, 614 P2d 466 (1980).

Adverse Possession — Parol Grant: A parol grant of real property can serve as a foundation for a claim of title by adverse possession, notwithstanding the Statute of Frauds. Swecker v. Dorn, 181 M 436, 593 P2d 1055 (1979).

Conveyance Required for Trade or Exchange:

An agreement whereby lessee sold his liquor license for $9,000 plus a promise by the buyer that he would assume the lease on property in which lessee conducted his cafe satisfied the requirements of this section in that the agreement was in writing and signed by the lessee. Kintner v. Harr, 146 M 461, 408 P2d 487 (1965).

A trade or exchange of lands is not effective under this section unless deeds of conveyance pass between the parties. Price v. W. Life Ins. Co., 115 M 509, 146 P2d 165 (1944).

Parol Evidence of Signature: Where quitclaim deed was typewritten on printed form which contained lines for the signatures and the acknowledgment but the paper showed no evidence that any name had ever been signed thereto or any notary's seal attached, it could not be shown by parol evidence that the deed was actually signed. Miller v. Miller, 121 M 55, 190 P2d 72 (1948).

Deeding to Another, and Holding Unrecorded Reconveyance, Life Estate Not Created: Where a son deeded residence property to his parents for purpose of giving them a life estate therein and they at the same time reconveyed property to him, the first deed being recorded but not the second until many years after when litigation over ownership arose, the two instruments constituted a single transaction with record title in the parents and legal title in the son, and since a life estate can be created under this section only in writing or by operation of law, such an estate was not thereby created. Kelly v. Grainey, 113 M 520, 129 P2d 619 (1942).

Easements: An easement is an interest in land that cannot be created, granted, or transferred except by operation of law, by an instrument in writing, or by prescription. Mannix v. Powell County, 75 M 202, 243 P 568 (1926); Smith v. Denniff, 24 M 20, 60 P 398 (1900).

Statute of Frauds:

Performance, partial or complete, under an invalid oral assignment of a lease for a term exceeding 1 year, takes the case out of the Statute and renders the tenant liable according to its terms. Wells v. Waddell, 59 M 436, 196 P 1000 (1921).

The Statute of Frauds is not intended to cloak fraud but to prevent it, its aim being to avoid the assertion of claims which from their nature should be evidenced by an instrument in writing signed by the party to be charged or his duly authorized agent. Wells v. Waddell, 59 M 436, 196 P 1000 (1921).

Law Review Articles

Validity of Deed Given Under Compulsion of "Foreign" Court, 12 Mont. L. Rev. 59 (1951).

70-20-102. Exceptions to statute of frauds.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Sufficient Indica of Mutual Assent to Find Written Contract — Compensatory Damages — Constructive Fraud — Statute of Frauds — Statute of Limitations: The defendants sold a tract of land from their parents' estate despite the fact that the plaintiffs had an oral agreement with the parents for the purchase of a portion of the property. The District Court properly determined that the plaintiffs had an enforceable contract to buy the property under 70-20-102 and 30-11-111 based on (1) an unsigned land purchase agreement, (2) a land survey, (3) a check issued by one of the plaintiffs that was endorsed and deposited, and (4) a letter to a tax preparer referencing the check received as partial payment for the property at issue. Because the plaintiffs had an enforceable contract, the District Court properly determined that the plaintiffs suffered compensatory damages and that the personal representative's statements showed constructive fraud. The Supreme Court held that the District Court did not err in its conclusion that the limitations provided under 72-3-803 did not bar the plaintiffs' claim. Wood v. Anderson, 2017 MT 180, 388 Mont. 166, 399 P.3d 304.

Statute of Frauds — No Bar to Fraud Claim: Because the plaintiffs were not merely seeking to enforce an oral agreement, the Supreme Court overturned a District Court finding that the statute of frauds precluded a plaintiff's claim of actual fraud, constructive fraud, and violations of the Montana Consumer Protection Act. Rather, the plaintiffs were alleging that the defendants misrepresented an existing real estate loan and serviced the loan in an unfair and deceptive manner, a claim that relied on the oral contract as evidence of alleged fraud but that did not rely on the validity of the oral contract itself. Morrow v. Bank of America, N.A., 2014 MT 117, 375 Mont. 38, 324 P.3d 1167. However, see Bank of America, N.A. v. Alexander, 2017 MT 31, 386 Mont. 305, 389 P.3d 1020, in which a claim that the parties modified an oral agreement was dismissed because it was barred by the statute of frauds.

No Improper Reliance on Extrinsic Evidence in Finding of Valid and Enforceable Express 60-Foot Easement for Subdivision: Defendant acquired certain property after an express easement across the property was created by the former owner. Defendant refused to allow the building of an access road across the property, contending that the easement agreement was invalid on several grounds. The District Court examined the agreement and concluded that the easement was valid and enforceable and granted summary judgment for plaintiffs. On appeal, defendant asserted that the District Court erroneously relied on facts outside the agreement, making summary judgment inappropriate, but the Supreme Court affirmed. For purposes of interpreting a writing granting an interest in real property, evidence of the surrounding circumstances, including the situation of the property and the context of the parties' agreement, may be shown so that the judge is placed in the position of those whose language the judge is to interpret. However, to comply with the statute of frauds and the recording system, the writing itself must ultimately stand on its own and meet the formal requirements for granting a property interest. In this case, the District Court was allowed to consider various facts not contained in the easement agreement for purposes of understanding the situation, but the court's analysis of the easement's validity apparently was limited to the face of the agreement, so the court did not erroneously rely on extrinsic facts. The easement agreement satisfied the formal requirements for expressly granting an easement and created a valid 60-foot emergency public access and utility easement that was enforceable against defendant. Additionally, the District Court properly concluded that because there was no dominant tenement, the easement was in gross and could be used by members of the public to travel between the subdivision and the public highway for emergency purposes and to provide utility services. There being no questions of material fact, summary judgment was proper. Broadwater Dev., LLC v. Nelson, 2009 MT 317, 352 M 401, 219 P3d 492 (2009), distinguishing Blazer v. Wall, 2008 MT 145, 343 M 173, 183 P3d 84 (2008). See also Kuhlman v. Rivera, 216 M 353, 701 P2d 982 (1985).

Use of Shared Access Easement Following Amendment of Plat — Statute of Frauds Inapplicable: Two neighbors signed an agreement in the form of an amended plat to relocate a common boundary and share an access easement. Both parties used the access road after executing the agreement, so part performance occurred. A dispute arose, and the District Court concluded that the amended plat constituted an instrument in writing sufficient to satisfy the statute of frauds. On appeal, the parties questioned whether the memorialized amended plat was a sufficient instrument in writing to comply with the statute of frauds. The Supreme Court did not reach the question, concluding that because the parties performed their obligations under the agreement and because part performance occurred at least for a time, the statute of frauds could not defeat the parties' agreement to share the access easement. Although the District Court did not reach its conclusion on the same grounds, the conclusion was nevertheless correct, and the Supreme Court affirmed. Morton v. Lanier, 2002 MT 214, 311 M 301, 55 P3d 380 (2002).

Statute of Frauds and Statute of Limitations Not Applicable to Constructive Trust: The husband argued that the statute of frauds and the statute of limitations for agreements not in writing barred his wife's claim to marital property. However, in this case, a constructive trust should have been created for the property. Constructive trusts arise by operation of law, so 70-20-101 did not bar the wife's claim because under this section, 70-20-101 may not be construed to prevent creation of a trust. Further, because the wife was not attempting to directly enforce a verbal agreement, the requirement in 27-2-202 that an action based on a contract, account, or promise not founded on an instrument in writing be brought within 5 years also did not apply. In re Marriage of Moss, 1999 MT 62, 293 M 500, 977 P2d 322, 56 St. Rep. 257 (1999).

Negative Easement Based on Oral Agreement — Statute of Frauds Inapplicable: Appellants claimed an oral agreement made in 1967 subjected land known as the Base Area Chalet to a negative easement that restricted the property to noncommercial activities. The Supreme Court found that a written 1971 agreement only contracted to convey property described as "sellers' land" which had been "subject to ski easement"; however, the chalet property was conveyed away by appellants in 1967 and had never been subject to the ski easement. Since the Base Area Chalet did not belong to "sellers" and was not subject to the easement in 1971, the 1971 agreement had no effect on the chalet property. For the same reason, the 1971 agreement could not satisfy the Statute of Frauds for any alleged oral agreement that would create a negative easement on the chalet property. Haggerty v. Gallatin County, 221 M 109, 717 P2d 550, 43 St. Rep. 674 (1986).

Contract to Make Will Denied — No Part Performance Exception: An oral agreement whereby respondents agreed to move to decedent's ranch and lease it from decedent for remainder of his lifetime and decedent agreed to give an undivided one-half interest in the ranch to them at his death and provide them with the right to buy the other one-half interest at the appraised value as of the date of his death was an oral agreement for disposition of decedent's property at death. The District Court committed error and contradicted its own findings of fact when it concluded that the oral agreement was for the leasing, sale, and purchase of real property. The agreement does not conform to a single particular of the requirements provided by statute for the enforcement of such an agreement. The language of 72-2-105 (renumbered 72-2-534) is unambiguous and does not provide for a part performance exception to the Statute of Frauds. Orlando v. Prewett, 218 M 5, 705 P2d 593, 42 St. Rep. 1328 (1985), followed, with regard to the holding that oral contracts to make a devise are barred, in In re Estate of Braaten, 2004 MT 213, 322 M 364, 96 P3d 1125 (2004). A mechanics' lien filed against real property that was the subject of the 1985 quiet title action against the same parties who filed the lien was held void under the doctrine of res judicata in Orlando v. Prewett, 236 M 478, 771 P2d 111, 46 St. Rep. 520 (1989).

Partial Performance of Grantor Support Agreement: Over a period of years, grantor, a 95-year-old woman, had deeded various parcels of land near her home to several relatives. She filed a complaint against grantees, alleging that the land had been conveyed in return for their promise to support her and that they had failed to live up to their agreement. As relief, grantor sought either damages or, in the event that the agreement was determined to be unenforceable under the Statute of Frauds, return of the land. Grantees denied the existence of any agreement and pleaded the Statute of Limitations as a defense. The District Court granted grantees' motion for summary judgment and further ruled that grantor's claims were barred by the Statute of Limitations. The Supreme Court reversed in part, ruling that grantor was entitled to present evidence on two of her claims because Montana law provides for the enforcement of a grantor support agreement, that there was a genuine issue of fact as to whether or not such an agreement had been made, and that the trial court's ruling on the Statute of Limitations was premature. Additionally, the court ruled that grantor had no claim for return of the land since, if an agreement existed, grantor's partial performance of that agreement rendered the Statute of Frauds inapplicable, and if no agreement existed, grantor was not entitled to any relief. Sands v. Nestegard, 198 M 421, 646 P2d 1189, 39 St. Rep. 1101 (1982).

Constructive Trust: A constructive trust in third parties' improvements placed upon property, created by a previous landowner's conduct and imposed upon a purchaser as successor in interest and as an equitable lien in favor of the third parties, is a trust as contemplated by this section, thus allowing the admission of parol evidence. Rase v. Castle Mtn. Ranch, Inc., 193 M 209, 631 P2d 680, 38 St. Rep. 992 (1981).

Trust by Operation of Law: A trust created by operation of law does not come under the Statute of Frauds and may be proved by parol evidence. Cremer v. Cremer Rodeo Land & Livestock Co., 181 M 87, 592 P2d 485 (1979).

70-20-103. Form of grant.

Compiler's Comments

1999 Amendment: Chapter 51 near end after "(insert month)" substituted "20..." for "19..."; and made minor changes in style. Amendment effective January 1, 2000.

Case Notes

Building Restriction Line on Subdivision Plat Creating Negative Easement Precluding Building in Restricted Portion of Lot: Defendant constructed a garage that was located on both sides of a building restriction line marked on a subdivision plat. Plaintiffs sought removal of the portion of the garage that crossed the building restriction line. Although defendant was aware of the building restriction line when purchasing the subdivision property, defendant contended that an easement was not created because the deed failed to have express language of the grantor's request to create an easement and because the deed did not identify the dominant and servient tenement or give the servient tenement knowledge of the building restriction line's use and necessity. The District Court found that defendant was aware of the building restriction by virtue of the recorded plat and a special exception to the title policy obtained upon purchase of the property, and defendant was ordered to remove the garage. Defendant appealed, but the Supreme Court affirmed. The description of the building restriction line on the subdivision plat clearly created a negative easement in plaintiffs' favor, restricting any building on a portion of defendant's lot, so the District Court did not err in prohibiting defendant from building in that area. Plaintiffs' easement was thus enforceable and removal of the garage was proper. Conway v. Miller, 2010 MT 103, 356 Mont. 231, 232 P.3d 390, following Halverson v. Turner, 268 Mont. 168, 885 P.2d 1285 (1994), and Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 Mont. 52, 993 P.2d 688, and distinguishing Blazer v. Wall, 2008 MT 145, 343 Mont. 173, 183 P.3d 84. See also Lewis & Clark County v. Wirth, 2022 MT 105, 409 Mont. 1, 510 P.3d 1206.

No Improper Reliance on Extrinsic Evidence in Finding of Valid and Enforceable Express 60-Foot Easement for Subdivision: Defendant acquired certain property after an express easement across the property was created by the former owner. Defendant refused to allow the building of an access road across the property, contending that the easement agreement was invalid on several grounds. The District Court examined the agreement and concluded that the easement was valid and enforceable and granted summary judgment for plaintiffs. On appeal, defendant asserted that the District Court erroneously relied on facts outside the agreement, making summary judgment inappropriate, but the Supreme Court affirmed. For purposes of interpreting a writing granting an interest in real property, evidence of the surrounding circumstances, including the situation of the property and the context of the parties' agreement, may be shown so that the judge is placed in the position of those whose language the judge is to interpret. However, to comply with the statute of frauds and the recording system, the writing itself must ultimately stand on its own and meet the formal requirements for granting a property interest. In this case, the District Court was allowed to consider various facts not contained in the easement agreement for purposes of understanding the situation, but the court's analysis of the easement's validity apparently was limited to the face of the agreement, so the court did not erroneously rely on extrinsic facts. The easement agreement satisfied the formal requirements for expressly granting an easement and created a valid 60-foot emergency public access and utility easement that was enforceable against defendant. Additionally, the District Court properly concluded that because there was no dominant tenement, the easement was in gross and could be used by members of the public to travel between the subdivision and the public highway for emergency purposes and to provide utility services. There being no questions of material fact, summary judgment was proper. Broadwater Dev., LLC v. Nelson, 2009 MT 317, 352 M 401, 219 P3d 492 (2009), distinguishing Blazer v. Wall, 2008 MT 145, 343 M 173, 183 P3d 84 (2008). See also Kuhlman v. Rivera, 216 M 353, 701 P2d 982 (1985).

Potential Access Rights Merged With Deeds and Extinguished — Applicability of Contract Law Doctrine of Merger: Prior to Gehring's consent to sell 360 acres to APS Corporation (APS) in 1970, they entered an agreement that included a provision on access rights, whereby Gehring purported to grant future purchasers access to other land owned by Gehring for certain recreational purposes. After being told by the Gehring Ranch Corporation that they would not be allowed access to Gehring's land for recreation, the successors in interest to APS sought to enforce the agreement, alleging that they had been improperly excluded from the land and that the agreement created an easement over Gehring's land. The District Court granted summary judgment for the Gehring Ranch Corporation, noting that the agreement did not identify Gehring's other lands upon which an easement was purportedly created. The court also held that any agreement prior to execution of the deeds was merged with the deeds and that because the deeds transferring title did not provide for access, any access rights promised in the agreement were lost. The decision was appealed, and the Supreme Court affirmed. The clause in the agreement was part of a larger agreement to transfer property in the future, and Gehring did not intend to create an easement, but at most intended to provide for potential access privileges if certain conditions, such as creation of a property owners' association and adoption of rules governing the use of the recreational privileges, were met. The Supreme Court cited Urquhart v. Teller, 1998 MT 119, 288 M 497, 958 P2d 714 (1998), in applying the contract law doctrine of merger, holding that the deeds contained all the rights of the parties and that because no access privileges were mentioned in the deeds, any potential access rights referred to in the agreement merged with the deeds and were lost. Richman v. Gehring Ranch Corp., 2001 MT 293, 307 M 443, 37 P3d 732 (2001).

Easement by Grant Upheld on Basis of Stipulation and Circumstantial Evidence: Tanners and others purchased property on Flathead Lake. Tanners and the others obtained access to their property by driving on roads located on Daly's property to the north. When Daly erected a fence across the roads and blocked access to their property, Tanners and the others brought suit, alleging that they had purchased with their properties an easement by grant for the use of the roads. The Supreme Court held that inasmuch as Daly had stipulated to the admissibility of the chain of title documents without foundation testimony and had not objected to introduction of the exhibits at trial, Daly could not now refute the authenticity of the deeds of Tanners' predecessors by arguing that the deeds bore no signatures or notary seal. The Supreme Court also noted that Daly testified that she knew of the roads at the time that she purchased her property and could therefore not claim to be a bona fide purchaser without notice. The Supreme Court also held that even though there was no direct evidence that the present roads were the ones referred to in the 1932 deed, there was circumstantial evidence in the form of testimony from two elderly witnesses that the same roads existed in the mid-1930s and were well traveled at that time, and Daly's attorney had admitted in correspondence that road A existed in 1932. Tanner v. Dream Island, Inc., 275 M 414, 913 P2d 641, 53 St. Rep. 208 (1996).

Inadequate Description — Sale of Two of Twelve Acres and Description of Only Twelve: A deed purported to transfer 2 acres of a 12.63-acre tract but described the whole 12.63 acres and did not describe the 2 acres to be transferred. There was no evidence extrinsic to the deed identifying which 2 acres were intended to be transferred. The deed was void for uncertainty. Therefore, a subsequent deed transferring the 2 acres to a third person was also void. McDonald v. Jones, 258 M 211, 852 P2d 588, 50 St. Rep. 502 (1993). Following the ruling in this case, the District Court took judicial notice of the underlying case and granted summary judgment to Insured Titles, Inc., after determining that the exclusions of the insurance policy applied and that McDonald knowingly altered the legal description of the property, thus defeating coverage under the policy. The grant of summary judgment was affirmed in Insured Titles, Inc. v. McDonald, 275 M 111, 911 P2d 209, 53 St. Rep. 61 (1996).

Creation of Easement by Grant: A written water well agreement conveying a right to use water satisfied the requirements of this section since it identified the grantor and the grantee, adequately described what was conveyed, had language of conveyance, and was signed. Kuhlman v. Rivera, 216 M 353, 701 P2d 982, 42 St. Rep. 863 (1985).

Life Estate Created by Words "Rent-Free for the Rest of Life": In an appeal from a summary judgment decree that a life estate in an apartment of the defendant-mother was void, the Supreme Court held that the words "entitled to remain in possession thereof, rent-free, for the rest of her life" are clear and unambiguous as an indication that the mother holds a life estate as against a buyer of the apartment building. This is particularly true given that in the contract creating the life estate, provisions clearly show an intention to create such a life estate by providing for all of the details of such estate, including the matter of repairs, replacement, taxation, utilities, and other provisions. Harbeck v. Orr, 192 M 243, 627 P2d 1217, 38 St. Rep. 668 (1981).

Where Further Recitals Made Document a Contract of Sale: Document which opened with the recital "hereby sells, grants and conveys" the property, for and in consideration of the purchase price, but contained the further recital "to be paid as hereinafter set forth", was to be interpreted in the same manner as an ordinary contract for purpose of determining whether it was a grant or a contract of sale. Norwegian Lutheran Church of America v. Armstrong, 112 M 528, 118 P2d 380 (1941).

Sufficiency of Description: Under the rule that where a simple name serves to identify property conveyed or where reference is made to something which, on being consulted, indicates the property sold, the description is sufficient, a memorandum of agreement of conveyance describing the land as the "Burke homestead at Big Sandy" sufficiently described property to support a decree of specific performance. Shaw v. MacNamara & Marlow, Inc. 85 M 389, 278 P 836 (1929).

70-20-105. Joint tenancy — how created.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Death of Partner — Disposition of Property Held Jointly by Partners: Robert and William, brothers, opened a joint checking account in 1947, paid all ranch expenses through the account, put all ranch income in the account, and equally split net profits. All cattle were branded with either of two brands, each of which was registered in the name of "William Palmer or Robert Palmer". The brothers were also joint tenants in a commodity brokerage account. The Supreme Court held that the cattle and both accounts were partnership property not held in joint tenancy and remained so upon Robert's death. Thus, they did not pass to William as the surviving joint tenant; rather, they remained in the partnership for the purpose of winding up the partnership and paying its liabilities, after which William must account to Robert's survivor, his widow, for Robert's share of the partnership. By its very nature, partnership property must be treated differently than property of individuals, including property held by individuals as joint tenants but who are not in partnership. This rule applies regardless of the formal legal manner in which the property is held. This is a rule of equity developed over hundreds of years and codified in the Uniform Partnership Act. In re Estate of Palmer, 218 M 285, 708 P2d 242, 42 St. Rep. 1585 (1985), followed in Fiedler v. Fiedler, 266 M 133, 879 P2d 675, 51 St. Rep. 691 (1994).

Real Estate Listing — Capability of Performance — Sale by Cotenant: Plaintiff and defendant entered into a real estate listing agreement. Defendant was a cotenant in the property with her husband. The defendant contended that listing contained an erroneous asking price, did not adequately describe the property to be sold, and was signed only by the defendant. A cotenant in a joint tenancy has a right and ability to sell her interest. Defendant was free to act and capable of acting without her husband, even though the husband knew at all times that she had put the property up for sale. Because she was capable of entering and performing contracts and was legally responsible for her acts, the contract was fully capable of being performed. Barrett v. Ballard, 191 M 39, 622 P2d 180, 37 St. Rep. 2038 (1980).

Law Review Articles

Real Property—Co-Tenancies—Creation of Joint Tenancies, O'Brien, 19 Mont. L. Rev. 69 (1957).

70-20-108. Attorney-in-fact — how to execute for principal.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Common-Law Rule: The common-law rule that deeds executed by an agent or attorney in fact should be executed in the name of the principal has not been abrogated in this state. The rule, in part, finds expression in this section. Shackleton v. Allen Chapel African Methodist Episcopal Church, 25 M 421, 65 P 428 (1901).

70-20-109. Change of owner's name after acquisition — later conveyance to include former name.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-20-110. Redelivery or cancellation of grant — no retransfer.

Case Notes

Placement of Deed in Safety Deposit Box: Grantee's testimony that he placed deed delivered to him by grantor in her safety deposit box, to which he had a key, with the idea that she would probably feel better in case she wanted to change her mind later on, could not explain away her act of making delivery of it or indicate that she did not intend to make delivery. The fact that after delivery deed was given back to grantor or was found in her deposit box after her death was not material, since this section provides that mere delivery of a grant of real property to the grantor does not operate to retransfer the title. Walsh v. Kennedy, 115 M 551, 147 P2d 425 (1944).

Husband and Wife: After delivery of deed from husband to wife, mere fact that grantor regained possession of instrument and thereafter retained it did not retransfer title to him. Sylvain v. Page, 84 M 424, 276 P 16, 63 ALR 528 (1929).

70-20-113. Notice of presence of smoke and carbon monoxide detectors upon sale of dwelling — definitions.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 43 in (1) in two places before reference to smoke detectors inserted reference to carbon monoxide detectors; in (2) near beginning inserted reference to buyer's agent; in (3) inserted definition of carbon monoxide detector; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Erroneous Codification Instruction: Section 2, Ch. 30, L. 1991, provided that sec. 1, Ch. 30, L. 1991, be codified as an integral part of Title 30, ch. 11, part 2; Title 30, ch. 11, part 2, only applies to the transfer of personal property, therefore the Code Commissioner has codified sec. 1, Ch. 30, L. 1991, under Title 70, ch. 20, part 1.

70-20-115. Notice to purchaser of property under contract for deed.

Case Notes

Deed Outside Chain of Title — No Easement Absent Notice That Property Servient to Access Stated in Deed: Nelson's deed for a subdivision lot stated that Nelson would have a roadway easement for access to another lot bordered by Flathead Lake. That lot was subsequently purchased by Barlow. Barlow's deed contained no reference to an easement or reference to Nelson's deed stating that Nelson had a roadway easement to access Barlow's lot. When Barlow began building a cabin on his lot, Nelson sued to enjoin construction, alleging that Nelson's deed entitled him to cross Barlow's lot to access Flathead Lake. The District Court granted Barlow's motion for judgment on the pleadings and dismissed Nelson's claim, so Nelson appealed. The Supreme Court first noted that the language in Nelson's deed was ambiguous and concluded that the District Court erred in holding otherwise. However, the District Court correctly noted that Barlow was not a party to Nelson's deed, and because no similar access provision existed in Barlow's deed, Barlow was not bound by Nelson's deed. Nelson's deed was outside Barlow's chain of title. Even though Nelson's deed was recorded several years prior to Barlow's purchase, that fact was insufficient to impose an easement on Barlow's lot. Barlow was not required to examine the chain of title to Nelson's land to discover an alleged easement across the Barlow property for the benefit of Nelson, and the purported grant of lake access in Nelson's deed did not put Barlow on notice that his property was servient to an easement. The District Court was affirmed. Nelson v. Barlow, 2008 MT 68, 342 M 93, 179 P3d 529 (2008), overruled in part in Earl v. Pavex Corp., 2013 MT 343, 372 Mont. 476, 313 P.3d 154. See also Rigney v. Swingley, 112 M 104, 113 P2d 344 (1941), and Goeres v. Lindey's, Inc., 190 M 172, 619 P2d 1194 (1980).

Sufficiency of Notice of Default: A contract for deed did not require that notice be dated in any certain way, except to specify that service was complete on deposit in a post office. Appellant asserted that the notice of default was invalid because the copy he received was undated. However, he acknowledged receiving the notice by certified mail, and there was nothing to indicate prejudice to him by a failure to date it. LeClair v. Reiter, 233 M 332, 760 P2d 740, 45 St. Rep. 1531 (1988).

Contract for Deed Not Same Legal Concept as Mortgage: Although certain similarities exist between the two, a contract for deed is not the same legal concept as a mortgage under Montana law. Therefore, a contract for deed need not be treated as a mortgage for purposes of foreclosure. Aveco Properties, Inc. v. Nicholson, 229 M 417, 747 P2d 1358, 44 St. Rep. 2098 (1987). See also Burgess v. Shiplet, 230 M 387, 750 P2d 460, 45 St. Rep. 293 (1988).

Gross Negligence in Failure to Perform — No Relief From Forfeiture: The seller of real property is entitled to cancellation of a contract for deed. The purchasers are not entitled to any equitable relief from forfeiture because they were grossly negligent in failing to perform in accordance with the terms and provisions of the contract. Redinger v. French, 216 M 16, 699 P2d 94, 42 St. Rep. 604 (1985).

Attorney General's Opinions

Purchaser Under Contract for Deed Not "Owner" for Purpose of Attaching Tax Lien: One who is purchasing land under a contract for deed is not the "owner" of the property for purposes of 15-16-402(1). Personal property taxes assessed to the purchaser would not constitute a lien on the land because title remains in the seller until the contract is finally executed. 42 A.G. Op. 27 (1987), citing A.G. Op. 440 (1920-22).

Part 2

Construction of Grant

70-20-201. Rules for construing description.

Case Notes

Certificate of Survey and Deed Together Established Tract as Servient Estate for Depicted Easement — District Court Did Not Improperly Use Extrinsic Evidence. Mary Ellen Duke Trust v. Lee Lou, LLC, 2023 MT 177, 413 Mont. 356, 535 P.3d 1133, following Blazer v. Wall, 2008 MT 145, 343 Mont. 173, 183 P.3d 84.

Subdivision Plat Map Supported Public Right-of-Way to River: The District Court correctly determined that the subdivision plat donating a right-of-way from Rio Vista Drive to the banks of the Bitterroot River and the Missoula County Commissioners' acceptance of that right-of-way constituted an instrument of conveyance or deed of a right-of-way to Missoula County to hold the conveyance in trust for the public. The metes and bounds plots approximately corresponded to the low water mark of the otherwise nonuniform edge of the meandering river. Aside from the express references to specific metes and bounds, nothing in the subdivision plat map conveyance instrument indicated any intent of the original owner to strip herself or the public of access to the river along the Rio Vista alley right-of-way. Callsen v. Missoula County, 2020 MT 176, 400 Mont. 383, 467 P.3d 580.

Boundary Dispute — Fence Not Conclusive of Border — Issues of Genuine Fact — Summary Judgment Improper: In a boundary dispute involving three adjacent properties, the District Court granted partial summary judgment for one party, directed that a decree of quiet title be entered, and certified the order as final under Rule 54, M.R.Civ.P. (Title 25, ch. 20). The dispute involved an incorrect survey, two subsequent surveys, questions of boundary placement, and a fence found by the District Court to be a survey monument. On appeal, the Supreme Court recognized that the District Court relied on material facts that were genuinely disputed, that the fence was not established as the boundary, that the affidavit relied on did not include personal knowledge, and that summary judgment was improper. Sacrison v. Evjene, 2017 MT 170, 388 Mont. 144, 398 P.3d 273.

Priority of Calls Not Absolute: The priority of calls is not absolute. A lower-ranked call may prevail over a high-ranked call if the circumstances demonstrate the lower-ranked call constitutes more reliable evidence of a boundary's true location. A boundary dispute should be resolved to reflect the original intent of the parties to the conveyance, and preference should be given to the determination that best fits the majority of the recovered evidence. Larsen v. Richardson, 2011 MT 195, 361 Mont. 344, 260 P.3d 103. See also Sacrison v. Evjene, 2017 MT 170, 388 Mont. 144, 398 P.3d 273.

Deed Within Chain of Title Not Considered Extrinsic Evidence: In a declaratory action involving a boundary dispute, the District Court properly examined the chains of title to the parties' properties in determining the boundary. A deed contained in the chain of title, which provided the first description of the disputed boundary, was not extrinsic evidence and, therefore, was properly considered. Ethen Revocable Trust v. River Resource Outfitters, LLC, 2011 MT 143, 361 Mont. 57, 256 P.3d 913.

Ambiguous Deeds of Conveyance — Intent of Parties Properly Considered: A dispute arose in a quiet title action based on subdivision surveys that differed from the original government survey. The District Court held that the property belonged to defendants, and the Supreme Court affirmed. Inconsistencies between the original plat and the location of the subdivision surveyor's monuments created an ambiguity. References to quarter section lines and quarter corners in the original survey were definite and ascertainable, and the subdivision surveyor's improperly placed monuments were considered false particulars frustrating the conveyance. The District Court properly applied Brown's Boundary Control and Legal Principles (4th Ed. 1995) to determine that the subdivision surveyor's monuments conflicted with the government's original monument and correctly considered the intent of the parties in interpreting the surveys and conveyances. Further, the original plat was part of the deeds of conveyance in defendants' chain of title, so the District Court correctly allowed the certificate of dedication into evidence. Olson v. Jude, 2003 MT 186, 316 M 438, 73 P3d 809 (2003).

Use of Original Survey for Reference — Proper Determination of Tract Boundary: A dispute arose in a quiet title action based on subdivision surveys that differed from the original government survey. When surveyors use corner sections and lines to base measurements and plot tracts, it is essential that they properly identify and authenticate the original monument. Original corners established by a government survey, if those corners can be found, or places where they were originally established, if those places can be definitely determined, are conclusive without regard to whether they were located correctly or not and must remain the true corners or monuments by which to determine the boundaries. The footsteps of the original surveyor should be followed, so far as discoverable on the ground by monuments, and it is immaterial if the lines run by the original surveyor are incorrect. Olson v. Jude, 2003 MT 186, 316 M 438, 73 P3d 809 (2003). See also Vaught v. McClymond, 116 M 542, 155 P2d 612 (1945), and Helehan v. Ueland, 223 M 228, 725 P2d 1192 (1986).

Examination of Chain of Title and Circumstances of Making of Deed in Establishing Legal Boundary: Plaintiff sought to quiet title in a strip of land in Bridger Canyon, alleging that a state highway formed the western boundary of the property rather than an older county road. The District Court agreed. The Supreme Court examined plaintiff's chain of title back to 1903 and found that a deed conveying the property in 1951 unambiguously established the county road as the western boundary of the property. An unambiguous deed must be interpreted according to its written language, without resort to extrinsic evidence of the grantor's intent. Further, under 1-4-102, the Supreme Court may examine the circumstances under which a deed was made. Here, the section plats and state highway records, coupled with the plain language of the deed, established that the old county road was the legal western boundary, so the District Court was reversed. Tester v. Tester, 2000 MT 130, 300 M 5, 3 P3d 109, 57 St. Rep. 538 (2000), followed in Ethen Revocable Trust v. River Resource Outfitters, LLC, 2011 MT 143, 361 Mont. 57, 256 P.3d 913.

Specification of Acreage Quantities by Approximation Indicative of Sale of Property in Gross: Language in a deed conveyed property described as "about 7 acres" and "approximately 7 acres". The actual legal description of the property was omitted from the chain of title beginning in 1950 and was not included in any subsequent deed, although the property was resold two more times. In a quiet title action, the District Court ruled that the size of the parcel was unimportant because the property had been conveyed in gross, with each party taking the risk of the actual quantity varying, so the exact quantity was immaterial. The Supreme Court agreed. Although words of estimation alone do not necessarily create a sale in gross, the plain meaning of the words "about" and "approximately" indicated that the parties did not intend to convey a precise number of acres, and the specification of acreage quantities, when qualified by words of approximation, rendered the acreage quantities merely descriptive rather than material to the agreement, thus indicating a sale in gross. Because the conveyance was a sale in gross, the variation in acreage was not grounds for rescission, nor did the acreage discrepancies in the relevant conveyances raise a genuine issue of material fact precluding summary judgment because the grantor's acreage-consistent description of the property boundaries controlled over the inconsistent acreage estimates in the conveyances. Cedar Lane Ranch, Inc. v. Lundberg, 1999 MT 299, 297 M 145, 991 P2d 440, 56 St. Rep. 1207 (1999), following Hardin v. Hill, 149 M 68, 423 P2d 309 (1967), and Turner v. Ferrin, 232 M 146, 757 P2d 335, 45 St. Rep. 946 (1988).

Ambiguity Eliminated by Application of Statutory Rules of Construction: Bartmess argued that the lower court erred in granting Ferriter a summary judgment in a quiet title case because the language in the deed in question was ambiguous as to boundaries. The Supreme Court held that although there was some ambiguity in the deed's language, the lower court had properly concluded that statutory rules of construction when applied dispelled any ambiguity and therefore summary judgment was proper. Ferriter v. Bartmess, 281 M 100, 931 P2d 709, 54 St. Rep. 79 (1997).

Inadequate Description — Sale of Two of Twelve Acres and Description of Only Twelve: A deed purported to transfer 2 acres of a 12.63-acre tract but described the whole 12.63 acres and did not describe the 2 acres to be transferred. There was no evidence extrinsic to the deed identifying which 2 acres were intended to be transferred. The deed was void for uncertainty. Therefore, a subsequent deed transferring the 2 acres to a third person was also void. McDonald v. Jones, 258 M 211, 852 P2d 588, 50 St. Rep. 502 (1993). Following the ruling in this case, the District Court took judicial notice of the underlying case and granted summary judgment to Insured Titles, Inc., after determining that the exclusions of the insurance policy applied and that McDonald knowingly altered the legal description of the property, thus defeating coverage under the policy. The grant of summary judgment was affirmed in Insured Titles, Inc. v. McDonald, 275 M 111, 911 P2d 209, 53 St. Rep. 61 (1996).

Monuments Paramount:

One surveyor located an artificial monument as opposed to the placement made by a second surveyor through his "compass rule". The District Court did not err in relying on the evidence of the surveyor who found the monument because the general rule is that courses and distances, similar to location by "compass rule", must yield to natural or artificial monuments. Goodover v. Lindey's, Inc., 232 M 302, 757 P2d 1290, 45 St. Rep. 1068 (1988). Lindey's, Inc.'s attempt to quiet title to a newly disputed parcel was held to be res judicata, the matter having already been adjudged and affirmed in this case, in Lindey's, Inc. v. Goodover, 264 M 449, 872 P2d 764, 51 St. Rep. 359 (1994).

A resurvey which paid no attention to artificial monuments relied upon in deeds and used by the owners of the property could not disrupt or change existing property lines. Buckley v. Laird, 158 M 483, 493 P2d 1070 (1972).

In a boundary dispute, if there is a conflict between permanent and visible or ascertained boundaries or monuments and measurements, the boundaries or monuments are controlling under this section. Nemitz v. Reckards, 98 M 229, 38 P2d 980 (1934), explained in Grosfield v. Johnson, 98 M 412, 39 P2d 660 (1935).

In an action in ejectment in which the paramount question was whether a former owner of the land had removed a government quarter section corner monument so as to include an adjoining tract within his own, in the absence of testimony contradictory of that of plaintiff's that it never had been moved, the rights of the parties were governed by the monuments upon the ground. Kurth v. Le Jeune, 83 M 100, 269 P 408 (1928).

When there is a conflict between monuments and courses and distances, the latter must yield to the former. Myrick v. Peet, 56 M 13, 180 P 574 (1919).

Factors Indicative of Sale in Gross — Slight Acreage Variation Immaterial: Plaintiffs purchased "96.73 acres, more or less", but later sought rescission after finding the amount of land was 6% less than 96.73 acres. Although the words "more or less" did not alone create a sale in gross, the phrase was sufficient, when combined with the observation of the property by plaintiffs, the sale price as a negotiated lump sum, and the lack of a statement of price per acre, to create a sale in gross. A slight disparity in acreage would justify equitable relief if the sale was by the acre, but a great disparity must exist to authorize relief if the sale is in gross. Turner v. Ferrin, 232 M 146, 757 P2d 335, 45 St. Rep. 946 (1988), followed in Cedar Lane Ranch, Inc. v. Lundberg, 1999 MT 299, 297 M 145, 991 P2d 440, 56 St. Rep. 1207 (1999).

Sufficiency of Property Description — "All Property" as Sufficiently Definite: An oil company asserted it held a valid lease to a mineral interest derived from a lengthy chain of title originating in 1922. As the interest changed hands through the years, the property was variously described in deeds purporting to transfer "any and all interest . . . to real estate . . . in the State of Montana", "every species of real property . . . which Grantor owned or claimed to own within Toole County, Montana", "all and singular of the undesignated and unknown assets . . . wherever situated within the state of Montana", or by no legal description at all. In affirming the sufficiency of description in the chain of title, the Supreme Court cited the majority rule outlined in 23 Am. Jur. 2d Deeds 59 that a deed describing land as "all" the grantor's property or "all" his property in a certain locality is not defective or void for want of a sufficient description. Somont Oil Co., Inc. v. Nutter, 228 M 467, 743 P2d 1016, 44 St. Rep. 1685 (1987).

Property Description Adequate: The property description in a deed is adequate if it contains sufficient information to permit the identification of the property to the exclusion of all others. Peterson v. Taylor, 226 M 400, 735 P2d 1120, 44 St. Rep. 754 (1987).

Sale "In Gross" — Risk of Quantity Varying: A purchaser is not entitled to a reduction in purchase price or reformation of a contract for deed containing an error in the legal description when the sale is in gross. A contract of sale by the tract or in gross is one wherein boundaries are specified, but quantity is not specified, or if specified, the existence of the exact quantity specified is not material. Each party takes the risk of the actual quantity varying. Parcel v. Myers, 214 M 225, 697 P2d 92, 42 St. Rep. 352 (1985). See also Cedar Lane Ranch, Inc. v. Lundberg, 1999 MT 299, 297 M 145, 991 P2d 440, 56 St. Rep. 1207 (1999).

Tract Boundary Ascertainable on Three Sides — Fence on Fourth Side Not a Boundary Monument: The tract in question was bounded on the south by a river, on the west by a highway (both in property description), and by a fence uncontroverted as a monument on the north. This section requires the application of measurement along the north (fence) and south (river) to establish the eastern boundary. A fence near the eastern boundary was not a monument because it was not referenced in the property description and its placement (as it jogged and zigzagged around trees) was not evidence of intent to be a boundary; it was not a boundary line but merely a fence "that separated one side of the fence from the other". Pilgrim v. Kuipers, 209 M 177, 679 P2d 787, 41 St. Rep. 625 (1984). See also Sacrison v. Evjene, 2017 MT 170, 388 Mont. 144, 398 P.3d 273.

Duties of Resurveyor: It was not error for resurveyor to ignore a present county road when surveying for "wagon road" monument designated in 1899 and 1903 deeds because in surveying a tract of land according to a former plat or survey, the surveyor's only duty is to relocate, upon best evidence obtainable, the courses and lines at the same place where originally located by the first surveyor on the ground, as the object of a resurvey is to furnish proof of the location of the lost lines or monuments, not to dispute the correctness of or to control the original survey. Johnson v. Jarrett, 169 M 408, 548 P2d 144 (1976).

Improper Description: Where there was improper land description in easement, trial court properly ordered survey of land in question so intent of parties to easement could be effectuated. Missoula v. Rose, 164 M 90, 519 P2d 146 (1974).

Order of Survey: Trial court properly ordered survey of land allegedly subject to an easement where the description of the land subject to the easement was defective but could be determined pursuant to subsections (2) and (6) of this section. Missoula v. Rose, 164 M 90, 519 P2d 146 (1974).

Attorney General's Opinions

When Map or Narrative Legal Description Defines District Boundaries: When presented with the question of whether a narrative legal description contained in a zoning petition or an accompanying map that is inconsistent with the legal description defines the boundaries of a proposed planning and zoning district, the Attorney General applied this section, which contains the rules for construing the description of real property being conveyed when construction is doubtful and no other sufficient method exists by which to determine the description. In this case, if signatures were obtained on the petition as a result of reference to the map, the map defines the district boundaries; however, if the map was created from the narrative legal description contained in the zoning petition, the narrative controls. The planning and zoning commission shall ascertain the exact facts through the public hearing process provided for in 76-2-101. 48 A.G. Op. 5 (1999).

70-20-202. Extrinsic evidence not to be considered in construction of deed — exceptions.

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GENERAL

Certificate of Survey and Deed Together Established Tract as Servient Estate for Depicted Easement — District Court Did Not Improperly Use Extrinsic Evidence. Mary Ellen Duke Trust v. Lee Lou, LLC, 2023 MT 177, 413 Mont. 356, 535 P.3d 1133, following Blazer v. Wall, 2008 MT 145, 343 Mont. 173, 183 P.3d 84.

Existence of Express Easement Governed by Rules of Contract Interpretation: Neighbors each asserted having an express easement over the other's property and denied being burdened by an express easement. The District Court looked to their predecessor's easement agreement and the incorporation of that agreement into their conveyances, ruling that each neighbor enjoyed and was burdened by an easement. When both parties appealed, the Supreme Court affirmed the District Court's decision. The Supreme Court explained that the existence of an express easement is governed by the rules of contract interpretation and engaged in extensive discussion of the case, concluding that the District Court was correct. Wiegele v. W. Dry Creek Ranch, LLC, 2019 MT 254, 397 Mont. 414, 450 P.3d 879.

Lakeside Property Dispute — Presumption That Grantee Takes Land to Low-Water Mark: In a property dispute relating to a subdivided lakeside parcel, the defendant asserted ownership of all land between the high- and low-water marks on the lake. The Army Corps of Engineers previously declared that the lake was a nonnavigable intrastate body and not subject to the Corps' jurisdiction. The District Court held that the plaintiff owned the land between the high- and low-water marks of the lake bordering her property. On appeal, the Supreme Court held that Montana's public trust easement was not at issue, that a conveyance of riparian property by reference to a specific metes and bounds description along the high-water mark is insufficient alone to overcome the presumption of 70-16-201 that the grantee takes at least to the low-water mark, and that the District Court correctly held that the plaintiff's property included the disputed land between the high- and low-water marks of the lake. Ash v. Merlette, 2017 MT 305, 389 Mont. 486, 407 P.3d 304.

Pleadings Varying Terms of Agreement: In action by sellers of hotel business, including personal property, against buyers for balance due on contract, answer setting up affirmative defenses, which pleaded mistake and invalidity based on representations and warranties of seller concerning the leasing of the premises on which the buyers relied, was sufficiently clear to comply with this section as against motion to strike on the ground that the allegations tended to vary the terms of a written contract. Swecker v. Badura, 141 M 329, 377 P2d 752 (1963).

Extension of Time to Pay — Oral Evidence Not Admissible: Where escrow agreement in connection with sale of land required $700 to be paid by a certain date, oral evidence could not be received to show that there had been an extension of time. Herman v. Herman, 123 M 39, 207 P2d 1155 (1949), distinguished in Dalakow v. Geery, 132 M 457, 318 P2d 253 (1957).

Illiteracy of Party: Generally, in the absence of fraud or mistake, where the terms of the contract have been reduced to writing by the parties, it must be considered as containing all the terms of the agreement, and parol evidence cannot be resorted to, to alter the written contract, and usually plaintiff's inability to read does not alter the rule. Ikovich v. Silver Bow Motor Car Co., 117 M 268, 157 P2d 785 (1945).

Correspondence Constituting Contract: An instruction in an action for breach of contract based largely upon correspondence between the parties, that all papers or other instruments made by the parties at the same time and relating to the same subject matter should be considered by the jury as constituting one contract if the preponderance of the evidence so showed, was proper. W. J. Lake & Co. v. Mont. Horse Prod. Co., 109 M 434, 97 P2d 590 (1939).

Corroborative Evidence: Where a contract whereunder the buyer was to receive one-half the freight refunds was established by a properly admitted copy of one of a number of letters, the fact that copies of the others may have been improperly admitted would not require a reversal of the judgment for plaintiff, where they were only corroborative, in the absence of substantial evidence refuting existence of the contract. W. J. Lake & Co. v. Mont. Horse Prod. Co., 109 M 434, 97 P2d 590 (1939).

Waiver of Rule by Introduction of Evidence: Where one party to an action on a written contract is permitted to introduce evidence of preceding oral negotiations leading up to the making of the writing, thus varying its terms, his opponent may properly give oral testimony as to the same matter, over an objection that the testimony offered tends to contradict the writing. Peterson v. Nelson, 77 M 539, 252 P 368 (1926).

Endorsement on Instrument: In an action on a promissory note which had never been previously negotiated and was overdue when plaintiff acquired it by assignment, so that he was not a holder in due course, parol evidence was admissible to show that defendants with plaintiff's knowledge had endorsed the note with the understanding that each was doing so as representative of an association and not in his personal capacity. Anderson v. Border, 75 M 516, 244 P 494 (1926), distinguished in Swan v. Le Clair, 77 M 422, 251 P 155 (1926).

Guaranty Agreement: An offer of proof by defendant directors, who had guaranteed payment of an account as represented by a note of the corporation, that it was their understanding that the guaranty was to be considered merely an assurance on their part that plaintiff's account was recognized as a valid claim against the company, was properly rejected under this section as contradicting the terms of the writing. Schauer v. Morgan, 67 M 455, 216 P 347 (1923).

Oral Extension of Time Inadmissible: Where, in an action by a building contractor to foreclose a mechanics' lien, defendant set up a counterclaim for damages for failure to complete the building within the time stipulated but the contract provided that no additional time should be allowed unless request therefor was presented in writing to the architect and plaintiff failed to make such request though the owner had directed alterations, he was precluded from asserting that before signing the contract defendant had orally agreed that the penalty therein provided for would not be enforced. (Mechanics' lien provisions repealed, 1987—see construction liens, Title 71, ch. 3, part 5.) Leigland v. Rundle Land & Abstract Co., 64 M 154, 208 P 1075 (1922).

Warehouse Receipts: Warehouse receipts for grain stored in an elevator issued under the provisions of the Grain Elevator Act constituted binding contracts between the bailor and bailee which could not be varied or contradicted by parol testimony, the effect of which was to show that the transaction amounted to a sale and not a bailment. State ex rel. Broadwater Farms Co. v. Broadwater Elevator Co., 61 M 215, 201 P 687 (1921).

Purpose of Contract: Where a contract supplemental to one made for the sale of lands recited that it was made for the purpose of granting the buyer additional time in which to make payment, it precluded the idea that it was made for any other purpose, and in the absence of allegation of mistake or other imperfection, the presumption is conclusive that the writing contained all the engagements then made by the parties. Crawford v. Pierce, 56 M 371, 185 P 315 (1919).

Stranger as Party to Action: The rule that parol evidence cannot be introduced to vary, enlarge, or contradict its terms, except where a mistake or imperfection therein is put in issue by the pleadings or when the validity of the contract is the fact in dispute, does not apply in a controversy between a party to the contract and a stranger. As against such stranger, a party may assert that the agreement was other or different in any respect from that which the writing expresses. Reed v. Lewis & Clark County, 55 M 412, 178 P 177 (1919), distinguished in Habets v. Swanson, 2000 MT 367, 303 M 410, 16 P3d 1035 57 St. Rep. 1567 (2000).

Evidence Whether Third Party Is or Is Not Bound: When there was nothing in a contract signed by a third party which showed a consideration affecting him or inducing him to become a party to it or an intent on his part to be bound as surety for or joint promisor with one of the parties efficiently bound, parol evidence may not be resorted to for the purpose of furnishing the basis of an inference that he was or was not bound. The Henry O. Shepard Co. v. Freeman, 40 M 144, 105 P 484 (1909).

Common-Law Rule: This section merely declares the common-law rule. Riddell v. Peck-Williamson Heating & Ventilating Co., 27 M 44, 69 P 241 (1902); Gaffney Mercantile Co. v. Hopkins, 21 M 13, 52 P 561 (1898).

VALIDITY OF AGREEMENT AT ISSUE

Estimate Not Intended as an Offer: Parol evidence was admissible to show that a contractor's letter estimating the cost of a building was not intended as an offer to build at that price but rather that the parties intended a cost plus contract. Hammond v. Knievel, 141 M 433, 378 P2d 388 (1963).

Effective Only if FHA Loan Approved: Parol evidence could be received to show that a lease agreement was intended to be effective only if the FHA approved a loan to the lessee, since this question went to the validity of the agreement itself. Platt v. Clark, 141 M 376, 378 P2d 235 (1963).

Evidence Admissible to Show Invalidity of Contract: Where, in an action to recover damages for breach of a contract of lease for failure of the lessee to gain possession, a defense of the lessor was that the contract was entered into with the express understanding that it should not become effective until and unless a tenant in possession would relinquish possession or could be ousted, parol testimony was admissible to show that what appeared to be a valid and binding contract was in reality not such, under the exception provided for in this section, that where the validity of the agreement is the fact in issue, such testimony may be admitted. Smith v. Fergus County, 98 M 377, 39 P2d 193 (1934).

Purpose of Writing: The rule excluding parol testimony to contradict or vary a written instrument does not forbid inquiry into the object the parties had in executing, delivering, and receiving instruments made the basis of an action for breach of grain buying contracts, which defendant claimed were to be used merely as memoranda to complete plaintiff's office files and not to hold him personally liable for delivery of the grain. McCaull-Dinsmore Co. v. Stevens, 59 M 206, 194 P 213 (1921), distinguished in Hosch v. Howe, 92 M 405, 16 P2d 699 (1932).

COMPLETENESS OF WRITING

Merger of Prior Agreement Into Deed — No Presumption of Surrender of Covenants: Appellants contended that since there was no express language in deeds recorded in 1972 that the parties intended to merge the restrictive provisions of a 1971 agreement into the deeds, the commercial use restrictions in the 1971 agreement still applied, regardless of being left out of the deeds. The Supreme Court, recalling its decision in Story v. Montforton, 112 M 24, 113 P2d 507 (1941), noted that "whether or not there has been a merger depends on the intention of the parties". The court applied this principle in Thisted v. Country Club Tower Corp., 146 M 87, 405 P2d 432 (1965), quoting Reid v. Sykes, 27 Ohio St. 285: ". . . evidence of that intention may exist in or out of the deed. There is no presumption that a party, in giving or accepting a deed, intends to give up the covenants of which the deed is not a performance or satisfaction." In the present case, the court found strong evidence that the deeds contained all of the restrictions on the lands that were intended by the parties and that the contract had merged in the deeds. Haggerty v. Gallatin County, 221 M 109, 717 P2d 550, 43 St. Rep. 674 (1986).

Writing to Control: Statements made by various agency personnel in regard to continued use of defendant's office building were not admissible under parol evidence rule to alter or contradict terms of express written contract since such statements and assurances did not come within any recognized exception to rule and since defendant admitted that he knew written contract would be controlling. U.S. v. Willard E. Fraser Co., 308 F. Supp. 557 (D.C. Mont. 1970), affirmed in 459 F2d 483 (9th Cir. 1972).

General Rule as to Completeness: In determining whether parol testimony varied a written contract, a satisfactory test is: Was the matter testified to mentioned, covered, or dealt with in the writing? If it was, then presumably the writing was meant to represent the entire transaction and the testimony was inadmissible. Cont. Oil Co. v. Bell, 94 M 123, 21 P2d 65 (1933).

Evidence of Vendee's Understanding: Where a land contract required of the vendor the execution of a deed without reservations and the deed deposited in escrow excepted from its operation the timber growing thereon, parol evidence to the effect that the witness understood from conversations with the vendee that the latter was buying the land without the timber was inadmissible under this section. Hollensteiner v. Anderson, 78 M 122, 252 P 796 (1927).

Evidence of Conditional Contract: In the absence of fraud, an unconditional written contract of purchase of building material presumably embraced the whole agreement of the parties, and therefore evidence of an oral understanding to the effect that it should not become binding until the architect in charge had approved the materials was inadmissible. Wheeler v. James, 70 M 37, 223 P 900 (1924).

Understanding of Parties as to Interest on Note: Parol testimony to show the understanding of the parties that no interest was to be paid on a promissory note which provided for the payment of interest but did not specify the rate was properly excluded. Burnett v. Burnett, 68 M 546, 219 P 831 (1923).

Conveyance of Land — Oral Negotiations Superseded: All oral negotiations relative to the covenant of seizin on a sale of land were superseded by the deed and a contemporaneous writing executed with relation thereto. Morehouse v. N. Land Co., 68 M 96, 216 P 792 (1923).

Execution and Delivery of Deed — All Former Oral Agreements Superseded: Testimony concerning an alleged oral agreement between vendor and vendee that the latter bought the land subject to the right of possession of a tenant, in contravention of the recital in the deed, was inadmissible under the rule that execution and delivery of the deed supersede all former oral agreements. Adams v. Durfee, 67 M 315, 215 P 664 (1923).

Writing to Supersede Oral Negotiations: Under this section and 28-2-904, when a contract has been reduced to writing its contents cannot be added to, contradicted, altered, or varied by parol or extrinsic evidence, and the writing supersedes all oral negotiations concerning its matter which preceded, accompanied, or led up to its execution. Webber v. Killorn, 66 M 130, 212 P 852 (1923).

Writing Considered to Contain All Prior Oral Agreements: A written agreement must be considered as containing all prior oral ones concerning its subject matter, and its terms may therefore not be varied by oral testimony. Leigland v. Rundle Land & Abstract Co., 64 M 154, 208 P 1075 (1922).

Negotiations Prior to Contract:

Prior oral negotiations and directions as to points at which livestock should be stopped for resting and feeding are merged in the contract of shipment, where it and the waybills bore notations stating the points at which stops were to be made, and therefore parol testimony of directions to make other stops was incompetent as an attempt to vary the terms of the written contract. Cook v. N. Pac. Ry. 61 M 573, 203 P 512 (1921).

In an action for damages for breach of a clause of a written contract of sale of a threshing machine warranting it as being well made, of good material, and that with proper use and management it would do as good work as any other machine of the same size manufactured for the like purpose, evidence of statements made by defendant's agent in making the sale that it would thresh and clean alfalfa as well as any other machine of the same size, etc., was properly rejected as an attempt to vary the terms of the written instruments by parol. Rowe v. Emerson-Brantingham Implement Co., 61 M 73, 201 P 316 (1921).

A written contract supersedes any oral negotiations theretofore had relative to the subject matter of it and must be considered as containing all of its terms agreed upon at the time it was executed. Arnold v. Fraser, 43 M 540, 117 P 1064 (1911).

Evidence Admissible — Price Paid Before Execution: The mere execution of a bill of sale by the seller does not exclude proof of a parol agreement for the sale of an animal offered by the buyer, the terms of which had been agreed upon and the purchase price paid before the execution of the bill. Southerland v. Green, 49 M 379, 142 P 636 (1914).

Bill of Sale: Parol evidence that parties did not intend to include buildings described in a bill of sale was inadmissible. Hogan v. Kelly, 29 M 485, 75 P 81 (1904).

COLLATERAL AGREEMENTS

Joint Venture Agreement: Trial court could have excluded evidence relating to an agreement for a joint venture, none of which was in writing, as being designed to alter or vary the terms of a note made by one joint venturer and held by the other. Barrett v. Morton, 137 M 190, 351 P2d 601 (1960).

Oral Contract About Term Covered in Written Contract — Parol Evidence Inadmissible: In an action to recover the balance due under a contract of sale of gasoline to a dealer under a written contract fixing the price, parol testimony of defendant tending to prove an oral contract to refund a portion of the price was held inadmissible under the rule above. Cont. Oil Co. v. Bell, 94 M 123, 21 P2d 65 (1933).

Writing to Remain Intact: An oral agreement, to be collateral within the meaning of the exception to the parol testimony rule and as such admissible in evidence as against the objection that it varies a written instrument, must relate to a subject distinct from that to which the writing applies. The writing must remain intact after the reception of the parol testimony. Cont. Oil Co. v. Bell, 94 M 123, 21 P2d 65 (1933).

Parol Evidence Not Admissible to Vary Terms of Written Contract: Parol evidence of an oral agreement, made contemporaneously with a promissory note which contains an absolute promise to pay at a specified time, is not admissible to extend the time of payment or to provide for payment in any other way than that so specified or to make it depend upon condition. Hosch v. Howe, 92 M 405, 16 P2d 699 (1932).

Oral Agreement Superseded by Writing: Where the signers of a promissory note unqualifiedly bound themselves to pay a certain sum of money at a specified time, parol evidence was inadmissible for the purpose of showing that the payee in an oral contemporaneous stipulation had agreed that payment could be made in a certain manner. Such oral agreement was superseded by the writing, and the evidence, erroneously admitted, tended to vary and contradict the writing, contrary to the provisions of this section, where the validity of the note was not attacked and a mistake or imperfection in the writing was not pleaded. Swan v. Le Clair, 77 M 422, 251 P 155 (1926).

Agreement to Conform to Usage and Custom — Not Admissible: Evidence that at the time a written contract was made, an oral contract was entered into that payments should be made in conformity with a usage and custom, as the work was done and materials furnished, was not admissible. Riddell v. Peck-Williamson Heating & Ventilating Co., 27 M 44, 69 P 241 (1902).

Agreement to Extend Lease — Inadmissible: Testimony by lessees that they would not have signed the lease of a lode mining claim but for an understanding that the time would be extended was not admissible to show a contemporaneous agreement to extend. Evidence of a contemporaneous agreement between the parties to a written sublease of said claim, that in case the sublessors should buy the property the lease would be extended, was inadmissible. Armington v. Stelle, 27 M 13, 69 P 115 (1902), distinguished in Orem v. Hansen Packing Co., 91 M 222, 7 P2d 546 (1932). See also Kelly v. Ellis, 39 M 597, 104 P 873 (1909), distinguished in Orem v. Hansen Packing Co., 91 M 222, 7 P2d 546 (1932).

Parol Evidence Improper: Evidence of a parol agreement, at the time of the making of a promissory note, that in case the same was not paid at maturity, subsequent payments might be applied upon the principal first and the interest afterward, is improper. Anderson v. Perkins, 10 M 154, 25 P 92 (1890). See also Gaffney Mercantile Co. v. Hopkins, 21 M 13, 52 P 561 (1898); York v. Steward, 21 M 515, 55 P 29 (1898).

Contemporaneous Agreement as to Construction of Writing: Where it was alleged that at the time of the execution of a written agreement it was agreed that a particular construction should be given to the terms of the writing, to the effect that it meant that the collateral security should be exhausted before an action was commenced on the notes, such contemporaneous construction was within the purview of this section. Fisher v. Briscoe, 10 M 124, 25 P 30 (1890). See also Bohn Mfg. Co. v. Harrison, 13 M 293, 34 P 313 (1893).

CLEAR LANGUAGE

Deed Within Chain of Title Not Considered Extrinsic Evidence: In a declaratory action involving a boundary dispute, the District Court properly examined the chains of title to the parties' properties in determining the boundary. A deed contained in the chain of title, which provided the first description of the disputed boundary, was not extrinsic evidence and, therefore, was properly considered. Ethen Revocable Trust v. River Resource Outfitters, LLC, 2011 MT 143, 361 Mont. 57, 256 P.3d 913.

Examination of Chain of Title and Circumstances of Making of Deed in Establishing Legal Boundary: Plaintiff sought to quiet title in a strip of land in Bridger Canyon, alleging that a state highway formed the western boundary of the property rather than an older county road. The District Court agreed. The Supreme Court examined plaintiff's chain of title back to 1903 and found that a deed conveying the property in 1951 unambiguously established the county road as the western boundary of the property. An unambiguous deed must be interpreted according to its written language, without resort to extrinsic evidence of the grantor's intent. Further, under 1-4-102, the Supreme Court may examine the circumstances under which a deed was made. Here, the section plats and state highway records, coupled with the plain language of the deed, established that the old county road was the legal western boundary, so the District Court was reversed. Tester v. Tester, 2000 MT 130, 300 M 5, 3 P3d 109, 57 St. Rep. 538 (2000), followed in Ethen Revocable Trust v. River Resource Outfitters, LLC, 2011 MT 143, 361 Mont. 57, 256 P.3d 913.

Ambiguity in Reservation — Summary Judgment Improper: In a 1944 deed, the grantor reserved "six percent of all royalties received for oil and gas removed from the above-described property". In 1968, the mineral owners leased the property subject to a one-eighth landowner's royalty (12½% of oil and gas produced). In a subsequent suit, the royalty owners claimed they were entitled to 6% of production and the mineral owners claimed that the royalty owners were entitled to 6% of the landowner's royalty of 12½% of production. The District Court granted summary judgment for the mineral owners. The Supreme Court reversed on the grounds that the reservation language is ambiguous and the true intent of the parties is discernible only with reference to extrinsic evidence, not from the deed alone; therefore, summary judgment was inappropriate. Proctor v. Werk, 220 M 246, 714 P2d 171, 43 St. Rep. 333 (1986), distinguished in Ferriter v. Bartmess, 281 M 100, 931 P2d 709, 54 St. Rep. 79 (1997).

No Ambiguity if Description Can Be Reasonably Construed: This section must be read with 70-20-201. If the description in a written conveyance can be reasonably construed pursuant to the rules of 70-20-201, such a construction may not be circumvented by resort to extrinsic evidence under the "ambiguity" clause of this section. Extrinsic evidence cannot be used to contradict construction resolved through 70-20-201. Pilgrim v. Kuipers, 209 M 177, 679 P2d 787, 41 St. Rep. 625 (1984).

Life Estate Created by Words "Rent-Free for the Rest of Life": In an appeal from a summary judgment decree that a life estate in an apartment of the defendant-mother was void, the Supreme Court held that the words "entitled to remain in possession thereof, rent-free, for the rest of her life" are clear and unambiguous as an indication that the mother holds a life estate as against a buyer of the apartment building. This is particularly true given that in the contract creating the life estate, provisions clearly show an intention to create such a life estate by providing for all of the details of such estate, including the matter of repairs, replacement, taxation, utilities, and other provisions. Harbeck v. Orr, 192 M 243, 627 P2d 1217, 38 St. Rep. 668 (1981).

Permissive Easement: Parol testimony was not admissible to extend the term of a permissive easement beyond the expiration date set in a written agreement that clearly contained no mistake, imperfection, or ambiguity. Larson v. Burnett, 158 M 421, 492 P2d 921 (1972).

No Ambiguity: No ambiguity existed between clause conveying one-half of the minerals in 1,040 acres and the conveyance of 520 mineral acres, so that mineral deed could not be varied by parol evidence. Superior Oil Co. v. Vanderhoof, 297 F. Supp. 1086 (D.C. Mont. 1969).

Ambiguity in Contract:

In an action for specific performance arising over interpretation of contract for conveyance of land reserving mineral interest, where cross-complaint of defendants alleged that the contract was ambiguous and uncertain and prayed for a declaratory judgment to adjudicate the rights of the parties, it was the duty of the trial court to determine the intent of the parties, and the exclusion of parol evidence of intent was error. Stokes v. Tutvet, 134 M 250, 328 P2d 1096 (1958).

Where an agreement to furnish automobiles to be sold on commission did not furnish its own interpretation, parol evidence was properly admitted to determine the intention of the parties. Brockway v. Blair, 53 M 531, 165 P 455 (1917).

No Interpretation Needed — Language Clear: If the language of a contract is clear it needs no interpretation, and the intention of the parties in entering into it must be ascertained from the writing alone. New Home Sewing Mach. Co. v. Songer, 91 M 127, 7 P2d 238 (1931).

Parol Evidence Not Allowed to Vary Terms: Where, in an action on a written contract, there was not any issue of fraud or mistake in the execution of it or any imperfection in the writing and the provisions of such instrument were plain and unambiguous, parol evidence, the tendency of which was to vary the terms thereof, was properly excluded. W. Loan & Sav. Co. v. Smith, 42 M 442, 113 P 475 (1911).

FRAUD

Fraudulent Representation in Negotiations:

In an action by the seller against the buyer for the purchase price of a hotel, the buyer should be permitted to present evidence that: (1) he was given false information by the seller's agent in response to inquiries made upon buyer's inspection of the property; and (2) that he was prevented by the seller from further inspection of the premises. Jenkins v. Hillard, 199 M 1, 647 P2d 354, 39 St. Rep. 1156 (1982).

Where a contract is sought to be avoided on the ground that the party bound was induced to enter into it by his opponent's fraudulent representations, the latter is not in a position to invoke the rule that a contract in writing may not be varied by parol testimony to prevent the former from testifying to such representations made during preliminary negotiations. Advance-Rumely Thresher Co. v. Wenholz, 80 M 82, 258 P 1085 (1927).

Parol Evidence to Show Fraud or Resolve Ambiguity: Parol evidence is admissible to resolve ambiguities and to determine whether the buyers were fraudulently induced into entering a written contract where seller made express warranties that application for special improvement district had been made when he knew that an application had not been made. Dodds v. Gibson Prod. Co., 181 M 373, 593 P2d 1022 (1979).

Contract Different From Writing — Evidence Admitted: In an action by the payees against the makers for the balance due on a renewal note, where there was fraud and partial failure of consideration and one of the makers testified that he did not know how to figure interest, the makers were not precluded from showing that the contract was different from what the writing showed it to be. Jensen v. Franklin, 135 M 341, 340 P2d 832 (1959).

Evidence Admissible to Show Fraudulent Conduct: Where plaintiff alleged mistake and fraud and the evidence disclosed that the inducement held out to plaintiff to sign an agreement was based on fraudulent representations of defendants that a lease need not be mentioned in a contract of sale of a business and the lease, the evidence was admissible to show the purchase of the lease and defendant's fraudulent conduct, over objection that it varied the contract. Sathre v. Rolfe, 31 M 85, 77 P 431 (1904).

CIRCUMSTANCES OF EXECUTION

Genuine Issue of Material Fact Whether Dam Operation Damaged Lakeshore Properties — Summary Judgment Improper — Class Action Vacated: Flathead Lake landowners brought a class action suit against defendant operators of Kerr Dam for operating outside the scope of their easements in a manner that continuously eroded and damaged plaintiffs' lakeshore properties. The District Court rejected plaintiffs' argument that the dam operator was not allowed to affect plaintiffs' properties above an elevation of 2,893 feet, concluding instead that defendants' easements covered entire parcels. The court concluded that erosion, including wave action erosion, was within the scope of the easements and held that any duty defendants had to not cause unreasonable damage to plaintiffs' properties applied only to damage unrelated to use of the easement. Therefore, summary judgment was granted to defendants, and plaintiffs appealed. The Supreme Court first agreed that the District Court's contour line theory was correct. The "2,893 feet" clause did not establish the vertical limit argued by plaintiffs because although the dam operators' right to flood, subirrigate, drain, or otherwise affect the shoreline was not unlimited, it was not restricted to a maximum elevation of 2,893 feet at each parcel, but rather extended to whatever part of each parcel was affected when the lake was held at 2,893 feet above mean sea level as measured at the dam. The court also agreed that the right to cause some erosion was necessary to the enjoyment of the right to perpetually flood, subirrigate, and drain and was thus included by implication in the easements. However, further factual development and trial were necessary to address the question of whether the erosion was reasonable, necessary, and within the scope of the easements, which could not be resolved by summary judgment. Additionally, the question of whether defendants breached their obligation to not cause unreasonable damage to the shoreline properties and to not unreasonably interfere with plaintiffs' enjoyment also required further factual development and possibly trial. Therefore, the order certifying the case as a class action was vacated and the case was remanded for further consideration. Mattson v. Mont. Power Co., 2009 MT 286, 352 M 212, 215 P3d 675 (2009).

On remand, the District Court decertified the class as to one defendant and denied the plaintiffs' motion for certification as to another defendant on the basis that the question of whether the erosion caused unreasonable damage to or unreasonably interfered with the plaintiffs' properties required an individual, property-by-property analysis that was improper for class certification. On appeal, the Supreme Court reversed, concluding that class certification to both defendants was proper because the reasonableness of the erosion presents a common question that is incapable of being resolved on a property-by-property basis since an aggregate of the benefits and burdens imposed on all of the shoreline properties must be considered together to determine reasonableness. Mattson v. Mont. Power Co., 2012 MT 318, 368 Mont. 1, 291 P.3d 1209.

Loan of Title Based Upon Exchange of Deeds Upheld — Oral Extrinsic Evidence Controlling: Johnson agreed to loan Anderson the title to several lots that Johnson owned on Flathead Lake so that Anderson could mortgage the lots and use the proceeds for a business venture. Johnson and Anderson both executed deeds to the property, and Anderson occupied the property pursuant to a lease agreement. Later, the agreement was breached when Anderson conveyed his interest to a third party and cut trees from the property. Both parties sought a declaration of ownership in a quiet title action. The District Court admitted oral evidence showing that nothing more than a loan of title evidenced by an exchange of deeds was intended. The Supreme Court held that the timing of the execution and delivery of the two deeds was not controlling and that the deed conveying the property back to Johnson, even though it may have been signed and delivered first, was controlling in light of the circumstances of the transaction. The Supreme Court held that the deed conveying the property back to Johnson was valid as between the parties even though it was not recorded until later. Anderson v. Johnson, 264 M 66, 870 P2d 59, 51 St. Rep. 149 (1994).

Witnesses to Contract — Admissible to Explain Circumstances: Under this section, testimony of witnesses who were present at the time a contract of lease of oil lands was entered into or just prior thereto, as to statements made by officers of the lessors in connection with conversations had with an officer of defendant with relation to offers received for drilling wells on the lands in question, was properly admissible in explanation of the circumstances under which the contract was made. Brown v. Homestake Exploration Co., 98 M 305, 39 P2d 168 (1934).

Object of Parties in Executing Permissible Inquiry: The parol testimony rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument sued upon. While its language cannot be qualified or varied from its natural import, the circumstances under which it was entered into and the real intention of the parties may be shown by parol to prevent either of the parties to it from committing a fraud on the other by claiming it to be what it in fact is not. Bridges & Co., Inc. v. Bank of Fergus County, 77 M 524, 251 P 1057 (1926).

Evidence Showing Circumstances of Execution Admissible: A conversation between buyer and seller had prior to the execution of a bill of sale, with the terms of which it was not in conflict and which was material to show the circumstances under which the writing was executed, was admissible in evidence and not open to the objection that it varied the written agreement. Sutherland v. Green, 49 M 379, 142 P 636 (1914).

Part 3
Effect of Transfer

70-20-301. Fee simple presumed to pass.

Case Notes

Option Agreement Upheld — Minor Variations Not Fatal: The defendant appealed from a judgment granting specific performance of an option agreement to the plaintiff and ordering the property involved conveyed to the plaintiff. The defendant claimed on appeal that the tender and demand under the option agreement were not a legal tender. Specifically, he contended that the claimed tender actually was a counteroffer and therefore he was at liberty to ignore it or to impose other terms in response to it. A number of attacks on the actual terms of the "tender and demand" sent by him to the plaintiff were included in this issue on appeal. Matters that are subsidiary, collateral, or which do not go to the performance of the contract are not essential and do not have to be expressed in the contract. Accordingly, the plaintiff's obtaining a warranty deed and the signature of the defendant's wife on the deed here, when they had no right to obtain either, were not a fatal variance from the terms of the option agreement. The option agreement did not specify the kind of deed, and in such cases it is presumed that a fee simple is intended to pass. The court noted that the plaintiff was ready, willing, and able to perform. The demand that the defendant's wife also sign the deed was not such a material variance from the option agreement as to defeat specific performance. Van Atta v. Schillinger, 191 M 472, 625 P2d 73, 38 St. Rep. 426 (1981), followed in Hetherington v. Ford Motor Co., 257 M 395, 849 P2d 1039, 50 St. Rep. 325 (1993), which was distinguished in Murphy v. The Home Depot, 2012 MT 23, 364 Mont. 27, 270 P.3d 72.

Option Agreement — "Indefinite" Terms: The defendant appealed from a judgment granting specific performance of an option agreement to the plaintiff and ordering the property involved conveyed to the plaintiff. The defendant contended that the terms of the option agreement were so indefinite that specific performance could not be granted as a remedy. When the contract is silent, the place of payment is wherever the seller can be found. The option agreement here provided for the manner and the amount of payment. Although the interest to be conveyed was not mentioned, 70-20-301 provides that when the contract or terms of the grant are silent, a fee simple is presumed to be intended to pass. The Supreme Court concluded that the defendant surely did not intend that any less interest should pass and if he so intended, he did not prove it. Specific performance was affirmed. Van Atta v. Schillinger, 191 M 472, 625 P2d 73, 38 St. Rep. 426 (1981).

Restriction on Reconveyance: Addition to a warranty deed in the usual printed form of statement that grantees agreed not to sell or dispose of the land except to grantors or their heirs did not limit the interest conveyed to a life estate. In re Vincent's Estate, 133 M 424, 324 P2d 403 (1958).

Quitclaim:

Although granting clause of deed read "remise, release and forever quitclaim", deed was more than a quitclaim deed and passed after-acquired title where habendum clause read "To have and to hold all and singular the said premises together with the appurtenances unto the said party of the second part, and to his heirs and assigns forever" and certain surface tracts were excepted from the conveyance. Henningsen v. Stromberg, 124 M 185, 221 P2d 438 (1950).

Use of word "quitclaim" does not restrict the conveyance if other language is employed in the instrument indicating the intention to convey the land itself. Henningsen v. Stromberg, 124 M 185, 221 P2d 438 (1950).

Rebuttable Presumptions: The presumptions that a fee-simple title passes by grant of real property unless it appears that a lesser estate was intended, that a thing delivered by one to another belongs to the latter, and that a conveyance made to one toward whom the grantor stands in a confidential relation is a gift are rebuttable and must give way to proved facts. Hoppin v. Lang, 81 M 330, 263 P 421 (1928).

Growing Timber: Where a landowner conveyed growing timber, with a right-of-way over the land for the purpose of removing it, to the buyer, "his heirs and assigns forever", without limitation or condition, a fee-simple estate in the timber passed to the grantee, and such grant was not defeated by the latter's failure to cut and remove timber within a reasonable time. R. M. Cobban Realty Co. v. Donlan, 51 M 58, 149 P 484 (1915).

Mining Claim: One who executes a deed to a portion of a lode claim is presumed to intend to pass the best title he has in the ground. Collins v. McKay, 36 M 123, 92 P 295, 122 Am. St. Rep. 334 (1907).

70-20-302. After-acquired title to pass by operation of law.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Quitclaim: Although granting clause of deed read "remise, release and forever quitclaim", deed was more than a quitclaim deed and passed after-acquired title where habendum clause read "To have and to hold all and singular the said premises together with the appurtenances unto the said party of the second part, and to his heirs and assigns forever" and certain surface tracts were excepted from the conveyance. Henningsen v. Stromberg, 124 M 185, 221 P2d 438 (1950).

Royalty Interest: Where person conveyed a 1% royalty of all oil and gas produced and saved from certain land and the instrument of conveyance concluded with the words "and agree to warrant and defend the title to the same and that I have lawful authority to sell and assign said royalty", the instrument was sufficient to pass after-acquired title where grantee had no title at time of execution of instrument. Mitchell v. Pestal, 123 M 142, 208 P2d 807 (1949).

Estoppel as Basis: The doctrine that title to realty, acquired by grantor thereof after conveyance, passes to grantee is based on estoppel. Rowell v. Rowell, 119 M 201, 174 P2d 223, 168 ALR 1141 (1946).

Title Defective at Time of Grant: The statutory rule that title to realty, acquired by grantor thereof after conveyance, passes by operation of law to grantee applies where grantor's title, at time of grant, is defective or lacking and he obtains title or portion thereof after grant. Rowell v. Rowell, 119 M 201, 174 P2d 223, 168 ALR 1141 (1946).

Assent by Grantor to Mortgage by Grantee: One who transfers his interest in land by deed absolute or in trust to secure a debt and thereafter agrees to the execution of a mortgage thereon by the grantee is estopped by his deed from later claiming an interest in the property adverse to the mortgagee, and any title he may thereafter acquire inures to the benefit of the mortgagee as security for the payment of the grantor's debts assumed by the grantee. First St. Bank v. Mussigbrod, 83 M 68, 271 P 695 (1928).

Desert Land: Where an entryman of desert land conveyed it before patent to another who mortgaged it and thereafter the entry was canceled for fraud, whereupon the entryman filed upon the same land under the Enlarged Homestead Act and secured patent, the title thus acquired by him did not inure to the benefit of the mortgagee of his grantee of the desert land, the provisions of this section, 70-20-303, and 71-1-213, relating to after-acquired title, having no application under such circumstances, since to hold otherwise would be in effect to nullify the act of Congress prohibiting the alienation of public land prior to patent. Phoenix Mut. Life Ins. Co. v. Brainard, 82 M 39, 265 P 10 (1928).

Mining Claim: Under this section and 70-20-301, a deed purporting to transfer a portion of a lode claim, which is named therein, located for the purpose of protecting a placer claim from possible adverse claimants prior to procurement of patent for the latter, conveyed such portion of the afterward patented placer claim, lying within the exterior boundaries of the lode claim, as could be identified. It was immaterial whether the lode location was a valid one as against others. Collins v. McKay, 36 M 123, 92 P 295, 122 Am. St. Rep. 334 (1907).

70-20-303. Grant conclusive — exception for good faith purchaser.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Property Transferred to Deny Spousal Interest in Marital Estate — Inclusion as Distributable Property Proper: A husband and wife owed about $6,000 in back taxes on their property, which was in jeopardy of being sold at a tax sale. The couple was unable to obtain a loan because of a prior bankruptcy, so they arranged to transfer the property to the husband's mother, who then took out a loan to pay the taxes, using the property as collateral. When the couple later sought to dissolve their marriage, their petition made no mention of any real property acquired during the marriage. The husband testified at the hearing, but the wife did not attend, and dissolution was granted without addressing the wife's interest in the property. She moved to set aside the judgment pursuant to 40-4-135, and the District Court voided the deed transferring the property to the mother, issued a court deed naming the mother as grantor and the husband and wife as grantees to hold the property as tenants in common, and included the property in the marital estate. The mother contended that the property transfer more than 2 years before commencement of the dissolution was final against the husband and wife as grantors, citing this section, and that the property was thus not available as an asset of the couple and was improperly included in the marital estate. The Supreme Court affirmed, noting that the couple had submitted false proposed findings and conclusions when they made no mention of any real property acquired during the marriage, which had the effect of defrauding the court and denying the wife her interest in the marital property. Inclusion of the property in the marital estate was proper. In re Marriage of Bell, 2000 MT 88, 299 M 219, 998 P2d 1163, 57 St. Rep. 381 (2000).

Not Applicable to Desert Land Entry Before Patent: This section did not apply to a conveyance of a desert land entry before patent, where the entry was subsequently canceled for fraud, even though the same entryman eventually secured patent under the Enlarged Homestead Act, since to apply the section would nullify the congressional policy against alienation before patent. Phoenix Mut. Life Ins. Co. v. Brainard, 82 M 39, 265 P 10 (1928).

Grantee Vested With Clear Title: A deed is a declaration that the grantee is vested with a clear title, free from any lawful claim, not only by the grantor but by any other person, except as provided in this section. Dubbels v. Thompson, 49 M 550, 143 P 986 (1914).

70-20-304. Implied covenants — free from encumbrance.

Compiler's Comments

2009 Amendment: Chapter 56 ; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Disclosure of Building Leakage and Source of Water Not Material Fact: Plaintiffs purchased a building in Philipsburg for use as a residence. Water began seeping into the basement a couple of years later, and plaintiffs sued the sellers for breach of the warranty of habitability and the city because the source of the water may have been from a broken water line nearby. The District Court summarily dismissed the claim against the sellers because the sellers' knowledge of prior leakage was not a material fact and because the question of the source of the water was not material to the transaction between the parties. Plaintiffs appealed, but the Supreme Court affirmed. Plaintiffs all but conceded that the prior leakage was not important when they did not disclose the leakage to the bank when they refinanced the property. Further, plaintiffs' initial claim against the sellers was for nondisclosure of the leakage without regard to the source, so summary judgment was not precluded because the source was not essential to the case against the sellers. Bond v. Philipsburg, 2003 MT 74, 315 M 7, 67 P3d 255 (2003).

No Express Warranties Found in Repair Contracts, Protective Covenants, and Preliminary Declaration: The plaintiffs, a condominium owners' association and its individual members, sued Big Sky of Montana Realty, Inc., the successor in interest of Big Sky of Montana, Inc., for breach of express warranties in failing to originally construct and later repair construction defects in fireplaces in the Deer Lodge Condominiums at Big Sky, Montana, in accordance with applicable fire and building codes. The plaintiffs based their claim of express warranty upon the repair contracts, claiming that the contracts called for the repairs to be done according to applicable plumbing, electrical, and building codes. Plaintiffs also based their claim of express warranty on protective covenants that require compliance with the same codes and on the preliminary declaration for the condominiums that required compliance with those codes. The plaintiffs contended that the declaration ran with the land because it had to be recorded. The District Court granted the defendants' motion for summary judgment, dismissing Big Sky of Montana Realty, Inc. The Supreme Court held that the District Court correctly found that no express warranties existed. Ass'n of Unit Owners of Deer Lodge Condominium v. Big Sky of Mont., Inc., 245 M 64, 798 P2d 1018, 47 St. Rep. 1814 (1990).

No Implied Warranty of Habitability or Use Found: The plaintiffs, a condominium owners' association and its individual members, sued Big Sky of Montana Realty, Inc., the successor in interest of Big Sky of Montana, Inc., for breach of implied warranties in failing to originally construct and later repair construction defects in fireplaces in the Deer Lodge Condominiums at Big Sky, Montana, in accordance with applicable fire and building codes. The plaintiffs based their claim of implied warranty on case law that found an implied warranty of habitability and on cases that held that subdivision plats create an implied covenant between developers and subsequent purchasers to use space in the manner designated in the plat. The District Court granted the defendants' motion for summary judgment, dismissing Big Sky of Montana Realty, Inc. The Supreme Court held that the District Court correctly found that no implied warranties existed. Ass'n of Unit Owners of Deer Lodge Condominium v. Big Sky of Mont., Inc., 245 M 64, 798 P2d 1018, 47 St. Rep. 1814 (1990).

Defects Not Precluding Use of Dwelling as Residence — Limitation of Implied Warranty of Habitability: The Supreme Court reversed a holding that the implied warranty of habitability applied in a case where a water seepage problem was an inconvenience but did not render the home uninhabitable. The court more clearly defined the implied warranty of habitability in holding that it was limited to defects that are so substantial as to reasonably preclude use of the dwelling as a residence. Samuelson v. A.A. Quality Constr., Inc., 230 M 220, 749 P2d 73, 45 St. Rep. 157 (1988).

Encroachment as Encumbrance: An encroachment may or may not be an encumbrance. In determining that there was a fact question as to whether there was a legal right to encroachment, the Supreme Court adopted the rule set out in 3 American Law of Property 12.128 (A.J. Casner ed. 1952): "[I]f the encroachment is of an improvement located on adjoining land which extends across the line onto the land conveyed, there may be a breach of either the covenant of seizin or of the covenant against encumbrances, depending on whether title to that part of the land purchased has been lost by adverse possession, or has become encumbered by an easement." D'Agostino v. Schapp, 230 M 59, 748 P2d 466, 45 St. Rep. 14 (1988).

Warranty of Habitability of Mobile Home — No Remedy for Minor Defects: Although a builder-vendor of a new home impliedly warrants that the residence is constructed to be habitable, the warranty does not require that the home be defect free. The critical determination for a breach of habitability is whether defects relate to useful occupancy of the home. Where a mobile home did not constitute a health or safety hazard and, despite a number of irritating problems, was still considered by experts for both parties to be habitable, the implied warranty was not broadened to provide a remedy for the minor defects and annoyances. McJunkin v. Kaufman, 229 M 432, 748 P2d 910, 44 St. Rep. 2111 (1987).

Contract for Deed — When Vendor to Produce Marketable Title: The rule in Montana is that a seller under an installment sales contract does not have to produce marketable title until the date set for final payment and tender of the deed, as explained in Silfvast v. Asplund, 93 M 584, 20 P2d 631 (1933). In the instant case, the Supreme Court refused to acknowledge an exception to the rule urged by the vendee for the reason that the contract expressly contemplated that the vendor produce marketable title well in advance of the closing date. The court disapproved of vendee's withholding of payments until title deficiencies were rectified, noting that the contract provided remedies for such deficiencies but vendee failed to avail itself of them. Scheitlin v. R & D Minerals, 217 M 8, 701 P2d 1388, 42 St. Rep. 986 (1985), followed in Hollas v. McLeod, 246 M 436, 804 P2d 1038, 48 St. Rep. 28 (1991), and in Wise v. Sebena, 248 M 32, 808 P2d 494, 48 St. Rep. 309 (1991). However, when the parties specifically agreed a mortgage would be released no later than 1 year after a contract was entered into but seller failed to obtain release, buyer was entitled to suspend performance. Sjoberg v. Kravik, 233 M 33, 759 P2d 966, 45 St. Rep. 1270 (1988).

Implied Warranty of Habitability — Privity of Contract Not Required: Sale of a lot to plaintiffs was contingent upon plaintiffs' agreement to allow seller to contract with Mora Brothers, Inc., for the construction of their home. When the land beneath their new home began to slide downhill, plaintiffs sued for damages. District Court granted plaintiffs' motion for summary judgment against seller and Mora Brothers, Inc., as builder-vendors on the theory of breach of implied warranty of habitability but denied plaintiffs' motion against Mora Brothers, Inc., on the issue of negligence. Supreme Court affirmed District Court's finding that Mora Brothers, Inc., is liable to plaintiffs under theory of implied warranty of habitability. The warranty does not depend on a contract for its existence, therefore privity of contract is not required. Once plaintiffs showed that house moved, defendant had to provide an explanation to create a genuine issue of fact. Defendant failed to provide an explanation, so summary judgment was proper. Degnan v. Executive Homes, Inc., 215 M 165, 696 P2d 431, 42 St. Rep. 262 (1985).

Implied Warranty of Habitability: Where builder sold a newly built single family residence which subsequently became uninhabitable due to settling damage caused by a unique soil condition and where no negligence or fault of the builder was found, the court upheld the imposition of a common-law implied warranty of habitability in placing liability on the builder. (The restriction on implied covenants contained in this section was not addressed.) The implied warranty is based on an implicit agreement that the seller will transfer a house which is suitable for habitation and on the fact that the builder is in a better position to examine and discover defects. Chandler v. Madsen, 197 M 234, 642 P2d 1028, 39 St. Rep. 508 (1982).

Recognition of Implied Negative Easements Under Limited Circumstances Only: Appellant appealed from a permanent injunction restraining it from making commercial use of its property. A number of land transactions in the title chain preceded appellant's purchase of its parcel. The issue on appeal was whether or not the parcel was subject to a restriction against commercial use set forth in the 1948 deed. Because of the way various transactions in the chain of title were handled, any restriction on appellant's land would have to be an implied one. The reviewing court stated that equitable principles control the application of implied restrictions on land use. Additionally, recognition of any implied negative easements as to a particular lot was to be considered with extreme caution since such an action results in depriving a person of the use of his property by imposing a servitude through mere implication. An implied restriction on land use should be enforced only as an equitable servitude against a transferee who takes with knowledge of its terms and under circumstances that would make enforcement of the restriction equitable. In this case, there was no evidence that the appellant or its predecessor was ever informed in a deed, contract, or brochure or by representations of the seller that the lots were subject to a restriction against commercial use. No evidence was presented that the restriction was ever placed on the original subdivision. The reviewing court refused to find an implied use restriction and lifted the injunction. Goeres v. Lindey's, Inc., 190 M 172, 619 P2d 1194, 37 St. Rep. 1846 (1980), followed in Flaig v. Gramm, 1999 MT 181, 295 M 297, 983 P2d 396, 56 St. Rep. 710 (1999).

Implied Covenants Not Enumerated: There can be implied reservations or grants of easement by necessity. Where high-rise condominium was constructed and apartments therein sold under plan whereby corporate builders sold individual apartments to suitable applicants but management corporation retained ownership of building and deed between the two corporations reserved no easements, an implied equitable servitude attached to transfers of apartments in question, requiring that they be used for residential purposes only. Thisted v. Country Club Tower Corp., 146 M 87, 405 P2d 432 (1965), overruling holding in Simonson v. McDonald, 131 M 494, 311 P2d 982 (1957), that this section abolishes all implied covenants except the two enumerated and observing that language in Simonson was too broadly put and should have been limited in application to facts of that case.

Delinquent Taxes: Where by warranty deed the "parties of the first part" grant unto the Northern Company the lands described therein, the grantors impliedly, under the statutes, covenanted that at time of execution of deed the lands were free from delinquent taxes. Such implied covenant could be sued upon as if expressly set out in the deed. Schuster v. Northern Co., 127 M 39, 257 P2d 249 (1953).

Tax Liens: A covenant in a deed to warrant and defend plaintiff's "right, title, and interest in and to said premises" and the quiet and peaceable possession thereof, "unto the said party of the second part, his heirs and assigns against the acts and deeds of said party of the first part, and all and every person and persons whomsoever, lawfully claiming or to claim the same", constitutes a sufficient warranty to compel the grantor to answer for taxes lawfully levied on the premises conveyed and existing as a lien thereon at time of the conveyance. Milot v. Reed, 11 M 568, 29 P 343 (1892).

Law Review Articles

Real Property: "Reciprocal Negative Easement" Implied From Contract, Deed and General Building Plan (Thisted v. Country Club Tower Corp., 146 M 87, 103, 405 P2d 432), 27 Mont. L. Rev. 91 (1965).

Landlord and Tenant—Waste—Implied Covenant Restricting Use of Premises, 19 Mont. L. Rev. 167 (1958).

Implied Grants and Reservations of Ways of Necessity Abolished (Simonson v. McDonald, 131 M 494, 311 P2d 982), 19 Mont. L. Rev. 73 (1957).

70-20-305. Encumbrance defined.

Case Notes

Encroachment as Encumbrance: An encroachment may or may not be an encumbrance. In determining that there was a fact question as to whether there was a legal right to encroachment, the Supreme Court adopted the rule set out in 3 American Law of Property 12.128 (A.J. Casner ed. 1952): "[I]f the encroachment is of an improvement located on adjoining land which extends across the line onto the land conveyed, there may be a breach of either the covenant of seizin or of the covenant against encumbrances, depending on whether title to that part of the land purchased has been lost by adverse possession, or has become encumbered by an easement." D'Agostino v. Schapp, 230 M 59, 748 P2d 466, 45 St. Rep. 14 (1988).

When Lien Attaches: A lien created by a special improvement district assessment is an encumbrance upon the property which dates from the passage of the resolution creating the assessment and not from the date the individual installments mature. Engebretson v. Putnam, 174 M 409, 571 P2d 368 (1977).

70-20-306. Responsibility of heirs of covenantor — certain warranties abolished.

Compiler's Comments

2009 Amendment: Chapter 307 near middle following "property are" inserted exception clause; and made minor changes in style. Amendment effective October 1, 2009.

70-20-307. Transfer of land bounded by highway — what passes.

Case Notes

Boundary With and to Side of Street — Fee to Center of Street: A boundary to and with the side of a street carries the fee to the center of the street unless a contrary intent appears from the deed. Herreid v. Hauck, 254 M 496, 839 P2d 571, 49 St. Rep. 884 (1992), followed in Knutson v. Schroeder, 2008 MT 139, 343 M 81, 183 P3d 881 (2008).

Boundary Set at Road — No Intent Not to Pass to Center of Road: Fact that deed described boundary as "following the south side of said county road" did not show an intent that title was not to pass to the center of the road. McPherson v. Monegan, 120 M 454, 187 P2d 542 (1947).

70-20-308. Easements to pass with property.

Case Notes

Existence of Implied Easement by Preexisting Use — Easement by Implication Created by Operation of Law at Time of Severance — Undisputed Facts Established Scope of Easement Providing Ingress and Egress to Owner, Invitees, and Public. Thomas Mann Post No. 81 v. Knudsen Family Ltd. Partnership, 2022 MT 150, 409 Mont. 318, 514 P.3d 409.

Appurtenant Easement Created When Servient and Dominant Estates Ascertainable: A road access easement was granted to the defendant's predecessor-in-interest in an easement document that did not specify whether the easement was appurtenant or in gross. The owner of the servient estate sued to restrain the defendant from using the road. The District Court found that the easement was in gross and therefore ruled in favor of the owner of the servient estate. On appeal, the Supreme Court found that the recorded plat referenced in the easement document was part of the instrument conveying the easement, and that the dominant and servient estates were reasonably ascertainable using the easement document and plat. Because the conveyance language in the easement document and subsequent conveyances had included the original easement holder's successors-in-interest and the defendant clearly owned the relevant properties, the Supreme Court reversed, concluding that the easement was appurtenant and benefited the defendant. Wilkinson, LLC v. Erler, 2021 MT 177, 404 Mont. 541, 491 P.3d 704.

Valid Easement in Gross Created for Conservation Purpose — Restriction Enforceable Against New Owners — Conservation Easement Laws Not Only Means of Creating Conservation Restriction: A seller of a 40-acre parcel of land imposed restrictions in a deed that prevented usage of the property in a manner that reduced the quality of the stream and the riparian area, in addition to limiting construction to one single-family residence. The purchaser of the property eventually sold it to the plaintiffs. Twelve years after purchasing the property, the plaintiffs filed a complaint in District Court against the trust of the original seller for the purpose of invalidating the property restrictions and going forward with a subdivision of the property. The District Court held that the restrictions were enforceable against the plaintiffs by the trust, despite the fact that the restrictions were not created as a Title 76, ch. 6, conservation easement. On appeal, the Supreme Court affirmed, determining that the restrictions were enforceable against the plaintiffs as an easement in gross and that a conservation restriction is not invalid simply because it was not created under Title 76, ch. 6. The court reasoned that the restrictions were made for conservation purposes within the scope of 70-17-102, the benefit and burden of the easement passed to the successors in interest, the plaintiffs had actual notice of the restrictions, the restrictions were recorded, and there was no language in the deed from the original seller to the original buyer limiting the seller's ability to transfer the easement. The court also reasoned that 76-6-105 allows for restrictions for the purpose of conserving land even if the restrictions are not created under Title 76, ch. 6. Scott v. Lee and Donna Metcalf Charitable Trust, 2015 MT 265, 381 Mont. 64, 358 P.3d 879.

Contiguous Estates Not Necessary for Prescriptive Easement to Exist: A prescriptive easement may be appurtenant to noncontiguous property. Meine v. Hren Ranches, Inc., 2015 MT 21, 378 Mont. 100, 342 P.3d 22.

Easement by Reservation — Creation by Reference — Location Description on Plat Sufficient to Establish Burden Imposed by Easement With Reasonable Certainty: The Supreme Court held that an easement by reservation was created when the deed conveying title referred to the plat on file with the County Clerk and Recorder. While the plat did not provide a metes-and-bounds description of the easement's location, the court determined that the plat identified the dominant and servient tenements, the intended use or necessity for the easement, and a description of the easement's location sufficient to establish with reasonable certainty the course of the easement across the property. Yorlum Properties, Ltd. v. Lincoln County, 2013 MT 298, 372 Mont. 159, 311 P.3d 748.

Implied Easement by Necessity — Negated by Eminent Domain Power: In the context of federal checkerboard land grants to railroads, the claimant of an implied easement by necessity traced common ownership of the dominant and servient parcels to the federal government, and the necessity for the easement arose when the parcels were severed from the federal government's common ownership, thus satisfying the unity of ownership requirement. However, the easement failed because the United States' power of eminent domain negated the "strict necessity" requirement, and the claimant failed to produce evidence regarding the government's intent to reserve an easement and its inability to condemn an easement. Yellowstone River, LLC v. Meriwether Land Fund I, LLC, 2011 MT 263, 362 Mont. 273, 264 P.3d 1065.

Elements of Implied Easement by Necessity Established — Easement Properly Granted — Interference Claim Properly Dismissed: Plaintiffs sought an easement by necessity across defendants' property. The District Court held that an easement by necessity existed and defined the scope of the easement, and both parties appealed. The Supreme Court affirmed. There was sufficient clear and convincing evidence of both unity of ownership and strict necessity to establish an easement by necessity. Additionally, nothing in the history or condition of the property at the time of severance supported a finding that the extent of the implied easement by necessity across the servient estate should be unlimited, so plaintiffs were entitled to cross defendants' land to reach a public road. However, plaintiffs' claim that defendants interfered with the easement failed. The essential acts that gave rise to the easement by necessity arose in the 1930s, but plaintiffs' right to the easement was not established until 2007, so defendants could not have wrongfully interfered with the easement. Ashby v. Maechling, 2010 MT 80, 356 Mont. 68, 229 P.3d 1210. See also Albert G. Hoyem Trust v. Galt, 1998 MT 300, 292 Mont. 56, 968 P.2d 1135, Watson v. Dundas, 2006 MT 104, 332 Mont. 164, 136 P.3d 973, and Wolf v. Owens, 2007 MT 302, 340 Mont. 74, 172 P.3d 124.

Lack of Express Utility Easements Not Condition Adversely Affecting Title: The buyer of condominium units refused to close on the sale because the sale agreement did not expressly state the existence of utility easements for each parcel. The District Court determined that the lack of express utility easements was not a condition that adversely affected title and held that the buyer breached the contract by refusing to close the sale. On appeal, the Supreme Court affirmed. The entire property was part of the sale, including all units and appurtenances. If the buyer wanted each unit to have a stated right to access the utility areas, the buyer could affirmatively grant that right to each unit after acquiring the property. Also, the buyer could have required the express establishment of the easements in a written addendum to the contract to be a condition precedent to closing, but the buyer did not do so. The buyer failed to establish that the absence of individual unit easements was an adverse condition of title that allowed the buyer to refuse to close the sale. Apple Park, LLC v. Apple Park Condominiums, LLC, 2008 MT 284, 345 M 359, 192 P3d 232 (2008).

Ditches Not Necessary for Exercise of Water Right — No Ownership Interest in Ditches: A dispute arose over whether plaintiff with water rights had an ownership interest in two ditches that crossed a neighbor's property. The District Court determined that no ownership interest existed, and plaintiff appealed. The Supreme Court noted that ditches are easements that attach to land and that a transfer of real property also transfers a ditch right in the same manner and to the same extent as at the time that the property was transferred, but also noted that a ditch right and a water right are separate and distinct property rights and that if a water right passes as an appurtenance, the means of conveying the water also passes. In order to determine whether the ditch right was appurtenant to the water right, the court examined necessity and beneficial use. In this case, the ditches in question were not necessary for plaintiff to exercise its water rights. Testimony indicated that no one had used the ditches to irrigate plaintiff's land and that plaintiff was able to exercise its water right through two other ditches, nor did plaintiff recognize a historical ownership interest in or beneficial use of the ditches in question. In addition, because the deeds were ambiguous with respect to which ditch rights were conveyed to each parcel, a search of the chain of title would not have revealed that plaintiff had an easement in the ditches. The District Court weighed the conflicting evidence and did not err in holding that plaintiff did not have an ownership interest in the ditches. The judgment was affirmed. Wills Cattle Co. v. Shaw, 2007 MT 191, 338 M 351, 167 P3d 397 (2007), following Lincoln v. Pieper, 245 M 12, 798 P2d 132 (1990), and Ponderosa Pines Ranch, Inc. v. Hevner, 2002 MT 184, 311 M 82, 53 P3d 381 (2002).

Easement Transferred With Transfer of Portion of Dominant Estate — Subdivision of Dominant Tenement Not Considered Increased Burden on Servient Tenement: The District Court found that the creation of a tract and the subsequent sale to Dabney constituted a transfer of a portion of the dominant estate and that the transfer conveyed all easements attached to the property to Dabney, so Dabney had a prescriptive easement to use a road across Leichtfuss's property to access the Dabney property. The court also concluded that Leichtfuss's parcels were not impermissibly burdened by Dabney's use of the road. On appeal, the Supreme Court affirmed. Although a life tenant or lessee generally cannot impose upon land a burden that passes to a remainderman or reversioner, the termination of a dominant estate held in less than fee simple does not automatically extinguish an appurtenant easement. Rather, it is the intent or expectations of the parties to the servitude that determine its duration. In this case, there was no evidence that the parties intended to abandon Dabney's parcel, so Dabney's use of the road was within the scope of the original easement on the parcel, and the easement was apportioned according to the division of the dominant tenement. In addition, Leichtfuss's contention that the apportionment increased the burden on the servient tenement also failed. "Subdivision and conveying away of portions of a dominant estate does not, in and of itself, mean that an additional burden is imposed upon the servient estate." Dabney's use of the parcel was consistent with the predecessor's historical use, and this was not a case in which the easement was suddenly being used to serve additional land or residences or in which the character of the easement's use was changed, so no increased burden to Leichtfuss's parcel was created. Leichtfuss v. Dabney, 2005 MT 271, 329 M 129, 122 P3d 1220 (2005), distinguishing Leffingwell Ranch, Inc. v. Cieri, 276 M 421, 916 P2d 751 (1996), and following Burleson v. Kinsey-Cartwright, 2000 MT 278, 302 M 141, 13 P3d 384 (2000).

Aerial Photographs Establishing Presence of Open and Visible Road on Property Before and After Purchase — Summary Judgment Regarding Easement Proper: Defendant purchased a lot in plaintiff's subdivision. Plaintiff's declaration of easements and rights-of-way granted and reserved easements across and in favor of all lots in the subdivision, but did not specify the location of any particular easement. Defendant blocked the road running across her property, and plaintiff sought monetary, injunctive, and declaratory relief. The District Court granted plaintiff a preliminary injunction prohibiting defendant from interfering with the road. Plaintiff then moved for partial summary judgment, arguing that plaintiff had an easement on the road by express reservation, by implication, and by prescription, supporting the motion with affidavits and aerial photographs taken 6 years before and 6 years after defendant purchased the property, indicating that the road was open and obvious. The District Court granted partial summary judgment, and defendant appealed. The Supreme Court affirmed. When an easement is reserved without designating a location and a road exists at the time of the reservation, then a court will treat the road as an easement that the parties anticipated and the parties are presumed to contract with reference to the condition of the property at the time of sale if the marks are open and visible. The aerial photographs established the absence of a genuine issue of material fact regarding the existence of the road in its present location prior to defendant's purchase of the property, and defendant denied but offered no proof that the road was not open and visible. The photographs were not susceptible to cross-examination because the credibility of the affiant who testified regarding the veracity of the photographs was not crucial to the decision of material fact. Plaintiff demonstrated the presence of the easement, and partial summary judgment on that issue was proper. Ponderosa Pines Ranch, Inc. v. Hevner, 2002 MT 184, 311 M 82, 53 P3d 381 (2002). See also Pioneer Min. Co. v. Bannack Gold Min. Co., 60 M 254, 198 P 748 (1921), and Godfrey v. Pilon, 165 M 439, 529 P2d 1372 (1974).

Easement by Reservation — Showing of Intent to Create Easement in Favor of Stranger to Deed Required: The Loomises contended that an easement by reservation to their property was created by two clauses within an original contract for deed when the Kolbs sold some adjoining property to the Luraskis. The language in the contract for deed purported to reserve a right-of-way and easement over and across the west 30 feet of the Luraski property for the purpose of establishing a public road and an easement for utilities. The District Court concluded that the disputed easement was outside the Loomises' chain of title, making them strangers to the deed, because the express reservation was from the Kolbs to the Luraskis and the Loomises were not parties. The Supreme Court agreed. An easement by reservation in favor of a stranger to a deed can be created only by clearly showing the grantor's intent to do so. In this case, testimony and evidence established that the Kolbs intended to preserve the option for means of access to other property only in the event that property was purchased, but the optional property was never purchased and the road was never constructed. The Supreme Court also disagreed with the Loomises' contention that no one should be considered a stranger to the deed because the reservation was for a public road. No rights are granted to the public prior to a road's actual creation and dedication. The court found it unlikely that a prudent landowner would reserve an easement for the benefit of the public at large, and the burden was on the Loomises, as strangers to the deed, to show the Kolbs' intent to reserve an easement for the Loomises' benefit. The fact that the Kolbs subsequently amended the original certificate of survey to eliminate the disputed easement was further proof that no easement reservation was created for the Loomises. Subsequent acts of the parties that tend to show the construction that they themselves placed upon the writing are also important in determining intent if intent is not clearly expressed in the deed. No easement by reservation was created in favor of the Loomises as a matter of law, and the District Court did not err in so holding. Loomis v. Luraski, 2001 MT 223, 306 M 478, 36 P3d 862 (2001).

Obstruction of Easement Properly Enjoined: Burleson filed an action to enjoin defendant from refusing access to an easement across defendant's property, and the District Court granted summary judgment to Burleson, permanently enjoining defendant from obstructing the easement. Defendant appealed, making various overlapping arguments attacking the creation of the easement, contending that the easement did not pass to subsequent purchasers, that the easement was somehow extinguished, and that defendant was not provided notice of the easement. The Supreme Court addressed each argument, noting that an easement is a nonpossessory interest in land creating a right of one person to use the land of another for a specific purpose or a servitude imposed as a burden upon the land and that an easement cannot be created, granted, or transferred except by operation of law, by an instrument in writing, or by prescription. In this case, an easement by reservation was created by the original documents and attached to the property when the dominant tenement was partitioned or subdivided. Summer access roads were clearly defined rights-of-way constituting easements that were attached to the remaining parcels in the subdivision and passed to subsequent purchasers, such as Burleson. Defendant's argument regarding lack of notice failed because each purchaser of land in the subdivision was notified of the easement through specific language in the contracts, deeds, and title insurance and defendant had actual notice of the easement when inspecting the property prior to purchase. The documents were sufficiently clear to indicate that the summer access roads, despite their designation, were intended to be available to subdivision owners for full-time access to their property. Defendant also presented no evidence to satisfy the necessary elements of extinguishment or abandonment. The owner of the servitude and the servient tenement were not the same person; there was no unity of ownership; the servient tenement was not destroyed; there was no evidence that the owner of the servitude performed or assented to an act that was incompatible with the nature of the easement; and the necessary elements of extinguishment through adverse possession were neither alleged nor satisfied. On the basis of the record, the District Court was affirmed. Burleson v. Kinsey-Cartwright, 2000 MT 278, 302 M 141, 13 P3d 384, 57 St. Rep. 1162 (2000), distinguished in Roland v. Davis, 2013 MT 148, 370 Mont. 327, 302 P.3d 91.

Public Highway Established Pursuant to 1895 Law — Mere Nonuse by County Not Considered Abandonment — Inapplicability of Prescriptive Easement and Reverse Adverse Possession: The District Court found that the Tucker Gulch Road was clearly defined and in use by the public for at least 27 years prior to enactment of sec. 2600, The Codes and Statutes of Montana (1895), which declared all highways and roads then used by the public as public highways. However, the court went on to hold that it was not a petitioned county road and that there was a prescriptive easement by the public over the road that had been lost through abandonment and by reverse adverse possession when a new road was relocated near the old one. The District Court properly found that Tucker Gulch Road was a public highway; however, mere nonuse or lack of maintenance by the county was insufficient to indicate a clear intent to abandon the road without notice and a public hearing. Moreover, the county's failure to respond to several quiet title actions in which the county was not served and the county's adoption of a resolution naming the road did not indicate an intent to abandon. Abandonment cannot be established by mere implication. The Supreme Court cited Baertsch v. Lewis & Clark County, 256 M 114, 845 P2d 106 (1992), for the general rule that title to a public road may not be obtained by adverse possession. The Supreme Court also cited Granite County v. Komberec, 245 M 252, 800 P2d 166 (1990), and affirmed the District Court's finding that there was not a public prescriptive easement along the relocated new road because most of the nonpermissive use of the new road was by occasional recreationists. The District Court's conclusion that creation of the easement was not specific and that the easements were designed for the access of the owners for activities associated with residential living was in error, however, absent evidence in the access agreement or survey establishing such a restriction. Thus, the grant of unrestricted access to landowners who had owned a mine adjoining the property in question was not in error. McCauley v. Thompson-Nistler, 2000 MT 215, 301 M 81, 10 P3d 794, 57 St. Rep. 855 (2000), distinguishing Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Foundation, Inc., 259 M 279, 856 P2d 525 (1993), and followed in Lee v. Musselshell County, 2004 MT 64, 320 M 294, 87 P3d 423 (2004). The Supreme Court clarified its ruling in McCauley on abandonment of a public highway in Soup Creek, LLC v. Gibson, 2019 MT 58, 395 Mont. 105, 439 P.3d 369.

Extent and Scope of Implied Easement: The extent and scope of an implied easement from existing use are determined by 70-17-106 and this section and are limited to its historical use at the time that the easement was created. In the present case, prior to severance and for over 50 years since, use of the easement was limited to agricultural and recreational purposes, and there was no evidence that the parties ever considered the easement to be unlimited in scope. Therefore, the District Court did not err when it found that the Hoyem Trust had an implied easement from existing use rather than an implied easement by necessity and that the scope and extent of the easement were limited to agricultural and recreational purposes based on the historical use of the easement at the time of its creation. Albert G. Hoyem Trust v. Galt, 1998 MT 300, 292 M 56, 968 P2d 1135, 55 St. Rep. 1230 (1998), modified in Tungsten Holdings, Inc. v. Kimberlin, 2000 MT 24, 298 M 176, 994 P2d 1114, 57 St. Rep. 125 (2000), requiring that in determining the scope and extent of an implied easement, consideration be given to the intent and reasonable expectations of the parties at the time of severance, and followed in Wolf v. Owens, 2007 MT 302, 340 M 74, 172 P3d 124 (2007). See also Fristoe v. Drapeau, 215 P2d 729 (Calif. 1950), and Restatement of Property 484, comment b (1944). Tungsten Holdings was followed in Waters v. Blagg, 2008 MT 451, 348 M 48, 202 P3d 110 (2008), which was overruled in part in Earl v. Pavex Corp., 2013 MT 343, 372 Mont. 476, 313 P.3d 154.

Informal Apparent Easement — Reasonable Necessity: For a use to give rise to an implied easement from existing use, it must be apparent and continuous at the time that the tract is divided. An easement is apparent when it may be discovered upon reasonable inspection. An apparent easement need not be so formal as to be an improved, paved, or even graveled two-way road but may be as simple as a path, roadway of sorts, trail, or primitive road. In addition to the requirement that the use be apparent and continuous at the time that the tract is divided, an implied easement from existing use must also have a use that is reasonably necessary for the enjoyment of the dominant parcel. An implied easement from existing use passes to all future owners of the property pursuant to this section. In the present case, the District Court properly held that an easement from existing use, not an implied easement by necessity, existed in favor of the Hoyem Trust over and across Galts' property. The easement by necessity requirement of "strict necessity" did not exist at the time that the property was severed in 1944 because a road existed that provided practical access to a public road for ingress and egress. The presence of an implied easement from existing use necessarily defeats the strict necessity requirement of an easement by necessity. Albert G. Hoyem Trust v. Galt, 1998 MT 300, 292 M 56, 968 P2d 1135, 55 St. Rep. 1230 (1998), following Michaelson v. Wardell, 186 M 278, 607 P2d 100 (1980), and followed in Tungsten Holdings, Inc. v. Kimberlin, 2000 MT 24, 298 M 176, 994 P2d 1114, 57 St. Rep. 125 (2000), and Wolf v. Owens, 2007 MT 302, 340 M 74, 172 P3d 124 (2007). See also Waters v. Blagg, 2008 MT 451, 348 M 48, 202 P3d 110 (2008), wherein the Supreme Court clarified that a connection to a public road is not required when a landowner seeks declaration of an implied easement by preexisting use, overruled in part in Earl v. Pavex Corp., 2013 MT 343, 372 Mont. 476, 313 P.3d 154,

Easement by Reservation — Written Documents — All Easements Considered Conveyed: An easement by reservation must arise from the written documents of conveyance. Deeds that reference plats are considered to convey all easements that are established by the recording of the plat. Tungsten Holdings, Inc. v. Parker, 282 M 387, 938 P2d 641, 54 St. Rep. 399 (1997), following Ruana v. Grigonis, 275 M 441, 913 P2d 1247 (1996), and followed in Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 M 52, 993 P2d 688, 57 St. Rep. 65 (2000).

Lack of Consent by All Owners to Purchase Real Property — Contract Unenforceable: Thornton offered to purchase certain real property by executing a buy/sell agreement. The evidence showed that Thornton knew that half of the property was held in trust by Norwest and half was owned by Songstad and her sisters. Thornton obtained the signature of Songstad (representing her sisters) on the buy/sell agreement, but not that of Norwest. Citing Weigand v. Mt. Land & Real Estate Inv., Inc., 223 M 137, 724 P2d 194 (1986), and Rase v. Castle Mtn. Ranch, Inc., 193 M 209, 631 P2d 680 (1981), the Supreme Court held that even though Thornton intended to purchase 100% of the interests in the property, he did not obtain consent for the sale of 100%. Therefore, no contract was formed and specific performance was unavailable to require the sale of the property. Thornton v. Songstad, 263 M 390, 868 P2d 633, 51 St. Rep. 104 (1994), followed in Austin v. Cash, 274 M 54, 906 P2d 669, 52 St. Rep. 1119 (1995).

Implied Easement Conveyed With Property: In the absence of any act to extinguish an implied easement, the easement acquired by a previous property owner passes with the title to the new owner upon purchase of the property. Wangen v. Kecskes, 256 M 165, 845 P2d 721, 50 St. Rep. 6 (1993).

Easement of Necessity — Strict Definition: Necessity must be strictly defined by the lack of means of ingress and egress. When at the time of severing unity of title of two parcels of land there was access across open prairie to the remainder, then no easement of necessity ever existed with respect to the road access through the severed parcel. Wagner v. Olenik, 234 M 135, 761 P2d 822, 45 St. Rep. 1790 (1988). See also Kelly v. Burlington N. RR Co., 279 M 238, 927 P2d 4, 53 St. Rep. 1132 (1996), in which an easement was granted on the basis that easement of necessity existed at the time that unity of ownership was severed.

Negative Easement Based on Oral Agreement — Statute of Frauds Inapplicable: Appellants claimed an oral agreement made in 1967 subjected land known as the Base Area Chalet to a negative easement that restricted the property to noncommercial activities. The Supreme Court found that a written 1971 agreement only contracted to convey property described as "sellers' land" which had been "subject to ski easement"; however, the chalet property was conveyed away by appellants in 1967 and had never been subject to the ski easement. Since the Base Area Chalet did not belong to "sellers" and was not subject to the easement in 1971, the 1971 agreement had no effect on the chalet property. For the same reason, the 1971 agreement could not satisfy the Statute of Frauds for any alleged oral agreement that would create a negative easement on the chalet property. Haggerty v. Gallatin County, 221 M 109, 717 P2d 550, 43 St. Rep. 674 (1986).

Finding of Way of Necessity Properly Denied: Jenkins sold a parcel of land to the defendant's predecessor in interest. The land was surrounded by other property, including state and railroad lands, and there was no access to it. The plaintiffs subsequently purchased property immediately behind the defendant's land. The District Court did not err in finding that no way of necessity in favor of the plaintiffs existed across the defendants' land. In order for a way of necessity to exist, the way must: (1) have existed prior to or at the time of the severance of the sold land; and (2) run over land, granted or reserved by the same grantor, over which there was access to a public road. In this case a third party, the state of Montana, owns land over which the way is alleged to run and, additionally, there was no access to or from a public road at the time of the conveyance. The prerequisites for a way of necessity did not exist. Schmid v. McDowell, 199 M 233, 649 P2d 431, 39 St. Rep. 1313 (1982), followed in Rathbun v. Robson, 203 M 319, 661 P2d 850, 40 St. Rep. 475 (1983), Peters v. Johnson, 203 M 120, 661 P2d 24, 40 St. Rep. 336 (1983), Big Sky Hidden Village Owners Ass'n, Inc. v. Hidden Village, Inc., 276 M 268, 915 P2d 845, 53 St. Rep. 379 (1996), and Frame v. Huber, 2010 MT 71, 355 Mont. 515, 231 P.3d 589, and relied upon and easement granted in Kelly v. Burlington N. RR Co., 279 M 238, 927 P2d 4, 53 St. Rep. 1132 (1996).

Innocent Purchaser Without Notice — Duty to Investigate Equities of Occupants: A purchaser, having actual notice of the presence of cabin owners and substantial improvements on a part of the land to be purchased suggesting outstanding equities in the cabin owners, has a duty to reasonably investigate those outstanding claims against the property, and failing to do so, the purchaser cannot claim to be an innocent purchaser without notice and rely upon written "licenses" of the cabin owners that contained never-used 30-day termination provisions that were formulated, not to allow wholesale eviction of cabin owners, but to allow the seller to rid himself of objectionable cabin owners. Rase v. Castle Mtn. Ranch, Inc., 193 M 209, 631 P2d 680, 38 St. Rep. 992 (1981), followed in Thornton v. Songstad, 263 M 390, 868 P2d 633, 51 St. Rep. 104 (1994).

Implied Easement for Road to Residence: When, prior to selling a portion of his property, appellant built an access road to serve the residence now owned by respondents, that road was continuously used by respondents and their predecessors to serve the residence, and the road was and still is the only means of access used by respondents and their predecessors, the conveyance of the residence property to the predecessors of the respondents created a permanent easement under this statute for the use of a roadway to the residence. Michaelson v. Wardell, 186 M 278, 607 P2d 100 (1980), followed in Albert G. Hoyem Trust v. Galt, 1998 MT 300, 292 M 56, 968 P2d 1135, 55 St. Rep. 1230 (1998).

Statutory Enlargement of Common Law: This statute recites the common-law principle that an easement is reserved when the dominant tenement is conveyed and a servient tenement is retained. However, this statute also extends the common law and creates an easement, nonexistent prior to the conveyance, in cases where the property in question was "obviously and permanently" used by the grantor for the benefit of what becomes the dominant estate. Michaelson v. Wardell, 186 M 278, 607 P2d 100 (1980), followed in Albert G. Hoyem Trust v. Galt, 1998 MT 300, 292 M 56, 968 P2d 1135, 55 St. Rep. 1230 (1998).

Intent of Grantor to Control Creation of Easement: Before the creation of an easement in a stranger to a conveyance will be recognized, the intent of the grantor to create the easement must clearly be shown. If it appears it is as likely the purpose of the clause in the deed was to protect the grantor's warranty of title as to reserve an easement, the court will not depart from the majority rule and find an easement. The testimony presented indicated that in executing the documents that passed equitable title to the property, the grantor did not intend to create an easement. There was no testimony that any of the grantors received less than full value for the land because of the existence of an easement. Finally, although the language of the deed does locate the easement, it fails to name a dominant tenement. Considering these factors together, as in Wilson v. Chestnut, 164 M 484, 525 P2d 24 (1974), it is as likely the grantors intended to protect their warranty of title as to reserve an easement. Thus, the deeds do not establish an easement of record. Medhus v. Dutter, 184 M 437, 603 P2d 669 (1979), followed in Kelly v. Wallace, 1998 MT 307, 292 M 129, 972 P2d 1117, 55 St. Rep. 1271 (1998).

Enforcement of Easement — Laches: The plaintiff had no duty to seek judicial enforcement of an easement by prescription until the easement's benefits were in jeopardy as a result of defendant's actions. Thus, plaintiff was not barred by the doctrine of laches. Mtn. View Cemetery v. Granger, 175 M 351, 574 P2d 254 (1978).

Implied Reserved Easement of Necessity: Where all witnesses agreed that there was no visible sign of a roadway or path over defendant's property at the time when plaintiff bought the adjoining property, and defendant still owned land over which he had access, there could have been no implied reserved easement for the roadway. Godfrey v. Pilon, 165 M 439, 529 P2d 1372 (1974).

Marking of Reserved Easement: Common grantor who sold land fronting on the road could not later reserve an easement for construction of ingress road over land previously sold by placing a coffee can marker at the point where the ingress road was to be constructed. Godfrey v. Pilon, 165 M 439, 529 P2d 1372 (1974).

Implied Easement: Ample room for alternative ingress and egress to contiguous county road precluded finding of implied easement on conveyance of part of a tract, in spite of permissive use of access road by several succeeding property owners for 24 years. Poepping v. Neil, 159 M 488, 499 P2d 319 (1972).

Implied Reservations or Grants of Easement: There can be implied reservations or grants of easement by necessity. Where high-rise condominium was constructed and apartments therein sold under plan whereby corporate builders sold individual apartments to suitable applicants but management corporation retained ownership of building and deed between the two corporations reserved no easements, an implied equitable servitude attached to transfers of apartments in question, requiring that they be used for residential purposes only. Thisted v. Country Club Tower Corp., 146 M 87, 405 P2d 432 (1965), overruling holding in Simonson v. McDonald, 131 M 494, 311 P2d 982 (1957), that 70-20-304 abolishes all implied covenants except the two enumerated therein and observing that language in Simonson was too broadly put and should have been limited in application to facts of that case, and distinguished in Flaig v. Gramm, 1999 MT 181, 295 M 297, 983 P2d 396, 56 St. Rep. 710 (1999).

Conveyance of Servient Tenement: The doctrine of implied easements by reservation as set forth in this section will apply where the servient tenement is severed and conveyed but the dominant tenement is retained by the grantor. Spaeth v. Emmett, 142 M 231, 383 P2d 812 (1963).

Abandonment of Public Easement — Private Easement: Where original grantor owned fee in county road subject to public easement for highway purposes and she conveyed tracts of land bordering on such road, a private easement over such county road passed with such conveyance and such private easement would survive extinguishment of public easement upon abandonment of the road. McPherson v. Monegan, 120 M 454, 187 P2d 542 (1947).

Law Review Articles

Real Property: "Reciprocal Negative Easement" Implied From Contract, Deed and General Building Plan (Thisted v. Country Club Tower Corp., 146 M 87, 103, 405 P2d 432), 27 Mont. L. Rev. 91 (1965).

Implied Grants and Reservations of Ways of Necessity Abolished (Simonson v. McDonald, 131 M 494, 311 P2d 982), 19 Mont. L. Rev. 73 (1957).

70-20-310. Conveyance in joint tenancy — right of survivorship.

Case Notes

Law Governing Personal Property Decided by Situs of Property and Domicile of Owner — Tenancy by the Entirety Impermissible Mode of Personal Property Ownership in Montana: A Montana District Court determined that personal property jointly owned by Lurie and her husband as tenancy by the entirety in Missouri was owned by them either as joint tenancy property or as tenancy in common property after the couple moved to Montana. The property was subject to execution to satisfy a judgment against the husband on a validly issued writ. Lurie contended that as tenancy by the entirety property, it was not subject to execution to satisfy a judgment against the husband only, because Missouri law followed the personal property and should be applied in Montana. The Supreme Court concluded that the District Court was correct in determining that the law governing personal property is decided by the situs of the property and the domicile of the owner, so Montana law applied. Further, under Clark v. Clark, 143 M 183, 387 P2d 907 (1963), tenancy by the entirety is not a permissible mode of real property ownership in Montana, and the District Court properly extended the reasoning in Clark with equal force to personal property in Lurie's case. Lurie v. Sheriff, 2000 MT 103, 299 M 283, 999 P2d 342, 57 St. Rep. 414 (2000), distinguishing Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121 (1998).

Death of Spouse Before Final Disposition — Distribution as Severance of Joint Tenancy: Wife contended that: (1) because husband died before final resolution of property division, her right of survivorship remained; and (2) the District Court erred in refusing to recognize that the property was held in joint tenancy and should therefore have given the wife the property upon husband's death. On review, the Supreme Court found that a lower court order distributing the property in question to the husband effectively severed the joint tenancy. In re Marriage of Butler, 232 M 418, 756 P2d 1159, 45 St. Rep. 1160 (1988).

Right of Survivorship Not Related to Estate of Deceased: The right of survivorship exists under the deed grant and is not in any way related to the estate of the deceased, the latter passing by the law of intestate succession or the law of wills. In re Estate of Matye, 198 M 317, 645 P2d 955, 39 St. Rep. 1009 (1982).

Estates by Entirety: While a joint tenancy is a joint interest, a joint interest is not limited to the estate of joint tenancy but may include estates by entirety. However, estates by the entirety are no longer a permissible mode of property ownership in this state; and where husband and wife took under a deed to them "as joint tenants with right of survivorship and not as tenants in common", the property was held in a joint tenancy, and this was not converted by divorce into a tenancy in common. Clark v. Clark, 143 M 183, 387 P2d 907 (1963), followed in Lurie v. Sheriff, 2000 MT 103, 299 M 283, 999 P2d 342, 57 St. Rep. 414 (2000), in which tenancy by the entirety as applied to personal property was held an impermissible mode of ownership in Montana in the same way that tenancy by the entirety as applied to real property was held impermissible in Clark.

Exception to Right of Survivorship: Where husband feloniously killed his wife, he did not acquire her share of jointly owned realty by right of survivorship but took the property under a constructive trust. When he thereafter committed suicide his heirs had no right to wife's share. In re Cox's Estate, 141 M 583, 380 P2d 584 (1963).

Effect: Effect of this enactment was to provide that right of survivorship exists in those classes of conveyances covered by it, whether made to joint tenants or to tenants in estates by entirety. This section does not purport to exclude the right of survivorship in other types of conveyances. Hennigh v. Hennigh, 131 M 372, 309 P2d 1022 (1957).

Right of Survivorship in Joint Tenancy: A conveyance to persons in joint tenancy carries with it the right of survivorship since Legislature did not abrogate that right as an incidence of joint tenancy. Hennigh v. Hennigh, 131 M 372, 309 P2d 1022 (1957).

Law Review Articles

Husband Who Murders Wife and Commits Suicide Prevented From Asserting Survivorship Right in Joint Tenancy, 25 Mont. L. Rev. 145 (1963).

Real Property—Co-Tenancies—Creation of Joint Tenancies (Hennigh v. Hennigh, 131 M 372, 309 P2d 1022), 19 Mont. L. Rev. 69 (1957).

70-20-311. Grant on condition subsequent.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-20-313. Grant by owner for life or years.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-20-314. Grant of property occupied by tenant.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-20-315. Validation of unacknowledged deeds.

Compiler's Comments

1983 Amendment: Substituted "January 1, 1983" for "January 1, 1973" and "October 1, 1983" for "July 1, 1973".

Case Notes

Nonapplicability to Void Deed: This section applies to deeds executed by grantors and signed in due form, deeds that are otherwise valid except for the lack of an acknowledgement or other witness thereto. The statute is not intended to validate a void deed. McWilliams v. Clem, 228 M 297, 743 P2d 577, 44 St. Rep. 1536 (1987).

70-20-316. Deeds made prior to 1900 — presumption grantor had no wife.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Finding That Grantor Was Single: Where instrument, executed in 1876, purporting to sell interest in land did not show marital status of grantor, it was proper for District Court to find that he was a single man. Clinton v. Miller, 124 M 463, 226 P2d 487 (1951).

Part 4
Fraudulent Conveyances

Part Case Notes

Bank's Fiduciary Duty to Customers It Gives Financial Advice — Real Estate Sales: Wife, whose husband had recently died, signed a contract for a deed to her ranch with Dittman, who signed as "trustee". There were two other purchasers, who did not sign: a person to whom, according to the evidence, wife would not have knowingly sold and the marketing officer of the bank used by the wife and husband for some 24 years. Wife was unfamiliar with real estate and financial affairs and relied upon the advice of various bank officers with regard to the sale of the ranch. This put the bank in a prima facie fiduciary relationship as to the wife. The relationship and its attendant duties extended to the advising officers in their dealings with the wife in regard to sale of the ranch. The marketing officer thus had a duty to fully inform the wife and protect her interests. This duty he breached, and the breach amounted to constructive fraud, where evidence showed that: (1) the contract price and terms were disadvantageous to the wife; (2) the true purchasers were not disclosed to her either by the contract or the marketing officer; (3) the purchasers intended to and began to subdivide and sell the ranch, though the marketing officer knew wife apparently did not wish this, having refused an earlier offer to purchase with right to subdivide; (4) the marketing officer had extensive financial interests involving loans to him from his bank, and an audit of the bank recommended that in view of this his lending authority should be eliminated or curtailed; and (5) the lower court was unimpressed with the way in which wife's attorney in the negotiations represented her interests. The lower court properly ordered the contract for deed rescinded. Deist v. Wachholz, 208 M 207, 678 P2d 188, 41 St. Rep. 286 (1984).

Part Law Review Articles

Fraudulent Conveyances—Necessity of Judgment to Set Aside, Sarsfield, 11 Mont. L. Rev. 60 (1950).

70-20-401. Instrument made with intent to defraud — void.

Case Notes

Ratification of Forged Deed Considered in Equity: Commercial property in Hamilton was transferred to multiple parties in successive transactions, resulting in competing claims to the property. Some of the transactions involved fraud or forgery. Plaintiff filed a complaint against numerous parties that were involved in the transactions and sought to quiet title to the property. The District Court concluded that the documents of conveyance to three of the parties were forged and therefore void ab initio and that no rights were transferred to any of those parties. The court found that two of the parties had ratified the forged conveyances by their subsequent actions and that because plaintiff was the first to record a document of transfer, plaintiff was entitled to quiet title. One defendant appealed on grounds that a forged deed cannot be ratified, but the Supreme Court affirmed. A forged deed is void and transfers no rights, even if the subsequent purchaser is bona fide. Thus, the three deeds were void ab initio and plaintiff's interest in the property was not saved by 70-20-404, even though plaintiff parted with value, had no notice of the forgery, and duly recorded the appropriate transfer documents. However, in order to provide a legal remedy in the appropriate case, principles of equity and justice compel recognition of ratification, so a forged deed may be considered in equity. Erler v. Creative Fin. & Inv., LLC, 2009 MT 36, 349 M 207, 203 P3d 744 (2009), distinguishing Hames v. Polson, 123 M 469, 215 P2d 950 (1950), and In re Estate of Griffin, 248 M 472, 812 P2d 1256 (1991).

Claim of Material Alteration of Deed — Reliance on Public Record by Good Faith Purchaser: Appellants sought to set aside summary judgment in an action to quiet title, contending that a warranty deed, which contained no reservation of mineral interests, was materially altered. After the deed was recorded in 1950, various grantees engaged in partnership business activities involving the property. Eventually the property was mortgaged, and a number of quitclaim deeds were filed. The trial court did not find that any of this activity pointed to a material alteration of the deed or to any caveat to a title examiner that the deed had been altered. The Supreme Court noted that the document purporting to prove alteration consisted of an unsigned carbon copy warranty deed that included a mineral reservation not on the recorded deed. Under 70-20-404, protection is provided for purchasers in good faith, and the purchaser in this case had a right to rely on a document of public record for more than 30 years. Appellants "slept on their rights by not ascertaining the status of their property for nearly 40 years". Benson v. Diehl, 228 M 199, 745 P2d 315, 44 St. Rep. 1455 (1987).

Warranty Deed — Donative Intent — No Fraud or Lack of Consideration: Plaintiff filed an action to set aside a warranty deed to defendant transferring land that plaintiff had received originally as a tenant in common with defendant's father under the condition that they deed the land to defendant "when they were done with it". The District Court found that defendant was not guilty of deceit or false representation and that there was fair and adequate consideration for the transfer and refused to void the deed. The Supreme Court affirmed, holding that there was sufficient evidence to support the District Court's findings. Although the land was valued at $300,000 to $600,000 and the consideration for the transfer was $1, plaintiff's performance of the condition requiring transfer of the land to defendant, coupled with the payment of $1, constituted fair and adequate consideration in this case. Wright v. Blevins, 217 M 439, 705 P2d 113, 42 St. Rep. 1311 (1985).

70-20-402. Instrument not void as to purchaser with notice — exception.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Ratification of Forged Deed Considered in Equity: Commercial property in Hamilton was transferred to multiple parties in successive transactions, resulting in competing claims to the property. Some of the transactions involved fraud or forgery. Plaintiff filed a complaint against numerous parties that were involved in the transactions and sought to quiet title to the property. The District Court concluded that the documents of conveyance to three of the parties were forged and therefore void ab initio and that no rights were transferred to any of those parties. The court found that two of the parties had ratified the forged conveyances by their subsequent actions and that because plaintiff was the first to record a document of transfer, plaintiff was entitled to quiet title. One defendant appealed on grounds that a forged deed cannot be ratified, but the Supreme Court affirmed. A forged deed is void and transfers no rights, even if the subsequent purchaser is bona fide. Thus, the three deeds were void ab initio and plaintiff's interest in the property was not saved by 70-20-404, even though plaintiff parted with value, had no notice of the forgery, and duly recorded the appropriate transfer documents. However, in order to provide a legal remedy in the appropriate case, principles of equity and justice compel recognition of ratification, so a forged deed may be considered in equity. Erler v. Creative Fin. & Inv., LLC, 2009 MT 36, 349 M 207, 203 P3d 744 (2009), distinguishing Hames v. Polson, 123 M 469, 215 P2d 950 (1950), and In re Estate of Griffin, 248 M 472, 812 P2d 1256 (1991).

70-20-403. Grant by person with power to revoke — power executed.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-20-404. Purchaser in good faith not affected.

Case Notes

Ratification of Forged Deed Considered in Equity: Commercial property in Hamilton was transferred to multiple parties in successive transactions, resulting in competing claims to the property. Some of the transactions involved fraud or forgery. Plaintiff filed a complaint against numerous parties that were involved in the transactions and sought to quiet title to the property. The District Court concluded that the documents of conveyance to three of the parties were forged and therefore void ab initio and that no rights were transferred to any of those parties. The court found that two of the parties had ratified the forged conveyances by their subsequent actions and that because plaintiff was the first to record a document of transfer, plaintiff was entitled to quiet title. One defendant appealed on grounds that a forged deed cannot be ratified, but the Supreme Court affirmed. A forged deed is void and transfers no rights, even if the subsequent purchaser is bona fide. Thus, the three deeds were void ab initio and plaintiff's interest in the property was not saved by 70-20-404, even though plaintiff parted with value, had no notice of the forgery, and duly recorded the appropriate transfer documents. However, in order to provide a legal remedy in the appropriate case, principles of equity and justice compel recognition of ratification, so a forged deed may be considered in equity. Erler v. Creative Fin. & Inv., LLC, 2009 MT 36, 349 M 207, 203 P3d 744 (2009), distinguishing Hames v. Polson, 123 M 469, 215 P2d 950 (1950), and In re Estate of Griffin, 248 M 472, 812 P2d 1256 (1991).

Ratification of Void Deeds — Authority of Agent to Convey Property — Title Properly Quieted: Defendant third party raised three challenges to a District Court's conclusion that deeds voided by forgery during transfer were nevertheless ratified by subsequent actions of the parties and contended that the court erred by quieting title to plaintiff. The first argument dealt with the fact that one of the parties never received proper written authority to convey the property to plaintiff, so ratification was voided under the statute of frauds. The Supreme Court noted that an agreement to sell an interest in property must be in writing and that an agent's authority to sell property must also be in writing. However, the agency relationship may arise either by precedent authorization or by subsequent ratification. In this case, the warranty deeds constituted subsequent written authority for conveyance of the property, so the statute of frauds was not violated for want of written authorization. The second argument was that the criteria for ratification were not satisfied, but after examining the chain of title, the Supreme Court found that the personal actions of the principal ratified the deed and that the criteria for ratification were satisfied. The third argument was that defendant was prejudiced as a third party by ratification, but that argument did not prevail because defendant could not have been prejudiced since defendant's interest in the property was invalid both prior to and after ratification and defendant could have become aware of the void deeds by conducting a title check and avoiding the problem. Lastly, title was properly quieted in plaintiff because defendants with prior interests in the property stipulated that they no longer claimed any right, title, or interest in the property. Plaintiff's deed was superior because it was the first to be recorded and had been ratified, and plaintiff was therefore entitled to have quiet title to the property. The District Court was affirmed. Erler v. Creative Fin. & Inv., LLC, 2009 MT 36, 349 M 207, 203 P3d 744 (2009). See also U.S. v. Heinszen, 206 US 370 (1907), Audit Serv., Inc. v. Francis Tindall Constr., 183 M 474, 600 P2d 811 (1979), Safeco Ins. Co. v. Lovely Agency, 200 M 447, 652 P2d 1160 (1982), and Moore v. Adolph, 242 M 221, 789 P2d 1239 (1990).

Claim of Material Alteration of Deed — Reliance on Public Record by Good Faith Purchaser: Appellants sought to set aside summary judgment in an action to quiet title, contending that a warranty deed, which contained no reservation of mineral interests, was materially altered. After the deed was recorded in 1950, various grantees engaged in partnership business activities involving the property. Eventually the property was mortgaged, and a number of quitclaim deeds were filed. The trial court did not find that any of this activity pointed to a material alteration of the deed or to any caveat to a title examiner that the deed had been altered. The Supreme Court noted that the document purporting to prove alteration consisted of an unsigned carbon copy warranty deed that included a mineral reservation not on the recorded deed. Under 70-20-404, protection is provided for purchasers in good faith, and the purchaser in this case had a right to rely on a document of public record for more than 30 years. Appellants "slept on their rights by not ascertaining the status of their property for nearly 40 years". Benson v. Diehl, 228 M 199, 745 P2d 315, 44 St. Rep. 1455 (1987).

Part 5
Residential Real Property Disclosure Requirements

Part Compiler's Comments

Effective Date: This section is effective October 1, 2023.

Codification Change: Section 7, Ch. 375, L. 2023, provided that this part was to be codified as an integral part of Title 70, chapter 1. The Code Commissioner has codified this part in Title 70, chapter 20, to more closely reflect the subject matter.

CHAPTER 21
RECORDING TRANSFERS AND OTHER TRANSACTIONS RELATING TO REAL PROPERTY

Part 1
General Provisions

70-21-101. Instrument defined — abstract.

Compiler's Comments

1993 Amendment: Chapter 192 at beginning deleted reference to parts 1 through 3 of Title 1, chapter 5; and made minor changes in style.

Applicability: Section 23, Ch. 192, L. 1993, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act]." Effective October 1, 1993.

70-21-102. Unrecorded instruments valid between parties.

Case Notes

Admissibility and Jury Instructions Related to Unrecorded Subdivision Covenants — Validity of Unrecorded Instrument Between Persons With Notice: At issue in a subdivision dispute were unrecorded covenants prohibiting commercial activity in the subdivision. The District Court allowed the unrecorded instruments into evidence and instructed the jury that the instruments were valid between the parties who had notice of them. On appeal, the Supreme Court found no error either in admission of the covenants into evidence or in the jury instruction. Witnesses testified that copies of the unrecorded instruments had been given to both parties, so the documents were clearly relevant and admissible, and because both parties were notified of the restrictive covenants, an instruction regarding the validity of the instruments was appropriate under this section. Rice v. C.I. Lanning, 2004 MT 237, 322 M 487, 97 P3d 580 (2004).

Loan of Title Based Upon Exchange of Deeds Upheld — Oral Extrinsic Evidence Controlling: Johnson agreed to loan Anderson the title to several lots that Johnson owned on Flathead Lake so that Anderson could mortgage the lots and use the proceeds for a business venture. Johnson and Anderson both executed deeds to the property, and Anderson occupied the property pursuant to a lease agreement. Later, the agreement was breached when Anderson conveyed his interest to a third party and cut trees from the property. Both parties sought a declaration of ownership in a quiet title action. The District Court admitted oral evidence showing that nothing more than a loan of title evidenced by an exchange of deeds was intended. The Supreme Court held that the timing of the execution and delivery of the two deeds was not controlling and that the deed conveying the property back to Johnson, even though it may have been signed and delivered first, was controlling in light of the circumstances of the transaction. The Supreme Court held that the deed conveying the property back to Johnson was valid as between the parties even though it was not recorded until later. Anderson v. Johnson, 264 M 66, 870 P2d 59, 51 St. Rep. 149 (1994).

Unlawful Detainer — Right of Lessor With Unrecorded Title to Sue: Plaintiff leased land to defendants and assigned her interest in the land to a trust. The assignment was recorded. The trust later reassigned the interest back to plaintiff through an unrecorded quitclaim deed. Plaintiff sued defendants when they refused to vacate at the end of the lease. Record title and legal title are not synonymous, and plaintiff had valid legal title even though it was not record title. Recording has the purposes of giving notice to subsequent purchasers and encumbrancers and of establishing priority but has nothing to do with conveying title. Defendants' only interest in the property was a lease, and they were not within the scope of the recording statutes' protection. Plaintiff, contrary to defendants' claim, was the real party in interest, not the trust, and was entitled to bring the suit. The party with legal title is the real party in interest in real property disputes. Blakely v. Kelstrup, 218 M 304, 708 P2d 253, 42 St. Rep. 1601 (1985).

Notice of Contract That Is Unrecorded by Purchaser: A contract for deed between appellants and a life estate contracted for therein are effective and enforceable as against the parties and also against subsequent purchasers who have notice of the contract under 70-21-102. Notice to a subsequent purchaser can be constructive notice through a duly authorized, trained real estate agent who acts for the purchaser throughout the purchase transactions. A misapprehension on the part of the purchaser as to the contract provisions is not to be confused with lack of knowledge or notice. Harbeck v. Orr, 192 M 243, 627 P2d 1217, 38 St. Rep. 668 (1981).

Failure to File Sublease of State Lands — Knowledge Controls: Aye, the holder of a lease of state lands, executed a sublease to Fix, along with an unenforceable oral promise to assign the lease. The leaseholder then assigned the lease to Bruski. Section 81-419, R.C.M. 1947 (now 77-6-208), at the time of the sublease, provided that a sublease of state land was illegal unless a copy of the sublease had been filed in the state land office and approved by the Commissioner. This statute did not override 70-21-102, which provides that an unrecorded instrument is valid as between the parties and those who have notice thereof. The purpose of 77-6-208 is to facilitate the management of state lands, but it does not abrogate general principles of property law. The Bruskis were aware of the sublease, as Fix was farming the leased land at the time the lease was assigned to them. Because of this knowledge, the Bruskis had notice and the sublease was valid. Aye v. Fix, 192 M 141, 626 P2d 1259, 38 St. Rep. 578A (1981).

Burden of Proof: The burden is on the grantee in an unrecorded deed to show that a subsequent purchaser had notice. Zier v. Osten, 135 M 484, 342 P2d 1076 (1959); Custer Consol. Mines Co. v. Helena, 52 M 35, 156 P 1090 (1916); Sheldon v. Powell, 31 M 249, 78 P 491 (1904); Mullins v. Butte Hardware Co., 25 M 525, 65 P 1004 (1901); Hull v. Diehl, 21 M 71, 52 P 782 (1898).

Grazing Lease: Though unacknowledged, unrecorded grazing lease was valid as between lessor and lessee, it was not binding on one who was not a party to the lease and who had no notice thereof at time lessor contracted to sell him the land and who promptly entered into possession of the land and made improvements thereon, including plowing of almost 70 acres thereof. Attempted recording almost 9 months after contract of sale did not constitute constructive notice. Epletveit v. Solberg, 119 M 45, 169 P2d 722 (1946).

Payment of Taxes: Payment of taxes by the grantee in an unrecorded deed is not notice to a subsequent purchaser. Hurley v. O'Neill, 31 M 595, 79 P 242 (1905); Sheldon v. Powell, 31 M 249, 78 P 491 (1904).

Part 2
Recording — Procedure

70-21-201. What may be recorded — recording copy in another county.

Case Notes

Proper Deposit of Leasehold Interest Entitling Leaseholder to Notice and Right to Redeem Property Tax Lien: Section 15-18-212 requires that the purchaser or assignee of a tax sale certificate notify all persons interested in the property, including a person with properly recorded interest in the property, that a tax deed will be issued to the purchaser unless the tax lien is redeemed prior to the expiration date of the redemption period. Under 70-21-209, an acknowledged or certified instrument is considered recorded when it is deposited with the appropriate County Clerk and Recorder. In this case, an instrument reflecting plaintiffs' interest as assignee of a vendor's interest in the contract for sale of a cabin and leasehold, which constituted real property, was properly recorded at the Lewis and Clark County Clerk and Recorder's office, so plaintiffs were entitled as an interested party to notice by certified mail pursuant to 15-18-212; however, no notice was given. Plaintiffs' right to redeem the property tax lien continued indefinitely until proper notice was given; thus, a tax deed subsequently issued by the county was void for failure to comply with the notice provisions of 15-18-212. Ditto v. Kipp, 2000 MT 162, 300 M 278, 3 P3d 647, 57 St. Rep. 679 (2000). See also Kneedler v. League Wide, Inc., 1999 MT 80, 294 M 101, 979 P2d 163 (1999).

Title Insurer Not Obligated to Search City Engineer or Water Department Records — Public Records as Properly Recorded Documents — Reasonable Expectations Doctrine Inapplicable: The Millers sought to hold a title insurance company responsible for costs involved in relocating a neighbor's water and sewer lines that were discovered on the property. The lines were of record with the city engineer and the water department, but their existence was not recorded in the chain of title. The title insurance policy defined public records as "those records which by law impart constructive notice of matters relating to said land". The Supreme Court held that the definition was unambiguous and clearly related to records filed and docketed with the County

Clerk and Recorder because it was proper recordation that imparted constructive notice of matters relating to the property. Nothing in Montana recordation law required the title insurer to search city engineer or water department records. For the same reason, the Millers' attempt to apply the reasonable expectations doctrine also failed because the policy did not insure against loss or damage by reason of "easements, or claims of easements, not shown by the public records". Miller v. Title Ins. Co. of Minn., 1999 MT 230, 296 M 115, 987 P2d 1151, 56 St. Rep. 908 (1999). See also Am. Family Mut. Ins. Co. v. Livengood, 1998 MT 329, 292 M 244, 970 P2d 1054, 55 St. Rep. 1336 (1998).

No Duty of Clerk and Recorder to Record Invalid Deed — Writ of Mandamus Improper: Under 7-4-2617, a County Clerk and Recorder is obligated to record only an instrument, paper, or notice that is authorized by law to be recorded. Under 76-3-302, a County Clerk and Recorder has a mandatory duty not to accept and record an otherwise proper deed if it fails to comply with the applicable survey requirements. The District Court did not err in refusing to issue a writ of mandamus requiring recording of deeds when a landowner attempted to divide a large parcel of land into smaller parcels by executing a deed in which the landowner was both grantor and grantee, which is not authorized by law, and when the statutorily required plat was not filed. Rocky Mtn. Timberlands, Inc. v. Lund, 265 M 463, 877 P2d 1018, 51 St. Rep. 653 (1994).

Certificate of Sale: A certificate of sale issued by the Sheriff is a conveyance within meaning of the Recording Act (70-21-201). Lepper v. Home Ranch Co., 90 M 558, 4 P2d 722 (1931).

Attorney General's Opinions

Notice of Right to Claim Construction Lien — Acknowledgment Not Required: A notice of right to claim a construction lien filed with a County Clerk and Recorder pursuant to 71-3-531 is not subject to the acknowledgment requirements of 70-21-203. 42 A.G. Op. 53 (1988).

70-21-202. Certain transfers in trust — mortgages — when to be recorded.

Attorney General's Opinions

Recordation of Trust Indenture — Amount and Maturity Date Not Required: A County Clerk and Recorder may not refuse to accept for filing a trust indenture that does not include an amount secured and a maturity date because there are no specific requirements that such matters be set forth in the instrument. 41 A.G. Op. 11 (1985).

70-21-203. Acknowledgment of instruments required — exceptions.

Compiler's Comments

1999 Amendment: Chapter 51 in introduction inserted "acknowledged as provided in subsection (1) or proved as provided in subsection (2)"; in (1) in introductory clause after "acknowledged" inserted "as acknowledgment is defined in 1-5-602"; in (1)(b) after "by the corporation" substituted "to act" for "executing the instrument"; in (2) at end substituted "Proof of execution as provided for in this subsection must be notarized as provided in Title 1, chapter 5" for "the acknowledgment or proof certified in the manner prescribed by Title 1, chapter 5"; and made minor changes in style. Amendment effective March 15, 1999.

1993 Amendment: Chapter 192 in introductory clause, before "70-21-205", deleted references to 1-5-108 and 1-5-109; in (2)(c) deleted reference to parts 1 through 3 of Title 1, chapter 5; and made minor changes in style.

Applicability: Section 23, Ch. 192, L. 1993, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act]." Effective October 1, 1993.

Case Notes

Negligence in Taking Acknowledgment — Liability for Damages: At the behest of the husband, a notary public took the acknowledgment of a deed transferring real property without knowing or having satisfactory evidence that the wife, whose name appeared on the deed as signator-grantor, was the individual described in and who executed the deed. The wife was not present at the time of acknowledgment and was never contacted by the notary; nevertheless, the notary signed the certificate of acknowledgment as if the wife had personally appeared and made the acknowledgment. The notary public was negligent in performance of official duty and was liable for damages proximately caused by such negligence. (See 1999 amendment.) McWilliams v. Clem, 228 M 297, 743 P2d 577, 44 St. Rep. 1536 (1987), distinguishing Mahoney v. Dixon, 31 M 107, 77 P 519 (1904), and Ellis v. Hale, 58 M 181, 194 P 155 (1920).

Constructive Notice:

For record of instrument to impart "constructive notice", the writing must be one which the law authorizes to be recorded and not one that is illegally placed of record in violation of the express mandate of statute. Epletveit v. Solberg, 119 M 45, 169 P2d 722 (1946); Lee v. Laughery, 55 M 238, 175 P 873 (1918).

To entitle an instrument to be recorded under this section, it must be acknowledged by the party who is bound by it to the performance of an act. Acknowledgment by the party to whom he is bound is of no avail, and record of it in the latter case imparts no constructive notice whatever. Lee v. Laughery, 55 M 238, 175 P 873 (1918).

Grazing Lease: A grazing lease which was not acknowledged or proved as required by this section was not entitled to be recorded, and it imparted no constructive notice to anyone. Epletveit v. Solberg, 119 M 45, 169 P2d 722 (1946).

Bill of Sale: A real estate bill of sale which was not acknowledged or proved was not entitled to record under this section, and therefore its record imparted no constructive notice to anyone. Baum v. N. Pac. Ry., 55 M 219, 175 P 872 (1918).

Attorney General's Opinions

Notice of Right to Claim Construction Lien — Acknowledgment Not Required: A notice of right to claim a construction lien filed with a County Clerk and Recorder pursuant to 71-3-531 is not subject to the acknowledgment requirements of 70-21-203. 42 A.G. Op. 53 (1988).

70-21-208. In what county to be recorded.

Case Notes

Proper Deposit of Leasehold Interest Entitling Leaseholder to Notice and Right to Redeem Property Tax Lien: Section 15-18-212 requires that the purchaser or assignee of a tax sale certificate notify all persons interested in the property, including a person with properly recorded interest in the property, that a tax deed will be issued to the purchaser unless the tax lien is redeemed prior to the expiration date of the redemption period. Under 70-21-209, an acknowledged or certified instrument is considered recorded when it is deposited with the appropriate County Clerk and Recorder. In this case, an instrument reflecting plaintiffs' interest as assignee of a vendor's interest in the contract for sale of a cabin and leasehold, which constituted real property, was properly recorded at the Lewis and Clark County Clerk and Recorder's office, so plaintiffs were entitled as an interested party to notice by certified mail pursuant to 15-18-212; however, no notice was given. Plaintiffs' right to redeem the property tax lien continued indefinitely until proper notice was given; thus, a tax deed subsequently issued by the county was void for failure to comply with the notice provisions of 15-18-212. Ditto v. Kipp, 2000 MT 162, 300 M 278, 3 P3d 647, 57 St. Rep. 679 (2000). See also Kneedler v. League Wide, Inc., 1999 MT 80, 294 M 101, 979 P2d 163 (1999).

70-21-209. When instrument considered recorded.

Case Notes

Proper Deposit of Leasehold Interest Entitling Leaseholder to Notice and Right to Redeem Property Tax Lien: Section 15-18-212 requires that the purchaser or assignee of a tax sale certificate notify all persons interested in the property, including a person with properly recorded interest in the property, that a tax deed will be issued to the purchaser unless the tax lien is redeemed prior to the expiration date of the redemption period. Under this section, an acknowledged or certified instrument is considered recorded when it is deposited with the appropriate County Clerk and Recorder. In this case, an instrument reflecting plaintiffs' interest as assignee of a vendor's interest in the contract for sale of a cabin and leasehold, which constituted real property, was properly recorded at the Lewis and Clark County Clerk and Recorder's office, so plaintiffs were entitled as an interested party to notice by certified mail pursuant to 15-18-212; however, no notice was given. Plaintiffs' right to redeem the property tax lien continued indefinitely until proper notice was given; thus, a tax deed subsequently issued by the county was void for failure to comply with the notice provisions of 15-18-212. Ditto v. Kipp, 2000 MT 162, 300 M 278, 3 P3d 647, 57 St. Rep. 679 (2000). See also Kneedler v. League Wide, Inc., 1999 MT 80, 294 M 101, 979 P2d 163 (1999).

Title Insurer Not Obligated to Search City Engineer or Water Department Records — Public Records as Properly Recorded Documents — Reasonable Expectations Doctrine Inapplicable: The Millers sought to hold a title insurance company responsible for costs involved in relocating a neighbor's water and sewer lines that were discovered on the property. The lines were of record with the city engineer and the water department, but their existence was not recorded in the chain of title. The title insurance policy defined public records as "those records which by law impart constructive notice of matters relating to said land". The Supreme Court held that the definition was unambiguous and clearly related to records filed and docketed with the County

Clerk and Recorder because it was proper recordation that imparted constructive notice of matters relating to the property. Nothing in Montana recordation law required the title insurer to search city engineer or water department records. For the same reason, the Millers' attempt to apply the reasonable expectations doctrine also failed because the policy did not insure against loss or damage by reason of "easements, or claims of easements, not shown by the public records". Miller v. Title Ins. Co. of Minn., 1999 MT 230, 296 M 115, 987 P2d 1151, 56 St. Rep. 908 (1999). See also Am. Family Mut. Ins. Co. v. Livengood, 1998 MT 329, 292 M 244, 970 P2d 1054, 55 St. Rep. 1336 (1998).

Notice of Covenants — Forfeiture — Summary Judgment: Plaintiffs purchased real property on a contract for deed from defendants, subject to restrictive covenants filed after the contract was drawn but before it was signed. Some months later the sellers sent the buyers notice of default, citing the covenants. The issues on appeal related to summary judgment. Under former Rule 56, M.R.Civ.P. (now superseded), the moving party must show he is entitled to summary judgment. The sellers were found to have met the burden inasmuch as the validity and genuineness of all the documents in question were admitted by both parties, along with the signatures and dates of the documents. The reference in the contract put all parties on constructive notice of the covenants. The buyers failed to carry their ensuing burden to show issues of material fact and, accordingly, granting of sellers' motion for partial summary judgment was upheld. The lower court's ruling denying the buyers' motion for summary judgment was reversed. The sellers' counterclaim on this motion had raised the issue of violation of the covenants by the buyers, but the buyers argued that summary judgment should have been granted because the remedy sought by the sellers (forfeiture) was improper. The Supreme Court held that when a violation of the covenants would not defeat the main objective or purpose of the contract, a remedy of forfeiture was not warranted. The case was remanded. Van Uden v. Hendricksen, 189 M 164, 615 P2d 220 (1980).

Law Review Articles

The Improvement of Conveyancing in Montana—A Proposal, Cromwell, 22 Mont. L. Rev. 26 (1960).

70-21-210. Clerk to endorse fee.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 3
Effect of Recording

Part Case Notes

Broad Chain of Title Concept Adopted: Recognizing that there are two lines of authority — the broad approach and narrow approach — on the question of whether a servitude created by a common grantor in the deed to the benefited parcel is in the chain of title of the burdened parcel, the Supreme Court adopted the broad approach and concluded that a prospective purchaser is on constructive notice not only of conveyances to the prior owners of the parcel, but also of conveyances from the prior owners of the parcel during each of their respective periods of ownership. Earl v. Pavex Corp., 2013 MT 343, 372 Mont. 476, 313 P.3d 154.

70-21-301. Conveyance defined.

Case Notes

Broad Chain of Title Concept Adopted: Recognizing that there are two lines of authority — the broad approach and narrow approach — on the question of whether a servitude created by a common grantor in the deed to the benefited parcel is in the chain of title of the burdened parcel, the Supreme Court adopted the broad approach and concluded that a prospective purchaser is on constructive notice not only of conveyances to the prior owners of the parcel, but also of conveyances from the prior owners of the parcel during each of their respective periods of ownership. Earl v. Pavex Corp., 2013 MT 343, 372 Mont. 476, 313 P.3d 154.

Creation of a Negative Easement Notwithstanding Absence of a Conveyance: A written agreement in the form of a court settlement not to use property as a restaurant and bar creates a valid and enforceable covenant which runs with the land and which is binding on each of the parties and their successors in interest notwithstanding absence of a conveyance of the estate to which the covenant pertains or words to that effect in the settlement agreement. The agreement was expressly intended to constitute a covenant running with the land and to bind the present owners, heirs, and assigns and was entered into voluntarily. A negative easement, as was created here, can be created by a grant (conveyance) or agreement; the agreement being construed as a grant is binding upon purchasers of the servient tenement who have actual or constructive notice of it. Reichert v. Weeden, 190 M 95, 618 P2d 1216, 37 St. Rep. 1788 (1980).

Notice of Covenants — Forfeiture — Summary Judgment: Plaintiffs purchased real property on a contract for deed from defendants, subject to restrictive covenants filed after the contract was drawn but before it was signed. Some months later the sellers sent the buyers notice of default, citing the covenants. The issues on appeal related to summary judgment. Under former Rule 56, M.R.Civ.P. (now superseded), the moving party must show he is entitled to summary judgment. The sellers were found to have met the burden inasmuch as the validity and genuineness of all the documents in question were admitted by both parties, along with the signatures and dates of the documents. The reference in the contract put all parties on constructive notice of the covenants. The buyers failed to carry their ensuing burden to show issues of material fact and, accordingly, granting of sellers' motion for partial summary judgment was upheld. The lower court's ruling denying the buyers' motion for summary judgment was reversed. The sellers' counterclaim on this motion had raised the issue of violation of the covenants by the buyers, but the buyers argued that summary judgment should have been granted because the remedy sought by the sellers (forfeiture) was improper. The Supreme Court held that when a violation of the covenants would not defeat the main objective or purpose of the contract, a remedy of forfeiture was not warranted. The case was remanded. Van Uden v. Hendricksen, 189 M 164, 615 P2d 220 (1980).

Restrictions: Declaration of restrictions constitutes an instrument which affects title to land under this section, so that where filed, subsequent purchaser had constructive notice, pursuant to 70-21-302, and could not use his land for commercial purposes. Kosel v. Stone, 146 M 218, 404 P2d 894 (1965).

Reservation of Royalty: Recordation of royalty assignment falls within definition of conveyance of real property. Pluhar v. Guderjahn, 134 M 46, 328 P2d 129 (1958).

Mortgage:

A real estate mortgage extension agreement, executed as provided by 25-3-603, is a "conveyance" within the meaning of this section. Hastings v. Wise, 91 M 430, 8 P2d 636 (1932).

A mortgage on real property is a conveyance within the meaning of the Recording Acts (Title 70, ch. 21, part 3). Angus v. Mariner, 85 M 365, 278 P 996 (1929).

While a mortgage is a conveyance, it is a conveyance of only a chattel interest. Cornish v. Woolverton, 32 M 456, 81 P 4 (1905); Mueller v. Renkes, 31 M 100, 77 P 512 (1904); Hull v. Diehl, 21 M 71, 52 P 782 (1898).

Contract for Sale of Land: A contract for the sale of land is a conveyance of real property within the meaning of the law. Piccolo v. Tanaka, 78 M 445, 253 P 890 (1927).

Lease: A lease directed by the District Court to be executed by an executor of certain realty belonging to his testator's estate falls within the meaning of the term "conveyance" as used in this section. Estate of Tuohy, 23 M 305, 58 P 722 (1899).

Purpose and Intent: The definition given to the term "conveyance" is to make plain the meaning of the provisions touching recordation and is not designed to change the more restricted, technical meaning in which it is used in the books. Estate of Tuohy, 23 M 305, 58 P 722 (1899).

Attorney General's Opinions

Notice of Right to Claim Construction Lien — Acknowledgment Not Required: A notice of right to claim a construction lien filed with a County Clerk and Recorder pursuant to 71-3-531 is not subject to the acknowledgment requirements of 70-21-203. 42 A.G. Op. 53 (1988).

70-21-302. Recording as constructive notice — effect of recording copy in other county.

Case Notes

Broad Chain of Title Concept Adopted: Recognizing that there are two lines of authority — the broad approach and narrow approach — on the question of whether a servitude created by a common grantor in the deed to the benefited parcel is in the chain of title of the burdened parcel, the Supreme Court adopted the broad approach and concluded that a prospective purchaser is on constructive notice not only of conveyances to the prior owners of the parcel, but also of conveyances from the prior owners of the parcel during each of their respective periods of ownership. Earl v. Pavex Corp., 2013 MT 343, 372 Mont. 476, 313 P.3d 154.

No Misrepresentation Regarding Property Encumbrances — Actual and Constructive Notice to Plaintiffs: It was not an error for the District Court to enforce a settlement agreement despite plaintiffs' allegation of misrepresentation by the defendants regarding property encumbrances. The claims of misrepresentation failed since the plaintiffs had actual notice of the mortgages in the purchase agreement on one parcel and in the warranty deed on another parcel. Alternatively, there was no misrepresentation since the mortgages were recorded, which gave the plaintiffs constructive notice. Hinderman v. Krivor, 2010 MT 230, 358 Mont. 111, 244 P.3d 306.

Ratification of Void Deeds — Authority of Agent to Convey Property — Title Properly Quieted: Defendant third party raised three challenges to a District Court's conclusion that deeds voided by forgery during transfer were nevertheless ratified by subsequent actions of the parties and contended that the court erred by quieting title to plaintiff. The first argument dealt with the fact that one of the parties never received proper written authority to convey the property to plaintiff, so ratification was voided under the statute of frauds. The Supreme Court noted that an agreement to sell an interest in property must be in writing and that an agent's authority to sell property must also be in writing. However, the agency relationship may arise either by precedent authorization or by subsequent ratification. In this case, the warranty deeds constituted subsequent written authority for conveyance of the property, so the statute of frauds was not violated for want of written authorization. The second argument was that the criteria for ratification were not satisfied, but after examining the chain of title, the Supreme Court found that the personal actions of the principal ratified the deed and that the criteria for ratification were satisfied. The third argument was that defendant was prejudiced as a third party by ratification, but that argument did not prevail because defendant could not have been prejudiced since defendant's interest in the property was invalid both prior to and after ratification and defendant could have become aware of the void deeds by conducting a title check and avoiding the problem. Lastly, title was properly quieted in plaintiff because defendants with prior interests in the property stipulated that they no longer claimed any right, title, or interest in the property. Plaintiff's deed was superior because it was the first to be recorded and had been ratified, and plaintiff was therefore entitled to have quiet title to the property. The District Court was affirmed. Erler v. Creative Fin. & Inv., LLC, 2009 MT 36, 349 M 207, 203 P3d 744 (2009). See also U.S. v. Heinszen, 206 US 370 (1907), Audit Serv., Inc. v. Francis Tindall Constr., 183 M 474, 600 P2d 811 (1979), Safeco Ins. Co. v. Lovely Agency, 200 M 447, 652 P2d 1160 (1982), and Moore v. Adolph, 242 M 221, 789 P2d 1239 (1990).

Constructive Notice of Owners of Property — Owners Could Have Been Joined in Litigation — Res Judicata Properly Applied: In 1976, the Halls purchased land from the Rennes that was entirely surrounded by land belonging to the Rennes and thereby landlocked from public roads. However, the warranty deed given by the Rennes described an easement over the Rennes' property south to Kagy Lane. In 1991, the Rennes conveyed the land surrounding the Hall property to Heckerman, subject to any interest of the Halls in the conveyed property. The Halls brought a quiet title action in District Court in 1996 to declare the title to their property and the easement granted by the Rennes and prevailed in that action. However, the easement granted in the judgment ran across land conveyed by the Rennes to the Cowdreys in 1976, and the Cowdreys were not parties to the Halls' quiet title action. The Halls then brought an action against Heckerman for a prescriptive easement or easement by necessity, and Heckerman moved to dismiss, claiming that res judicata applied. The District Court held, and the Supreme Court affirmed, citing Orlando v. Prewett, 236 M 478, 771 P2d 111 (1989), that res judicata applied because the Halls were on notice by virtue of this section as to whom the owners of the property surrounding their land were and could have included the Cowdreys in their 1996 quiet title action. Hall v. Heckerman, 2000 MT 300, 302 M 345, 15 P3d 869, 57 St. Rep. 1266 (2000).

Lack of Legal Description of Tracts in Covenant Amendment Not Fatal When Landowners Provided Actual Notice of Amendment: A supermajority of subdivision property owners authorized an amendment creating new and unexpected restrictions not contained or contemplated in the original declaration of restrictive covenants. Some landowners who disagreed with the amendment appealed, contending that it was invalid because it did not contain a legal description of the affected property. The District Court found the argument unpersuasive because the amendment referred to a previous amendment that did contain a legal description. The Supreme Court agreed, noting further that none of the appellants denied that they had actual notice of the amendment, so their claims of inadequate notice failed. Windemere Homeowners Ass'n, Inc. v. McCue, 1999 MT 292, 297 M 77, 990 P2d 769, 56 St. Rep. 1173 (1999). See also Poncelet v. English, 243 M 481, 795 P2d 436, 47 St. Rep. 1342 (1990).

Title Insurer Not Obligated to Search City Engineer or Water Department Records — Public Records as Properly Recorded Documents — Reasonable Expectations Doctrine Inapplicable: The Millers sought to hold a title insurance company responsible for costs involved in relocating a neighbor's water and sewer lines that were discovered on the property. The lines were of record with the city engineer and the water department, but their existence was not recorded in the chain of title. The title insurance policy defined public records as "those records which by law impart constructive notice of matters relating to said land". The Supreme Court held that the definition was unambiguous and clearly related to records filed and docketed with the County Clerk and Recorder because it was proper recordation that imparted constructive notice of matters relating to the property. Nothing in Montana recordation law required the title insurer to search city engineer or water department records. For the same reason, the Millers' attempt to apply the reasonable expectations doctrine also failed because the policy did not insure against loss or damage by reason of "easements, or claims of easements, not shown by the public records". Miller v. Title Ins. Co. of Minn., 1999 MT 230, 296 M 115, 987 P2d 1151, 56 St. Rep. 908 (1999). See also Am. Family Mut. Ins. Co. v. Livengood, 1998 MT 329, 292 M 244, 970 P2d 1054, 55 St. Rep. 1336 (1998).

Granting Document Considered Actual and Constructive Notice of Easement: A granting document setting out the existence of a state road easement, received by McDonald at the time of purchase of the property, as well as language in the warranty deed referring to the certificate of survey on file, plainly outlining the easement and stating that the conveyance was subject to the easement, constituted actual and constructive notice to McDonald of the existence of the easement. Bridger v. Lake, 271 M 186, 896 P2d 406, 52 St. Rep. 395 (1995).

Recording of Revocation of Trust Agreement as Constructive Delivery: This section imparts constructive delivery of the contents of the revocation instrument. The recording statutes import notice to all interested parties in matters affecting title to real property. Therefore, all cotrustees received constructive delivery when a revocation of trust was recorded with the County Clerk and Recorder. Hauseman v. Koski, 259 M 498, 857 P2d 715, 50 St. Rep. 898 (1993).

Mistake in Reference to Encumbered Property Interest — Constructive Notice: A mortgage contained no error in the legal description of the land but did contain a mistake in its reference to the specific property interest encumbered. However, the mistake was held to be immaterial, and as a matter of law, defendants, as subsequent judgment lienholders, had constructive notice of plaintiff's prior recorded mortgage. When the specific property intended to be mortgaged can be identified from the language of the instrument itself or from information gained from an inquiry clearly suggested by the language of the instrument, a mistake in the reference to the encumbered property interest does not affect the validity of the instrument. Washington v. Slack, 249 M 56, 813 P2d 447, 48 St. Rep. 576 (1991), distinguishing Poncelet v. English, 243 M 481, 795 P2d 436 (1990), and Ely v. Hoida, 70 M 542, 226 P 525 (1924).

Risk Upon First Mortgagee to Use Care in Describing Property: The risk is upon the first mortgagee to use care in correctly and properly describing property to protect against subsequent purchasers or mortgagees. Poncelet v. English, 243 M 481, 795 P2d 436, 47 St. Rep. 1342 (1990).

Recording of First Page of Deed of Trust — Constructive Notice of Contents: The recording of the first page of a deed of trust as an abstract of conveyance gave constructive notice of its contents and terms, including the future advance clause. Serv. Funding, Inc. v. Craft, 234 M 431, 763 P2d 1131, 45 St. Rep. 2030 (1988).

No Notice of Drainage System in Warranty Deed — No Trespass: Plaintiffs who were rightfully excavating ground they owned pursuant to a warranty deed that gave no notice of a drainage system belonging to a nearby supper club could not be found guilty of trespass in the absence of evidence of intentional intrusion on supper club property. Branstetter v. Beaumont Supper Club, Inc., 224 M 20, 727 P2d 933, 43 St. Rep. 1981 (1986).

Effect of Recording:

In a suit for partition, transferor claimed that several years before she had conveyed part of her interest in less than half of a quarter section and presented a recorded deed in support of her claim. Transferees' successors in interest claimed that transferor's actions and statements after the conveyance indicated that she had conveyed a part interest in the entire half of the quarter section. The Supreme Court affirmed the District Court's ruling in transferor's favor since under this section, any inconsistent actions by transferor are controlled by the contents of a recorded deed. Tillotsen v. Frazer, 199 M 342, 649 P2d 744, 39 St. Rep. 1442 (1982).

Where the deed under which one holds lands is of record and the grantee takes possession, such possession is referable to such deed, and a subsequent purchaser is relieved from further inquiry to ascertain whether any other or different claim is asserted. Baum v. N. Pac. Ry., 55 M 219, 175 P 872 (1918).

The record of the assignment of a mortgage is notice to a purchaser from the mortgagor, so that payments by him to the assignor are at his own risk. Cornish v. Woolverton, 32 M 456, 81 P 4, 108 Am. St. Rep. 598 (1905).

Notice of Covenants — Forfeiture — Summary Judgment: Plaintiffs purchased real property on a contract for deed from defendants, subject to restrictive covenants filed after the contract was drawn but before it was signed. Some months later the sellers sent the buyers notice of default, citing the covenants. The issues on appeal related to summary judgment. Under former Rule 56, M.R.Civ.P. (now superseded), the moving party must show he is entitled to summary judgment. The sellers were found to have met the burden inasmuch as the validity and genuineness of all the documents in question were admitted by both parties, along with the signatures and dates of the documents. The reference in the contract put all parties on constructive notice of the covenants. The buyers failed to carry their ensuing burden to show issues of material fact and, accordingly, granting of sellers' motion for partial summary judgment was upheld. The lower court's ruling denying the buyers' motion for summary judgment was reversed. The sellers' counterclaim on this motion had raised the issue of violation of the covenants by the buyers, but the buyers argued that summary judgment should have been granted because the remedy sought by the sellers (forfeiture) was improper. The Supreme Court held that when a violation of the covenants would not defeat the main objective or purpose of the contract, a remedy of forfeiture was not warranted. The case was remanded. Van Uden v. Hendricksen, 189 M 164, 615 P2d 220 (1980).

Ownership of Real Property: As against purchasers and lien creditors dealing with the owners of land on the faith of a recorded title and without notice that ownership is different from what appears on record, parol evidence is inadmissible to show that land conveyed to the grantees as individuals was held by them as partnership property. Robertson v. Robertson, 180 M 226, 590 P2d 113 (1978).

Recording of Restrictions: Declaration of restrictions constitutes a conveyance under 70-21-301, so that where residential restriction was filed with subdivision plat, it constituted constructive notice to subsequent purchaser who wanted to use land for commercial purposes. Kosel v. Stone, 146 M 218, 404 P2d 894 (1965).

Reservation of Royalty: Where plaintiff, seeking to quiet title, held premises under quitclaim deed from prior owner, he took title subject to all prior recordations or conveyances concerning the land in question, including reservation of royalty appearing on face of prior conveyances. Pluhar v. Guderjahn, 134 M 46, 328 P2d 129 (1958).

Fraud — Constructive Notice No Defense: Second mortgagee was chargeable with constructive notice of recorded first mortgage; he was not estopped, in action for attachment, from showing that second mortgage, given in reliance upon mortgagor's misrepresentation that property was unencumbered, was valueless. Bailey v. Hansen, 105 M 552, 74 P2d 438 (1937).

Effect of Actual Knowledge Though Unrecorded: One who takes a mortgage upon property with actual knowledge of an earlier though unrecorded one takes it subject thereto and will not be permitted, by placing his mortgage first on record, to gain priority over the earlier lien, even though the prior instrument is imperfect in itself or is defectively executed. Angus v. Mariner, 85 M 365, 278 P 996 (1929).

Constructive Notice to Whom: The record of an instrument is constructive notice to subsequent purchasers and encumbrancers only and does not affect a prior purchaser though he has not acquired the legal title or made full payment of the purchase price. Piccolo v. Tanaka, 78 M 445, 253 P 890 (1927).

Description of the Property: In order to give a mortgagee priority as against a subsequent purchaser or mortgagee, the mortgage must describe the land covered by it with sufficient accuracy to enable one examining the record to identify the land. Ely v. Hoida, 70 M 542, 226 P 525 (1924), followed in Poncelet v. English, 243 M 481, 795 P2d 436, 47 St. Rep. 1342 (1990).

Knowledge Presumed From Record: Where, after giving an oil and gas lease upon his land to one party, which lease was not recorded, the owner gave an option to purchase the land to another party subject to the lease, the option being recorded, purchaser of land before expiration of option was chargeable with constructive notice of the option and its contents and hence of the provision therein that it was subject to the lease. Purchaser was not an innocent purchaser without notice and therefore not entitled to an injunction to prevent the lessee from going upon the land for the purpose of exploration. Guerin v. Sunburst Oil & Gas Co., 68 M 365, 218 P 949 (1923), distinguished in Ely v. Hoida, 70 M 542, 226 P 525 (1924).

Form of Instrument: Under this section, 1-5-106 (now repealed), and 70-21-304, a certificate of acknowledgment of a mortgage by husband and wife is not rendered insufficient to charge a subsequent purchaser with notice by reason of the fact that, in the statement that the parties "severally acknowledged __he__ executed the same", the blanks before and after the word "he" were not filled so as to make the word "they". Trerise v. Bottego, 32 M 244, 79 P 1057, 108 Am. St. Rep. 521 (1905).

Oral Agreements: Oral agreements affecting the title to real property, being incapable of record, are not within the express language of this section and 70-21-304. Mullins v. Butte Hardware Co., 25 M 525, 65 P 1004, 87 Am. St. Rep. 430 (1901).

Law Review Articles

The Improvement of Conveyancing in Montana—A Proposal, Cromwell, 22 Mont. L. Rev. 26 (1960).

70-21-303. After-acquired interest — effect on notice.

Law Review Articles

The Improvement of Conveyancing in Montana—A Proposal, Cromwell, 22 Mont. L. Rev. 26 (1960).

70-21-304. Conveyance void as against other conveyance recorded first.

Case Notes

Ratification of Forged Deed Considered in Equity: Commercial property in Hamilton was transferred to multiple parties in successive transactions, resulting in competing claims to the property. Some of the transactions involved fraud or forgery. Plaintiff filed a complaint against numerous parties that were involved in the transactions and sought to quiet title to the property. The District Court concluded that the documents of conveyance to three of the parties were forged and therefore void ab initio and that no rights were transferred to any of those parties. The court found that two of the parties had ratified the forged conveyances by their subsequent actions and that because plaintiff was the first to record a document of transfer, plaintiff was entitled to quiet title. One defendant appealed on grounds that a forged deed cannot be ratified, but the Supreme Court affirmed. A forged deed is void and transfers no rights, even if the subsequent purchaser is bona fide. Thus, the three deeds were void ab initio and plaintiff's interest in the property was not saved by 70-20-404, even though plaintiff parted with value, had no notice of the forgery, and duly recorded the appropriate transfer documents. However, in order to provide a legal remedy in the appropriate case, principles of equity and justice compel recognition of ratification, so a forged deed may be considered in equity. Erler v. Creative Fin. & Inv., LLC, 2009 MT 36, 349 M 207, 203 P3d 744 (2009), distinguishing Hames v. Polson, 123 M 469, 215 P2d 950 (1950), and In re Estate of Griffin, 248 M 472, 812 P2d 1256 (1991).

State Law Controlling as to Ownership for Purposes of Federal Drug Forfeiture of Real Property — Right, Title, and Interest Found in Daughter of Convicted Drug Dealer — Daughter's Forfeiture Reversed: Victor "Big Vic" Nava was convicted in federal court of federal criminal offenses based upon his dealing in methamphetamines. The government also obtained forfeiture of two pieces of real estate under 21 U.S.C. 853, based upon the jury's conclusion that the property was used in the drug dealing and the District Court's conclusion that Victoria, daughter of Big Vic, who was record owner of the two properties, had failed to establish by a preponderance of the evidence that she had held right, title, and interest to the properties. For this reason, the District Court denied Victoria's motion to set aside the forfeiture. The court of appeals held that title must be determined by state law and not federal common law or else ownership for state law purposes would be thrown into question and "havoc" at the state courthouse (with the recordation of property rights) would be the result. The court of appeals held that Victoria's evidence that she had received the property in a purchase or a gift from her father, held record title to the property, lived at the property, and taken out a second mortgage on the property was sufficient against the evidence by the government that Victoria was unemployed, that some witnesses thought her father owned the property, that Victor had made a statement in a plea bargain that he owned it, and that Victor had made some tax payments on the property for Victoria. The court of appeals therefore reversed the forfeiture order of the District Court. U.S. v. Nava, 404 F3d 1119 (9th Cir. 2005).

Failure to Raise Conveyance Voidness Claim in Motion for Summary Judgment — Waiver of Claim on Appeal: Defendant claimed on appeal that under this section, good title had been claimed to a disputed tract of real property through first recording. Although defendant had raised the argument in principle before the District Court in one paragraph of a reply brief, defendant failed to cite any legal authority for the argument when requesting summary judgment. The District Court was not made aware of this section and never ruled on its applicability. Defendant waived the right to any claim under that section. Old Republic Nat'l Title Ins. Co. v. Realty Title Co., 1999 MT 69, 294 M 6, 978 P2d 956, 56 St. Rep. 286 (1999).

Possession of Real Property Insufficient to Grant Title Against Good Faith Purchasers — No Adverse Possession Shown: In 1989, the Luloffs bought part of a ranch from the Manweilers by a deed that excluded "Tract B". The Luloffs mistakenly assumed that Tract B was the part of the ranch that had been occupied by the Blackburns for approximately 4 years. When the Luloffs later discovered that Tract B was another part of the ranch, they brought an action to have the Blackburns evicted, and the District Court granted summary judgment. The Supreme Court held that summary judgment was correctly granted because there was no contract between the Manweilers and the Blackburns satisfying the statute of frauds for the sale of the property to the Blackburns. The Supreme Court held that the Blackburns' mere possession was insufficient against the Luloffs, who had purchased the ranch as bona fide purchasers in good faith, because they were without notice of any claim of title by the Blackburns. The Supreme Court noted that the Blackburns could not make a claim of title because they had mere possession, which did not satisfy the requirements for adverse possession because the Blackburns had not paid taxes upon the property. Luloff v. Blackburn, 274 M 64, 906 P2d 189, 52 St. Rep. 1124 (1995).

Mistake in Reference to Encumbered Property Interest — Constructive Notice: A mortgage contained no error in the legal description of the land but did contain a mistake in its reference to the specific property interest encumbered. However, the mistake was held to be immaterial, and as a matter of law, defendants, as subsequent judgment lienholders, had constructive notice of plaintiff's prior recorded mortgage. When the specific property intended to be mortgaged can be identified from the language of the instrument itself or from information gained from an inquiry clearly suggested by the language of the instrument, a mistake in the reference to the encumbered property interest does not affect the validity of the instrument. Washington v. Slack, 249 M 56, 813 P2d 447, 48 St. Rep. 576 (1991), distinguishing Poncelet v. English, 243 M 481, 795 P2d 436 (1990), and Ely v. Hoida, 70 M 542, 226 P 525 (1924).

Fraudulent Conveyances: In determining the date of transfer of an alleged fraudulent conveyance under the Federal Bankruptcy Act, the date of transfer of an assignment of a note and mortgage was the date of recordation and not the date upon which the transfer was effective between the parties since it is not until recordation that subsequent transferees or purchasers could not acquire an interest superior to that of the original transferee. Raucci v. Davis, 161 M 270, 505 P2d 887 (1973).

Unrecorded Easement: In condemnation proceeding, refusal to instruct in words of statute was error where owner of adjacent land claimed compensation for unrecorded easement in condemned land. St. Highway Comm'n v. Robertson & Blossom, Inc., 151 M 205, 441 P2d 181 (1968).

Donee Not Good Faith Purchaser: Where a son receives property from his father as a gift, he cannot be considered a good faith purchaser for a valuable consideration within meaning of this section. Hughes v. Melby, 135 M 415, 340 P2d 511 (1958).

Estoppel to Record Gift Deed: Where the father executed a deed of a one-third interest in his ranch to his son as a gift but did not record or deliver such deed, then placed the ranch with a real estate broker with the power to sell, the broker and his purchaser could rely on the record ownership, and both the son and his father were estopped to defeat them by a recordation subsequent to the contract of purchase. Hughes v. Melby, 135 M 415, 340 P2d 511 (1958).

Existing Legal Obligation to Support — Not Good Faith Purchaser: While an existing legal obligation, such as rests upon children to support their indigent parents to the extent of their ability, under 40-6-214 and 40-6-301 (now repealed), is a good consideration for a promise under 28-2-802, "to an extent corresponding with the extent of the obligation, but no further or otherwise", that is not to say that it is such a consideration as to make defendant a purchaser in good faith and for a valuable consideration, so as to entitle him to plaintiff's property under this section. Kelly v. Grainey, 113 M 520, 129 P2d 619 (1942).

Good Faith Purchaser: A purchaser in good faith is one who at the time of his purchase advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase should be set aside. Kelly v. Grainey, 113 M 520, 129 P2d 619 (1942).

Where Recording Not Substitute for Actual Notice to Change Permissive Possession to Hostile: Although the recording of deeds to supply additional security for bank loan to sister of plaintiff would have constituted such notice as would protect a bona fide purchaser for a valuable consideration whose deed had been recorded first under this section, it could not take the place of actual notice to the owner of the property, involved in a quiet title action in which the defendant, another sister of plaintiff, relied upon the doctrine of adverse possession of her grantor, that the permissive nature of the possession had been changed into a hostile one. Kelly v. Grainey, 113 M 520, 129 P2d 619 (1942).

Knowledge of Royalty Assignments in Subsequent Leaseholder: Where the holder of a federal oil and prospecting permit assigned a number of royalty interests in the lands covered by it, which assignments were duly recorded, and he thereafter transferred the permit to another who secured leases on the lands, the latter took the leases subject to and with knowledge of the assignments of royalty interests, under this recording statute. Aronow v. Bishop, 107 M 317, 86 P2d 644 (1938).

Definition of "Encumbrancer": This section does not operate in favor of an attaching creditor as against a contract of sale and the assignment thereof not recorded prior to levy of the attachment, the term "encumbrancer" not being broad enough to include such creditor. Stauffacher v. Great Falls Pub. Serv. Co., 99 M 324, 43 P2d 647 (1935); Short v. Karnop, 84 M 276, 275 P 278 (1929).

Effect of Recording in General:

A real estate mortgage extension agreement executed under 71-1-203, before maturity of the last of a series of mortgage notes, was not recorded until after the period of extension had expired. Two years prior thereto the property had been conveyed to another, subject to the mortgage, the deed, however, not being recorded until some 6 weeks after recordation of the extension agreement. It was held, in mortgage foreclosure action, that the extension agreement, having been valid and first placed of record, took priority over the deed, even assuming that the vendee was a subsequent purchaser in good faith and for a valuable consideration. Hastings v. Wise, 91 M 430, 8 P2d 636 (1932).

Under this section it is presumed that the holder of the prior recorded title acquired the entire estate, unless he had or was charged with notice. Custer Consol. Mines Co. v. Helena, 52 M 35, 156 P 1090 (1916).

This section unequivocally makes all unrecorded deeds and conveyances except leases for 1 year void as to subsequent purchasers and encumbrancers in good faith and for a valuable consideration. Sheldon v. Powell, 31 M 249, 78 P 491, 107 Am. St. Rep. 429 (1904).

General Requisites: To entitle a subsequent purchaser of real property to protection against prior conveyances under this section, he must not only have purchased for a valuable consideration but his conveyance must have been first duly recorded. Hastings v. Wise, 91 M 430, 8 P2d 636 (1932).

Creditor of Former Owner — Attachment Before Transfer Recorded: In an action to quiet title to real property, it was held that where a former owner of the property had no interest in the property at the time an attachment was levied against it by his creditor, the latter took nothing thereby as against the then owner, and his contention that under this section, since prior instruments affecting the title had not been placed of record before levy of the attachment, the title of plaintiff was subject to the attachment may not be upheld, under the above rules. Short v. Karnop, 84 M 276, 275 P 278 (1929).

"Other Conditional Estate": Under the rule of ejusdem generis, words "other conditional estate" used in this section mean such estates of the nature previously mentioned in the statute, i.e., estates created by the owner of the property or by assignment thereof. Short v. Karnop, 84 M 276, 275 P 278 (1929).

Constructive Notice of Lease in Option to Purchase: Where, after giving an oil and gas lease upon his land to one party, which lease was not recorded, the owner gave an option to purchase the land to another party subject to the lease, the option being recorded, plaintiff who purchased the land before the expiration of the option was chargeable with constructive notice of the option and its contents and hence of the provision therein that it was subject to the lease, and in the absence of inquiry from the lessee, was not an innocent purchaser without notice and therefore not entitled to an injunction to prevent the lessee from going upon the land for the purpose of exploration. Guerin v. Sunburst Oil & Gas Co., 68 M 365, 218 P 949 (1923), distinguished in Ely v. Hoida, 70 M 542, 226 P 525 (1924).

Inquiry of Person in Possession — Purchaser in Good Faith: Where plaintiff in an action in unlawful detainer, before purchasing land had consulted the records and found that the then occupant was holding under an expired lease, and upon inquiry was informed by the latter than he was so holding and paying rent annually, he was a purchaser in good faith and without notice of defendant's claim as a life tenant under a letter from the owner to defendant that he could remain in possession so long as he used the premises for a certain purpose and paid the rent. Stoltze Land Co. v. Westberg, 63 M 38, 206 P 407 (1922).

70-21-305. Abstract of conveyance — effect of recording.

Case Notes

Claimed Easement From Certificate of Survey Referenced in Notice of Purchaser's Interest — Warranty Deed Conveying Easement Never Recorded — Quiet Title Upheld. Towsley v. Stanzak, 2022 MT 217, 410 Mont. 403, 519 P.3d 817.

Recording of First Page of Deed of Trust — Constructive Notice of Contents: The recording of the first page of a deed of trust as an abstract of conveyance gave constructive notice of its contents and terms, including the future advance clause. Serv. Funding, Inc. v. Craft, 234 M 431, 763 P2d 1131, 45 St. Rep. 2030 (1988).

70-21-306. Recording judgments to impart notice.

Case Notes

Judgment Lien Against Husband's Property Not Supportive of Execution Against Interests of Second Wife and Children — Property Subject to Prior Judgments Only: Following dissolution of his marriage, Ken Jones purchased real property in 1986. In May 1987, he executed a homestead declaration on the property pursuant to 70-32-105. In July 1987, he conveyed the property by quitclaim deed, with one-half interest to himself and one-half to his second wife and their two daughters in equal shares. In January 1988, his second wife also filed a declaration of homestead. Also in 1988, Ken declared bankruptcy. As a result of that filing, a dissolution decree property settlement provision that he pay certain sums to his first wife Rita was redesignated as a maintenance obligation. Ken appealed that order, and while the appeal was pending, Ken and his second wife conveyed the real property to Poindexter. Rita executed upon one-half of the sale proceeds, which Poindexter had withheld to satisfy Ken's past-due maintenance and support, but $2,113.53 remained due on the underlying judgment. Rita moved for an order of sale of the property so that she could recover the remaining maintenance plus her attorney fees. The District Court determined that Ken's homestead exemption was abandoned when he sold the property to Poindexter and that because Rita's judgment liens had never been removed or extinguished, the liens attached and encumbered the property at the time the homestead exemption was abandoned and thus the property was conveyed to Poindexter subject to the liens and the execution order. The Supreme Court disagreed and reversed because: (1) Rita had already executed on Ken's half of the sale proceeds and further execution would be against the interests of the second wife and daughters and was therefore unsupported; and (2) the maintenance payments became due and judgments were entered after Ken sold the property. Under this section, a purchaser takes property subject only to prior judgments; therefore, execution was inappropriate on the property for judgments entered after Poindexter's purchase. In re Marriage of Jones v. Poindexter, 253 M 408, 833 P2d 1044, 49 St. Rep. 501 (1992).

Recording Not Condition Precedent to Judgment Becoming a Lien: This section and 7-4-2613 define the effect of recording a final judgment as far as imparting constructive notice is concerned, but they are not controlling as to when the judgment becomes a lien. It is 25-9-301 which determines when the lien becomes effective. The lien attaches when the judgment is docketed, and recordation of the judgment is not made a condition precedent to its becoming a lien. Gaines v. Van Demark, 106 M 1, 74 P2d 454 (1937).

70-21-307. Effect of conveyance to grantee as trustee when no trust conditions provided.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-21-309. Validation of conveyances recorded after defective execution — notice imparted.

Compiler's Comments

1991 Amendment: In (1), in three places, substituted "1991" for "1983".

1983 Amendment: In (1), substituted "October 1, 1983" for "October 1, 1981" and, in two places, substituted "January 1, 1983" for "January 1, 1981".

1981 Amendment: Substituted "pending as of October 1, 1981" for "now pending" near the beginning of (1); changed "1973" to "1981" after "January 1" near the beginning of (1); substituted "recorded" for "copied into the proper book kept" after "January 1, 1981" near the middle of (1); inserted "technical" after "notwithstanding any" near the middle of (1); deleted language relating to instruments acknowledged by corporate officers after "any such certificate" near the end of (1) (see sec. 1, Ch. 147, L. 1973, for former text); substituted "January 1, 1981" for "that date" at the end of (1).

CHAPTER 22
CORNER RECORDATION ACT
SURVEYS AND COORDINATES

Chapter Case Notes

Ambiguous Deeds of Conveyance — Intent of Parties Properly Considered: A dispute arose in a quiet title action based on subdivision surveys that differed from the original government survey. The District Court held that the property belonged to defendants, and the Supreme Court affirmed. Inconsistencies between the original plat and the location of the subdivision surveyor's monuments created an ambiguity. References to quarter section lines and quarter corners in the original survey were definite and ascertainable, and the subdivision surveyor's improperly placed monuments were considered false particulars frustrating the conveyance. The District Court properly applied Brown's Boundary Control and Legal Principles (4th Ed. 1995) to determine that the subdivision surveyor's monuments conflicted with the government's original monument and correctly considered the intent of the parties in interpreting the surveys and conveyances. Further, the original plat was part of the deeds of conveyance in defendants' chain of title, so the District Court correctly allowed the certificate of dedication into evidence. Olson v. Jude, 2003 MT 186, 316 M 438, 73 P3d 809 (2003).

Use of Original Survey for Reference — Proper Determination of Tract Boundary: A dispute arose in a quiet title action based on subdivision surveys that differed from the original government survey. When surveyors use corner sections and lines to base measurements and plot tracts, it is essential that they properly identify and authenticate the original monument. Original corners established by a government survey, if those corners can be found, or places where they were originally established, if those places can be definitely determined, are conclusive without regard to whether they were located correctly or not and must remain the true corners or monuments by which to determine the boundaries. The footsteps of the original surveyor should be followed, so far as discoverable on the ground by monuments, and it is immaterial if the lines run by the original surveyor are incorrect. Olson v. Jude, 2003 MT 186, 316 M 438, 73 P3d 809 (2003). See also Vaught v. McClymond, 116 M 542, 155 P2d 612 (1945), and Helehan v. Ueland, 223 M 228, 725 P2d 1192 (1986).

Survey Services Provided — No Breach of Contract — Judicial Determination of Survey Locations Not Warranted: Property developers contracted with professional surveyors to survey several parcels of property into 20-acre lots. A subsequent unofficial government survey concluded that the results of the contracted work may have been in error, resulting in a potential encroachment of adjacent property. The developers brought an action for breach of contract, contending that if the corners were located where the government survey located them, some lots would be less than the 20-acre units they contracted for. The District Court properly found no breach of contract because, taking into consideration the inexact nature of surveying generally and the fact that the surveyors relied on approved standards and the best available information, the developers in fact received the services they contracted for. Yellowstone Basin Properties, Inc. v. Burgess, 255 M 341, 843 P2d 341, 49 St. Rep. 1051 (1992).

Use of Approved Surveying Source and Best Evidence Available — Standard of Care Met: Surveyors who presented evidence that they complied with rules and regulations set out in the approved source, in this case the 1973 Manual of Surveying Instructions, and that they used the best evidence obtainable in establishing and recording corners and survey information did not breach the standard of care required of registered land surveyors. Yellowstone Basin Properties, Inc. v. Burgess, 255 M 341, 843 P2d 341, 49 St. Rep. 1051 (1992).

Government Survey Conclusive: The location of corners and lines established by federal government survey is conclusive and the true corners are where the U.S. surveyors in fact established them. Stidham v. Whitefish, 229 M 170, 746 P2d 591, 44 St. Rep. 1869 (1987), citing Stephens v. Hurly, 172 M 269, 563 P2d 546 (1977).

Conflicting Surveys: At a trial between two adjacent landowners over the exact location of the boundary, conflicting findings of several surveyors were submitted into evidence. The District Court accepted the defendant's survey, and the Supreme Court affirmed, finding substantial credible evidence that defendant's surveyor was not only experienced but also an experienced surveyor of the property in question, having surveyed the same section line in 1949 and 1976. Helehan v. Ueland, 223 M 228, 725 P2d 1192, 43 St. Rep. 1679 (1986).

Part 1
Corner Recordation Act

Part Case Notes

No Error in District Court Using Plat to Determine Right-of-Way Width When Nearby Boundary Markers Available: When no boundary markers were found marking a right-of-way at issue, the District Court did not err in determining the city's right-of-way was 60 feet in width. Although a surveyor tried to recreate where the boundary markers would have been based on nearby markers and other factors, resulting in a wider right-of-way, the District Court relied instead on another surveying expert's opinion, based on a plat showing the street's width as 60 feet. The Supreme Court noted that the original boundary markers take precedence over plats only when the markers were set and can be located by a subsequent surveyor. The District Court's conclusion was further supported by other surveying principles, a lack of other evidence that the road was intended to be wider than 60 feet, and the practice of subdividers fixing definite road widths to maximize area for lots. Wohl v. Missoula, 2013 MT 46, 369 Mont. 108, 300 P.3d 1119.

Natural and Artificial Boundaries Prevail: In this action to quiet title, the boundary line between the parties' properties, based upon a resurvey that located the original corner monuments, was correctly determined. The general rule is that courses and distances must yield to natural and artificial monuments. Bollinger v. Hollingsworth, 227 M 454, 739 P2d 962, 44 St. Rep. 1228 (1987).

Part Attorney General's Opinions

Survey Plat With Intention to Drill — Conformance With Corner Recordation Act Required: Survey plats submitted with a notice of intention to drill under 82-11-122 must be completed in conformance with Title 70, ch. 22, part 1. 41 A.G. Op. 89 (1986).

70-22-103. Definitions.

Compiler's Comments

2001 Amendment: Chapter 492 in definition of surveyor near beginning after "A" substituted ""surveyor" means a person who is licensed" for ""registered surveyor" is a surveyor who is registered"; and made minor changes in style. Amendment effective October 1, 2001.

1989 Amendment: In definition of Board, before "land surveyors", inserted "professional".

1981 Amendment: Changed internal reference to the board in (9).

70-22-104. Filing of corner record required.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-22-105. Filing permitted as to any corner or accessory.

Compiler's Comments

2003 Amendment: Chapter 549 inserted (2) relating to use of a corner record in lieu of a certificate of survey; and made minor changes in style. Amendment effective October 1, 2003.

70-22-107. Form and contents of record — board to prescribe.

Administrative Rules

ARM 24.183.1001 Form of corner records — information to be included.

70-22-108. Corner records to be certified.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-22-109. Duties of county clerk.

Compiler's Comments

2003 Amendment: Chapter 549 in (3) at end of first sentence inserted "for public land corners or on an index referenced to tract or lot number in a survey of record"; and made minor changes in style. Amendment effective October 1, 2003.

1981 Amendment: Deleted former (5) relating to fee determination; added (5) eliminating a filing fee.

70-22-110. Surveyor to rehabilitate monument.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-22-115. Monument preservation.

Compiler's Comments

Effective Date: This section is effective October 1, 2009.

Part 2
Montana Coordinate System

70-22-201. Coordinate systems adopted — designation — division of state into zones.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 473, L. 2023. Amendment effective October 1, 2023.

1987 Amendment: In beginning of (1) substituted "North American datum systems" for "system", before "United States" inserted "national ocean survey/national geodetic survey (formerly the", and after "survey" inserted ") or a successor"; at end of (1) inserted "NAD 27" and the "Montana coordinate system NAD 83""; in (2), before "system", substituted "the Montana coordinate" for "this", after "system" inserted "NAD 27", and after "south zone" inserted "as provided in subsections (3) through (5)"; inserted (6) making the state a single zone for purposes of the Montana coordinate system NAD 83; and made minor changes in phraseology.

70-22-202. Designation of system by zone.

Compiler's Comments

1987 Amendment: Throughout section, after "system", inserted "NAD 27".

70-22-203. Use of x- and y-coordinates.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 3, Ch. 473, L. 2023. Amendment effective October 1, 2023.

1987 Amendment: At beginning of section inserted "(1) For the Montana coordinate system NAD 27", after "plane" substituted "coordinate values for a point" for "coordinates of a point", and before "position" inserted "geographic"; at end of (1) substituted "terms of a United States survey foot" for "feet"; inserted (2) giving the plane coordinate values and international conversion value for Montana coordinate system NAD 83 and requiring that the unit of measure be clearly stated when expressing coordinate values; in (3), after "distances", inserted "used to express a position or location" and after "conform to" substituted clause requiring coordinate values published by national survey and computed on designated systems for "the coordinates on the Montana coordinate system of the triangulation and traverse stations of the United States coast and geodetic survey within the state of Montana as those coordinates have been determined by the survey"; and made minor changes in phraseology

70-22-204. Description of location.

Compiler's Comments

1987 Amendment: Inserted (1) providing that the position of the survey station on the designated system of plane coordinates be considered a complete, legal, and satisfactory location description; and in (2), before "coordinate", substituted "NAD 27" for "above".

70-22-205. Technical description of zones.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 4, Ch. 473, L. 2023. Amendment effective October 1, 2023.

1987 Amendment: In lead-in, after "coordinate", substituted "systems NAD 27 and NAD 83" for "system" and after "by" inserted "the national ocean survey/national geodetic survey (formerly"; in (1), (2), and (3), after "system", inserted "NAD 27"; near end of (1), after "parallel", substituted "47°" for "44°"; near end of (3), after "parallel", substituted "44°" for "47°"; inserted (4) describing and outlining the origin of coordinates for the Montana coordinate system NAD 83; and deleted former (2) that described position of Montana coordinate system marked on the ground by triangulation or traverse stations.

70-22-206. Conformity to standards required for use of coordinates in recorded instrument.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 5, Ch. 473, L. 2023. Amendment effective October 1, 2023.

2001 Amendment: Chapter 494 in first sentence near beginning after "coordinate" deleted reference to system NAD 27, after "coordinates have been" deleted "established in conformity with the national prescribed standards for third-order class II horizontal control surveys and provided that these surveys have been", substituted "first-order or higher accuracy horizontal control points" for "first- or second-order horizontal control stations", and substituted "as part of the national spatial reference system" for "in the national network of geodetic control and are within 3 miles of said land boundaries. Standards of accuracy and specifications apply for first-, second-, and third-order geodetic surveying as prepared and published by the federal geodetic control committee (FGCC) of the United States department of commerce or its successors. Publication of the existing control stations or acceptance with intent to publish newly established control stations by the national ocean survey/national geodetic survey constitutes evidence of adherence to FGCC specifications" and at end inserted last sentence that read: "Public land or deed records presented for recording that purport to define the position of a point on a land boundary based on coordinates from the Montana coordinate system NAD 83 must contain a statement that identifies the first-order or higher accuracy control stations used in the survey, the specific NAD 83 datum adjustment tag of the coordinates used, and the type of equipment and methods used to perform the survey"; and made minor changes in style. Amendment effective October 1, 2001.

1987 Amendment: In first sentence, after "Montana coordinate", substituted "systems NAD 27 and NAD 83" for "system" and after "unless" substituted remainder of section describing establishment and publication of coordinates according to federal specifications for "such point is within one-half mile of a triangulation or traverse station established in conformity with the standards prescribed in 70-22-205, provided that said one-half mile limitation may be modified by a duly authorized state agency to meet local conditions".

70-22-207. Use of term Montana coordinate system limited.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 6, Ch. 473, L. 2023. Amendment effective October 1, 2023.

1987 Amendment: In middle of first sentence, after "system", inserted "NAD 27 north, central, or south zone" or "Montana coordinate system NAD 83""; and made minor changes in phraseology.

70-22-208. Public land survey description to prevail.

Compiler's Comments

1987 Amendment: At end of section, after "record", deleted "and in the event of any conflict, the description by reference to the subdivision, line, or corner of the United States public land surveys shall prevail over the description by coordinates".

Case Notes

Government Survey Conclusive: The location of corners and lines established by federal government survey is conclusive and the true corners are where the U.S. surveyors in fact established them. Stidham v. Whitefish, 229 M 170, 746 P2d 591, 44 St. Rep. 1869 (1987), citing Stephens v. Hurly, 172 M 269, 563 P2d 546 (1977).

70-22-209. Purchaser or mortgagee not required to rely on description using systems.

Compiler's Comments

1987 Amendment: After "Montana coordinate" substituted "systems" for "system".

70-22-211. Limit on use of Montana coordinate system NAD 83.

Compiler's Comments

Effective Date: This section is effective October 1, 2023.

CHAPTER 23
UNIT OWNERSHIP ACT — CONDOMINIUMS

Chapter Case Notes

Property Within Certificate of Survey but Not Within Condominium Declaration Not Subject to Declaration or Bylaws: Pursuant to 70-23-103, Big Sky Camper Village, Inc., filed a declaration that submitted Tract I-A to the Unit Ownership Act and allowed Big Sky Camper Village, Inc., to expand the number of condominium units in its development within 10 years. Additional lands within certificate of survey (COS) 1605 were at various later times also submitted to the declaration by amendment. Hidden Village, Inc. (HVI), the successor in interest of Big Sky Camper Village, sought to construct improvements on property adjacent to the Big Sky Hidden Village Condominium, but the owners' association, Big Sky Hidden Village Owners Association, brought an action to prevent development without its permission, claiming that all the land within COS 1605 was subject to the 10-year limitation contained in the original declaration. The Supreme Court held that only a declaration and not a COS can submit land to the Unit Ownership Act and that only the original declaration and its subsequent amendments determine the land subject to the Act. The Supreme Court therefore held that the limitation on expansion contained in the declaration applied only to land subject to the declaration and not to other property outside the declaration but shown on the COS. Big Sky Hidden Village Owners Ass'n, Inc. v. Hidden Village, Inc., 276 M 268, 915 P2d 845, 53 St. Rep. 379 (1996).

Apartment Building — Implied Equitable Servitude: There can be implied reservations or grants of easement by necessity. Where high-rise condominium was constructed and apartments therein sold under plan whereby corporate builders sold individual apartments to suitable applicants but management corporation retained ownership of building and deed between the two corporations reserved no easements, an implied equitable servitude attached to transfers of apartments in question, requiring that they be used for residential purposes only. Thisted v. Country Club Tower Corp., 146 M 87, 405 P2d 432 (1965), overruling holding in Simonson v. McDonald, 131 M 494, 311 P2d 982 (1957), that 70-20-304 abolishes all implied covenants except the two enumerated therein and observing that language in Simonson was too broadly put and should have been limited in application to facts of that case.

Part 1
General Provisions

Part Law Review Articles

Condominiums, Reform, and the Unit Ownership Act, Natelson, 58 Mont. L. Rev. 495 (1997).

70-23-101. Short title.

Law Review Articles

Real Property: "Reciprocal Negative Easement" Implied From Contract, Deed and General Building Plan (Thisted v. Country Club Tower Corp., 146 M 87, 103, 405 P2d 432), 27 Mont. L. Rev. 91 (1965).

Implied Grants and Reservations of Way of Necessity Abolished (Simonson v. McDonald, 131 M 494, 311 P2d 982), 19 Mont. L. Rev. 73 (1957).

70-23-102. Definitions.

Compiler's Comments

2021 Amendment: Chapter 164 in definition of community land trust after "nonprofit organization" deleted "exempt from taxation", after "land beneath individually owned" deleted "housing", and after "units" inserted "including but not limited to single-family homes, townhomes, condominiums, and multiunit rental properties"; in definition of condominium substituted current second sentence concerning exclusions for former second sentence that read: "The term does not include a townhome, a townhouse, a community land trust, or a housing unit located on land belonging to a community land trust"; and made minor changes in style. Amendment effective October 1, 2021.

2019 Amendment: Chapter 323 inserted definitions of borrower, conversion, and lienholder; and made minor changes in style. Amendment effective October 1, 2019.

Nonapplicability: Section 10, Ch. 323, L. 2019, provided: "Nothing in [this act] may be interpreted to modify or expand existing insurance coverage on a condominium unit, townhome, or townhouse."

2017 Amendment: Chapter 214 inserted definition of community land trust; in definition of condominium at end inserted "a community land trust, or a housing unit located on land belonging to a community land trust"; and made minor changes in style. Amendment effective April 20, 2017.

2011 Amendment: Chapter 373 in definition of condominium inserted second sentence providing that the term does not include a townhome or townhouse; inserted definition of townhome or townhouse; and made minor changes in style. Amendment effective May 12, 2011.

1999 Amendment: Chapter 12 deleted definition of department that read: ""Department" means the department of commerce"; and made minor changes in style. Amendment effective October 1, 1999.

1981 Amendment: Substituted "department of commerce" for "department of business regulation" in (7).

Case Notes

Carport Not Considered Part of Home — Privacy Standard Inapplicable to DUI Search of Condominium Carport: Large was arrested for misdemeanor DUI while seated in her running car that was parked in the carport outside her condominium. Large moved to suppress the evidence because she was arrested at night at her home for a misdemeanor committed elsewhere, in violation of 46-6-105. She also contended that the arrest was in violation of her right to privacy. The motion was denied, and on appeal, the Supreme Court affirmed. Although a carport may be structurally contiguous with the rest of a private house or dwelling, presence in a carport does not equate to presence in the home, and although lot lines do convey certain concrete ownership rights, the right to be free from misdemeanor arrest at night is reserved for the home, not coterminous property appurtenant to the home. Further, under 61-8-101, ways of the state open to the public include parking areas and other public or private places adapted for public travel that are in common use by the public. Large could not be considered to be in her home while sitting in a car parked in the common-area parking lot in her condominium complex where officers could see what was readily visible to any visitor without being overly intrusive. Thus, Large had no reasonable expectation of privacy that prohibited her arrest in her own carport, nor did a violation of 46-6-105 occur. Whitefish v. Large, 2003 MT 322, 318 M 310, 80 P3d 427 (2003). See also St. v. Hubbel, 286 M 200, 951 P2d 971 (1997).

Property Within Certificate of Survey but Not Within Condominium Declaration Not Subject to Declaration or Bylaws: Pursuant to 70-23-103, Big Sky Camper Village, Inc., filed a declaration that submitted Tract I-A to the Unit Ownership Act and allowed Big Sky Camper Village, Inc., to expand the number of condominium units in its development within 10 years. Additional lands within certificate of survey (COS) 1605 were at various later times also submitted to the declaration by amendment. Hidden Village, Inc. (HVI), the successor in interest of Big Sky Camper Village, sought to construct improvements on property adjacent to the Big Sky Hidden Village Condominium, but the owners' association, Big Sky Hidden Village Owners Association, brought an action to prevent development without its permission, claiming that all the land within COS 1605 was subject to the 10-year limitation contained in the original declaration. The Supreme Court held that only a declaration and not a COS can submit land to the Unit Ownership Act and that only the original declaration and its subsequent amendments determine the land subject to the Act. The Supreme Court therefore held that the limitation on expansion contained in the declaration applied only to land subject to the declaration and not to other property outside the declaration but shown on the COS. Big Sky Hidden Village Owners Ass'n, Inc. v. Hidden Village, Inc., 276 M 268, 915 P2d 845, 53 St. Rep. 379 (1996).

Right of Third Party to Use Water and Sewer Lines Under Condominium Property — Indicia of Ownership Determinative: Big Sky Camper Village, Inc., filed a declaration that submitted Tract I-A to the Unit Ownership Act and allowed Big Sky Camper Village, Inc., to expand the number of condominium units in its development within 10 years. Hidden Village, Inc. (HVI), the successor in interest of Big Sky Camper Village, sought to construct improvements on property adjacent to the Big Sky Hidden Village Condominium and to use the existing water and sewer lines for the new improvements. The owners' association, Big Sky Hidden Village Owners Association, brought an action to prevent development without its permission, claiming that the water and sewer lines sought to be used by HVI were the common property of the Association for the exclusive use of the Association and could not be used without permission of the Association. However, the Supreme Court found that the water and sewer lines were constructed and maintained by third parties, a water delivery company and a water and sewer district, and that the Association asserted ownership but provided no evidence of indicia of ownership. For these reasons, the Supreme Court held that the Association could not interfere with or control the hookup and servicing of HVI on the water and sewer lines used by the members of the Association. Big Sky Hidden Village Owners Ass'n, Inc. v. Hidden Village, Inc., 276 M 268, 915 P2d 845, 53 St. Rep. 379 (1996).

Developers as "Unit Owners" and the "Association": Until the final declaration is filed, those who are the fee owners of the condominium project are the fee owners of the units of the project and thus "unit owners". As such, these persons are the parties contemplated by statute to sign and file the final declaration. As "unit owners" they are the "association" who must adopt bylaws and whose officers must certify the bylaws, such certificate to be recorded simultaneously with the final declaration. In the present case, the developers of the project were such parties and did so validly file the final declaration and bylaws. Jordan v. Elizabethan Manor, 181 M 424, 593 P2d 1049 (1979).

70-23-103. Applicability — submission by declaration required — optional declaration for townhouses.

Compiler's Comments

2011 Amendment: Chapter 373 inserted (2) concerning a declaration for a townhome or townhouse; and made minor changes in style. Amendment effective May 12, 2011.

Case Notes

Property Within Certificate of Survey but Not Within Condominium Declaration Not Subject to Declaration or Bylaws: Pursuant to this section, Big Sky Camper Village, Inc., filed a declaration that submitted Tract I-A to the Unit Ownership Act and allowed Big Sky Camper Village, Inc., to expand the number of condominium units in its development within 10 years. Additional lands within certificate of survey (COS) 1605 were at various later times also submitted to the declaration by amendment. Hidden Village, Inc. (HVI), the successor in interest of Big Sky Camper Village, sought to construct improvements on property adjacent to the Big Sky Hidden Village Condominium, but the owners' association, Big Sky Hidden Village Owners Association, brought an action to prevent development without its permission, claiming that all the land within COS 1605 was subject to the 10-year limitation contained in the original declaration. The Supreme Court held that only a declaration and not a COS can submit land to the Unit Ownership Act and that only the original declaration and its subsequent amendments determine the land subject to the Act. The Supreme Court therefore held that the limitation on expansion contained in the declaration applied only to land subject to the declaration and not to other property outside the declaration but shown on the COS. Big Sky Hidden Village Owners Ass'n, Inc. v. Hidden Village, Inc., 276 M 268, 915 P2d 845, 53 St. Rep. 379 (1996).

Developers as "Unit Owners" and the "Association": Until the final declaration is filed, those who are the fee owners of the condominium project are the fee owners of the units of the project and thus "unit owners". As such, these persons are the parties contemplated by statute to sign and file the final declaration. As "unit owners" they are the "association" who must adopt bylaws and whose officers must certify the bylaws, such certificate to be recorded simultaneously with the final declaration. In the present case, the developers of the project were such parties and did so validly file the final declaration and bylaws. Jordan v. Elizabethan Manor, 181 M 424, 593 P2d 1049 (1979).

Part 3
Creation — Declaration and Bylaws

70-23-301. Contents of declaration.

Compiler's Comments

2011 Amendment: Chapter 373 in (8) inserted "townhomes, or townhouses"; and made minor changes in style. Amendment effective May 12, 2011.

2009 Amendment: Chapter 446 inserted (8) requiring certification exhibit; and made minor changes in style. Amendment effective May 5, 2009.

Administrative Rules

ARM 42.20.105 Condominiums/townhomes.

Case Notes

Property Within Certificate of Survey but Not Within Condominium Declaration Not Subject to Declaration or Bylaws: Pursuant to 70-23-103, Big Sky Camper Village, Inc., filed a declaration that submitted Tract I-A to the Unit Ownership Act and allowed Big Sky Camper Village, Inc., to expand the number of condominium units in its development within 10 years. Additional lands within certificate of survey (COS) 1605 were at various later times also submitted to the declaration by amendment. Hidden Village, Inc. (HVI), the successor in interest of Big Sky

Camper Village, sought to construct improvements on property adjacent to the Big Sky Hidden Village Condominium, but the owners' association, Big Sky Hidden Village Owners Association, brought an action to prevent development without its permission, claiming that all the land within COS 1605 was subject to the 10-year limitation contained in the original declaration. The Supreme Court held that only a declaration and not a COS can submit land to the Unit Ownership Act and that only the original declaration and its subsequent amendments determine the land subject to the Act. The Supreme Court therefore held that the limitation on expansion contained in the declaration applied only to land subject to the declaration and not to other property outside the declaration but shown on the COS. Big Sky Hidden Village Owners Ass'n, Inc. v. Hidden Village, Inc., 276 M 268, 915 P2d 845, 53 St. Rep. 379 (1996).

70-23-302. Preliminary declaration.

Case Notes

No Express Warranties Found in Repair Contracts, Protective Covenants, and Preliminary Declaration: The plaintiffs, a condominium owners' association and its individual members, sued Big Sky of Montana Realty, Inc., the successor in interest of Big Sky of Montana, Inc., for breach of express warranties in failing to originally construct and later repair construction defects in fireplaces in the Deer Lodge Condominiums at Big Sky, Montana, in accordance with applicable fire and building codes. The plaintiffs based their claim of express warranty upon the repair contracts, claiming that the contracts called for the repairs to be done according to applicable plumbing, electrical, and building codes. Plaintiffs also based their claim of express warranty on protective covenants that require compliance with the same codes and on the preliminary declaration for the condominiums that required compliance with those codes. The plaintiffs contended that the declaration ran with the land because it had to be recorded. The District Court granted the defendants' motion for summary judgment, dismissing Big Sky of Montana Realty, Inc. The Supreme Court held that the District Court correctly found that no express warranties existed. Ass'n of Unit Owners of Deer Lodge Condominium v. Big Sky of Mont., Inc., 245 M 64, 798 P2d 1018, 47 St. Rep. 1814 (1990).

70-23-304. Declaration to be approved by county before recording.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 308, L. 2023. Amendment effective October 1, 2023.

1997 Amendment: Chapter 279 in (1) substituted "does not comply" for "is proper so as to comply"; and in (2) substituted "have not been paid" for "have been paid".

1993 Special Session Amendment: Chapter 27 in introductory clause, before "the department of revenue", deleted "the agent of"; and made minor changes in style. Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

70-23-305. Recording of declaration.

Compiler's Comments

1993 Special Session Amendment: Chapter 27 in (2), at end, deleted "or its agent in the county in which the property is located". Amendment effective January 1, 1994.

Applicability: Section 171(2), Ch. 27, Sp. L. November 1993, provided that the amendments to this section apply to tax years after December 31, 1993.

1991 Amendment: Inserted (3) requiring filing of a declaration of unit ownership with a city or town clerk if condominium property is located within a city or town; and made minor changes in style.

70-23-306. Floor plans recorded with declaration — certification.

Compiler's Comments

1985 Amendment: In (2) added registered professional land surveyors to the persons authorized to certify floor plans, by inserting references to such surveyors in three places; in (2) in first sentence, substituted "who has reviewed" for "who prepared"; and made minor changes in phraseology.

70-23-307. Bylaws — adoption, recording, and amendment.

Case Notes

Developers as "Unit Owners" and the "Association": Until the final declaration is filed, those who are the fee owners of the condominium project are the fee owners of the units of the project and thus "unit owners". As such, these persons are the parties contemplated by statute to sign and file the final declaration. As "unit owners" they are the "association" who must adopt bylaws and whose officers must certify the bylaws, such certificate to be recorded simultaneously with the final declaration. In the present case, the developers of the project were such parties and did so validly file the final declaration and bylaws. Jordan v. Elizabethan Manor, 181 M 424, 593 P2d 1049 (1979).

70-23-308. Contents of bylaws.

Compiler's Comments

2009 Amendment: Chapter 307 at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2009.

1999 Amendment: Chapter 12 in (2) substituted "70-23-102" for "70-23-102(10)"; and made minor changes in style. Amendment effective October 1, 1999.

70-23-309. Association of unit owners — remote meetings.

Compiler's Comments

Effective Date: This section is effective October 1, 2021.

Part 4
Nature of the Ownership Interest

Part Case Notes

Lack of Membership in Homeowners' Association — Insufficient Standing to Sue Association — Lack of District Court Jurisdiction Affirmed: Edwards and other plaintiffs sued Burke and others for allegedly illegal fencing of tract 3, property commonly owned by a homeowners' association. The District Court dismissed the suit for lack of jurisdiction, ruling that Edwards was not a member of the homeowners' association, had no ownership interest in tract 3, and therefore had no standing to bring the action. The Supreme Court affirmed, holding that in as much as Edwards was not a tenant in common with the members of Burke's homeowners' association, he had no standing to sue. The Supreme Court, citing Rehder v. Rankin, 91 NW 2d 399 (Iowa 1958), and in part following and in part distinguishing Winchell v. Dept. of State Lands, 262 M 328, 865 P2d 249 (1993), which held that because an unincorporated association cannot hold property, the members of the association hold the property in place of the association, said, in dicta, that the association could not hold title to the tract 3 common property. However, the Supreme Court said that whether the association or members of the association owned the property made no difference because Edwards was not even a member of the homeowners' association. Although Edwards argued that he now owns land that would have made him a member of the association, his ownership interest in the common property at issue in the case is, according to the Rehder decision, only one of beneficial ownership caused by his potential membership in the homeowners' association, and he still was not a member of the association or, if ever a member, was divested of his membership when the association's articles changed. Without a sufficient interest in the association's common property by virtue of association membership, Edwards had no standing to bring the action regarding fencing of the common property, and the District Court therefore had no jurisdiction over the action. Edwards v. Burke, 2004 MT 350, 324 M 358, 102 P3d 1271 (2004).

70-23-402. Exclusive ownership and possession of unit — joint ownership.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-23-403. Common elements — undivided interest of unit owner.

Administrative Rules

ARM 42.20.105 Condominiums/townhomes.

70-23-404. Common elements — undivided interest to remain attached to unit.

Case Notes

Right of Third Party to Use Water and Sewer Lines Under Condominium Property — Indicia of Ownership Determinative: Big Sky Camper Village, Inc., filed a declaration that submitted Tract

I-A to the Unit Ownership Act and allowed Big Sky Camper Village, Inc., to expand the number of condominium units in its development within 10 years. Hidden Village, Inc. (HVI), the successor in interest of Big Sky Camper Village, sought to construct improvements on property adjacent to the Big Sky Hidden Village Condominium and to use the existing water and sewer lines for the new improvements. The owners' association, Big Sky Hidden Village Owners Association, brought an action to prevent development without its permission, claiming that the water and sewer lines sought to be used by HVI were the common property of the Association for the exclusive use of the Association and could not be used without permission of the Association. However, the Supreme Court found that the water and sewer lines were constructed and maintained by third parties, a water delivery company and a water and sewer district, and that the Association asserted ownership but provided no evidence of indicia of ownership. For these reasons, the Supreme Court held that the Association could not interfere with or control the hookup and servicing of HVI on the water and sewer lines used by the members of the Association. Big Sky Hidden Village Owners Ass'n, Inc. v. Hidden Village, Inc., 276 M 268, 915 P2d 845, 53 St. Rep. 379 (1996).

Part 5
Rights and Duties Incidental to Unit Ownership

70-23-502. Certain work on unit by owner prohibited.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-23-503. Common elements — use by unit owner.

Case Notes

Right of Third Party to Use Water and Sewer Lines Under Condominium Property — Indicia of Ownership Determinative: Big Sky Camper Village, Inc., filed a declaration that submitted Tract I-A to the Unit Ownership Act and allowed Big Sky Camper Village, Inc., to expand the number of condominium units in its development within 10 years. Hidden Village, Inc. (HVI), the successor in interest of Big Sky Camper Village, sought to construct improvements on property adjacent to the Big Sky Hidden Village Condominium and to use the existing water and sewer lines for the new improvements. The owners' association, Big Sky Hidden Village Owners Association, brought an action to prevent development without its permission, claiming that the water and sewer lines sought to be used by HVI were the common property of the Association for the exclusive use of the Association and could not be used without permission of the Association. However, the Supreme Court found that the water and sewer lines were constructed and maintained by third parties, a water delivery company and a water and sewer district, and that the Association asserted ownership but provided no evidence of indicia of ownership. For these reasons, the Supreme Court held that the Association could not interfere with or control the hookup and servicing of HVI on the water and sewer lines used by the members of the Association. Big Sky Hidden Village Owners Ass'n, Inc. v. Hidden Village, Inc., 276 M 268, 915 P2d 845, 53 St. Rep. 379 (1996).

70-23-504. Maintenance and improvement of common elements.

Case Notes

Right of Third Party to Use Water and Sewer Lines Under Condominium Property — Indicia of Ownership Determinative: Big Sky Camper Village, Inc., filed a declaration that submitted Tract I-A to the Unit Ownership Act and allowed Big Sky Camper Village, Inc., to expand the number of condominium units in its development within 10 years. Hidden Village, Inc. (HVI), the successor in interest of Big Sky Camper Village, sought to construct improvements on property adjacent to the Big Sky Hidden Village Condominium and to use the existing water and sewer lines for the new improvements. The owners' association, Big Sky Hidden Village Owners Association, brought an action to prevent development without its permission, claiming that the water and sewer lines sought to be used by HVI were the common property of the Association for the exclusive use of the Association and could not be used without permission of the Association. However, the Supreme Court found that the water and sewer lines were constructed and maintained by third parties, a water delivery company and a water and sewer district, and that the Association asserted ownership but provided no evidence of indicia of ownership. For these reasons, the Supreme Court held that the Association could not interfere with or control the hookup and servicing of HVI on the water and sewer lines used by the members of the Association. Big Sky Hidden Village Owners Ass'n, Inc. v. Hidden Village, Inc., 276 M 268, 915 P2d 845, 53 St. Rep. 379 (1996).

70-23-505. Abandonment or waiver of use not to effect exemption.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-23-506. Compliance with bylaws, rules, and covenants required — action.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 307 at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2009.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

70-23-507. Restriction on covenants by association of unit owners.

Compiler's Comments

Effective Date: Section 5, Ch. 339, L. 2019, provided: "[This act] is effective on passage and approval." Approved May 9, 2019.

Severability: Section 4, Ch. 339, L. 2019, was a severability clause.

Part 6

Conveyances, Liens, and Common Expenses

70-23-601. Contents of deed or lease of unit.

Compiler's Comments

2009 Amendment: Chapter 307 at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2009.

70-23-603. Lien allowable against unit not against the property.

Case Notes

Valid Single Lien: Plaintiffs' mechanics' lien that arose from work performed as subcontractor and from materials supplied during initial construction of a condominium project was not rendered invalid when developer filed a declaration of unit ownership but remained a valid single lien, which was proportionately effective against each unit. (Mechanics' lien provisions repealed, 1987—see construction liens, Title 71, ch. 3, part 5.) Hostetter v. Inland Dev. Corp., 172 M 167, 561 P2d 1323 (1977).

70-23-604. Construction lien — no effect on nonconsenting owner — exception.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Valid Single Lien: Plaintiffs' mechanics' lien that arose from work performed as subcontractor and from materials supplied during initial construction of a condominium project was not rendered invalid when developer filed a declaration of unit ownership but remained a valid single lien, which was proportionately effective against each unit. (Mechanics' lien provisions repealed, 1987—see construction liens, Title 71, ch. 3, part 5.) Hostetter v. Inland Dev. Corp., 172 M 167, 561 P2d 1323 (1977).

70-23-605. Lien effective against two or more units — release from.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Valid Single Lien: Plaintiffs' mechanics' lien that arose from work performed as subcontractor and from materials supplied during initial construction of a condominium project was not rendered invalid when developer filed a declaration of unit ownership but remained a valid single lien, which was proportionately effective against each unit. (Mechanics' lien provisions repealed, 1987—see construction liens, Title 71, ch. 3, part 5.) Hostetter v. Inland Dev. Corp., 172 M 167, 561 P2d 1323 (1977).

70-23-606. Records of receipts and expenditures affecting common elements — inspection.

Compiler's Comments

1983 Amendment: In (2), after "the payments" inserted "and receipts for payments" and after "for examination" inserted "at the manager's place of business".

70-23-607. Claim for common expenses — priority of lien — contents — recording.

Compiler's Comments

1987 Amendment: In (3) substituted reference to "Title 71, chapter 3, part 5" for "71-3-501".

Case Notes

Liens for Overdue Assessments: Where the condominium project was validly established and the expenditures against plaintiff were admitted as proper, the lien against plaintiff for overdue assessments could be foreclosed following the statutory perfection of the lien. Payment of the debt upon which the lien is based extinguishes the lien and also any foreclosure based upon it. Jordan v. Elizabethan Manor, 181 M 424, 593 P2d 1049 (1979).

70-23-608. Foreclosure of lien under claim for common expenses — action without foreclosure.

Compiler's Comments

1987 Amendment: In (1) substituted reference to "Title 71, chapter 3, part 5" for "71-3-501".

Case Notes

Liens for Overdue Assessments: Where the condominium project was validly established and the expenditures against plaintiff were admitted as proper, the lien against plaintiff for overdue assessments could be foreclosed following the statutory perfection of the lien. Payment of the debt upon which the lien is based extinguishes the lien and also any foreclosure based upon it. Jordan v. Elizabethan Manor, 181 M 424, 593 P2d 1049 (1979).

70-23-609. Foreclosure on unit — payment of rent — purchase of unit by manager.

Compiler's Comments

1983 Amendment: In (2), changed "bid in" to "bid on".

70-23-610. Purchaser at foreclosure sale not totally liable for prior common expenses.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-23-611. Joint liability of grantor and grantee for unpaid common expenses.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-23-612. Insurance of building — premiums as common expenses.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-23-613. Disclosure by seller — seller to furnish documents — delay period.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 8
Removal of Property From Unit Ownership Act

70-23-801. Removal from chapter — recorded instrument — consent of lienholders.

Compiler's Comments

1985 Amendment: Deleted former (2) that read: "The tax collector for any taxing unit having a lien for taxes or assessments shall have authority to consent to such a transfer of any tax or assessment lien."

Part 9
Actions and Process

70-23-902. Change of agent for service of process.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 11
Conversion of Condominium to Townhouse

Part Compiler's Comments

Effective Date: This part is effective October 1, 2019.

Nonapplicability: Section 10, Ch. 323, L. 2019, provided: "Nothing in [this act] may be interpreted to modify or expand existing insurance coverage on a condominium unit, townhome, or townhouse."

CHAPTER 24
RESIDENTIAL LANDLORD AND TENANT ACT OF 1977

Chapter Compiler's Comments

Uniform Act: The Montana Residential Landlord and Tenant Act of 1977 is a substantial adoption of the Uniform Residential Landlord and Tenant Act as approved by the National Conference of Commissioners on Uniform State Laws, but it contains numerous variations, omissions, and additional matters from the Uniform Act. The commissioners' comments to sections of the Uniform Act are included under corresponding sections of the Montana Act when there is substantial similarity between the sections.

Chapter Case Notes

Third-Party Standing by Neighbor Denied: The owner of a townhouse duplex sued a neighboring duplex owner that shared a property boundary divided by a fence, alleging that the neighbor breached an obligation of good faith under 70-24-321. The District Court did not err by dismissing the claim because the neighbor was not a landlord, tenant, or guest of the property in question. Cossitt v. Flathead Indus., Inc., 2018 MT 82, 391 Mont. 156, 415 P.3d 486.

Fire Protection Services Not Required of Mobile Home Court Owners: Appellant claimed that the owners of a mobile home court violated The Montana Residential Landlord and Tenant Act of 1977 (similar to The Montana Residential Mobile Home Lot Rental Act) by failing to provide fire protection services. While 70-24-303 requires all common areas to be kept in a clean and safe condition and 70-24-105 extends the principles of law and equity relating to safety and fire prevention to the Act, absent the existence between the parties of any contractual obligation to provide fire protection services and absent proof of a statutory or common-law duty to provide those services, the complaint was properly dismissed. Rookhuizen v. Blain's Mobile Home Court, Inc., 236 M 7, 767 P2d 1331, 46 St. Rep. 139 (1989).

Oral Contract for Purchase of House — Part Performance — Statute of Frauds Inapplicable — No Refund to Purchasers on Default: Defendant agreed to sell home to friends upon a $10,000 downpayment and assumption of defendant's loan. Plaintiffs did not qualify for assumption, so defendant prepared lease for plaintiffs' signature. They refused to sign because it was not a contract for deed. Defendant allowed plaintiffs to take occupancy, and they made sporadic payments for 4 years. Defendant's patience waned when the bank exercised acceleration provision for delinquencies. Plaintiffs sued for refund of payments. The court found an oral contract for deed. The Statute of Frauds was inapplicable because defendant was, at all times, willing to effect sale and transfer of the home. He was not required to refund plaintiffs' payments. Since no lease was ever signed and no rental relationship created, landlord and tenant law was inapplicable. Hayes v. Hartelius, 215 M 391, 697 P2d 1349, 42 St. Rep. 457 (1985).

Availability of Wrongful Death Remedy Under Former Law: The defendants in this wrongful death and survival action owned a rental house leased to the plaintiff. The plaintiff's husband died of an electrical shock received through the plumbing of the house. The plaintiff appealed the granting of a summary judgment motion in favor of the defendants. The Residential Landlord and Tenant Act of 1977 was adopted after this case arose, so its adoption of the doctrine of implied warranty of habitability was inapplicable. The Supreme Court here examined case law prior to the new statute and overruled a holding in the Dier case that if the landlord fails to repair, after notice, the tenant may himself repair, within a certain limit, or move out; but he has no redress in damages for injury to person or property consequent upon the landlord's failure to repair. That holding was not applicable to cases involving tenant suits for personal injuries against a landlord. Citing Art. II, sec. 16, Mont. Const., the court said that it would be patently unconstitutional to deny a tenant all causes of action for personal injuries or wrongful death arising out of the alleged negligent management of rental premises by a landlord. A repair and deduct statute provides no alternative remedy for damages caused by personal injury or wrongful death. The duty of care in section 58-607, R.C.M. 1947, now 27-1-701, was held applicable. This is a duty to exercise ordinary care in the management of the premises to avoid exposing persons thereon to an unreasonable risk of harm, subject to the defenses of contributory negligence or assumption of risk. Corrigan v. Janney, 192 M 99, 626 P2d 838, 38 St. Rep. 545 (1981).

Chapter Law Review Articles

Summers v. Crestview: Protecting Tenants at the Expense of the Law, Henkel, 72 Mont. L. Rev. 321 (2011).

Housing in Montana: Not for Adults Only, Even, 47 Mont. L. Rev. 139 (1986).

Landowner Liability in Montana, Nelson, 47 Mont. L. Rev. 109 (1986).

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, V. Non-Secured Real Estate Transactions, Williams, 46 Mont. L. Rev. 136 (1985).

Residential Landlord-Tenant Law in Montana: A Landlord Prospective, Minto, 39 Mont. L. Rev. 177 (1978).

Statutory and Common Law Presumptions in Montana—Landlord and Tenant, Clarke, 37 Mont. L. Rev. 103 (1976).

Green v. The Superior Court: The Implied Warranty of Habitability in California and Montana, Swartley, 36 Mont. L. Rev. 129 (1975).

Constitutionality of Statute Delaying Commencement of Adverse Possession by Tenant Against Landlord Is Questioned by Court, Corontzos, 22 Mont. L. Rev. 189 (1961).

Part 1
General Provisions

70-24-101. Short title.

Commissioners' Comment to Section 1.101 of Uniform Act

[See chapter compiler's comments]

This Act concerns landlord-tenant relationships under rental agreements for residential purposes. The Act does not apply to rental agreements made for commercial, industrial, agricultural or any purpose other than residential.

70-24-102. Purposes — liberal construction to promote.

Commissioners' Comment to Section 1.102 of Uniform Act

[See chapter compiler's comments]

Existing landlord-tenant law in the United States, save as modified by statute or judicial interpretation, is a product of English common law developed within an agricultural society at a time when doctrines of promissory contract were unrecognized. Thus, the landlord-tenant relationship was viewed as conveyance of a lease-hold estate and the covenants of the parties generally independent. These doctrines are inappropriate to modern urban conditions and inexpressive of the vital interests of the parties and the public which the law must protect.

This Act recognizes the modern tendency to treat performance of certain obligations of the parties as interdependent.

Liberal construction of this Act and its application for promotion of its underlying purposes and policies will permit development by the courts in light of unforeseen and new circumstances and practices. However, proper construction of the Act requires that its interpretation and application be limited to its reason.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 572, L. 2023. Amendment effective May 18, 2023.

Change From Uniform Act: Section 70-24-102 is identical to section 1.102 of the Uniform Act except that Montana omitted "(2)(c) to make uniform the law with respect to the subject of this Act among those states which enact it."

70-24-103. General definitions.

Commissioners' Comment to Section 1.301 of Uniform Act

[See chapter compiler's comments]

[Subsection (7)] Accordingly, in the case of an active trust where all the duties and powers of management inure to the trustee and the rights of the beneficiary are limited to the receipt of income from the trust estate and the beneficiary has no right to the present use and enjoyment of the property, the trustee would be considered an owner but the beneficiary would not. In the case of the so-called "naked title" trust encountered in some jurisdictions where the trustee holds legal title but all powers of management and direction are vested in the beneficiary, the trustee, as the holder of legal title, would be considered an owner; the beneficiary, since he has a right under the trust agreement to present use and enjoyment of the property, would also be considered an owner. The same result would be reached if the trust were revocable at the direction of the beneficiary. In the case of property held in the name of a nominee or straw the beneficial owner would be considered an owner.

[Subsection (9)] Agricultural leases are excluded from operation of the Act ([70-24-104]). Inclusion of "grounds, areas and facilities held out for the use of tenants" does not alter the exclusion.

[Subsection (11)] "Rental agreement" will thus include the original agreement between landlord and tenant as well as any modification and all valid rules and regulations concerning use and occupancy as provided in Section 3.102.

[Subsection (12)] This Act provides lesser rights to a roomer as distinguished from the tenant of a dwelling unit. The definition requires certain facilities to be provided by the landlord. This requirement is not met by provision of the same by the tenant.

Compiler's Comments

2021 Amendment: Chapter 536 inserted definitions of abandon and actual and reasonable cost; substituted current definition of landlord for former definition (see 2021 Session Law for former text); in definition of rent at end substituted "including rent, late fees, or other charges as agreed on in the rental agreement, except money paid as a security deposit" for "under the rental agreement"; in definition of unauthorized person or trespasser after "Unauthorized person" in defined term inserted "or trespasser" and substituted current definition for former definition (see 2021 Session Law for former text); and made minor changes in style. Amendment effective May 14, 2021.

2015 Amendment: Chapter 454 inserted definitions of guest and unauthorized person; in definition of court inserted "small claims court"; in definition of tenant inserted (b) expanding definition to include person with sublease agreement under certain circumstances; and made minor changes in style. Amendment effective October 1, 2015.

Saving Clause: Section 5, Ch. 454, L. 2015, was a saving clause.

2007 Amendment: Chapter 267 in definition of dwelling unit in second sentence after "park" substituted "and rents" for "but does not rent" and after "means" deleted "the space rented and not"; in definition of landlord deleted former (a)(ii) that read: "(ii) a mobile home park"; deleted definition of mobile home owner that read: ""Mobile home owner" means the owner of a manufactured mobile home dwelling unit entitled under a rental agreement to occupy a mobile home park space in a mobile home park"; deleted definition of mobile home park that read: ""Mobile home park" means a trailer court as defined in 50-52-101"; and made minor changes in style. Amendment effective October 1, 2007.

1997 Amendment: Chapter 401 in definition of case of emergency, in second sentence and near end after "in which the tenant", inserted "or landlord"; and made minor changes in style.

1995 Amendment: Chapter 18 at end of (8) substituted "50-52-101" for "50-52-102"; and made minor changes in style.

1993 Amendments: Chapter 222 inserted definition of case of emergency; and made minor changes in style.

Chapter 343 in definition of court, after "district court", deleted "or the appropriate" and after "justice's court" inserted "or city court".

Chapter 470 in definition of landlord inserted reference to a mobile home park; inserted definitions of mobile home owner and mobile home park; and made minor changes in style. Amendment effective May 21, 1993.

Chapter 487 in definition of landlord, after "part", inserted "or of a mobile home park" and at end, after "position", inserted "and the operator of a mobile home park"; inserted definitions of mobile home owner and mobile home park; and made minor changes in style.

Preamble: The preamble attached to Ch. 470, L. 1993, provided: "WHEREAS, Montana residents currently face a housing crisis that includes a lack of affordable housing and a lack of available mobile home park spaces; and

WHEREAS, mobile homes are not "mobile" without substantial moving costs and the potential for substantial damage to the mobile homes; and

WHEREAS, under 70-24-441 landlords of mobile home parks may, without supplying a reason, evict tenants who rent space in mobile home parks; and

WHEREAS, if evicted unfairly, mobile home owners who rent space in mobile home parks may be forced to sell their mobile homes at a fraction of their costs and within an unreasonable amount of time (30 days pursuant to 70-24-441) in order to comply with the eviction.

THEREFORE, the Legislature of the State of Montana finds it necessary to define justifiable and reasonable grounds on which landlords may evict mobile home owners who rent space in mobile home parks."

70-24-104. Exclusions from application of chapter.

Commissioners' Comment to Section 1.202 of Uniform Act

[See chapter compiler's comments]

This Act regulates landlord-tenant relations in residential properties. It is not intended to apply where residence is incidental to another primary purpose such as residence in a prison, a hospital or nursing home, a dormitory owned and operated by a college or school, or residence by a landlord's employee such as a custodian, janitor, guard or caretaker rendering service in or about the demised premises. This Act is intended to apply to government or public agencies acting as landlords ([70-24-103(8)]).

This Act does not apply to occupancy by a purchaser under a contract of sale. This Act applies to occupancy by the holder of an option to purchase, as distinguished from a contract of sale.

This Act applies to roomers and boarders but is not intended to apply to transient occupancy. In many jurisdictions transient hotel operations are subject to special taxes and regulations and, where available, determinations under such authority constitute appropriate criteria.

All of the exclusions enumerated apply only to genuine, bona fide arrangements not created to avoid the application of the Act and are subject to the test of good faith (see [70-24-109]).

[Subsection (3)] A fraternal or social organization is deemed to also cover "athletic club".

Compiler's Comments

2003 Amendment: Chapter 282 in (1) at end after "service" inserted "including all housing provided by the Montana university system and other postsecondary institutions"; and made minor changes in style. Amendment effective October 1, 2003.

Case Notes

Lease Agreement Containing Future, Unexercised Option to Purchase — Not Contract of Sale — Damages Properly Awarded Under Act: The parties entered into a lease option agreement; however, the defendants failed to make payments according to the agreement, and the plaintiffs subsequently filed a complaint pro se seeking a writ of possession, quiet title, past due rent, and other damages, including treble damages for refusal to pay rent under the state's landlord-tenant act. The District Court awarded the plaintiffs treble damages and the defendants appealed the award to the Supreme Court, arguing that the lease option was a contract for sale, which is exempt under this section. The Supreme Court disagreed and affirmed, ruling that the option did not ripen into a contract for sale and was merely a rental agreement with a future, unexercised option and was subject to the provisions of the act. Enz v. Raelund, 2018 MT 134, 391 Mont. 406, 419 P.3d 674.

Termination of Lease — Removal of Holdover Tenant — Agricultural Exception to Landlord-Tenant Act: Defendant sold plaintiff her property. The instrument contained a lease back to defendant of the buildings and 6 acres. Plaintiff gave notice that the lease was to terminate. Defendant refused to vacate. Plaintiff brought an action under the unlawful detainer statutes, which provide for an award of treble damages. Defendant contended the dispute was governed by the Montana Residential Landlord and Tenant Act of 1977. Plaintiff contended the lease was within the "agricultural" exclusion contained in 70-24-104(8). The lease provisions gave no indication of the nature of the buildings or of the intended use of the 6 acres. The trial court allowed the introduction of photographs and oral testimony regarding the lease, which established that the use of the land was for maintenance of defendant's livestock. The trial court properly allowed parol evidence to resolve an ambiguity in the lease. The Supreme Court determined that the legislative intent of 70-24-104 was for a comprehensive coverage of all agricultural operations, whether they are large-scale operations for profit or small-scale operations secondary to the use of the residence. The unlawful detainer provisions were properly applied. Dussault v. Hjelm, 192 M 282, 627 P2d 1237, 38 St. Rep. 738 (1981).

70-24-105. Supplementary principles of law applicable.

Commissioners' Comment to Section 1.103 of Uniform Act

[See chapter compiler's comments]

This section, adapted from Section 1-103 of the Uniform Commercial Code, indicates the continued applicability to landlord-tenant relations of all supplemental bodies of law except in so far as they are explicitly displaced by this Act. The listing given in this section is merely illustrative; no listing could be exhaustive.

Case Notes

Jury Instruction Related to Common-Law Tort and Contract Law Not Contrary to Landlord and Tenant Act: During Bugger's trial against a landlord, the District Court presented the jury with a special verdict form that contained questions of common law tort and contract law, which Bugger contended on appeal violated The Montana Residential Landlord and Tenant Act of 1977. The Supreme Court disagreed. Bugger did not object to the verdict form at trial or demonstrate how the form was prejudicial. Additionally, this section permits the principles of law and equity, including law relating to mutuality of obligations, principal and agent, real property, estoppel, fraud, misrepresentation, or other validating or nonvalidating causes, to supplement the provisions of the Act, so the District Court correctly presented the jury with the applicable and correct statements of the law of the case. Bugger v. McGough, 2006 MT 248, 334 M 77, 144 P3d 802 (2006).

Fire Protection Services Not Required of Mobile Home Court Owners: Appellant claimed that the owners of a mobile home court violated The Montana Residential Landlord and Tenant Act of 1977 by failing to provide fire protection services. While 70-24-303 requires all common areas to be kept in a clean and safe condition and this section extends the principles of law and equity relating to safety and fire prevention to the Act, absent the existence between the parties of any contractual obligation to provide fire protection services and absent proof of a statutory or common-law duty to provide those services, the complaint was properly dismissed. Rookhuizen v. Blain's Mobile Home Court, Inc., 236 M 7, 767 P2d 1331, 46 St. Rep. 139 (1989).

70-24-106. Construction against implicit repeal.

Commissioners' Comment to Section 1.104 of Uniform Act

[See chapter compiler's comments]

This section indicates the policy that no Act which bears evidence of carefully considered permanent regulative intention should lightly be regarded as impliedly repealed by subsequent legislation. This Act, carefully integrated and intended as a uniform codification of permanent character covering an entire "field" of law, is to be regarded as particularly resistant to implied repeal.

70-24-108. What constitutes notice.

Compiler's Comments

2017 Amendment: Chapter 290 in (1) inserted "any of the following is true"; inserted (1)(c) providing for transmission of notice to an electronic mail address and completion of notice by electronic mail; in (1)(d) in middle of first sentence substituted "indicated by the person" for "held out by the person"; and made minor changes in style. Amendment effective October 1, 2017.

Applicability: Section 3, Ch. 290, L. 2017, provided: "[This act] applies to rental agreements entered into, extended, or renewed on or after [the effective date of this act]." Effective October 1, 2017.

1993 Amendment: Chapter 222 in (1)(c) substituted "mailed with a certificate of mailing" for "mailed by registered" and inserted last sentence regarding date of service by mailing; and made minor changes in style.

Case Notes

Receipt, Not Mailing, of Certified Letter Constituting Effective Notice: A lease provided that if the lessee defaulted and did not cure the default within 10 days after written notice from the lessor, then the lessor could retake possession of the property. The method for providing written notice was not described in the lease. When Anderson defaulted on rent, Grenfell sent a default notice by certified mail to Anderson's address as listed in the lease, but Anderson never picked up the letter, and it was returned to Grenfell as unclaimed. Nevertheless, after 11 days, Grenfell retook possession of the leased property, changed the locks, and filed suit, alleging breach of the lease agreement, unlawful detainer, and violation of the implied covenant of good faith and fair dealing. The District Court held in favor of Grenfell, and Anderson appealed. The Supreme Court reversed, finding that Anderson never received proper notice. Citing 58 Am. Jur. 2d Notice § 35 (1989), the court applied the common-law rule that when a statute or rule merely states that written notice must be given without stating how it is to be given, it is not enough that the notice is mailed—it must also be received. The same rule applies to contracts in the absence of express provisions to the contrary. Thus, Grenfell's decision to enforce the 10-day default cure period was effective only upon actual receipt of a written notice by Anderson, whether hand-delivered, mailed, or otherwise. The District Court's conclusion that Anderson had actual notice, effective by certified mailing alone, was in error. Grenfell v. Anderson, 1999 MT 272, 296 M 474, 989 P2d 818, 56 St. Rep. 1101 (1999), following Hill v. Zuckerman, 138 M 230, 355 P2d 521 (1960).

Unclaimed Notice Not Considered Constructive Notice: Grenfell sent a certified letter to Anderson regarding default on a lease, but Anderson never picked up the letter and it was returned to Grenfell as unclaimed. The District Court held that Anderson had constructive notice of the default. The Supreme Court disagreed. Although a party may not escape the effect of the giving of a written notice by refusing to receive it when it is presented in person as a notice, thereby profiting from a wrongful act, in the context of giving notice by certified mail, this rule requires an actual refusal to accept. In this case, there was no indication that the address to which the letter was sent was ever contemplated as a proper place of serving notice, yet Grenfell inexplicably served the default letter in a manner that Grenfell himself acknowledged would not be effective, even though Anderson had previously accepted all manner of lease-related business matters in person at Anderson's place of business. Although the District Court correctly found that Anderson did not claim the letter, the court incorrectly deduced that Anderson had refused the letter. Failure to claim the letter, of itself, was insufficient to impute Anderson's constructive notice absent evidence that receipt of the letter was refused. Grenfell v. Anderson, 1999 MT 272, 296 M 474, 989 P2d 818, 56 St. Rep. 1101 (1999), following Long v. Crum, 267 NW 2d 407 (Iowa 1978). See also Hill v. Zuckerman, 138 M 230, 355 P2d 521 (1960).

Unsanitary Conditions in Trailer Court — Breach of Warranty of Habitability — Notice Adequate: Various maintenance problems in a trailer court, including garbage accumulation due to inadequate collection services, septic system overflows and backups, and a contaminated water system necessitating a "boil order" by the county health department, which problems persisted over a period of years despite tenants' numerous complaints, constituted evidence that landlords breached the warranty of habitability by failing to maintain the premises in a safe and clean condition. Landlords were unable to escape their responsibility by claiming that they were never notified of the problems in writing because the trailer court manager was also a resident of the trailer court and even participated in rules infractions. Mathes v. Adams, 254 M 347, 838 P2d 390, 49 St. Rep. 723 (1992).

70-24-109. Obligation of good faith.

Commissioners' Comment to Section 1.302 of Uniform Act

[See chapter compiler's comments]

Section [70-24-109] is adapted from Section 1-203 of the Uniform Commercial Code. As the commentators there said, "This section sets forth a basic principle running throughout this Act. The principle involved is that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties." The commentators there drew attention to particular applications of this general principle. The intention is that the rule be identical in landlord-tenant relationships and, similarly, particular applications of this general principle appear in specific provisions of this Act such as exclusions ([70-24-104]), retaliatory eviction as well as complaints made to public authorities ([70-24-431]), and obligation of the landlord to repair.

70-24-110. Landlords and tenants — no firearm prohibition allowed.

Compiler's Comments

Preamble: The preamble attached to Ch. 332, L. 2009, provided: "WHEREAS, the Legislature declares that:

(1) the right of Montanans to defend their lives and liberties, as provided in Article II, section 3, of the Montana Constitution, and their right to keep or bear arms in defense of their homes, persons, and property, as provided in Article II, section 12, of the Montana Constitution, are fundamental and may not be called into question;

(2) the use of firearms for self-defense is recognized within the right reserved to the individual people of Montana in Article II, section 12, of the Montana Constitution;

(3) self-defense is a natural right under section 1-2-104, MCA, and is included in sections 49-1-101 and 49-1-103, MCA;

(4) the lawful use of firearms for self-defense is not a crime or an offense against the people of the state;

(5) in a criminal case in which self-defense is asserted, the burden of proof is as provided in [section 10] [actually section 9, Ch. 332, L, 2009, enacting 46-16-131];

(6) in self-defense, the use of justifiable force discourages violent crime and prevents victimization; and

(7) the purpose of [sections 1 through 3] [enacting 45-3-110 through 45-3-112] is to clarify and secure the ability of the people to protect themselves."

Effective Date: Section 11, Ch. 332, L. 2009, provided: "[This act] is effective on passage and approval." Approved April 27, 2009.

70-24-111. Notice of no contact.

Compiler's Comments

Effective Date: This section is effective October 1, 2015.

70-24-112. Application of security deposit laws.

Compiler's Comments

Effective Date: This section is effective October 1, 2021.

70-24-113. Removal of unauthorized person or trespasser.

Compiler's Comments

Effective Date: Section 19, Ch. 536, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 14, 2021.

70-24-114. Emotional support animals — documentation.

Compiler's Comments

Effective Date: This section is effective October 1, 2023.

Part 2
Rental Agreements

70-24-201. Rental agreement — terms and conditions.

Compiler's Comments

2021 Amendment: Chapter 536 inserted (2)(f) concerning damages available if either party terminates the rental agreement without cause prior to the expiration date of the lease term; and made minor changes in style. Amendment effective May 14, 2021.

2017 Amendment: Chapter 155 in (2)(a) before "rental value" deleted "fair"; in (2)(b) inserted "or using electronic funds transfer to an account designated for the payment of rent by the landlord"; and made minor changes in style. Amendment effective April 4, 2017.

Applicability: Section 5, Ch. 155, L. 2017, provided: "[This act] applies to rental agreements entered into, extended, or renewed on or after [the effective date of this act]." Effective April 4, 2017.

Case Notes

Agreement to Agree to Future Lease Terms Unenforceable: Defendant agreed to lease plaintiff farmland on a cash per acre basis for 5 years with an option to extend the lease on terms to be determined later. Toward the end of the 5-year lease, defendant offered to sell the land to plaintiff, but plaintiff declined, so defendant sold the land to a third party, and plaintiff filed a complaint alleging breach of the lease agreement. Both parties moved for summary judgment, and the District Court concluded that because the lease extension language constituted an agreement to agree and was vague and unenforceable, defendant was entitled to summary judgment. On appeal, the Supreme Court affirmed. Because the parties failed to include complete and material terms for determining the duration and payments for another lease term in the negotiation clause, the clause was rendered unenforceable, and specific performance was unavailable to enforce an agreement to agree to material terms in the future. Additionally, damages were not clearly ascertainable and calculation of damages was also untenable under the lease extension, so plaintiff could not recover damages. GRB Farm v. Christman Ranch, Inc., 2005 MT 59, 326 M 236, 108 P3d 507 (2005), following Steen v. Rustad, 132 M 96, 313 P2d 1014 (1957), Riis v. Day, 188 M 253, 613 P2d 696, (1980), and Quirin v. Weinberg, 252 M 386, 830 P2d 537 (1992), and followed in Bitterroot Int'l Sys., Ltd. v. W. Star Trucks, Inc., 2007 MT 48, 336 M 145, 153 P3d 627 (2007).

Amount of Rent — Essential Lease Term Requiring Certainty: Appellants signed a lease with an option to renew the lease. Although the appellants properly gave notice of intent to exercise the option, the renewal provision failed for lack of certainty regarding the amount of the rent because a determination of the amount of the rent upon renewal was based on bids from third parties. In this case, there was no such bid and therefore no means of determining the amount of the rent. The renewal provision of the lease was void for lack of certainty regarding the essential term of rent. Riis v. Day, 188 M 253, 613 P2d 696 (1980), followed in Nentwig v. United Indus., Inc., 256 M 134, 845 P2d 99, 49 St. Rep. 1172 (1992), and GRB Farm v. Christman Ranch, Inc., 2005 MT 59, 326 M 236, 108 P3d 507 (2005).

70-24-202. Prohibited provisions in rental agreements.

Compiler's Comments

2017 Amendment: Chapter 290 inserted (4) prohibiting electronic mail address as a condition of entering into the agreement and allowing a party to voluntarily provide an electronic mail address in an agreement; and made minor changes in style. Amendment effective October 1, 2017.

Applicability: Section 3, Ch. 290, L. 2017, provided: "[This act] applies to rental agreements entered into, extended, or renewed on or after [the effective date of this act]." Effective October 1, 2017.

Case Notes

Lease Provision May Not Require Tenant to Waive Rights Provided by Landlord and Tenant Act: The landlord's standardized rental agreement contained a provision holding a tenant terminating a lease prior to the lease's expiration date liable for all attorney fees and costs incurred by the landlord due to the tenant's breach of the lease. The Supreme Court held that the language of the Montana Residential Landlord and Tenant Act specifically authorized the awarding of attorney fees to the prevailing party and also provided that a lease agreement could not contain a provision requiring a tenant to waive a right granted by the Act. Summers v. Crestview Apartments, 2010 MT 164, 357 Mont. 123, 236 P.3d 586.

Acceptance of Refund of Deposit as Waiver of Claims — Prohibited Lease Provision — Allegations Under Two Acts: Solem and others rented an apartment from Chilcote under a written lease containing a provision stating that acceptance of a refund of a security deposit constituted a waiver of all claims against the landlord. The tenants brought an action for return of their security deposit under Title 70, ch. 25, commonly known as the Residential Tenants' Security Deposits Act, and made other claims under The Montana Residential Landlord and Tenant Act of 1977 as well. The Supreme Court held that the provision waiving claims against the landlord was illegal under 70-24-442 and this section. The fact that the tenants had sued for return of their security deposit did not prohibit their right to recover fees under the Act. Solem v. Chilcote, 274 M 72, 906 P2d 209, 52 St. Rep. 1128 (1995), followed in Whalen v. Taylor, 278 M 293, 925 P2d 462, 53 St. Rep. 914 (1996).

Law Review Articles

Summers v. Crestview: Protecting Tenants at the Expense of the Law, Henkel, 72 Mont. L. Rev. 321 (2011).

70-24-203. Agreement not to permit receipt of rent free of obligation.

Case Notes

Duty of Landlord — Domestic Water Supplied by Garden Hose — Sufficiency of Complaint: A tenant's sole source of domestic water supply for her rented residence was a garden hose run above ground from a neighboring house. After terminating the tenancy, the tenant brought an action against the landlord for actual damages, claiming that under this section the landlord was not entitled to collect rent because the water supply situation constituted failure to comply with his statutory duties under 70-24-303. The landlord's motion to dismiss for failure to state a claim was improperly granted as the complaint was sufficient. Busch v. Kammerer, 200 M 130, 649 P2d 1339, 39 St. Rep. 1624 (1982).

70-24-204. Effect of unsigned or undelivered rental agreement.

Commissioners' Comment to Section 1.402 of Uniform Act

[See chapter compiler's comments]

The subsections above [in this section] apply to transactions in which a written rental agreement has been signed and delivered by either landlord or tenant, the parties have agreed on terms, and the defect is solely the absence of a signature. Delivery thus means legal rather than physical delivery alone. Thus knowledge or notice of the signing of the rental agreement is required. These subsections do not apply to applications for leases or similar writings regarded by the parties as preliminary to written agreements.

Compiler's Comments

2017 Amendment: Chapter 220 in (1) near beginning substituted "agreement that has already been signed by the tenant and delivered to the landlord" for "agreement signed and delivered to the landlord by the tenant" and at end inserted "to the tenant"; in (2) "substituted "deliver to the landlord a written rental agreement that has already been signed by the landlord and delivered to the tenant, acceptance of possession of the premises and payment of rent without reservation by the tenant" for "deliver a written rental agreement signed and delivered to the tenant by the landlord, acceptance of possession and payment of rent without reservation" and at end inserted "to the landlord"; and made minor changes in style. Amendment effective April 20, 2017.

Applicability: Section 4, Ch. 220, L. 2017, provided: "[This act] applies to rental agreements entered into, extended, or renewed on or after [the effective date of this act]." Effective April 20, 2017.

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Case Notes

Receipt, Not Mailing, of Certified Letter Constituting Effective Notice: A lease provided that if the lessee defaulted and did not cure the default within 10 days after written notice from the lessor, then the lessor could retake possession of the property. The method for providing written notice was not described in the lease. When Anderson defaulted on rent, Grenfell sent a default notice by certified mail to Anderson's address as listed in the lease, but Anderson never picked up the letter, and it was returned to Grenfell as unclaimed. Nevertheless, after 11 days, Grenfell retook possession of the leased property, changed the locks, and filed suit, alleging breach of the lease agreement, unlawful detainer, and violation of the implied covenant of good faith and fair dealing. The District Court held in favor of Grenfell, and Anderson appealed. The Supreme Court reversed, finding that Anderson never received proper notice. Citing 58 Am. Jur. 2d Notice § 35 (1989), the court applied the common-law rule that when a statute or rule merely states that written notice must be given without stating how it is to be given, it is not enough that the notice is mailed—it must also be received. The same rule applies to contracts in the absence of express provisions to the contrary. Thus, Grenfell's decision to enforce the 10-day default cure period was effective only upon actual receipt of a written notice by Anderson, whether hand-delivered, mailed, or otherwise. The District Court's conclusion that Anderson had actual notice, effective by certified mailing alone, was in error. Grenfell v. Anderson, 1999 MT 272, 296 M 474, 989 P2d 818, 56 St. Rep. 1101 (1999), following Hill v. Zuckerman, 138 M 230, 355 P2d 521 (1960).

Unclaimed Notice Not Considered Constructive Notice: Grenfell sent a certified letter to Anderson regarding default on a lease, but Anderson never picked up the letter and it was returned to Grenfell as unclaimed. The District Court held that Anderson had constructive notice of the default. The Supreme Court disagreed. Although a party may not escape the effect of the giving of a written notice by refusing to receive it when it is presented in person as a notice, thereby profiting from a wrongful act, in the context of giving notice by certified mail, this rule requires an actual refusal to accept. In this case, there was no indication that the address to which the letter was sent was ever contemplated as a proper place of serving notice, yet Grenfell inexplicably served the default letter in a manner that Grenfell himself acknowledged would not be effective, even though Anderson had previously accepted all manner of lease-related business matters in person at Anderson's place of business. Although the District Court correctly found that Anderson did not claim the letter, the court incorrectly deduced that Anderson had refused the letter. Failure to claim the letter, of itself, was insufficient to impute Anderson's constructive notice absent evidence that receipt of the letter was refused. Grenfell v. Anderson, 1999 MT 272, 296 M 474, 989 P2d 818, 56 St. Rep. 1101 (1999), following Long v. Crum, 267 NW 2d 407 (Iowa 1978). See also Hill v. Zuckerman, 138 M 230, 355 P2d 521 (1960).

70-24-205. Extension of written rental agreements.

Compiler's Comments

2017 Amendment: Chapter 155 deleted former (1) through (3) that read: "(1) Prior to signing a written rental agreement, the landlord and tenant shall agree to accept a default extension period for the lease chosen by the tenant pursuant to subsection (2) that is to be given effect if a revised lease is not agreed to or if neither party gives a 30-day written notice of termination to the other prior to the rental agreement's original termination date.

(2) The tenant shall choose from a list of default options, including but not limited to renewal for an additional term of equal length as the original term, renewal for a set term that is not of equal length as the original term, renewal on a month-to-month basis, or termination of the tenancy.

(3) If neither party gives a 30-day written notice to the other as to the extension or termination of the tenancy, the mutually agreed upon default option takes effect immediately following the termination of the original rental agreement"; substituted "extension period for the lease in the rental agreement" for "option at the beginning of the tenancy as required in subsection (1)"; inserted "before the rental agreement's original termination date"; and made minor changes in style. Amendment effective April 4, 2017.

Applicability: Section 5, Ch. 155, L. 2017, provided: "[This act] applies to rental agreements entered into, extended, or renewed on or after [the effective date of this act]." Effective April 4, 2017.

Effective Date: This section is effective October 1, 2009.

Part 3
Rights and Duties of the Parties

70-24-301. Duty to disclose name of person responsible.

Commissioners' Comment to Section 2.102 of Uniform Act

[See chapter compiler's comments]

This section requires disclosure to the tenant of names and addresses of persons who (a) have power to negotiate, make repairs, etc., in the operation of the premises; (b) are empowered to receive service of notice and process which binds all of the owners. In the absence of such disclosure the person collecting the rent shall be deemed to have the authority to accept notices and service and to provide for the necessary maintenance and repairs.

The purpose of this section is to enable the tenant to proceed with the appropriate legal proceeding, to know to whom complaints must be addressed and, failing satisfaction, against whom the appropriate legal proceedings may be instituted.

Stat. 1972, Chapter 493 inserts into Chapter 143 of Massachusetts General Laws a provision requiring the posting of a non-resident owner's name, address and telephone number as well as the name, address and telephone number of any non-resident manager or agent subject to a fine of not more than $50.00 for each day of violation. However, this statute does not make available to the tenant the remedies provided in the Uniform Act.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-24-302. Landlord to deliver possession of dwelling unit.

Commissioners' Comment to Section 2.103 of Uniform Act

[See chapter compiler's comments]

Thus, the landlord may proceed directly against a squatter. The tenant may also, pursuant to [70-24-405], proceed with an action for possession. Where appropriate such actions may be in summary proceedings. It is thus possible that both landlord and tenant may have the right of action against third parties wrongfully in possession of the premises.

Compiler's Comments

1993 Amendment: Chapter 222 inserted (2) concerning acceptance of rent or deposit as consent for possession.

70-24-303. Landlord to maintain premises — agreement that tenant perform duties — limitation of landlord's liability for failure of smoke detector or carbon monoxide detector.

Commissioners' Comment to Section 2.104 of Uniform Act

[See chapter compiler's comments]

[Subsections (1) and (2)] Vital interests of the parties and public under modern urban conditions require the proper maintenance and operation of housing. It is thus necessary that minimum duties of landlords and tenants be set forth. Generally duties of repair and maintenance of the dwelling unit and the premises are imposed upon the landlord by this section. Major repairs, even access, to essential systems outside the dwelling unit are beyond the capacity of the tenant.

Conversely, duties of cleanliness and proper use within the dwelling unit are appropriately fixed upon the tenant (see [70-24-321] and [70-24-311]).

This section follows the warranty of habitability doctrine now recognized in the jurisdictions of:

California—Hinson v. Delis, 26 C.A.3d 62.
Washington, D.C.—Javins v. First National Realty, (U.S.C.A.D.C. 1970) 428 F.2d 1071.
Wisconsin—Pines v. Perssion, (1961) 111 N.W.2d 409.
New Jersey—Reste Realty Corp. v. Cooper, (1969) 53 N.J. 444, 251 A2d 268.
Illinois—Jack Springs Inc. v. Little, (1972) 280 N.E.2d 208.
Hawaii—Lemler v. Breedin, (1969) 462 P.2d 470.
Michigan—Rome v. Walker, (1972) 196 N.W.2d 850.
New Hampshire—Kline v. Burns, (1971) 276 A.2d 248.
Colorado—Guesenbury v. Patrick, (March 1972) C.C.H.Pov.L.Rptr. Sec. 15, 803.
Georgia—Genvens v. Gray, (April 1972) C.C.H.Pov.L.Rept. Sec. 15, 412.

Standards of habitability dealt with in this section are a matter of public police power rather than the contract of the parties or special landlord-tenant legislation. This section establishes minimum duties of landlords consistent with public standards. Generally duties of repair and maintenance of the dwelling unit and the premises are imposed upon the landlord by this section. Major repairs, even access, to essential systems outside the dwelling unit are beyond the capacity of the tenant. Conversely, duties of cleanliness and proper use within the dwelling unit are appropriately fixed upon the tenant.

Except as specifically provided, these obligations may not be waived ([70-24-403]).

Compiler's Comments

2021 Amendments — Composite Section: Chapter 2 in (1) at beginning inserted "Subject to 27-1-1603"; and made minor changes in style. Amendment effective February 10, 2021, and terminates January 1, 2031.

Chapter 536 deleted former (1)(b) that read: "(b) may not knowingly allow any tenant or other person to engage in any activity on the premises that creates a reasonable potential that the premises may be damaged or destroyed or that neighboring tenants may be injured"; in (1)(b) at end inserted "except when it is the tenant's responsibility to maintain the dwelling unit pursuant to 70-24-321"; in (3) and (4) near beginning after "landlord and tenant" deleted "of a one-, two- or three-family residence"; and made minor changes in style. Amendment effective May 14, 2021.

Preamble: The preamble attached to Ch. 2, L. 2021, provided: "WHEREAS, the COVID-19 pandemic has caused significant disruption to Montana's people, businesses, places of worship, property owners, and nonprofit organizations and has adversely affected Montana's economy and the rights of Montana's citizens; and

WHEREAS, in order to improve Montana's economy and to encourage people to engage in private sector activities, the Legislature believes it is necessary to enact this legislation to establish standards for imposing liability and to provide defenses for claims relating to COVID-19."

Saving Clause: Section 12, Ch. 2, L. 2021, was a saving clause.

Severability: Section 13, Ch. 2, L. 2021, was a severability clause.

2013 Amendment: Chapter 343 in (1)(b) after "injured" deleted: "by any of the following:
(i) criminal production or manufacture of dangerous drugs, as prohibited by 45-9-110;
(ii) operation of an unlawful clandestine laboratory, as prohibited by 45-9-132; or
(iii) gang-related activities, as prohibited by Title 45, chapter 8, part 4". Amendment effective October 1, 2013.

2009 Amendment: Chapter 43 in (1)(h) at beginning after "install" inserted "in each dwelling unit under the landlord's control an approved carbon monoxide detector, in accordance with rules adopted by the department of labor and industry, and an approved smoke detector" and at end of first sentence deleted "an approved smoke detector in each dwelling unit under the landlord's control", in second and third sentences inserted reference to carbon monoxide detector, in fourth sentence near beginning inserted "approved carbon monoxide detector, as defined in 70-20-113" and near middle after "smoke detector" substituted "as defined in 70-20-113, bear" for "is a device that is capable of detecting visible or invisible particles of combustion and that bears"; and made minor changes in style. Amendment effective October 1, 2009.

2003 Amendment: Chapter 408 inserted (1)(b) prohibiting a landlord from knowingly allowing a tenant or other person to engage in activities on the premises that create a reasonable potential of damage or destruction to the premises or injury to neighboring tenants by criminal production or manufacture of dangerous drugs, operation of a clandestine drug laboratory, or gang-related activity; and made minor changes in style. Amendment effective October 1, 2003.

1997 Amendment: Chapter 401 in (1)(e), at beginning, inserted "unless otherwise provided in the rental agreement"; and made minor changes in style.

Name Change — Code Commissioner Correction: Section 1, Ch. 706, L. 1991, provided: "(1) The name of the state fire marshal is changed to the state fire prevention and investigation program of the department of justice.

(2) Unless inconsistent with [sections 1 through 36] [Ch. 706, L. 1991], wherever the term "state fire marshal" or "fire marshal" appears in the Montana Code Annotated, the code commissioner shall change the term to the "state fire prevention and investigation program of the department of justice", "fire prevention and investigation program" (of the department of justice), or "program", as appropriate. The code commissioner shall also conform internal references and grammar to these changes". As directed, the Code Commissioner has changed the term, as appropriate, wherever it appears in this section. Amendment effective April 29, 1991.

1989 Amendment — Applicability: Inserted (1)(g) requiring installation of smoke detector in each dwelling unit; in (2) inserted reference to subsection (1)(g); and inserted (5) exempting landlord from liability. Amendment effective April 18, 1989, and, pursuant to sec. 3, Ch. 567, L. 1989, applies to all rental dwelling units after January 1, 1990.

Administrative Rules

ARM 23.12.406 Smoke detectors in rental units.

Case Notes

City Alley Not Considered Common Area or Sidewalk for Which Landlord Has Maintenance Responsibility: Willden was visiting her son in an apartment building owned by defendant when she slipped and fell in an icy alley, sustaining injuries. Willden sued defendant and the landlord of the apartment building on the other side of the alley, alleging that the landlords had a duty under 70-24-303 and under the city code to keep the alley clean and safe. The District Court granted summary judgment for defendants, and on appeal, the Supreme Court affirmed. Section 70-24-303 requires a landlord to keep safe all common areas on the landlord's premises. However, the landlords in this case did not own or have control over the city-owned alley, nor could the alley be considered a common area for which the landlords were responsible, so 70-24-303 did not apply. The city code required landowners to keep sidewalks free of ice and snow, but the alley was not a sidewalk, so the city code also did not apply. Willden's argument that the landlords of adjacent properties had a duty to keep the alley free of ice and snow that presented a hazard to guests visiting their tenants also failed. Willden's use of the alley as a guest was indistinguishable from general public use of that alley at any time for any lawful purpose. The Supreme Court declined to create a requirement that adjacent landowners have a legal duty to keep a public way that is owned by a municipality free from an accumulation of ice and snow or to post a notice warning persons that the public way might be slippery. Willden v. Neumann, 2008 MT 236, 344 M 407, 189 P3d 610 (2008), distinguishing Piedalue v. Clinton Elementary School District, 214 M 99, 692 P2d 20 (1984), and Limberhand v. Big Ditch Co., 218 M 132, 706 P2d 491 (1985).

Jury Instruction on Comparative Negligence Improper Absent Evidence of One Party's Negligence: A landlord who failed to maintain rental property in a safe condition was negligent per se. Pursuant to Reed v. Little, 209 M 199, 680 P2d 937 (1984), even in negligence per se cases, the factfinder must apportion negligence between the parties in reaching a verdict. Therefore, the trial court in this case gave the jury an instruction on comparative negligence. However, there was no evidence to show that plaintiff was negligent in any way, and all liability for plaintiff's injury on defendant's rental property lay with defendant. Thus, giving the instruction on comparative negligence was an abuse of the trial court's discretion. Edie v. Gray, 2005 MT 224, 328 M 354, 121 P3d 516 (2005).

Landlord Who Fails to Provide Safe Rental Property Negligent Per Se — Summary Judgment on Liability Proper: Plaintiff was injured in a fall in the staircase of a rental home because the stairwell light was not functional. Plaintiff claimed that the defendant landlord was negligent for failing to provide a safe and habitable premises and moved for partial summary judgment on the liability issue. The trial court denied the motion, and the jury found for defendant. On appeal, the Supreme Court reversed. Under this section, a landlord is required to keep rental premises in a fit and habitable condition and to maintain electrical facilities in good and safe working order. Defendant could have avoided liability by entering a separate written agreement signed by all parties in which plaintiff agreed to repair the light, but no such agreement existed, so defendant was negligent per se, and summary judgment for plaintiff was proper. Defendant's attempt to shift responsibility to plaintiff for failing to notify defendant of the inoperative light was misplaced because the duty of repair is on the landlord and there is no duty of the tenant to notify. Edie v. Gray, 2005 MT 224, 328 M 354, 121 P3d 516 (2005).

Damages for Carbon Monoxide Poisoning — Applicability of Landlord and Tenant Act to Third Parties — Act Sufficiently Pleaded — Fees Payable Though Not Specifically Requested: Kunst, a guest at the apartment leased by Erpenbach, and Erpenbach were granted a directed verdict as to liability in their suit against Pass, the landlord, that both were poisoned by carbon monoxide in the apartment building. (See 2009 amendment requiring carbon monoxide monitor.) The jury returned an award of $5,000 to each plaintiff. The District Court Judge, who had taken over the case from a judge who had retired after hearing the case, denied attorney fees on the basis that the previous judge concluded that Pass was liable only under a "general theory of negligence". The Supreme Court reviewed the record and determined that the former judge had in fact left open the issue of whether The Montana Residential Landlord and Tenant Act of 1977 applied. The Supreme Court pointed out that the complaint either made reference in every count to the Act or incorporated the Act by reference and that a review of the record showed that the plaintiffs had also moved for a directed verdict pursuant to the Act. Although the District Court didn't expressly hold that Pass had violated the Act, the Supreme Court held that as a matter of law, Pass had violated certain provisions of the Act. The Supreme Court also held that a third party, such as Kunst, was covered by the Act because: (1) a third party is an "aggrieved party", as used in 70-24-401, as demonstrated by the official comments to the corresponding section of the Uniform Residential Landlord and Tenant Act; (2) Oregon, with a similar statute, includes third parties as aggrieved parties; and (3) the official comments to the Uniform Residential Landlord and Tenant Act also demonstrate that the standards contained in the Act apply more broadly than only to persons who have a contract with the landlord. Because the Act applies, the Supreme Court held that the attorney fee provisions contained in 70-24-442 also apply. In response to the defendants' argument that the complaint did not specifically request payment of attorney fees, the Supreme Court responded that: (1) the Montana Rules of Civil Procedure require only notice pleading and that because the action was brought pursuant to the Act and the Act contains a provision for attorney fees, it should have been apparent to the defendants that they could be ordered to pay fees; (2) the defendants' argument that they had no opportunity to defend against the claim for fees was without merit; and (3) the plaintiffs were a "prevailing party", the motion for fees was timely filed because it was done immediately after the District Court granted the plaintiffs' motion for a directed verdict, and there is no statutory time limit in Montana in which to file a motion for fees, as there is a time limit in 25-10-501 to file a motion for costs. Because fees were denied by the District Court for a legal reason and the District Court misconstrued the law, the Supreme Court remanded the case to the District Court in order for the District Court to exercise its discretion in awarding fees. Kunst v. Pass, 1998 MT 71, 288 M 264, 957 P2d 1, 55 St. Rep. 289 (1998). However, see Cossitt v. Flathead Indus., Inc., 2018 MT 82, 391 Mont. 156, 415 P.3d 486, disqualifying neighboring third parties who are not guests.

Common Areas to Be Maintained by Landlord — Summary Judgment for Landlord Improper: Calder filed a complaint against the Andersons after falling on steps leading from an apartment rented from the Andersons. Summary judgment was granted for the Andersons when the court found that the injuries were not caused by a hidden or lurking danger subjecting the Andersons to liability. The Supreme Court held that summary judgment was improperly granted. As landlords, the Andersons had a duty to keep the area where Calder fell in a clean and safe condition, and by failing to do so, the Andersons were negligent as a matter of law. Calder v. Anderson, 275 M 273, 911 P2d 1157, 53 St. Rep. 139 (1996).

Fire Protection Services Not Required of Mobile Home Court Owners: Appellant claimed that the owners of a mobile home court violated The Montana Residential Landlord and Tenant Act of 1977 by failing to provide fire protection services. While this section requires all common areas to be kept in a clean and safe condition and 70-24-105 extends the principles of law and equity relating to safety and fire prevention to the Act, absent the existence between the parties of any contractual obligation to provide fire protection services and absent proof of a statutory or common-law duty to provide those services, the complaint was properly dismissed. Rookhuizen v. Blain's Mobile Home Court, Inc., 236 M 7, 767 P2d 1331, 46 St. Rep. 139 (1989).

Duty of Landlord — Domestic Water Supplied by Garden Hose — Sufficiency of Complaint: A tenant's sole source of domestic water supply for her rented residence was a garden hose run above ground from a neighboring house. After terminating the tenancy, the tenant brought an action against the landlord for actual damages, claiming that under 70-24-203 the landlord was not entitled to collect rent because the water supply situation constituted failure to comply with his statutory duties under this section. The landlord's motion to dismiss for failure to state a claim was improperly granted as the complaint was sufficient. Busch v. Kammerer, 200 M 130, 649 P2d 1339, 39 St. Rep. 1624 (1982).

Duty of Landlord — Visitors: The duty a landlord owes a tenant under 70-24-303 to keep all common areas of the premises in a clean and safe condition does not extend to visitors of the tenant. Instead, the injured visitor must look to Montana law concerning the status of the injured party in relation to the property owner and the corresponding duty of the property owner. Rennick v. Hoover, 186 M 167, 606 P2d 1079 (1980), overruled, as to the standard that a property owner is absolved of liability because a dangerous condition upon the premises is open and obvious, in Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748, 54 St. Rep. 1422 (1997).

70-24-304. Transfer of premises or termination of management — relief from liability.

Commissioners' Comment to Section 2.105 of Uniform Act

[See chapter compiler's comments]

This section relieves a landlord, unless otherwise agreed, from liability under the rental agreement and this Act as to events occurring after a good faith sale and conveyance to a bona fide purchaser and after written notice to the tenant of the conveyance except as to security recoverable under Section 2.101 and all prepaid rent. As between the original landlord and tenant, it is intended that the loss for failure to account for security and prepaid rent if recoverable should fall upon the landlord who, in contrast to the tenant, can take steps to protect the integrity of the security and prepaid rent account at the time of sale. The landlord for the time being is liable for compliance with the rental agreement and this Act. See definition of "landlord" in [70-24-103]. See also [70-24-203] and [70-24-304].

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-24-305. Transfer of premises by tenant.

Compiler's Comments

2007 Amendment: Chapter 267 deleted former (2) and (3) that read: "(2) The sale or rental of a mobile home located upon a rental lot does not entitle the purchaser or renter to retain rental of the lot unless the purchaser or renter enters into a rental agreement with the owner of the lot.

(3) A mobile home owner who owns the mobile home but rents the lot space has the exclusive right to sell the mobile home without interference or conditions by the landlord. The new purchaser shall make suitable arrangements with the landlord in order to become a tenant on the mobile home lot. The purchase of the mobile home does not automatically entitle the purchaser to rent the mobile home lot"; and made minor changes in style. Amendment effective October 1, 2007.

70-24-311. Landlord authorized to adopt rules.

Compiler's Comments

1995 Amendment: Chapter 389 deleted former (2) that read: "(2) As provided in subsection (1) and in conformance with the provisions of this chapter, the landlord of a mobile home park may adopt written rules concerning the tenant's use and occupancy of the premises"; in (2), after "landlord", deleted "of a mobile home park", after "each" deleted "mobile home owner or", after "tenant" deleted "of a mobile home owner", after "residing" substituted "on the premises" for "in the mobile home park", and after "new" substituted "tenant" for "resident"; in (3), in two places before "notice", inserted "written"; and made minor changes in style.

1993 Amendments — Composite Section: Chapter 470 inserted (3) relating to mobile home parks. Amendment effective May 21, 1993.

Chapter 487 inserted (2) providing that mobile home park landlord may adopt written rules concerning tenant's use and occupancy of premises; inserted (3) requiring that adopted rules be written and given to each tenant residing in mobile home park and to new tenants; and made minor changes in style.

The codifier has not codified (3) as enacted by Ch. 487 because it covered the same subject matter and content as (3) enacted by Ch. 470. Chapter 470 included mobile home owners in addition to tenants, so the version of (3) enacted by Ch. 470 was codified.

Preamble: The preamble attached to Ch. 470, L. 1993, provided: "WHEREAS, Montana residents currently face a housing crisis that includes a lack of affordable housing and a lack of available mobile home park spaces; and

WHEREAS, mobile homes are not "mobile" without substantial moving costs and the potential for substantial damage to the mobile homes; and

WHEREAS, under 70-24-441 landlords of mobile home parks may, without supplying a reason, evict tenants who rent space in mobile home parks; and

WHEREAS, if evicted unfairly, mobile home owners who rent space in mobile home parks may be forced to sell their mobile homes at a fraction of their costs and within an unreasonable amount of time (30 days pursuant to 70-24-441) in order to comply with the eviction.

THEREFORE, the Legislature of the State of Montana finds it necessary to define justifiable and reasonable grounds on which landlords may evict mobile home owners who rent space in mobile home parks."

70-24-312. Access to premises by landlord.

Compiler's Comments

2021 Amendment: Chapter 536 inserted (3)(b) concerning the effect of a landlord conspicuously posting the landlord's intent to enter on the main entry door of the dwelling unit for purposes of notice; and made minor changes in style. Amendment effective May 14, 2021.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1993 Amendment: Chapter 222 inserted (5) concerning locks changed by tenant; and made minor changes in style.

Case Notes

"Apartment Manager" Defense to Burglary Inadequate: Defendant who forcefully entered an apartment at night without consent and removed a rifle and ammunition claimed he entered the apartment in his capacity as apartment manager and, as part of the process of evicting tenant, removed the rifle as a "protective measure". However, defendant acted far beyond his capacity as agent of the landlord, having used destructive means to gain entry and having entered at night without tenant's consent and without notice. Defendant's "apartment manager" defense to burglary was found inadequate. St. v. McKimmie, 232 M 227, 756 P2d 1135, 45 St. Rep. 1011 (1988).

Abandonment — Characteristics — Subtenant Vacation: Abandonment of leased premises is an absolute relinquishment of the premises by the tenant and consists of both an act or omission and an intent to abandon. A subtenant's vacation of the premises in no way indicates an intent to abandon on the part of the tenant. LIC, Inc. v. Baltrusch, 215 M 44, 692 P2d 1264, 42 St. Rep. 162 (1985).

70-24-314. Resident associations — meetings.

Compiler's Comments

2007 Amendment: Chapter 267 at end of second sentence deleted "but the mobile home park landlord and the landlord's employees may not be members and may not attend meetings unless specifically invited by the tenant association"; deleted former (2) that read: "(2) The mobile home park landlord may not prohibit meetings by a tenant association or tenants relating to mobile home living"; and made minor changes in style. Amendment effective October 1, 2007.

70-24-321. Tenant to maintain dwelling unit.

Commissioners' Comment to Section 3.101 of Uniform Act

[See chapter compiler's comments]

This section, the converse of [70-24-303], establishes minimum duties of tenants consistent with public standards of health and safety.

Compiler's Comments

2013 Amendment: Chapter 343 in (3) after "injured" substituted "including but not limited to any of the following activities" for "by any of the following"; inserted (3)(d) and (3)(e) concerning unlawful activity and possession of certain items; and made minor changes in style. Amendment effective October 1, 2013.

2003 Amendment: Chapter 408 inserted (3) prohibiting a tenant from engaging or knowingly allowing another person to engage in activities on the premises that create a reasonable potential of damage or destruction to the premises or injury to neighboring tenants by criminal production or manufacture of dangerous drugs, operation of a clandestine drug laboratory, or gang-related activity; and made minor changes in style. Amendment effective October 1, 2003.

1993 Amendment: Chapter 222 in (1)(g) inserted last two sentences concerning operation of a limited business or cottage industry; and made minor changes in style.

Case Notes

Standing of Third-Party Neighbor Denied: The owner of a townhouse duplex sued a neighboring duplex owner that shared a property boundary divided by a fence for breach of the obligation of good faith, arguing that this section not only applied to tenants of a particular property but to occupants of neighboring buildings as well. On appeal, the Supreme Court found that the District Court did not err by dismissing the claim because the neighbor was not a landlord, tenant, or guest of the property in question. Cossitt v. Flathead Indus., Inc., 2018 MT 82, 391 Mont. 156, 415 P.3d 486.

Allegation That Lessee Violated Implied Covenant Not to Create Nuisance on Leased Premises: Plaintiffs, owners of a building in which defendants, lessees, operated a bar, filed an unlawful detainer action against defendants pursuant to 70-27-108. Plaintiffs claimed that defendants, by allowing loud music and noise in the bar, were violating an implied covenant not to operate their bar in such a manner as to create a nuisance. The trial judge ruled that the lease could not be canceled under any theory of nuisance because defendants were doing what they had a right to do, operate a bar. On appeal, the Supreme Court ruled that because substantial credible evidence supported the District Court's finding that the bar was not being operated as a nuisance, it was unnecessary to determine whether Montana law recognizes in real property leases an implied covenant on the part of the lessee to use the leased premises so as not to injure the lessor by creating a nuisance. Martinson v. Thompson, 205 M 264, 667 P2d 423, 40 St. Rep. 1259 (1983).

70-24-322. Tenant to occupy as dwelling unit only — extended absence.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Part 4
Remedies

70-24-401. Administration of remedies — enforcement.

Compiler's Comments

2021 Amendment: Chapter 536 in (1) at end inserted "The aggrieved party may include a reasonable charge for the party's labor"; and in (2) at end inserted "Nothing in this chapter prohibits the assignment of a right or the claim of a right by either landlord or tenant. The landlord's or tenant's defenses and obligations may not be affected by an assignment." Amendment effective May 14, 2021.

1993 Amendment: Chapter 222 inserted (3) concerning application and enforcement of rules and regulations; and made minor changes in style.

Case Notes

Equitable Relief Against Continuing Trespasser: A daughter previously living on her mother's property rent-free and with express permission began interfering with her mother's use and enjoyment of the property. The mother filed a complaint for possession or trespass. In District Court, the jury found the daughter was trespassing but awarded no damages, and the judge entered an order of possession for the mother. The Supreme Court affirmed the District Court's action, explaining that on a jury's finding of trespass, it is within the discretion of the District Court to afford equitable relief to a party whose exclusive possession has been divested by a continuing trespasser, and that a grant of possession is available as an equitable remedy to afford complete relief on a common-law trespass claim when legal relief is inadequate. Renz v. Everett-Martin, 2019 MT 251, 397 Mont. 398, 450 P.3d 892.

Lease Provision Requiring Accelerated Payment of Future Rent Unenforceable as Unconscionable: The landlord's standardized rental agreement contained a provision holding a tenant terminating a lease prior to the lease's expiration date liable for all remaining future monthly payments. The Supreme Court held that the accelerated rent provision conflicted with the landlord's statutory duty to mitigate damages by taking away any incentive on the landlord's part to rent the apartment as soon as possible and therefore was unconscionable and unenforceable. Summers v. Crestview Apartments, 2010 MT 164, 357 Mont. 123, 236 P.3d 586.

Damages for Carbon Monoxide Poisoning — Applicability of Landlord and Tenant Act to Third Parties — Act Sufficiently Pleaded — Fees Payable Though Not Specifically Requested: Kunst, a guest at the apartment leased by Erpenbach, and Erpenbach were granted a directed verdict as to liability in their suit against Pass, the landlord, that both were poisoned by carbon monoxide in the apartment building. The jury returned an award of $5,000 to each plaintiff. The

District Court Judge, who had taken over the case from a judge who had retired after hearing the case, denied attorney fees on the basis that the previous judge concluded that Pass was liable only under a "general theory of negligence". The Supreme Court reviewed the record and determined that the former judge had in fact left open the issue of whether The Montana Residential Landlord and Tenant Act of 1977 applied. The Supreme Court pointed out that the complaint either made reference in every count to the Act or incorporated the Act by reference and that a review of the record showed that the plaintiffs had also moved for a directed verdict pursuant to the Act. Although the District Court didn't expressly hold that Pass had violated the Act, the Supreme Court held that as a matter of law, Pass had violated certain provisions of the Act. The Supreme Court also held that a third party, such as Kunst, was covered by the Act because: (1) a third party is an "aggrieved party", as used in this section, as demonstrated by the official comments to the corresponding section of the Uniform Residential Landlord and Tenant Act; (2) Oregon, with a similar statute, includes third parties as aggrieved parties; and (3) the official comments to the Uniform Residential Landlord and Tenant Act also demonstrate that the standards contained in the Act apply more broadly than only to persons who have a contract with the landlord. Because the Act applies, the Supreme Court held that the attorney fee provisions contained in 70-24-442 also apply. In response to the defendants' argument that the complaint did not specifically request payment of attorney fees, the Supreme Court responded that: (1) the Montana Rules of Civil Procedure require only notice pleading and that because the action was brought pursuant to the Act and the Act contains a provision for attorney fees, it should have been apparent to the defendants that they could be ordered to pay fees; (2) the defendants' argument that they had no opportunity to defend against the claim for fees was without merit; and (3) the plaintiffs were a "prevailing party", the motion for fees was timely filed because it was done immediately after the District Court granted the plaintiffs' motion for a directed verdict, and there is no statutory time limit in Montana in which to file a motion for fees, as there is a time limit in 25-10-501 to file a motion for costs. Because fees were denied by the District Court for a legal reason and the District Court misconstrued the law, the Supreme Court remanded the case to the District Court in order for the District Court to exercise its discretion in awarding fees. Kunst v. Pass, 1998 MT 71, 288 M 264, 957 P2d 1, 55 St. Rep. 289 (1998). However, see Cossitt v. Flathead Indus., Inc., 2018 MT 82, 391 Mont. 156, 415 P.3d 486, disqualifying neighboring third parties who are not guests.

Law Review Articles

Summers v. Crestview: Protecting Tenants at the Expense of the Law, Henkel, 72 Mont. L. Rev. 321 (2011).

70-24-403. Prohibited provision in rental agreement — unenforceability — damages.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Request to Certify Class Based on Complaint Denied: The plaintiffs filed a complaint alleging violations of the Montana Residential Landlord and Tenant Act of 1977 and the Montana Consumer Protection Act. The District Court denied class certification prior to the parties briefing the issue, and the plaintiffs appealed. The Supreme Court affirmed, deferring to the District Court as being in the best position to make the determination, and noted that the issue could be revisited during the remainder of litigation before the District Court. Vulles v. Thies & Talle Management Inc., 2021 MT 279, 406 Mont. 169, 512 P.3d 248.

Rental Agreements Alleged to Violate State Law — Class Certification Proper: The plaintiffs, who were tenants of the defendants' apartment complexes, filed suit against the defendants, alleging that their rental agreements violated the state's landlord-tenant act (Title 70, ch. 24) and security deposit act (Title 70, ch. 25). The plaintiffs sought class certification, which the District Court granted. The defendants appealed the certification, arguing that the plaintiffs did not meet the prerequisites to class certification of commonality, typicality, and adequate representation. The Supreme Court affirmed, finding that the plaintiffs' leases were similar enough to satisfy commonality, that their interests were similar enough to satisfy typicality, and that the plaintiffs would adequately represent the class. Worledge v. Riverstone Residential Group, LLC, 2015 MT 142, 379 Mont. 265, 350 P.3d 39.

Lease Containing Provisions Prohibited by Landlord and Tenant Act Unenforceable and May Subject Landlord to Claim for Damages: The landlord's standardized rental agreement contained provisions holding a tenant terminating a lease prior to the lease's expiration date liable for all remaining future monthly payments and for all attorney fees and costs incurred by the landlord due to the tenant's breach of the lease. The Supreme Court held that the entire lease was unenforceable due to the illegal provisions and that the tenant could be entitled to actual damages, an amount up to three times the periodic rent, and attorney fees. Summers v. Crestview Apartments, 2010 MT 164, 357 Mont. 123, 236 P.3d 586.

Imposition of Single Treble Damage Award Despite Two Separate Violations: Whalen unlawfully excluded Taylor from Taylor's apartment and used a rental agreement that contained a prohibited provision, both violations that call for treble damage awards. However, absent a clear legislative mandate for cumulative imposition of penalties, the provisions of The Montana Residential Landlord and Tenant Act of 1977 are adequately served when only one treble damage award is imposed, despite two separate violations of the Act. Whalen v. Taylor, 278 M 293, 925 P2d 462, 53 St. Rep. 914 (1996).

Acceptance of Refund of Deposit as Waiver of Claims — Prohibited Lease Provision — Allegations Under Two Acts: Solem and others rented an apartment from Chilcote under a written lease containing a provision stating that acceptance of a refund of a security deposit constituted a waiver of all claims against the landlord. The tenants brought an action for return of their security deposit under Title 70, ch. 25, commonly known as the Residential Tenants' Security Deposits Act, and made other claims under The Montana Residential Landlord and Tenant Act of 1977 as well. The Supreme Court held that the provision waiving claims against the landlord was illegal under 70-24-202 and 70-24-442. The fact that the tenants had sued for return of their security deposit did not prohibit their right to recover fees under the Act. Solem v. Chilcote, 274 M 72, 906 P2d 209, 52 St. Rep. 1128 (1995), followed in Whalen v. Taylor, 278 M 293, 925 P2d 462, 53 St. Rep. 914 (1996).

Law Review Articles

Summers v. Crestview: Protecting Tenants at the Expense of the Law, Henkel, 72 Mont. L. Rev. 321 (2011).

70-24-404. Unconscionability — court discretion to refuse enforcement.

Commissioners' Comment to Section 1.303 of Uniform Act

[See chapter compiler's comments]

This Section, adapted from the Uniform Commercial Code and the Consumer Credit Code, is intended to make it possible for the courts to police explicitly against rental agreements, clauses, settlements, or waivers of claim or right which they find to be unconscionable. This section is intended to allow the courts to pass directly on the issue of unconscionability and to make a conclusion of law as to unconscionability. The basic test is whether, in light of the background and setting of the market, the conditions of the particular parties to the rental agreement, settlement or waiver of right or claim are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the agreement or settlement. Thus, the particular facts involved in each case are of utmost importance since unconscionability may exist in some situations but not in others. Either landlords or tenants may, in appropriate circumstances, avail themselves of this section.

Compiler's Comments

2021 Amendment: Chapter 236 in (1) at beginning inserted exception clause; inserted (2) concerning limitations to finding rental agreement unconscionable based on a tenant or landlord's duty to maintain; and made minor changes in style. Amendment effective April 15, 2021.

Saving Clause: Section 7, Ch. 236, L. 2021, was a saving clause.

70-24-405. Failure of landlord to deliver possession — tenant's remedies.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

70-24-406. Failure of landlord to maintain premises — tenant's remedies.

Compiler's Comments

1993 Amendment: Chapter 222 in (1)(a) inserted second sentence allowing termination for failure to remedy emergency situation; in (1)(b) inserted last sentence regarding making of repairs; and made minor changes in style.

Case Notes

Unsanitary Conditions in Trailer Court — Breach of Warranty of Habitability — Notice Adequate: (Decided prior to the enactment of The Montana Residential Mobile Home Lot Rental

Act, see Title 70, ch. 33.) Various maintenance problems in a trailer court, including garbage accumulation due to inadequate collection services, septic system overflows and backups, and a contaminated water system necessitating a "boil order" by the county health department, which problems persisted over a period of years despite tenants' numerous complaints, constituted evidence that landlords breached the warranty of habitability by failing to maintain the premises in a safe and clean condition. Landlords were unable to escape their responsibility by claiming that they were never notified of the problems in writing because the trailer court manager was also a resident of the trailer court and even participated in rules infractions. Mathes v. Adams, 254 M 347, 838 P2d 390, 49 St. Rep. 723 (1992).

70-24-408. Purposeful or negligent failure to provide essential services — tenant's remedies.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-24-409. Fire or casualty damage — rights of tenant.

Commissioners' Comment to Section 4.106 of Uniform Act

[See chapter compiler's comments]

Under common law, notwithstanding leased premises were destroyed, the tenant was still under obligation to pay rent. Legislation has been adopted in various states providing that if the premises are so destroyed or injured as to be untenantable [untenable] or unfit for occupancy the tenant may quit and surrender possession of the premises:

Arizona Rev.Stat., Sec. 33-343 (1956)
California Civil Code, Sec. 1933 (1985)
Kentucky Rev.Stat., Sec. 383.170 (1970)
Michigan Stat.Ann., Sec. 554.201 (1967)
Minnesota Stat.Ann., Sec. 504.05 (1947)
Mississippi Code Ann., Sec. 89-7-3 (1972)
Ohio Rev.Code Ann., Sec. 5301.11 (1981)
Tennessee Code Ann., Sec. 66-7-102, 66-28-503 (1982)
Wisconsin Stat.Ann., 704.07 (1979)

West Virginia in 1931 adopted Section 37-6-28 providing for

"... a reasonable reduction of the rent for such time as may elapse until there be placed again upon the premises buildings, or other structures, of as much value to the tenant for his purposes as those destroyed, ..."

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-24-411. Unlawful ouster, exclusion, or diminution of service — tenant's remedies.

Case Notes

Writ Not Properly Granted When Defendant Failed to Invoke Plain, Speedy, and Adequate Remedy: Marks obtained a writ of certiorari from the District Court remanding his case with Marcher to Justice's Court with instructions to set aside Marcher's default judgment against Marks on the grounds that the damages and treble damages awarded to Marcher in the landlord-tenant dispute exceeded the $5,000 jurisdictional limit of the Justice's Court. The Supreme Court held that the writ had been improperly granted because Marks did not appear in the original case in Justice's Court and did not appeal the default judgment that was entered against him, which was a plain, speedy, and adequate remedy available to him. By not taking advantage of an available remedy, Marks failed to meet the statutory requirement for a writ through a showing that no plain, speedy, and adequate remedy was available to him. Marcher v. Bonzell, 2004 MT 294, 323 M 364, 104 P3d 436 (2004).

Abandonment Not Shown — Landlord Not Entitled to Recovery of Property: Taylor lived consistently in his apartment for over 1 year, and although he was habitually late in paying rent, he always made arrangements for payment. In response to Taylor's late payment in June 1995, Whalen changed the locks on the apartment, declined to accept the late rent payment, and refused to allow Taylor access to the apartment to collect his belongings. Nothing in the evidence indicated absolute relinquishment of the apartment by Taylor, nor did he commit any act or omission to indicate abandonment. The issue of surrender was never raised, nor did Whalen follow the statutory remedies to recover possession, resorting instead to the self-help procedure of changing the locks, an extrajudicial procedure in violation of 70-24-428. Whalen was thus liable under this section, and the District Court properly awarded Taylor 3 months' periodic rent and possession of the apartment. Whalen v. Taylor, 278 M 293, 925 P2d 462, 53 St. Rep. 914 (1996).

Imposition of Single Treble Damage Award Despite Two Separate Violations: Whalen unlawfully excluded Taylor from Taylor's apartment and used a rental agreement that contained a prohibited provision, both violations that call for treble damage awards. However, absent a clear legislative mandate for cumulative imposition of penalties, the provisions of The Montana Residential Landlord and Tenant Act of 1977 are adequately served when only one treble damage award is imposed, despite two separate violations of the Act. Whalen v. Taylor, 278 M 293, 925 P2d 462, 53 St. Rep. 914 (1996).

Evidence of Retaliatory Conduct — Award of Damages Proper: Section 70-24-431 prohibits retaliatory conduct by a landlord against a tenant under certain circumstances. Whether a landlord has engaged in retaliatory conduct is a question of fact. In the present case, substantial evidence supported the trial court's findings that a landlord's attempt to evict tenants was retaliatory after the tenants wrote to the landlord complaining of conditions, joined a tenants' association, and testified before the Legislature in support of amendments to The Montana Residential Landlord and Tenant Act of 1977. Given the finding of retaliatory conduct, the court properly awarded the tenants damages equal to 3 months' rent pursuant to this section. Further, the landlord's violation of the retaliation statute was a defense to the landlord's action to regain possession pursuant to 70-24-441. Swenson v. Janke, 274 M 354, 908 P2d 678, 52 St. Rep. 1272 (1995).

Abandonment — Lawful Termination — No Landlord Liability for Stolen Property: The Supreme Court rejected appellants' contention that they were unlawfully removed by respondents from rental premises and entitled to the rental value, plus the value of property stolen from the premises. The court found substantial evidence to support the District Court findings that the appellants had abandoned the premises and that the respondents lawfully terminated the rental agreement. Respondents committed no negligent act in retaking possession that would make them liable for appellants' stolen property. Furthermore, the respondents had a valid claim for rent and damages, contrary to the judgment of the District Court. Napier v. Adkison, 209 M 163, 678 P2d 1143, 41 St. Rep. 619A (1984).

70-24-421. Action for nonpayment of rent — tenant's counterclaim.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Lease Provision Precluding Recovery of Unpaid Rent Beyond Time of Repossession: Tenant Anderson defaulted on payment of a commercial lease, and lessor Grenfell changed the locks, effectively retaking possession of the property. The District Court awarded Grenfell unpaid rent and utilities, plus future rent, utilities, and penalties for the remaining term of the lease. Applying Knight v. OMI Corp., 174 M 72, 568 P2d 552 (1977), the Supreme Court held that in order for future liability for rent subsequent to the landlord's cancellation and repossession to accrue, the lease must contain clear language to that effect. Here, the lease provided that Grenfell could recover rent due up to the time of entry, but the award for unpaid rent and utilities beyond the time that Grenfell took repossession could not be sustained. Further, Grenfell's claim for unlawful detainer was also void because once locked out, Anderson could in no sense unlawfully detain the premises absent a showing of reentry. Grenfell v. Anderson, 1999 MT 272, 296 M 474, 989 P2d 818, 56 St. Rep. 1101 (1999). See also Gallatin Valley Medical Dental Center, Inc. v. Lemley, 206 M 241, 670 P2d 83, 40 St. Rep. 1622 (1983).

70-24-422. Noncompliance of tenant generally — landlord's right of termination — damages — injunction.

Compiler's Comments

2021 Amendments — Composite Section: Chapter 236 in (1) near end of first sentence after "terminate" inserted "and that the tenant shall vacate the premises" and in second sentence after "terminates" inserted "and the tenant shall vacate the premises"; in (1)(a) after "remediable by repairs" substituted "the payment of damages, or written approval of the landlord" for "the repairs, the payment of damages, or otherwise" and after "tenant" deleted "adequately"; in (2), (3), and (4) at end inserted "and the tenant shall vacate the premises if the landlord terminates the rental agreement"; and made minor changes in style. Amendment effective April 15, 2021.

Chapter 536 in (1)(d) inserted reference to subsection (1)(f); inserted (1)(f) concerning if the noncompliance is from verbal abuse of the landlord by a tenant; and made minor changes in style. Amendment effective May 14, 2021.

Saving Clause: Section 7, Ch. 236, L. 2021, was a saving clause.

2013 Amendment: Chapter 343 in (4) substituted "in violation" for "as evidenced by the tenant being arrested for or charged with an act that violates the provisions"; and made minor changes in style. Amendment effective October 1, 2013.

2007 Amendment: Chapter 267 deleted former (1)(f) that read: "(f) This subsection (1) does not apply to a rental agreement involving a tenant who rents space for a mobile home but does not rent the mobile home"; in (2) deleted second sentence that read: "This subsection does not apply to a rental agreement involving a tenant who rents space for a mobile home but does not rent the mobile home"; deleted former (7) that read: "(7) Subsections (3) through (6) apply to all rental agreements, including those involving a tenant who rents space for a mobile home but does not rent the mobile home"; deleted former (8)(a) that read: "(a) the rental agreement does not involve a tenant who rents space for a mobile home but does not rent the mobile home"; and made minor changes in style. Amendment effective October 1, 2007.

2003 Amendment: Chapter 408 inserted (4) providing that if the tenant creates a reasonable potential that the premises may be damaged or destroyed or neighboring tenants injured, the landlord may terminate the rental agreement upon 3 days' written notice specifying the violation and noncompliance; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 456 throughout section substituted "noncompliance" for "breach"; in (1) in first sentence after "70-24-321" deleted "affecting health and safety", after "date" substituted "specified in the notice not less than the minimum number of days" for "not less than 14 days", and at end inserted "provided for in this section" and at beginning of second sentence deleted "If the breach is not remedied within that time"; in (1)(b) at end of first sentence substituted "the notice period is 3 days" for "landlord may deliver a written notice to the tenant that the rental agreement will terminate upon a date not less than 3 days after receipt of the notice if the breach is not remedied within that time" and deleted former second sentence that read: "This subsection does not apply to a rental agreement involving a tenant who rents space to park a mobile home but who does not rent the mobile home"; in (1)(c) at end of first sentence substituted "the notice period is 3 days" for "the landlord may deliver a written notice to the tenant that the rental agreement will terminate upon a date not less than 3 days after receipt of the notice if the breach is not remedied within that time" and deleted former second sentence that read: "This subsection does not apply to a rental agreement involving a tenant who rents space to park a mobile home but who does not rent the mobile home"; inserted (1)(d) concerning 14-day notice period; inserted (1)(f) concerning nonapplicability to tenant who rents space for a mobile home but who does not rent the mobile home; in (2) at beginning of first sentence deleted "Except as provided in subsection (2)" and inserted second sentence concerning nonapplicability to tenant who rents space for a mobile home but who does rent the mobile home; deleted former (2)(b) that read: "(b) For a rental agreement involving a tenant who rents space to park a mobile home but who does not rent the mobile home, the notice period referred to in subsection (2)(a) is 15 days"; inserted (6) concerning applicability to all rental agreements; inserted (7)(a) concerning rental agreement not involving tenant who rents space for a mobile home but who does not rent the mobile home; and made minor changes in style. Amendment effective October 1, 2001.

Applicability: Section 4, Ch. 456, L. 2001, provided: "The notice provisions of 70-24-422 and 70-24-436 apply to existing rental agreements to the extent that an existing rental agreement does not contain specific notice provisions."

1995 Amendment: Chapter 389 inserted (1)(b) concerning termination of a rental agreement due to the presence of an unauthorized pet; inserted (1)(c) concerning termination of a rental agreement due to the presence of unauthorized persons; and made minor changes in style.

1993 Amendment: Chapter 222 inserted (6) concerning election of notice provision; and made minor changes in style.

1987 Amendment: In (4), at beginning of second sentence, inserted "Except as provided in subsection (5)"; and inserted (5) disallowing recovery of treble damages for tenant's early tenancy termination.

1985 Amendment: At beginning of (2)(a) inserted exception clause; and inserted (2)(b) establishing a notice period for renters of space for mobile homes.

1983 Amendment: Inserted (3) establishing a notice period if a tenant damages or removes rental property.

Case Notes

Denial of Motion to Set Aside Default Proper — Relatives to Defendant Not a Party in Interest: The parties entered into a lease option agreement; however, the defendants failed to make payments according to the agreement, and the plaintiffs subsequently filed a complaint seeking a writ of possession, quiet title, past due rent, and other damages, including treble damages for refusal to pay rent. After the defendants were served by publication and a motion for entry of default was granted, they filed a motion to set aside the default. At a hearing on that motion, those appearing as the defendants appeared to be relatives to the defendants instead of the actual named defendants and offered testimony as to their interest in the litigation. Ultimately, the District Court denied the defendants' motion to set aside the default judgment. On appeal, the Supreme Court determined that the appellant was not a party in interest and held that the District Court had not abused its discretion. Enz v. Raelund, 2018 MT 134, 391 Mont. 406, 419 P.3d 674.

Lease Provision Precluding Recovery of Unpaid Rent Beyond Time of Repossession: Tenant Anderson defaulted on payment of a commercial lease, and lessor Grenfell changed the locks, effectively retaking possession of the property. The District Court awarded Grenfell unpaid rent and utilities, plus future rent, utilities, and penalties for the remaining term of the lease. Applying Knight v. OMI Corp., 174 M 72, 568 P2d 552 (1977), the Supreme Court held that in order for future liability for rent subsequent to the landlord's cancellation and repossession to accrue, the lease must contain clear language to that effect. Here, the lease provided that Grenfell could recover rent due up to the time of entry, but the award for unpaid rent and utilities beyond the time that Grenfell took repossession could not be sustained. Further, Grenfell's claim for unlawful detainer was also void because once locked out, Anderson could in no sense unlawfully detain the premises absent a showing of reentry. Grenfell v. Anderson, 1999 MT 272, 296 M 474, 989 P2d 818, 56 St. Rep. 1101 (1999). See also Gallatin Valley Medical Dental Center, Inc. v. Lemley, 206 M 241, 670 P2d 83, 40 St. Rep. 1622 (1983).

Failure to Affirmatively Assert Defect in Notice — Issue Not Preserved on Appeal: The Leistikos were sent three notices regarding noncompliance with their rental agreement. At trial, they denied the factual allegations related to the circumstances surrounding the giving of the notices of noncompliance, but they did not deny that the notices complied with this section or allege that the notices were defective. They argued on appeal that the eviction action against them should have been dismissed because the noncompliance notices were defective in failing to adequately specify the acts and omissions that constituted noncompliance, as required by this section. However, failure to raise the issue in the pleadings or to argue the issue at trial precluded their ability to raise the issue for the first time on appeal. Nason v. Leistiko, 1998 MT 217, 290 M 460, 963 P2d 1279, 55 St. Rep. 910 (1998), following Marsh v. Overland, 274 M 21, 905 P2d 1088 (1995).

Conversion Evidenced by Notification and Procedural Shortcomings: (Decided prior to the enactment of The Montana Residential Mobile Home Lot Rental Act, see Title 70, ch. 33.) Johnston owned a mobile home, entitling her to possession, and Galayda owned the property on which the mobile home was located. Galayda claimed that by virtue of various notices to quit the premises, a default judgment against Johnston for back rent, and a writ of assistance directing the Sheriff to remove the mobile home, Galayda had legal authority to physically evict Johnston and her mobile home from the premises. However, a number of procedural errors occurred during the removal process that rendered the eviction actions unauthorized, including: (1) Galayda's failure under a prior version of this section to give Johnston notice to pay rent prior to filing a complaint for nonpayment and possession of the premises; (2) basing the default judgment on Galayda's incorrect sworn affidavit that Johnston owed back rent, which had in fact been paid; (3) Galayda's contract with a third party to remove the mobile home under the writ of assistance rather than having the Sheriff carry out the process, in violation of 25-13-301; (4) Galayda's service on Johnston of a notice of abandonment without sufficient facts showing absolute abandonment, in violation of 70-24-430; and (5) Galayda's failure to notify Johnston under 70-24-730 of the location of the property and of the steps necessary to reclaim the property. Failure to meet these notification and procedural steps was evidence that Johnston was wrongfully deprived of her property and constituted conversion on the part of Galayda. Johnston v. Am. Reliable Ins. Co., 253 M 253, 833 P2d 176, 49 St. Rep. 495 (1992).

Dog Bite — No Duty of Defendant to Plaintiff: Where the defendant purchased a duplex subject to a preexisting lease that allowed the lessee to keep a dog in the duplex and required the defendant to give the lessee 15 days' notice to dispose of the dog if it created a nuisance (see 1995 amendment) and the plaintiff's child was later bitten by the dog 8 days after the defendant purchased the duplex, the court did not err in granting summary judgment for the defendant. Before a claim for relief may be made against a defendant for negligence, the existence of a duty to the plaintiff must be shown. The defendant had no legal duty to the plaintiff because the defendant had no control over the dog and no right to dispose of it prior to the child's injury. Roy v. Neibauer, 191 M 224, 623 P2d 555, 38 St. Rep. 173 (1981).

70-24-423. Waiver of landlord's right to terminate for breach.

Compiler's Comments

2021 Amendment: Chapter 236 in (1) at end inserted "including rent due". Amendment effective April 15, 2021.

Saving Clause: Section 7, Ch. 236, L. 2021, was a saving clause.

1997 Amendment: Chapter 132 near beginning of first sentence, after "rent due", substituted "is a waiver of a claimed breach of a rental agreement only when the claimed breach is the nonpayment of rent" for "with knowledge of a tenant's default or acceptance by the landlord of a tenant's performance that varies from the terms of the rental agreement constitutes a waiver of the landlord's right to terminate the rental agreement for that breach unless otherwise agreed after the breach has occurred"; and inserted second sentence related to nonwaiver of rights by acceptance of rent when claimed breach is not for nonpayment of rent.

Case Notes

Acceptance of Rent as Waiver of Tenants' Breach of Rental Agreement: The parties' rental agreement contained a provision requiring the tenants to obtain renter's insurance. The tenants were unable to obtain the insurance because of bad credit, and the landlords gave notice to them to vacate the premises. The tenants refused to give up possession of the property, and the landlords filed suit. During the months leading up to the trial, the landlords continued to accept rent. The tenants argued that acceptance of the rent was a waiver of their breach for failure to obtain insurance. The landlords argued that this section applies only to acceptance of rent when the breach is for failure to pay rent and additionally that a landlord is required to accept the rent in order to mitigate damages. The Supreme Court held that under this section, acceptance of the rent waived the right to terminate the agreement because of the tenants' failure to obtain renter's insurance. Kreger v. Francis, 271 M 444, 898 P2d 672, 52 St. Rep. 493 (1995).

70-24-424. Refusal of access — landlord's remedies.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 715, L. 2023. Amendment effective May 22, 2023.

1993 Amendment: Chapter 222 inserted (2) concerning locks changed by tenant.

70-24-426. Remedies for absence or abandonment.

Case Notes

Abandonment — Characteristics — Subtenant Vacation: Abandonment of leased premises is an absolute relinquishment of the premises by the tenant and consists of both an act or omission and an intent to abandon. A subtenant's vacation of the premises in no way indicates an intent to abandon on the part of the tenant. LIC, Inc. v. Baltrusch, 215 M 44, 692 P2d 1264, 42 St. Rep. 162 (1985).

Abandonment — Repossession by Changing Locks: After a leased store held a going-out-of-business sale and closed, the manager of the shopping center the store was in entered the store to determine for lessor whether and how the premises were used. Thirteen days later the lessor changed the locks. Repossession occurred at that time and not when the shopping center manager entered. LIC, Inc. v. Baltrusch, 215 M 44, 692 P2d 1264, 42 St. Rep. 162 (1985). See also Grenfell v. Anderson, 1999 MT 272, 296 M 474, 989 P2d 818, 56 St. Rep. 1101 (1999).

Abandonment — Proper Mailed Notice of Lessor's Intent: Tenant leased a store so that his daughter could operate it. The daughter held a going-out-of-business sale and closed the store. Lessor mailed tenant a letter detailing the rent owed and lessor's intention to find a new tenant. The letter was proper notice of intent to reenter, since the written lease provided that a notice be mailed to a party at his post-office box number. LIC, Inc. v. Baltrusch, 215 M 44, 692 P2d 1264, 42 St. Rep. 162 (1985).

Abandonment With Rent Due — Rights of Lessor: Tenant leased premises so his daughter could operate a store. At the end of August, the daughter held a going-out-of-business sale and the store closed September 1. The 5-year lease had not ended at that time. On September 8, the lessor notified the tenant that rent was delinquent, requested its payment, and stated that an attempt would be made to find another tenant. The lease stated that if the store was vacated and the rent was not paid the lessor could retake and rent the store and that the tenant was liable for the remainder of the rent due under the lease. Under the lease, the court upheld summary judgment granting the lessor rent for the remainder of the lease term and attorney fees. The lessor was entitled to reenter and relet and was not liable for forcible entry or unlawful detainer. LIC, Inc. v. Baltrusch, 215 M 44, 692 P2d 1264, 42 St. Rep. 162 (1985).

Abandonment — Lawful Termination — No Landlord Liability for Stolen Property: The Supreme Court rejected appellants' contention that they were unlawfully removed by respondents from rental premises and entitled to the rental value, plus the value of property stolen from the premises. The court found substantial evidence to support the District Court findings that the appellants had abandoned the premises and that the respondents lawfully terminated the rental agreement. Respondents committed no negligent act in retaking possession that would make them liable for appellants' stolen property. Furthermore, the respondents had a valid claim for rent and damages, contrary to the judgment of the District Court. Napier v. Adkison, 209 M 163, 678 P2d 1143, 41 St. Rep. 619A (1984).

70-24-427. Landlord's remedies after termination — action for possession.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 715, L. 2023. Amendment effective May 22, 2023.

2021 Amendment: Chapter 517 in (4) at end of introductory clause inserted "and a writ of assistance immediately. The writ of assistance must be executed by the sheriff"; inserted (4)(a) and (4)(b) concerning the timing of the execution of the writ of assistance; and made minor changes in style. Amendment effective October 1, 2021.

2015 Amendment: Chapter 454 in (4) inserted last sentence concerning writ of possession. Amendment effective October 1, 2015.

Saving Clause: Section 5, Ch. 454, L. 2015, was a saving clause.

2013 Amendment: Chapter 343 in (2) in two places substituted "14 days" for "20 days". Amendment effective October 1, 2013.

2003 Amendment: Chapter 408 in (2) in first and second sentences at end inserted exception clause. Amendment effective October 1, 2003.

1993 Amendment: Chapter 585 inserted (2) concerning 20-day time limit for hearing claim for possession; inserted (3) concerning stipulation to a continuance; and inserted (4) concerning 5-day time for ruling. Amendment effective April 28, 1993.

Case Notes

Jurisdiction of Justice's Court in Landlord-Tenant Action — Failure to Timely Assert Quiet Title Action Constituting Waiver of Jurisdictional Claim: Plaintiffs filed an action in Justice's Court to enforce a rental contract that defendant allegedly violated. Both parties initially argued that the case was governed by landlord-tenant law, but defendant subsequently argued in District Court that the case was actually an action to quiet title in a life estate granted to defendant by the contract and that because Justice's Courts may not hear actions concerning title to real property, the Justice's Court did not have subject matter jurisdiction to hear the case. The District Court concluded that the Justice's Court had jurisdiction, and on appeal, the Supreme Court concurred. Plaintiffs' pleadings established that the action was based on landlord-tenant law, and the Justice's Court therefore had subject matter jurisdiction at the onset. If defendant had raised the quiet title action in a proper and timely manner, the Justice's Court could have been divested of jurisdiction, but because defendant did not raise the title question in answer to the pleadings or in a timely amended answer, the Supreme Court held that the question was waived, and the District Court was affirmed. Stanley v. Lemire, 2006 MT 304, 334 M 489, 148 P3d 643 (2006).

Discovery and Trial Schedule Properly Expedited: Landlord Whalen insisted that this section provides a landlord, not a tenant, the right to an expedited trial and that tenant Taylor thus perpetrated sanctionable conduct by requesting an expedited hearing. This section mandates that an action for possession must be heard within 20 days unless both landlord and tenant stipulate to a continuance. Taylor's attorney requested that the trial court expedite the trial for possession and may not be sanctioned for demanding precisely what the statute authorizes. Further, the court did not abuse its discretion in properly limiting the time and extent of discovery to expedite the claim for possession. Whalen v. Taylor, 278 M 293, 925 P2d 462, 53 St. Rep. 914 (1996).

Conversion Evidenced by Notification and Procedural Shortcomings: (Decided prior to the enactment of The Montana Residential Mobile Home Lot Rental Act, see Title 70, ch. 33.) Johnston owned a mobile home, entitling her to possession, and Galayda owned the property on which the mobile home was located. Galayda claimed that by virtue of various notices to quit the premises, a default judgment against Johnston for back rent, and a writ of assistance directing the Sheriff to remove the mobile home, Galayda had legal authority to physically evict Johnston and her mobile home from the premises. However, a number of procedural errors occurred during the removal process that rendered the eviction actions unauthorized, including: (1) Galayda's failure under a prior version of 70-24-422 to give Johnston notice to pay rent prior to filing a complaint for nonpayment and possession of the premises; (2) basing the default judgment on Galayda's incorrect sworn affidavit that Johnston owed back rent, which had in fact been paid; (3) Galayda's contract with a third party to remove the mobile home under the writ of assistance rather than having the Sheriff carry out the process, in violation of 25-13-301; (4) Galayda's service on Johnston of a notice of abandonment without sufficient facts showing absolute abandonment, in violation of 70-24-430; and (5) Galayda's failure to notify Johnston under 70-24-730 of the location of the property and of the steps necessary to reclaim the property. Failure to meet these notification and procedural steps was evidence that Johnston was wrongfully deprived of her property and constituted conversion on the part of Galayda. Johnston v. Am. Reliable Ins. Co., 253 M 253, 833 P2d 176, 49 St. Rep. 495 (1992).

Abandonment — Lawful Termination — No Landlord Liability for Stolen Property: The Supreme Court rejected appellants' contention that they were unlawfully removed by respondents from rental premises and entitled to the rental value, plus the value of property stolen from the premises. The court found substantial evidence to support the District Court findings that the appellants had abandoned the premises and that the respondents lawfully terminated the rental agreement. Respondents committed no negligent act in retaking possession that would make them liable for appellants' stolen property. Furthermore, the respondents had a valid claim for rent and damages, contrary to the judgment of the District Court. Napier v. Adkison, 209 M 163, 678 P2d 1143, 41 St. Rep. 619A (1984).

70-24-428. Landlord's recovery of possession limited.

Case Notes

Abandonment Not Shown — Landlord Not Entitled to Recovery of Property: Taylor lived consistently in his apartment for over 1 year, and although he was habitually late in paying rent, he always made arrangements for payment. In response to Taylor's late payment in June 1995, Whalen changed the locks on the apartment, declined to accept the late rent payment, and refused to allow Taylor access to the apartment to collect his belongings. Nothing in the evidence indicated absolute relinquishment of the apartment by Taylor, nor did he commit any act or omission to indicate abandonment. The issue of surrender was never raised, nor did Whalen follow the statutory remedies to recover possession, resorting instead to the self-help procedure of changing the locks, an extrajudicial procedure in violation of this section. Whalen was thus liable under 70-24-411, and the District Court properly awarded Taylor 3 months' periodic rent and possession of the apartment. Whalen v. Taylor, 278 M 293, 925 P2d 462, 53 St. Rep. 914 (1996).

Abandonment — Lawful Termination — No Landlord Liability for Stolen Property: The Supreme Court rejected appellants' contention that they were unlawfully removed by respondents from rental premises and entitled to the rental value, plus the value of property stolen from the premises. The court found substantial evidence to support the District Court findings that the appellants had abandoned the premises and that the respondents lawfully terminated the rental agreement. Respondents committed no negligent act in retaking possession that would make them liable for appellants' stolen property. Furthermore, the respondents had a valid claim for rent and damages, contrary to the judgment of the District Court. Napier v. Adkison, 209 M 163, 678 P2d 1143, 41 St. Rep. 619A (1984).

70-24-429. Holdover remedies — consent to continued occupancy — tenant's response to service in action for possession.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 3, Ch. 715, L. 2023. Amendment effective May 22, 2023.

1993 Amendment: Chapter 176 inserted (2) providing that Title 25, chapter 23, provisions apply to actions for possession or unlawful holdover and reducing time for filing answer under Rule 4C(2)(b) to 10 days after service of summons and complaint.

70-24-430. Disposition of personal property abandoned by tenant after termination.

Compiler's Comments

2021 Amendment: Chapter 536 inserted (1)(a) concerning disposal of personal property if a tenancy terminates by court order; in (1)(b) in first sentence after "in any manner" substituted "other than by" for "except by"; in (9) near middle after "notification" deleted "in any lease or rental agreement at the time of the agreement or when the tenant occupies the property. The landlord shall provide the same notification"; and made minor changes in style. Amendment effective May 14, 2021.

2013 Amendments — Composite Section: Chapter 93 in (1)(a) near beginning after "except by court order and the landlord" substituted "has clear and convincing evidence" for "reasonably believes" and near middle after "a period of time of at least" substituted remainder of subsection concerning removal of property for "5 days has elapsed since the occurrence of events upon which the landlord formed that belief, the landlord may remove the property from the premises"; inserted (1)(b) concerning rent to own or leased items; inserted (1)(c) defining terms; in (2) in first sentence near beginning substituted "all abandoned personal property of the tenant that the landlord reasonably believes is valuable" for "all goods, chattels, and personal property of the tenant"; in (3) substituted current language for "After complying with subsections (1) and (2), the landlord shall:

(a) make a reasonable attempt to notify the tenant in writing that the property must be removed from the place of safekeeping;

(b) notify the local law enforcement office of the property held by the landlord;

(c) make a reasonable effort to determine if the property is secured or otherwise encumbered; and

(d) send a notice by certified mail to the last-known address of the tenant, stating that at a specified time, not less than 15 days after mailing the notice, the property will be disposed of if not removed"; in (5) in first sentence near end after "the tenant's property" inserted "whether of value or not"; inserted (9) concerning notification to tenants; and made minor changes in style. Amendment effective October 1, 2013.

Chapter 123 in (7) substituted "30-9A-610" for "30-9A-601". Amendment effective October 1, 2013.

1999 Amendment: Chapter 305 in (7) substituted "30-9-601" (renumbered 30-9A-601) for "30-9-504(3)". Amendment effective July 1, 2001.

1997 Amendment: Chapter 401 in (2), in second sentence after "charge a reasonable storage", inserted "and labor"; in (5), near middle of first sentence, substituted "7 days" for "15 days"; in (6), near end, substituted "actual damages" for "double damages"; in (8), after "costs of notice, storage", inserted "labor"; and made minor changes in style.

1985 Amendment: In (1) at end after "premises", deleted "the landlord shall:

(a) make reasonable attempts to notify the tenant in writing that the property must be removed:

(i) from the premises; or

(ii) from the place of safekeeping if the landlord has stored the goods as provided in subsection (3) of this section; and

(b) specify a day not less than 15 days after delivery of a notice mailed by certified mail to the last-known address of the tenant, at which specified time the property will be disposed of if not removed.

(2) The landlord may dispose of the property by:

(a) selling all or part of the property at a public or private sale; or

(b) destroying or otherwise disposing of all or part of the property if he reasonably believes the value of the property is so low that the cost of storage or sale exceeds the reasonable value thereof" and inserted "and a period of time of at least 5 days has elapsed since the occurrence of events upon which the landlord formed that belief, the landlord may remove the property from the premises"; in (2), at beginning deleted "After notifying the tenant as required by subsection (1) of this section", in first sentence, before "store all goods", inserted "inventory and", inserted second sentence relating to storage charge; inserted (3) establishing landlord's notice requirements if a tenant abandons personal property; and inserted (4) providing methods of disposal of tenant's abandoned property; in (5), near beginning substituted "subsection (3)" for "subsection (1) of this section", near end of second sentence, before "storage costs", deleted "reasonable or actual", and inserted last two sentences of (5) allowing storage costs to be paid to landlord; in (7) after "30-9-504(3)", inserted "or the sheriff's sale provisions of Title 25, chapter 13, part 7"; and in (8) near middle of first sentence, after "sale", inserted "and any delinquent rent or damages owing on the premises".

Case Notes

Conversion Evidenced by Notification and Procedural Shortcomings: (Decided prior to the enactment of The Montana Residential Mobile Home Lot Rental Act, see Title 70, ch. 33.) Johnston owned a mobile home, entitling her to possession, and Galayda owned the property on which the mobile home was located. Galayda claimed that by virtue of various notices to quit the premises, a default judgment against Johnston for back rent, and a writ of assistance directing the Sheriff to remove the mobile home, Galayda had legal authority to physically evict Johnston and her mobile home from the premises. However, a number of procedural errors occurred during the removal process that rendered the eviction actions unauthorized, including: (1) Galayda's failure under a prior version of 70-24-422 to give Johnston notice to pay rent prior to filing a complaint for nonpayment and possession of the premises; (2) basing the default judgment on Galayda's incorrect sworn affidavit that Johnston owed back rent, which had in fact been paid; (3) Galayda's contract with a third party to remove the mobile home under the writ of assistance rather than having the Sheriff carry out the process, in violation of 25-13-301; (4) Galayda's service on Johnston of a notice of abandonment without sufficient facts showing absolute abandonment, in violation of this section; and (5) Galayda's failure to notify Johnston under 70-24-730 of the location of the property and of the steps necessary to reclaim the property. Failure to meet these notification and procedural steps was evidence that Johnston was wrongfully deprived of her property and constituted conversion on the part of Galayda. Johnston v. Am. Reliable Ins. Co., 253 M 253, 833 P2d 176, 49 St. Rep. 495 (1992).

Abandonment — Lawful Termination — No Landlord Liability for Stolen Property: The Supreme Court rejected appellants' contention that they were unlawfully removed by respondents from rental premises and entitled to the rental value, plus the value of property stolen from the premises. The court found substantial evidence to support the District Court findings that the appellants had abandoned the premises and that the respondents lawfully terminated the rental agreement. Respondents committed no negligent act in retaking possession that would make them liable for appellants' stolen property. Furthermore, the respondents had a valid claim for rent and damages, contrary to the judgment of the District Court. Napier v. Adkison, 209 M 163, 678 P2d 1143, 41 St. Rep. 619A (1984).

70-24-431. Retaliatory conduct by landlord prohibited.

Commissioners' Comment to Section 5.101 of Uniform Act

State and federal courts in California (Aweeka v. Bonds, 20 Cal.App.3d 281, 97 Cal.Rptr. 650 [1971]; Schweiger v. Bonds, 3 Cal.App.2d 507, 90 Cal.Rptr. 729 [1970]), Florida (Bowles v. Blue Lake Development Corp., [S.Florida, 1971], C.C.H.Pov.L.Rptr. Sec. 12,920), Massachusetts (McQueen v. Druker, 317 F.Supp. 1122 [D.Mass.1970]), New Jersey (Alexander Hamilton Savings and Loan Assn. v. Whalen, 107 N.J.Super. 89, 257 A.2d 7 [1969]; Engler v. Capital Management Corp., 112 N.J.Super. 445, 271 A.2d 615 [1970]; E. E. Newman Inc. v. Hallock, 116 N.J.Super. 220, 281 A.2d 544 [1971]; Silberg v. Lipscomb, 117 N.J.Super. 491, 285 A.2d 86 [1971]), New York (Hosey v. Club Van Courtlandt, 299 F.Supp. 501 [S.D.N.Y.1969]), Ohio (T.R.O. granted, Case No. 8375 [S.D.Ohio]), Wisconsin (Dickhut v. Norton, 45 Wis.2d 309, 173 N.W.2d 297 [1970]) and the District of Columbia (Edwards v. Habib, 397 F.2d 687 [D.C.Cir.1968]) have upheld the defense of retaliatory eviction.

A number of states by statute have recognized the defense: Cal.C.C. Sec. 1942.5; Conn. Gen.St.Ann., Sec. 42-540a [Supp.1969]; Del.Ch. 25 Sec. 5917 [Supp.1971]; Ha.Ch. 666 Sec. 43 [Supp.1971]; Ill.Rev.St.Ch. 80, Sec. 71 [Supp.1971]; Me.Rev.St.Tit. 14 Sec. 6001, 6002; Md.Laws Ch. 687 Sec. 9-10 [Supp.1971]; Mass.Comp.Laws Ann., Ch. 186 Sec. 18 [Supp.1970]; Mich.Comp. Laws Ann., Ch. 600, Sec. 5646 [Am'd P.S.1969]; Minn.Stat.Ch. 240 Sec. 566.03 [Supp. 1971]; N.J.Stat.Ann. 2A Sec. 42-10.10; N.Y. [McKinney's] Unconsolidated Laws, Tit. 23 Sec. 8590, 8609 [Supp.1971]; Pa.St.Ann.Ch. 35, Sec. 1700-1 [Supp.1971]; R.I.Gen.Laws Ann. Sec. 34-20-10 [1968]. The legislatures of Maine, Massachusetts, New Jersey, Michigan, and Rhode Island also protect tenants from eviction if they have organized or become a member of a tenants' union or similar organization.

The question as to whether the landlord is engaging in retaliatory conduct as prohibited by the statute is a question of fact to be determined by the court. In an action by or against the tenant, evidence of a complaint within one year before the alleged act of retaliation creates a rebuttable presumption that the landlord's conduct was in retaliation. This presumption will not arise if the tenant made the complaint after notice of a proposed rent increase or diminution of services.

Compiler's Comments

2007 Amendment: Chapter 267 in (1)(c) after "union" deleted "mobile home park tenant association"; and made minor changes in style. Amendment effective October 1, 2007.

1993 Amendment: Chapter 487 in (1)(c) inserted "mobile home park tenant association"; and made minor changes in style.

Case Notes

Evidence of Retaliatory Conduct — Award of Damages Proper: This section prohibits retaliatory conduct by a landlord against a tenant under certain circumstances. Whether a landlord has engaged in retaliatory conduct is a question of fact. In the present case, substantial evidence supported the trial court's findings that a landlord's attempt to evict tenants was retaliatory after the tenants wrote to the landlord complaining of conditions, joined a tenants' association, and testified before the Legislature in support of amendments to The Montana Residential Landlord and Tenant Act of 1977. Given the finding of retaliatory conduct, the court properly awarded the tenants damages equal to 3 months' rent pursuant to 70-24-411. Further, the landlord's violation of the retaliation statute was a defense to the landlord's action to regain possession pursuant to 70-24-441. Swenson v. Janke, 274 M 354, 908 P2d 678, 52 St. Rep. 1272 (1995).

70-24-441. Termination by landlord or tenant.

Compiler's Comments

2007 Amendment: Chapter 267 deleted former (4) that read: "(4) The provisions of this section do not apply to a tenant who rents space for a mobile home in a mobile home park but does not rent the mobile home." Amendment effective October 1, 2007.

2001 Amendment: Chapter 456 inserted (4) concerning nonapplicability to tenant who rents mobile home space but who does not rent the mobile home. Amendment effective October 1, 2001.

Case Notes

Evidence of Retaliatory Conduct — Award of Damages Proper: Section 70-24-431 prohibits retaliatory conduct by a landlord against a tenant under certain circumstances. Whether a landlord has engaged in retaliatory conduct is a question of fact. In the present case, substantial evidence supported the trial court's findings that a landlord's attempt to evict tenants was retaliatory after the tenants wrote to the landlord complaining of conditions, joined a tenants' association, and testified before the Legislature in support of amendments to The Montana Residential Landlord and Tenant Act of 1977. Given the finding of retaliatory conduct, the court properly awarded the tenants damages equal to 3 months' rent pursuant to 70-24-411. Further, the landlord's violation of the retaliation statute was a defense to the landlord's action to regain possession pursuant to this section. Swenson v. Janke, 274 M 354, 908 P2d 678, 52 St. Rep. 1272 (1995).

70-24-442. Attorney fees — costs.

Case Notes

Landlord-Tenant Dispute — Denial of Attorney Fees for Minor Award Proper — Denial of Costs Improper — Remanded for Award of Costs: Landlords sued their former tenants, alleging that the tenants had caused considerable damage to the rental property. After significant litigation, which involved the obtaining of and setting aside of a default judgment, the landlords were awarded approximately $2,000. They then sought to recover their costs and attorney fees of $20,000. The District Court denied both their requests. The landlords appealed, and the Supreme Court agreed that the District Court had correctly interpreted the rental agreement as providing for attorney fees only in the event of an eviction, which had not occurred in this case. Furthermore, 70-24-442, which allows for the award of attorney fees, is discretionary; 25-10-101, however, which provides for an award of costs to the successful plaintiff, is mandatory. Therefore, the denial of attorney fees was proper given the circumstances, but the District Court erred in ordering the parties to pay their own costs. Accordingly, the Supreme Court remanded the case to the District Court to determine the proper amount of costs to award the landlords. Benintendi v. Hein, 2011 MT 298, 363 Mont. 32, 265 P.3d 1239.

Lease Provision May Not Require Tenant to Waive Rights Provided by Landlord and Tenant Act: The landlord's standardized rental agreement contained a provision holding a tenant terminating a lease prior to the lease's expiration date liable for all attorney fees and costs incurred by the landlord due to the tenant's breach of the lease. The Supreme Court held that the language of the Montana Residential Landlord and Tenant Act specifically authorized the awarding of attorney fees to the prevailing party and also provided that a lease agreement could not contain a provision requiring a tenant to waive a right granted by the Act. Summers v. Crestview Apartments, 2010 MT 164, 357 Mont. 123, 236 P.3d 586.

Failure of Either Party to Prevail in Landlord-Tenant Case — Attorney Fees Inappropriate: The Justice's Court awarded plaintiffs attorney fees and costs in a landlord-tenant action, and the District Court agreed and remanded for a determination of reasonableness of the amount of fees and costs to be awarded. On appeal, the Supreme Court noted that reasonable attorney fees are statutorily authorized to the prevailing party in a landlord-tenant action pursuant to this section and that with respect to reasonableness, there must be some type of proof of amount and reasonableness introduced into the record by counsel. Although the disposition by the District Court was otherwise correct, the court erred in affirming that plaintiffs were entitled to attorney fees in the first place because there was no prevailing party in the case. Both parties had separate final judgments rendered in their favor, though on different claims for relief set forth in the complaint, and because each party prevailed on different issues, neither party was entitled to attorney fees, and the Supreme Court reversed the award. Stanley v. Lemire, 2006 MT 304, 334 M 489, 148 P3d 643 (2006).

Insured Landlord Allowed Attorney Fees Under Residential Landlord and Tenant Act — Tripp Standard Inapplicable: Plaintiffs suffered damages when a fire in a mobile home owned by landlord defendant spread to plaintiffs' property. After a jury found in favor of defendant, the trial court awarded defendant attorney fees, and plaintiffs appealed the award. Plaintiffs asserted that defendant was not entitled to attorney fees as an insured landlord and argued that if an insured landlord is permitted to recover fees under this section, the court should extend Tripp v. Jeld-Wen, Inc., 2005 MT 121, 327 M 146, 112 P3d 1018 (2005), and require that a successful defendant show that plaintiff's action was frivolous, unreasonable, or without foundation before awarding attorney fees. The Supreme Court disagreed on both issues. Nothing in this section distinguishes between insured and uninsured parties in an award of attorney fees to the successful parties. In addition, the Tripp standard applies to actions under the Montana Unfair Trade Practices and Consumer Protection Act of 1973 in providing a preference for protecting the interests of a plaintiff over a defendant, but The Montana Residential Landlord and Tenant Act of 1977 provides equal protections for both landlord and tenant, even in cases when a plaintiff is represented by pro bono counsel. The Supreme Court declined to extend the Tripp standard to a successful defendant entitled to collect attorney fees under The Montana Residential Landlord and Tenant Act. Coleman Constr., Inc. v. Kudrna, 2006 MT 98, 332 M 112, 136 P3d 970 (2006).

Damages for Carbon Monoxide Poisoning — Applicability of Landlord and Tenant Act to Third Parties — Act Sufficiently Pleaded — Fees Payable Though Not Specifically Requested: Kunst, a guest at the apartment leased by Erpenbach, and Erpenbach were granted a directed verdict as to liability in their suit against Pass, the landlord, that both were poisoned by carbon monoxide in the apartment building. The jury returned an award of $5,000 to each plaintiff. The District Court Judge, who had taken over the case from a judge who had retired after hearing the case, denied attorney fees on the basis that the previous judge concluded that Pass was liable only under a "general theory of negligence". The Supreme Court reviewed the record and determined that the former judge had in fact left open the issue of whether The Montana Residential Landlord and Tenant Act of 1977 applied. The Supreme Court pointed out that the complaint either made reference in every count to the Act or incorporated the Act by reference and that a review of the record showed that the plaintiffs had also moved for a directed verdict pursuant to the Act. Although the District Court didn't expressly hold that Pass had violated the Act, the Supreme Court held that as a matter of law, Pass had violated certain provisions of the Act. The Supreme Court also held that a third party, such as Kunst, was covered by the Act because: (1) a third party is an "aggrieved party", as used in 70-24-401, as demonstrated by the official comments to the corresponding section of the Uniform Residential Landlord and Tenant Act; (2) Oregon, with a similar statute, includes third parties as aggrieved parties; and (3) the official comments to the Uniform Residential Landlord and Tenant Act also demonstrate that the standards contained in the Act apply more broadly than only to persons who have a contract with the landlord. Because the Act applies, the Supreme Court held that the attorney fee provisions contained in this section also apply. In response to the defendants' argument that the complaint did not specifically request payment of attorney fees, the Supreme Court responded that: (1) the Montana Rules of Civil Procedure require only notice pleading and that because the action was brought pursuant to the Act and the Act contains a provision for attorney fees, it should have been apparent to the defendants that they could be ordered to pay fees; (2) the defendants' argument that they had no opportunity to defend against the claim for fees was without merit; and (3) the plaintiffs were a "prevailing party", the motion for fees was timely filed because it was done immediately after the District Court granted the plaintiffs' motion for a directed verdict, and there is no statutory time limit in Montana in which to file a motion for fees, as there is a time limit in 25-10-501 to file a motion for costs. Because fees were denied by the District Court for a legal reason and the District Court misconstrued the law, the Supreme Court remanded the case to the District Court in order for the District Court to exercise its discretion in awarding fees. Kunst v. Pass, 1998 MT 71, 288 M 264, 957 P2d 1, 55 St. Rep. 289 (1998). However, see Cossitt v. Flathead Indus., Inc., 2018 MT 82, 391 Mont. 156, 415 P.3d 486, disqualifying neighboring third parties who are not guests.

Attorney Fees Properly Awarded to Prevailing Tenant: Tenant Taylor prevailed in District Court on all issues except whether landlord Whalen included a prohibited provision in the rental agreement. That issue was also decided in Taylor's favor by the Supreme Court; therefore, Taylor was entitled to attorney fees, costs, and necessary disbursements. The fact that the award was made to legal services, despite Congress's 1996 prohibition on those awards, had no affect in this case because the assistance was provided prior to enactment of the federal provision. Whalen v. Taylor, 278 M 293, 925 P2d 462, 53 St. Rep. 914 (1996).

Reasonable Attorney Fees in Landlord and Tenant Act Action: Applying the guidelines for determining reasonableness of attorney fees as set out in Majers v. Shining Mtn., 230 M 373, 750 P2d 449 (1988), in light of the fact that defendants' witness testified to all seven guideline factors and plaintiff neither objected to nor rebutted the testimony, the Supreme Court affirmed the award of attorney fees in the initial case in which defendants prevailed and granted an award of attorney fees in the appellate case that affirmed the trial court award. Swenson v. Janke, 274 M 354, 908 P2d 678, 52 St. Rep. 1272 (1995).

Acceptance of Refund of Deposit as Waiver of Claims — Prohibited Lease Provision — Allegations Under Two Acts: Solem and others rented an apartment from Chilcote under a written lease containing a provision stating that acceptance of a refund of a security deposit constituted a waiver of all claims against the landlord. The tenants brought an action for return of their security deposit under Title 70, ch. 25, commonly known as the Residential Tenants' Security Deposits Act, and made other claims under The Montana Residential Landlord and Tenant Act of 1977 as well. The Supreme Court held that the provision waiving claims against the landlord was illegal under 70-24-202 and this section. The fact that the tenants had sued for return of their security deposit did not prohibit their right to recover fees under the Act. Solem v. Chilcote, 274 M 72, 906 P2d 209, 52 St. Rep. 1128 (1995).

Law Review Articles

Summers v. Crestview: Protecting Tenants at the Expense of the Law, Henkel, 72 Mont. L. Rev. 321 (2011).

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, Non-Secured Real Estate Transactions, Williams, 46 Mont. L. Rev. 136 (1985).

CHAPTER 25
RESIDENTIAL TENANTS' SECURITY DEPOSITS

Part 1
General Provisions

70-25-101. Definitions.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: In definition of security deposit inserted last sentence relating to fees and charges for cleaning and damages.

Applicability: Section 6, Ch. 505, L. 1991, provided: "[This act] applies to all tenancies in existence 30 days after [the effective date of this act] [effective October 1, 1991]."

70-25-102. Application of chapter.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 383, L. 2023. Amendment effective May 3, 2023.

Saving Clause: Section 4, Ch. 383, L. 2023, was a saving clause.

Part 2
Rights and Duties

70-25-201. Security deposit — deductions authorized therefrom.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 383, L. 2023. Amendment effective May 3, 2023.

Saving Clause: Section 4, Ch. 383, L. 2023, was a saving clause.

2021 Amendment: Chapter 536 in (3) at end inserted "or the landlord may leave a copy of the notice in a conspicuous location in the rental unit and notify the tenant by email, phone, or text, and notice is considered delivered"; and made minor changes in style. Amendment effective May 14, 2021.

1997 Amendment: Chapter 401 in (1), at end, inserted "including a reasonable charge for the landlord's labor"; and made minor changes in style.

1995 Amendment: Chapter 389 in (1), after "unpaid rent", inserted "late charges, utilities, penalties due under lease provisions, and other money"; and made minor changes in style.

1993 Amendment: Chapter 342 in fourth sentence of (3) decreased from 48 to 24 the number of hours allowed to complete cleaning and inserted sixth sentence relieving landlord of notice requirements and allowing deduction of cleaning charges; and made minor changes in style.

1991 Amendment: In (1), near end after "deduction", inserted "including rent owed under 70-24-441(3)"; inserted (2) relating to inspection of premises; and in (3), in second sentence before "notice", inserted "written" and inserted last sentence relating to notice by certified mail.

Applicability: Section 6, Ch. 505, L. 1991, provided: "[This act] applies to all tenancies in existence 30 days after [the effective date of this act] [effective October 1, 1991]."

Case Notes

Second Cleaning Inspection Not Required — Notice of Cleaning Failure Provided to Tenant: The District Court did not err in determining that the defendant landlord complied with the requirements of the Montana Residential Tenants' Security Deposits Act (Title 70, ch. 25) prior to deducting costs of cleaning from the security deposit of the plaintiff, a vacating tenant. The defendant provided the plaintiff with more than 24 hours to finish the cleaning, as required by this section. The statute's plain language requires the landlord to provide notice of the cleaning not accomplished. A tenant's failure to clean before the inspection does not place an additional burden on the landlord to perform additional inspections. Thirty days prior to the plaintiff vacating the rental, she was provided with clear notice of the cleaning that was required in order to receive her full security deposit. The defendant complied with this section when it provided cleaning checklists, an inspection, and a written list of items in the rental that still needed to be cleaned. The plaintiff was made aware of the cleaning the defendant expected her to do prior to returning her keys 3 days later. Hines v. Topher Realty, LLC, 2018 MT 44, 390 Mont. 352, 413 P.3d 813.

Future Rent Not Deductible From Security Deposit: When the tenants terminated a lease agreement 8 months prior to the lease's expiration date, the landlord deducted the future monthly rent from the tenants' security deposit. The Supreme Court said statutory language clearly stated that a landlord could deduct only rent owed at the time of termination from the security deposit. Summers v. Crestview Apartments, 2010 MT 164, 357 Mont. 123, 236 P.3d 586.

Withholding for Repairs and Rent — Proration of Rent Under Unexecuted Lease Modification Upheld: Solem and other tenants leased an apartment from Chilcote under a written month-to-month lease with a $300 security deposit. On March 15, the tenants gave an oral 30-day notice of termination, but Chilcote offered to prorate their rent if they would leave by April 1, which the tenants agreed to do. Chilcote also gave the tenants a written notice of damages and cleaning expenses and deducted charges for damages and cleaning and the prorated rent. The tenants objected to the deductions. The Supreme Court held that Chilcote was not required to give written notice of needed repairs but only notice of damages, which he did, entitling Chilcote to retain $8 for a nail hole. The Supreme Court found that the District Court did not misapprehend the evidence that no notice of necessary cleaning was received by the tenants and that there was no credible proof of a working smoke detector and approved the return of the money withheld for cleaning and the smoke detector. However, because the District Court properly held that the written lease could not be modified by an unexecuted oral agreement, the Supreme Court allowed Chilcote to charge the tenants for the time that the property was not re-leased to another renter. Solem v. Chilcote, 274 M 72, 906 P2d 209, 52 St. Rep. 1128 (1995).

70-25-202. List of damages and refund — delivery to departing tenant.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 3, Ch. 383, L. 2023. Amendment effective May 3, 2023.

Saving Clause: Section 4, Ch. 383, L. 2023, was a saving clause.

2001 Amendment: Chapter 241 in (1) near end of first sentence after "have been followed" inserted "with regard" and near middle of third sentence after "refund to" deleted "the tenant's last-known address or" and at end inserted "or, if a new address is not provided, to the tenant's last-known address"; at end of (2) after "10 days" inserted reference to return of security deposit by mail; inserted (3) providing that it is not wrongful withholding of security deposit if tenant does not receive funds because of tenant's failure to provide new address; and made minor changes in style. Amendment effective October 1, 2001.

Preamble: The preamble attached to Ch. 241, L. 2001, provided: "WHEREAS, section 70-25-205, MCA, contains two statements that are in direct conflict with one another; and

WHEREAS, in 1993, the Legislature eliminated the double damages penalty for wrongful withholding of a security deposit; and

WHEREAS, before that penalty was removed, section 70-25-205, MCA, provided that if a tenant failed to furnish a new address, then the landlord was not liable for the double damages, but was still required to pay the tenant the actual amount owed; and

WHEREAS, the 1993 legislation amended that section in a way that both relieved a landlord of liability to pay damages while at the same time provided that a tenant could not be barred from recovering those damages; and

WHEREAS, section 70-25-204, MCA, provides that a tenant is entitled to recover damages.

THEREFORE, section 70-25-205, MCA, as it was amended in 1993, is redundant as well as conflicting."

1991 Amendment: In (1), near middle after "list of", inserted "any rent due and"; inserted (2) relating to return of security deposit; and made minor changes in style.

Applicability: Section 6, Ch. 505, L. 1991, provided: "[This act] applies to all tenancies in existence 30 days after [the effective date of this act] [effective October 1, 1991]."

Case Notes

Withholding for Repairs and Rent — Proration of Rent Under Unexecuted Lease Modification Upheld: Solem and other tenants leased an apartment from Chilcote under a written month-to-month lease with a $300 security deposit. On March 15, the tenants gave an oral 30-day notice of termination, but Chilcote offered to prorate their rent if they would leave by April 1, which the tenants agreed to do. Chilcote also gave the tenants a written notice of damages and cleaning expenses and deducted charges for damages and cleaning and the prorated rent. The tenants objected to the deductions. The Supreme Court held that Chilcote was not required to give written notice of needed repairs but only notice of damages, which he did, entitling Chilcote to retain $8 for a nail hole. The Supreme Court found that the District Court did not misapprehend the evidence that no notice of necessary cleaning was received by the tenants and that there was no credible proof of a working smoke detector and approved the return of the money withheld for cleaning and the smoke detector. However, because the District Court properly held that the written lease could not be modified by an unexecuted oral agreement, the Supreme Court allowed Chilcote to charge the tenants for the time that the property was not re-leased to another renter. Solem v. Chilcote, 274 M 72, 906 P2d 209, 52 St. Rep. 1128 (1995).

70-25-204. Wrongful withholding of security deposit — action.

Compiler's Comments

1993 Amendment: Chapter 342 near middle of first sentence of (1), after "amount equal to", deleted "double"; and made minor changes in style.

1991 Amendment: In (2)(c), near end after "premises", deleted "whichever occurs first"; inserted (2)(d) relating to expiration of 10-day period; and made minor changes in style.

Applicability: Section 6, Ch. 505, L. 1991, provided: "[This act] applies to all tenancies in existence 30 days after [the effective date of this act] [effective October 1, 1991]."

Case Notes

Modification of Security Deposit Award by District Court — Determination of Prevailing Party: In an action brought by Solem and other tenants for return of their security deposit, the District Court awarded the deposit to the tenants. The Supreme Court modified the District Court judgment by returning $80.50 of a $300 security deposit to the tenants. The Supreme

Court held that the tenants were still the prevailing party under this section and were entitled to attorney fees of $5,253.68. The Supreme Court noted that the District Court required the tenants to file an affidavit of their fees and provided the landlord a period of time to object to those fees. Solem v. Chilcote, 274 M 72, 906 P2d 209, 52 St. Rep. 1128 (1995).

Law Review Articles

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, Non-Secured Real Estate Transactions, Williams, 46 Mont. L. Rev. 136 (1985).

70-25-205. Failure of departing tenant to furnish new address.

Compiler's Comments

2001 Amendment: Chapter 241 near end after "occurs first" substituted "does not bar" for "relieves the landlord from liability as imposed by 70-25-204. The failure may not, however, bar" and near end before "amount" deleted "actual". Amendment effective October 1, 2001.

Preamble: The preamble attached to Ch. 241, L. 2001, provided: "WHEREAS, section 70-25-205, MCA, contains two statements that are in direct conflict with one another; and

WHEREAS, in 1993, the Legislature eliminated the double damages penalty for wrongful withholding of a security deposit; and

WHEREAS, before that penalty was removed, section 70-25-205, MCA, provided that if a tenant failed to furnish a new address, then the landlord was not liable for the double damages, but was still required to pay the tenant the actual amount owed; and

WHEREAS, the 1993 legislation amended that section in a way that both relieved a landlord of liability to pay damages while at the same time provided that a tenant could not be barred from recovering those damages; and

WHEREAS, section 70-25-204, MCA, provides that a tenant is entitled to recover damages.

THEREFORE, section 70-25-205, MCA, as it was amended in 1993, is redundant as well as conflicting."

1993 Amendment: Chapter 342 near end of first sentence, before "liability", deleted "double"; and made minor changes in style.

70-25-206. Landlord to furnish statement of condition of premises at beginning of lease.

Compiler's Comments

1993 Amendment: Chapter 342 in first sentence of (1), before "execution", substituted "in conjunction with" for "prior to"; deleted former (2)(c) that read: "if any damage to the leasehold premises resulting from the immediately preceding leasehold agreement has not been restored, a statement indicating such fact and setting forth such unrestored damage"; near beginning of (3), before "the execution", substituted "in conjunction with" for "prior to"; and made minor changes in style.

1991 Amendment: In (1), in first sentence before "tenant", deleted "prospective" and at end, after "let", deleted "as well as" and at beginning of second sentence inserted "At the written request of the tenant" and at end inserted "must be provided to the tenant"; and in (3), near beginning before "tenant", deleted "prospective" and before "a written list" substituted "upon the written request of the tenant" for "if any".

Applicability: Section 6, Ch. 505, L. 1991, provided: "[This act] applies to all tenancies in existence 30 days after [the effective date of this act] [effective October 1, 1991]."

CHAPTER 26
LANDLORD AND TENANT
RESIDENTIAL AND COMMERCIAL

Chapter Case Notes

Claimed Fraud Resulting in Benefit to Lessee — Summary Judgment Proper: Nentwig claimed fraud in failure by United Industry to renew her commercial lease. However, Nentwig received everything to which she would have been entitled under the lease in effect at the time the lease extension would have been signed, and in fact, rather than being damaged by the alleged fraud, she actually received benefits in the form of lower rent during the term of the lease. It was not error for the trial court to summarily dismiss the fraud claim based on the void option provision. Nentwig v. United Indus., Inc., 256 M 134, 845 P2d 99, 49 St. Rep. 1172 (1992).

Allegation That Lessee Violated Implied Covenant Not to Create Nuisance on Leased Premises: Plaintiffs, owners of a building in which defendants, lessees, operated a bar, filed an unlawful detainer action against defendants pursuant to 70-27-108. Plaintiffs claimed that defendants, by allowing loud music and noise in the bar, were violating an implied covenant not to operate their bar in such a manner as to create a nuisance. The trial judge ruled that the lease could not be canceled under any theory of nuisance because defendants were doing what they had a right to do, operate a bar. On appeal, the Supreme Court ruled that because substantial credible evidence supported the District Court's finding that the bar was not being operated as a nuisance, it was unnecessary to determine whether Montana law recognizes in real property leases an implied covenant on the part of the lessee to use the leased premises so as not to injure the lessor by creating a nuisance. Martinson v. Thompson, 205 M 264, 667 P2d 423, 40 St. Rep. 1259 (1983).

Chapter Law Review Articles

Housing in Montana: Not for Adults Only, Even, 47 Mont. L. Rev. 139 (1986).

Landowner Liability in Montana, Nelson, 47 Mont. L. Rev. 109 (1986).

Landlord and Tenant—Waste—Implied Covenant Restricting Use of Premises, Conklin, 19 Mont. L. Rev. 168 (1958).

Part 1
Residential and Commercial

70-26-101. Letting of parts of rooms prohibited.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-26-102. Transferee of rental property to have same rights as transferor.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Successor of Landlord — Rights: Successor of a landlord has no other or greater rights than the latter had. Centennial Brewing Co. v. Rouleau, 49 M 490, 143 P 969 (1914).

70-26-103. Attornment of tenant to stranger void.

Case Notes

Permission to Sublease Unreasonably Withheld in Violation of Lease Provision: Where the defendants, who rented office space from the plaintiff, were refused permission to sublet the space to the state parole board and were subsequently sued for damages when they quit the premises, the finding by the District Court that permission was "unreasonably withheld" in violation of the lease was not clearly erroneous. When a lessor agrees he will not unreasonably withhold consent to sublease, he is governed by principles of fair dealing and commercial reasonableness. Arbitrary considerations of taste, sensibility, or convenience are not proper criteria for the landlord's consent. As there was no showing that the parole board had been or would be a commercially unsuitable tenant, the plaintiff's failure to consent was unreasonable. Brigham Young Univ. v. Seman, 206 M 440, 672 P2d 15, 40 St. Rep. 1767 (1983).

70-26-104. Notice of action by third person served on tenant — duty to inform landlord.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-26-105. Assignee of lessee — remedies of lessor against.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Delay Rentals: An assignee of the lessee under an oil and gas lease is bound to pay the delay rentals under this section. Irwin v. Marvel Petroleum Corp., 139 M 413, 365 P2d 221 (1961).

Rights and Liabilities of Assignee:

Under an oil and gas lease whatever remedies the lessor has against the lessee may be enforced against an assignee of the lessee. Irwin v. Marvel Petroleum Corp., 139 M 413, 365 P2d 221 (1961).

Where one holds as assignee of an oil and gas sublease, his rights and liabilities in an action seeking its termination must be determined from it and not from the original lease to the sublessor, there being neither privity of estate nor privity of contract between him and the lessor. This section has no application as between the original lessor and the assignee of the sublease but does apply as between the assignee and the sublessor. McNamer Realty Co. v. Sunburst Oil & Gas Co., 76 M 332, 247 P 166 (1926).

Law Review Articles

Assignments by the Landowner and the Lessee, Sullivan, 17 Mont. L. Rev. 64 (1955).

70-26-106. Rights of lessee and assignees against lessor and assignees.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Case Notes

Waiver of Restrictions: A restriction in a lease against assignment by lessee without written approval of lessor is for benefit of lessor and may be waived by accepting rent from assignee and permitting him to remain in possession. Kintner v. Harr, 146 M 461, 408 P2d 487 (1965).

70-26-108. Rent dependent on life — recovery.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

70-26-109. Change of lease terms by notice.

Case Notes

Essential Terms: A letter between landlord and tenant was not an enforceable lease on which the tenant could bring a contract action because it failed to set forth material and essential terms necessary for the enforcement of the renewal provisions of a lease. Therefore, only a month-to-month lease existed. Drug Fair NW. v. Hooper Enterprises, Inc., 226 M 31, 733 P2d 1285, 44 St. Rep. 435 (1987).

Intent: Intent of this section is to inform tenants of rent increase, not to gain jurisdiction over them. Walker v. Tschache, 162 M 213, 510 P2d 9 (1973).

Notice Served Upon Tenant: Notice requirement of this section did not mean jurisdictional service and was fulfilled when landlord placed timely rent increase notices in addressed envelopes in tenants' mailboxes. Walker v. Tschache, 162 M 213, 510 P2d 9 (1973).

Increase in Rent: A tenant from month to month, upon being served with statutory notice of increase in rent upon expiration of the month, may deliver up the premises to landlord at expiration of the month, or tenant may hold over and continue in possession, in which event he assents to changed terms, rents, and conditions specified in the notice. State ex rel. Needham v. Justice Court, 119 M 89, 171 P2d 351 (1946).

Tenant Holding Over:

A tenant must deliver up premises to landlord on termination of lease, and a tenant can hold over rightfully only pursuant to valid agreement with landlord. The tenant may hold over by laches of landlord who at his election may treat tenant as a trespasser or accept him as tenant, but a tenant holding over has no election to regard himself as a tenant. State ex rel. Needham v. Justice Court, 119 M 89, 171 P2d 351 (1946).

Where tenant from month to month refused to pay increased rental as required by statutory notice served upon him by landlords, landlords by serving upon tenant 3 days' notice in writing elected to treat him as a tenant from month to month, and upon being served with such notice, tenant had 3 days in which to pay the rent or to deliver up the premises. By continuing in possession without paying the rent or delivering up the possession, tenant became guilty of unlawful detainer. State ex rel. Needham v. Justice Court, 119 M 89, 171 P2d 351 (1946).

70-26-110. Lease of city lot for over 75 years void.

Case Notes

"City Lot" Defined: The words "city lot" mean a lot within the limits of a city, regardless of its other characteristics. Lerch v. Missoula Brick & Tile Co., 45 M 314, 123 P 25 (1912).

Operation and Effect: This section applies to city and town lots and has no bearing upon 70-26-207 (since repealed). Lerch v. Missoula Brick & Tile Co., 45 M 314, 123 P 25 (1912).

Part 2
Commercial

Part Case Notes

Lease Provision Precluding Recovery of Unpaid Rent Beyond Time of Repossession: Tenant Anderson defaulted on payment of a commercial lease, and lessor Grenfell changed the locks, effectively retaking possession of the property. The District Court awarded Grenfell unpaid rent and utilities, plus future rent, utilities, and penalties for the remaining term of the lease. Applying Knight v. OMI Corp., 174 M 72, 568 P2d 552 (1977), the Supreme Court held that in order for future liability for rent subsequent to the landlord's cancellation and repossession to accrue, the lease must contain clear language to that effect. Here, the lease provided that Grenfell could recover rent due up to the time of entry, but the award for unpaid rent and utilities beyond the time that Grenfell took repossession could not be sustained. Further, Grenfell's claim for unlawful detainer was also void because once locked out, Anderson could in no sense unlawfully detain the premises absent a showing of reentry. Grenfell v. Anderson, 1999 MT 272, 296 M 474, 989 P2d 818, 56 St. Rep. 1101 (1999). See also Gallatin Valley Medical Dental Center, Inc. v. Lemley, 206 M 241, 670 P2d 83, 40 St. Rep. 1622 (1983).

Breach of Indefinite Term Sublease: A corporate business manager caused a corporation to pay the entire amount of rent for property subleased by the corporation from his solely owned business after he and another corporate shareholder agreed the corporation would pay only one-half of the rent. The court properly found a breach of an indefinite term sublease agreement. Evidence did not support the contention that the business manager orally modified the sublease agreement. He made unauthorized expenditures by unilaterally causing the corporation to pay the full amount of his solely owned company's obligation under the lease. Northwest Plating Co. v. Hoffman, 234 M 360, 763 P2d 44, 45 St. Rep. 1971 (1988).

Ratification of Lease by Accepting Compensation — Lease in Trust: Real property for which a lease was executed by husband and wife to lessee in 1956 for a 10-year term with 3-year extensions was transferred to a trust upon their divorce. The trustees were husband, wife, and daughter, with husband having "general control" over the business of the trust, but in other matters two of the three trustees were required to sign. At the expiration of the lease and the original three renewals, husband alone executed a new lease agreement to original lessee that was similar to the original but increased the rent. The rent increase was received and noted by wife and daughter. Three years later they sued husband and lessee for damages, unlawful detention, and liquidated damages, contending there was no valid lease signed by two of the three trustees. The Supreme Court held that by "generally operating" the trust the husband had authority to make a new lease. The actions of wife and daughter receiving increased compensation were notification to them of the lease change, and failure to act ratified the lease agreement even if the signature of one of them was required for its execution. Wyman v. Wyman, 208 M 57, 676 P2d 181, 41 St. Rep. 170 (1984).

Action to Collect Rent on Default of Commercial Lease — Interpretation of Lease and Default Notice: In a commercial lease, the lessee's obligation to pay the difference in rent between the lease amount and the amount received by the landlord upon reletting after default was not extinguished by a provision in the default notice letter which provided that the landlord "does elect without further notice to terminate the lease . . . reserving to itself all other rights and remedies contained in said lease in the event of default". The lease contained a provision allowing the landlord the right to collect lost rent. Construction of the lease instrument and the default notice letter provided for a termination of the lessee's rights in the lease in order to allow for reletting while holding the lessee liable for rent. Gallatin Valley Medical Dental Center, Inc. v. Lemley, 206 M 241, 670 P2d 83, 40 St. Rep. 1622 (1983).

Assignment of Lease — Waiver of Landlord's Right to Object: A lease contained a provision requiring the lessee to obtain the written consent of the lessor before subleasing or assigning any part of the leased premises. Lessee obtained written consent for the 1968 assignment but not for the 1971 assignment. The court held that the landlord's consent to the original assignment obviates the necessity of consent to subsequent assignments. In addition, the landlord knew the lease had been assigned and continued to receive rent payments for 4 years before a dispute arose. Under these facts, the landlord has long waived any right to assert breach of the restriction. Kosena v. Eck, 195 M 12, 635 P2d 1287, 38 St. Rep. 1736 (1981).

70-26-201. Term of lease when none specified.

Case Notes

Jury Instructions — Oral Agreement for Lease: In trial involving oral agreement for lease of land for grazing purposes, when term of lease was in dispute and when there was no preponderance of evidence contrary to the presumption of a yearly lease, it was not error to refuse to instruct on a presumption of a month-to-month tenancy. Hill v. Turley, 218 M 511, 710 P2d 50, 42 St. Rep. 1783 (1985).

Oral Lease — Usage — Partial Performance: The parties entered into an oral agreement for lease of defendants' lands for purposes of grazing cattle. The plaintiff claimed the lease was month-to-month, and defendants claimed lease was a 3-year lease. Payments were monthly. After 1½ years, the plaintiff terminated the lease. The defendants refused to allow the plaintiff to remove his cattle and asserted an agister's lien on the cattle. At trial, there was testimony that standard practice and usage in the area was to lease grazing land by the year. The jury found in favor of a yearly lease and awarded damages to the defendants. The Supreme Court affirmed. The partial performance of an oral lease for a term beyond that allowed by the Statute of Frauds will take it out of the operation of the statute. Hill v. Turley, 218 M 511, 710 P2d 50, 42 St. Rep. 1783 (1985).

Notice to Quit: Landlord could not maintain an action for unlawful detainer where notice to quit was not given to tenant 30 days prior to expiration of year-to-year tenancy. Roseneau Foods, Inc. v. Coleman, 140 M 572, 374 P2d 87 (1962).

Oral Lease:

Entry by a tenant under an invalid oral lease may create a tenancy from year to year, month to month, or a tenancy at will depending upon the circumstances. Roseneau Foods, Inc. v. Coleman, 140 M 572, 374 P2d 87 (1962).

Under this section it is possible to have an oral lease for at least 1 year without an expression as to time therein. This is consistent with 28-2-903, Statute of Frauds, which voids an oral agreement for the leasing of realty of a period longer than 1 year. Roseneau Foods, Inc. v. Coleman, 140 M 572, 374 P2d 87 (1962).

Presumption as to Term:

When tenant, pursuant to an oral agreement, entered into possession of property on April 1, 1957, to conduct a meat processing and selling business, his hiring of the property was presumed to be for 1 year from its commencement. Roseneau Foods, Inc. v. Coleman, 140 M 572, 374 P2d 87 (1962).

Where a store building is leased and there is no testimony of any usage on the subject, the lease is presumed to run for at least 1 year. Giovanetti v. Schab, 41 M 297, 109 P 141 (1910).

Presumption Rebuttable: The presumption that hiring is to be for 1 year is a rebuttable presumption. If the presumption is not controverted, the facts must be found according to the presumption. If it is controverted, the presumption must be given weight as evidence. Roseneau Foods, Inc. v. Coleman, 140 M 572, 374 P2d 87 (1962).

Tenancy From Month to Month: Payment of a monthly rental does not compel the conclusion that a tenancy is from month to month where other facts indicate to the contrary. Roseneau Foods, Inc. v. Coleman, 140 M 572, 374 P2d 87 (1962).

Tenancy From Year to Year: Where tenant hired property for meat business under an oral agreement, the tenancy was initially for a year with implied renewals for 1 year, resulting in a tenancy from year to year. Roseneau Foods, Inc. v. Coleman, 140 M 572, 374 P2d 87 (1962).

Construction of Oral Farm Lease: Judgment for tenant in action for construction of an oral farm lease was reversed and the case was remanded for a new trial where the evidence was insufficient to show either a mutual agreement or usage and the record was completely confused as to when the lease commenced. Enott v. Hinkle, 140 M 206, 369 P2d 413 (1962).

70-26-202. Rent — when payable.

Case Notes

Time for Payment of Rent: Where landlord and tenant agree upon a certain rental per year, it is payable at the end of each year of the tenancy, in the absence of an agreement to the contrary. Besse v. McHenry, 89 M 520, 300 P 199 (1931).

70-26-203. Failure of lessor to repair — lessee's remedies.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Improper Invocation of Statutory Remedies: Lessee Bengala complained to lessor bank regarding flooding, sidewalk repairs, and sewer system malfunctions on the leased premises. The sidewalk settled back down and was no longer in need of immediate repair; the sewer system was repaired and functioned properly; and the bank was making efforts to repair the flood control structure. Bengala remained a tenant but refused to pay rent even though his use of the leasehold was not substantially impaired. Bengala presented no evidence to support his claims of damage to reputation and loss of business profits. Bengala not only failed to properly invoke lessee's remedies pursuant to this section, but he was not entitled to invoke them. The District Court properly found Bengala liable for rent payments, late payment penalties, and reasonable attorney fees. Bengala v. Conservative Sav. Bank, 250 M 101, 818 P2d 371, 48 St. Rep. 880 (1991).

Substantial Interference Required — Remedies Exclusive: Plaintiff entered into a lease agreement for a motel in Forsyth that was not yet completed. The attorney for plaintiff prepared the lease. The county health and building code inspector found deficiencies requiring correction before the motel could be licensed. The parties negotiated a reduction of payments to a percentage of actual income. Many of the deficiencies were corrected, and the facility was issued a city business license. Plaintiff moved out of the motel and made no further payments. Plaintiff brought suit claiming breach by the defendant. The District Court awarded judgment and net damages to defendant. Plaintiff contended on appeal that the court had ignored this section. The Supreme Court held that the dilapidations that a landlord ought to repair under this section are those which significantly diminish the enjoyment of the premises or substantially interfere with the purposes for which the premises are intended. The court found the deficiencies were not significant enough to have an adverse financial impact upon the motel's operation and that steps had been taken to repair them. The court also found that the reduction in lease payments suggested an agreement to deduct and repair. Plaintiff could not both deduct and repair and vacate the premises without further obligation under this section. The judgment was affirmed. Bunke, Inc. v. Johnson, 205 M 125, 666 P2d 1234, 40 St. Rep. 1163 (1983).

Tenant Unilaterally Terminating Lease — Damages: Plaintiff entered into a lease agreement for a motel in Forsyth that was not yet completed. The attorney for plaintiff prepared the lease. The county health and building code inspector found deficiencies requiring correction before the motel could be licensed. The parties negotiated a reduction of payments to a percentage of actual income. Many of the deficiencies were corrected, and the facility was issued a city business license. Plaintiff moved out of the motel and made no further payments. Plaintiff brought suit claiming breach by the defendant. The District Court awarded judgment and net damages to defendant. Plaintiff contended that by taking possession of the motel and operating it, defendant impliedly consented to the surrender, thereby extinguishing further obligations under the lease. The Supreme Court held that when a tenant unilaterally terminates the lease of commercial residential premises and vacates, without justification under 70-26-203, and the landlord expressly refuses consent and subsequently operates the facility to mitigate damages, the tenant is liable for net damages. Bunke, Inc. v. Johnson, 205 M 125, 666 P2d 1234, 40 St. Rep. 1163 (1983).

Damages Denied: Lessee of hotel had the choice of making repairs demanded by fire marshal (now state fire prevention and investigation program of the Department of Justice) and deducting costs from the rent payment to the extent of 1 month's rent or vacating the premises, but lessee cannot recover damages from lessors for their failure to put the hotel into good condition. Lowe v. Root, 166 M 150, 531 P2d 674 (1975).

Extent of Dilapidation: The provisions of this and the preceding section apply only to dilapidations which render the leased premises unfit for habitation. Lake v. Emigh, 118 M 325, 167 P2d 575 (1946).

Damages: Where a landlord, after notice of dilapidations in a hotel building in need of repair, failed to repair, the tenant under this section had the option of making the repairs himself at a cost not to exceed 1 month's rent and deducting the expense from the rent or vacating the premises without further liability for rent, but had no cause of action for damages for injury to his personal property and for loss of profits. Noe v. Cameron, 62 M 527, 205 P 256 (1922).

70-26-204. Renewal of lease by lessee's continued possession.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

CRP Contract — No Extension of Lease Term — Tenants Remain on Property as Holdover Tenants Under Same Terms as Existed Prior to Expiration of Lease: The Smiths argued that when they and their landlord entered into a contract with the federal government to enroll the farm land that they leased in a conservation program, that contract extended the term of the lease because the government contract was for a period longer than the original lease term. The Supreme Court held that the government contract did not affect the underlying lease agreement and that it could not extend the term of the lease. The Supreme Court further held that the Smiths, by remaining on the land and continuing to work it, did so as holdover tenants under the same lease terms as existed prior to the expiration of the lease. Eagle Watch Inv., Inc. v. Smith, 278 M 187, 924 P2d 257, 53 St. Rep. 757 (1996).

Terms to Be Contained in Oral Agreement Made After First Year's Oral Renewal: Any oral agreement made after a renewal of 1 year cannot be presumed to contain all terms of the initial written agreement. An oral agreement made after the first year's oral renewal constitutes a new agreement and must contain its own terms. In the present case, the right of first refusal was not renewed pursuant to the renewal clause in the original written lease because that renewal clause was inadequate to renew the written lease. Therefore, the right of first refusal located in the original lease agreement ended at the conclusion of the written lease. Willson v. Terry, 265 M 119, 874 P2d 1234, 51 St. Rep. 462 (1994), following Lee v. Shaw, 251 M 118, 822 P2d 1061 (1992), and distinguishing Nevala v. McKay, 178 M 327, 583 P2d 1065 (1978), and Rumph v. Dale Edwards, Inc., 183 M 359, 600 P2d 163 (1979).

Option to Purchase as to Holdover Tenant: An option to purchase contained in an agreement for lease of agricultural lands does not carry over into a holdover tenancy. Upon expiration of the term of the lease, as specified in the lease agreement, the lessee became a holdover tenant and lost his right of first refusal, even though the holdover was by permission of the lessor. Nevala v. McKay, 178 M 327, 583 P2d 1065 (1978). See also Situ v. Smole, 2013 MT 33, 369 Mont. 1, 303 P.3d 747.

Term of Lease Modified: When an agricultural lease containing a provision for automatic renewal was modified to extend the original term of the lease, the modification constituted a new agreement as to the term of the lease, thus abrogating the automatic renewal provision. The lessee was rendered a holdover tenant upon expiration of the term of the lease as modified. Nevala v. McKay, 178 M 327, 583 P2d 1065 (1978).

"Or" Type Mining Lease: Where lease contained provision that lessee may pay minimum delay rental, 8-month retention by lessor of payment resulted in a valid extension as the effect of the provision obligated the lessee to produce "or" pay delay rentals making it incumbent upon the lessor to declare a forfeiture at the close of the primary term. Lessee's tender of payment was a valid and binding extension of the lease as lessor's only response was to hold the same for a period of time in excess of 8 months. Carroll v. Eaton, 168 M 150, 541 P2d 64 (1975).

Notice to Quit: Where notice to quit was not given by landlord to tenant 30 days prior to expiration of year-to-year tenancy, tenancy was deemed to be renewed for another year and unlawful detainer action could not be maintained by landlord. Roseneau Foods, Inc. v. Coleman, 140 M 572, 374 P2d 87 (1962).

Tenancy From Year to Year:

Where property was hired for meat business under 70-26-201, the tenancy was initially for a year with implied renewal for 1 year, resulting in a tenancy from year to year. Roseneau Foods, Inc. v. Coleman, 140 M 572, 374 P2d 87 (1962).

Where a tenant, after the expiration of his lease, held over at the invitation of the owner, paying rental to the latter, a tenancy from year to year was created, which upon proper notice was terminable at the pleasure of the purchaser of the property. Stoltze Land Co. v. Westberg, 63 M 38, 206 P 407 (1922).

Payments Under Expired Lease: Where at the time a Writ of Assistance was issued pursuant to foreclosure decree, the land in question was held by a lessee whose term had expired, a payment was made by him to the owner, not as rent but as the owner's share of wool grown by the tenant under the lease agreement, such payment did not have the effect of a renewal of the lease under this section and hence did not defeat the Writ. Lepper v. Home Ranch Co., 90 M 558, 4 P2d 722 (1931).

70-26-205. Notice required to terminate lease.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Notice Insufficient to Terminate Lease at End of Month Sufficient to Terminate Tenancy at End of Following Month: The tenant, Rogers, argued that his commercial month-to-month lease had never been properly terminated because the notice given to him on October 3 was not sufficient to terminate the lease on October 30. In a case of first impression, the Supreme Court held that while the notice was not timely with respect to terminating the lease on October 30, additional notice need not be given by the landlord in order to have the lease terminate on November 30. Sage v. Rogers, 257 M 229, 848 P2d 1034, 50 St. Rep. 244 (1993).

Judicial Proceedings Required: Unlawful detainer and statutory treble damages awarded pursuant to a finding of unlawful detainer are not viable remedies available to a plaintiff/lessor until either expiration of the lease term with a finding of the lessee's wrongful holding over or termination of the lease agreement and forfeiture are established by judicial proceedings. Mont. Williams Double Diamond Corp. v. Hill, 175 M 248, 573 P2d 649 (1978).

State Action — Procedural Due Process — Contents of Notice: Where landlord has freedom to select tenants, receipt of federal benefits in the form of mortgage insurance and rent supplements does not make him an agency of federal government or State of Montana so as to require him to include in his 30-day notice of termination and notice to quit to tenant reasons which would amount to good cause and entitle tenant to a hearing to establish existence of good cause, even though tenant qualified to receive federal rent supplement, as no state action is involved. Flamm v. Real-Blt, Inc., 168 M 351, 543 P2d 190 (1975).

Time for Giving Notice:

An action in unlawful detainer cannot be maintained under 70-27-108 if the tenant is lawfully in possession under a tenancy from year to year without first giving notice 30 days prior to the anniversary date of the tenancy. Roseneau Foods, Inc. v. Coleman, 140 M 572, 374 P2d 87 (1962).

Where the parties had a verbal rental arrangement from month to month, notice given April 15, 1949, to vacate May 1, 1949, was not sufficient to form a basis of a court action to remove the tenants from the premises. Welsh v. Roehm, 125 M 517, 241 P2d 816 (1952).

70-26-206. Rights of tenant for years or at will.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Reversion of Crop and Proceeds Upon Termination of Lease: In determining that a crop reverted to landlords and that they became entitled to all proceeds upon termination of a lease of which they were not advised, the District Court was correct in not applying the doctrine of wayward crops. Section 70-26-206 provided the proper authority concerning entitlement to the crop because the tenancy came to an end due to a default before the lease was up and because no rent was paid for the year in question. Moore v. Hardy, 230 M 158, 748 P2d 477, 45 St. Rep. 108 (1988).

Share of "Away Going" Crop: When a tenant's farm lease terminated in the fall, he was not entitled to a share of the next year's crop because he didn't plant, cultivate, or harvest that crop. Chamberlain v. Evans, 180 M 511, 591 P2d 237 (1979), following Johnson v. Anderson Ranch Co., 142 M 251, 384 P2d 271 (1963).

Ownership of Crops: Unless a tenant at will becomes a wrongdoer by holding over, he may take the annual products of the soil and may cultivate and harvest the crops growing at the end of his tenancy, which makes him at all times the owner, as against the landlord, of the crops, whether growing or severed. Power Mercantile Co. v. Moore Mercantile Co., 55 M 401, 177 P 406 (1918), distinguished in Hamilton v. Rock, 121 M 245, 191 P2d 663 (1948).

CHAPTER 27
FORCIBLE ENTRY AND DETAINER UNLAWFUL DETAINER

Chapter Case Notes

Claimed Fraud Resulting in Benefit to Lessee — Summary Judgment Proper: Nentwig claimed fraud in failure by United Industry to renew her commercial lease. However, Nentwig received everything to which she would have been entitled under the lease in effect at the time the lease extension would have been signed, and in fact, rather than being damaged by the alleged fraud, she actually received benefits in the form of lower rent during the term of the lease. It was not error for the trial court to summarily dismiss the fraud claim based on the void option provision. Nentwig v. United Indus., Inc., 256 M 134, 845 P2d 99, 49 St. Rep. 1172 (1992).

Part 1
Definitions and Preliminary Procedure

Part Case Notes

Abandonment With Rent Due — Rights of Lessor: Tenant leased premises so his daughter could operate a store. At the end of August, the daughter held a going-out-of-business sale and the store closed September 1. The 5-year lease had not ended at that time. On September 8, the lessor notified the tenant that rent was delinquent, requested its payment, and stated that an attempt would be made to find another tenant. The lease stated that if the store was vacated and the rent was not paid the lessor could retake and rent the store and that the tenant was liable for the remainder of the rent due under the lease. Under the lease, the court upheld summary judgment granting the lessor rent for the remainder of the lease term and attorney fees. The lessor was entitled to reenter and relet and was not liable for forcible entry or unlawful detainer. LIC, Inc. v. Baltrusch, 215 M 44, 692 P2d 1264, 42 St. Rep. 162 (1985).

70-27-102. Forcible entry defined.

Case Notes

Changing of Locks by Lessor Not Considered Forcible Entry or Forcible Detainer: When lessee Anderson defaulted on rent, Grenfell sent a default notice by certified mail to Anderson's address as listed in the lease, but Anderson never picked up the letter, and it was returned to Grenfell as unclaimed. Nevertheless, after 11 days, Grenfell retook possession of the leased property, changed the locks, and filed suit, alleging breach of the lease agreement, unlawful detainer, and violation of the implied covenant of good faith and fair dealing. Anderson filed a counterclaim against Grenfell, alleging forcible entry and forcible detainer for changing the locks. The District Court denied the counterclaims, and Anderson appealed, but the Supreme Court affirmed. Grenfell broke nothing and entered the premises peaceably and without force, so no forcible entry occurred. Further, in Grenfell v. Anderson, 1999 MT 272, 296 M 474, 989 P2d 818 (1999), it was determined that changing the locks effectively terminated the lease. Thus, Anderson's counterclaim for forcible detainer also failed because once the lease was terminated, Anderson's obligations under the agreement ended as a matter of law and Anderson could no longer claim a legal right to reenter and repossess the property. Grenfell v. Anderson, 2002 MT 225, 311 M 385, 56 P3d 326 (2002).

Landlord Evicting Tenant: Where the right to possession of real property is in dispute, the owners thereof may not take the law into their own hands and proceed by violence to evict the lessee and take possession. In order to secure such possession, resort must be had to the peaceful process of law. Brown v. Grenz, 127 M 49, 257 P2d 246 (1953).

Breaking of Door: Within the meaning of the forcible entry statute any opening of a closed door involving the use of force, however slight, even with the use of a key, if done without the consent of the person actually and peaceably in possession, is to be regarded as breaking open the door. Herzog v. The Texas Co., 88 M 580, 294 P 962 (1930).

Remedy for Possession: The purpose of this chapter is to furnish a summary remedy to obtain possession of real property and to prevent even rightful owners from taking the law into their own hands and proceeding to recover possession by violence. Herzog v. The Texas Co., 88 M 580, 294 P 962 (1930); Spellman v. Rhode, 33 M 21, 81 P 395 (1905).

Right to Possession:

Since neither title to nor the right of possession of real property can be made an issue in an action for forcible entry and detainer, allegation of either in a complaint in an action of that nature before a Justice of the Peace may be treated as surplusage and the complaint, otherwise sufficient, upheld. Lambert v. Helena Adjustment Co., 69 M 510, 222 P 1057 (1924).

In an action for forcible entry under this section, neither the title nor the right to the possession of land may be made matters of investigation. Spellman v. Rhode, 33 M 21, 81 P 395 (1905).

Pleadings: A complaint alleging that plaintiff was in possession of certain described lands, engaged in cultivating them as a homestead settlement, and that defendant forcibly and without right entered thereon and by force and arms ejected plaintiff therefrom states a cause of action for a forcible entry under subsection (1) of this section. Spellman v. Rhode, 33 M 21, 81 P 395 (1905).

Subsequent Acts of Plaintiff: Acts of plaintiff subsequent to the entry are no defense, and his abandonment of the land subsequent to the wrong complained of does not justify the previous wrongful acts of defendant. Spellman v. Rhode, 33 M 21, 81 P 395 (1905).

70-27-103. Forcible detainer defined.

Case Notes

CASES DECIDED AFTER 1979 AMENDMENT

Sufficient Evidence of Force and Possession to Constitute Forcible Detainer — Treble Damages Proper: Savoy contended that there was insufficient evidence of force and possession to satisfy the definition of forcible detainer, so the award of treble damages was erroneous. Applying Grenfell v. Anderson, 2002 MT 225, 311 M 385, 56 P3d 326 (2002), the Supreme Court agreed with the District Court's conclusion that Savoy's actions in destroying fences around disputed land, digging ditches across disputed roads, denying plaintiffs and the Sheriff access to the disputed land, and calling the Sheriff to complain of trespass whenever plaintiffs attempted to access the disputed property satisfied the definition of force and possession sufficient to constitute forcible detainer, so a treble damage award was warranted. Harding v. Savoy, 2004 MT 280, 323 M 261, 100 P3d 976 (2004).

Changing of Locks by Lessor Not Considered Forcible Entry or Forcible Detainer: When lessee Anderson defaulted on rent, Grenfell sent a default notice by certified mail to Anderson's address as listed in the lease, but Anderson never picked up the letter, and it was returned to Grenfell as unclaimed. Nevertheless, after 11 days, Grenfell retook possession of the leased property, changed the locks, and filed suit, alleging breach of the lease agreement, unlawful detainer, and violation of the implied covenant of good faith and fair dealing. Anderson filed a counterclaim against Grenfell, alleging forcible entry and forcible detainer for changing the locks. The District Court denied the counterclaims, and Anderson appealed, but the Supreme Court affirmed. Grenfell broke nothing and entered the premises peaceably and without force, so no forcible entry occurred. Further, in Grenfell v. Anderson, 1999 MT 272, 296 M 474, 989 P2d 818 (1999), it was determined that changing the locks effectively terminated the lease. Thus, Anderson's counterclaim for forcible detainer also failed because once the lease was terminated, Anderson's obligations under the agreement ended as a matter of law and Anderson could no longer claim a legal right to reenter and repossess the property. Grenfell v. Anderson, 2002 MT 225, 311 M 385, 56 P3d 326 (2002).

Previous Possession Required: Plaintiff, d/b/a Starhaven Ranch, Ltd., purchased a ranch on a contract for deed from Crofts. Crofts had purchased the land on a contract basis from Clarnos. Crofts assigned their purchasers' interest in the contract to defendant. Crofts defaulted on a contract provision requiring them to obtain grazing permits and on their contract with Clarnos. Starhaven fell in default on its final downpayment. Crofts fell in default on the loan with defendant. The bank recorded the quitclaim deed from Crofts. The bank asserted it succeeded to the rights of the Croft-Starhaven contract and took action against Starhaven. Crofts disappeared. Starhaven made payment on the Clarno-Croft contract to prevent Clarnos from declaring a forfeiture. The bank asserted absolute ownership rights against Starhaven. The bank obtained the quitclaim deed Starhaven had executed to Crofts and recorded it. The bank then sent Starhaven a notice to vacate, triggering the proceedings. Starhaven refused to vacate. The trial court held Starhaven guilty of forcible detainer. On appeal, the Supreme Court held the trial court ignored the fact Starhaven had been in possession long before default on the downpayment and had obtained a temporary injunction entitling it to possession during the pendency of the proceedings. The bank was never in possession, so the elements of subsection (2) of this section were not present. No evidence of either force or threats of violence was presented. Neither the bank nor Crofts had a cause of action for forcible detainer. On rehearing, the court held that there were no facts in the record to support a finding of forcible detainer. Erickson v. First Nat'l Bank, 215 M 350, 697 P2d 1332, 42 St. Rep. 423 (1985).

Contract for Deed — Regaining Possession: The plaintiff entered into a contract to sell certain real property and an on-premises beer license. The contract was assigned to Borkoski. Borkoski allowed the beer license to be revoked and as a result was served with notice of default and cancellation of the contract. Plaintiff then brought an action for forcible detainer against Borkoski. On appeal, Borkoski argued that the summary proceeding of forcible detainer may not be used to recover property sold under contract for deed. The court distinguished Kransky v. Hensleigh, 146 M 486, 409 P2d 537 (1965), which held that an unlawful detainer action is proper only where there is a landlord-tenant relationship. The court said that Kransky applied only to actions brought under 70-27-108. The case at bar was brought under 70-27-103, and that section does not require a landlord-tenant relationship. The District Court did not commit error by allowing the forcible detainer action in this case. Kootenai Corp. v. Dayton, 184 M 19, 601 P2d 47 (1979).

CASES DECIDED BEFORE 1979 AMENDMENT

Evidence Before Justice: While actions to determine title to real estate are not triable in Justices' Courts, where title becomes important in determining the right of possession in forcible entry, forcible detainer, or unlawful detainer action, evidence thereof as an incident tending to show right to possession is admissible in such courts. State ex rel. Hamshaw v. Justice Court, 108 M 12, 88 P2d 1 (1939).

Pleadings:

An allegation in forcible detainer that defendant has unlawfully withheld possession by menaces and threats of violence and still unlawfully withholds possession of the property from plaintiff is a sufficient allegation of such facts. Kennedy v. Dickie, 27 M 70, 69 P 672 (1902).

Where the complaint in forcible detainer did not allege that defendant took possession in the night or in the absence of the owners, the action was under subsection (1) of this section, and the complaint was not invalid in failing to allege that plaintiff had been in peaceable and undisputed possession within 5 days before the entry of defendant; the plaintiff is not required to establish such fact either by subsection (1) of this section or by 70-27-203. Kennedy v. Dickie, 27 M 70, 69 P 672 (1902).

Under 70-27-103(1), a demand for possession is not essential to be alleged in a complaint which charges that the possession was peaceably acquired but is withheld unlawfully and by force. McCleary v. Crowley, 22 M 245, 56 P 227 (1899).

Verdict: In forcible detainer, a verdict is defective which fails to find that defendant detained the property. McCleary v. Crowley, 22 M 245, 56 P 227 (1899).

70-27-104. Tenancy at will — termination by notice.

Case Notes

Trust Indenture Foreclosure Sale — Waiver of Right to Notice: By executing a trust indenture and agreeing by one of its paragraphs to vacate the trust property on the 10th day following a foreclosure sale, the grantor named in the trust indenture waived any right to notice to vacate under this section. Rocky Mtn. Bank v. Stuart, 280 M 74, 928 P2d 243, 53 St. Rep. 1305 (1996).

Essential Terms: A letter between landlord and tenant was not an enforceable lease on which the tenant could bring a contract action because it failed to set forth material and essential terms necessary for the enforcement of the renewal provisions of a lease. Therefore, only a month-to-month lease existed. Drug Fair NW. v. Hooper Enterprises, Inc., 226 M 31, 733 P2d 1285, 44 St. Rep. 435 (1987).

State Action — Procedural Due Process — Contents of Notice: Where landlord has freedom to select tenants, receipt of federal benefits in the form of mortgage insurance and rent supplements does not make him an agency of federal government or State of Montana so as to require him to include in his 30-day notice of termination and notice to quit to tenant reasons which would amount to good cause and entitle tenant to a hearing to establish existence of good cause, even though tenant qualified to receive federal rent supplement, as no state action is involved. Flamm v. Real-Blt, Inc., 168 M 351, 543 P2d 190 (1975).

Notice to Surrender Possession: An action in unlawful detainer to recover possession of real property from a tenant at will cannot be maintained, under this section, 70-27-105, 70-27-106, and 70-27-108, without first terminating the tenancy by giving at least 30 days' notice in writing and after its termination, giving 3 days' notice to surrender possession. The complaint must show that both notices were given. Hence, where plaintiff alleged that the 30-day notice was given but failed to aver that the 3-day notice was likewise given, the complaint did not state a cause of action and the Justice's Court before which the action was brought was without jurisdiction to try the cause. Boucher v. St. George, 88 M 162, 293 P 315 (1930).

Notice of Change of Landlords: A notice to a tenant that at a day named a certain person would become his landlord and that he should "take due and timely notice and act accordingly" is not such a notice as is required by this section to be given by a landlord for purpose of terminating tenancy. Centennial Brewing Co. v. Rouleau, 49 M 490, 143 P 969 (1914).

Void Lease: One who enters into possession of real property under a lease rendered void by the Statute of Frauds becomes a tenant at will, which tenancy may be terminated by giving the notice prescribed by this section. Centennial Brewing Co. v. Rouleau, 49 M 490, 143 P 969 (1914).

Contract to Purchase: Mere occupancy of premises by defaulting vendee does not convert him into a tenant at will. To create the relation of landlord and tenant there must be a contract, express or implied. There cannot be an implied agreement for the occupancy of land, in face of an express contract that vendee holds possession under his right to purchase. Arnold v. Fraser, 43 M 540, 117 P 1064 (1911).

70-27-106. Reentry — when and how to be made.

Case Notes

Abandonment — Proper Mailed Notice of Lessor's Intent: Tenant leased a store so that his daughter could operate it. The daughter held a going-out-of-business sale and closed the store. Lessor mailed tenant a letter detailing the rent owed and lessor's intention to find a new tenant. The letter was proper notice of intent to reenter, since the written lease provided that a notice be mailed to a party at his post-office box number. LIC, Inc. v. Baltrusch, 215 M 44, 692 P2d 1264, 42 St. Rep. 162 (1985).

Abandonment — Repossession by Changing Locks: After a leased store held a going-out-of-business sale and closed, the manager of the shopping center the store was in entered the store to determine for lessor whether and how the premises were used. Thirteen days later the lessor changed the locks. Repossession occurred at that time and not when the shopping center manager entered. LIC, Inc. v. Baltrusch, 215 M 44, 692 P2d 1264, 42 St. Rep. 162 (1985).

70-27-108. Unlawful detainer defined.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Opinion Viability Affected by Amendment: Rules of cases decided under this section prior to July 1, 1979, may be affected by the 1979 amendment to 70-27-101, which added subsection (1) on applicability.

Case Notes

Lease Provision Precluding Recovery of Unpaid Rent Beyond Time of Repossession: Tenant Anderson defaulted on payment of a commercial lease, and lessor Grenfell changed the locks, effectively retaking possession of the property. The District Court awarded Grenfell unpaid rent and utilities, plus future rent, utilities, and penalties for the remaining term of the lease. Applying Knight v. OMI Corp., 174 M 72, 568 P2d 552 (1977), the Supreme Court held that in order for future liability for rent subsequent to the landlord's cancellation and repossession to accrue, the lease must contain clear language to that effect. Here, the lease provided that Grenfell could recover rent due up to the time of entry, but the award for unpaid rent and utilities beyond the time that Grenfell took repossession could not be sustained. Further, Grenfell's claim for unlawful detainer was also void because once locked out, Anderson could in no sense unlawfully detain the premises absent a showing of reentry. Grenfell v. Anderson, 1999 MT 272, 296 M 474, 989 P2d 818, 56 St. Rep. 1101 (1999). See also Gallatin Valley Medical Dental Center, Inc. v. Lemley, 206 M 241, 670 P2d 83, 40 St. Rep. 1622 (1983).

Grant of Equitable Relief From Forfeiture — Conditions: Defendant defaulted on a contract to operate a coal mine. The District Court granted summary judgment, finding no genuine issue of material fact regarding defendant's unlawful detainer. Defendant sought equitable relief pursuant to 28-1-104. The Supreme Court may, under appropriate circumstances, equitably relieve a party from the harsh effects of a forfeiture. Circumstances warranting equitable relief must not only meet the statutory requirements of tendering full compensation within a reasonable time after service of notice of default and not acting in a grossly negligent, willful, or fraudulent manner, but the party seeking relief must also assert facts that appeal to the conscience of the court of equity. Mere financial inability is not sufficient to appeal to the court's conscience. In this case, defendant's request for equitable relief was deficient because it did not meet statutory and common-law criteria, so the grant of summary judgment was affirmed. Glacier Park Co. v. Mtn., Inc., 285 M 420, 949 P2d 229, 54 St. Rep. 1222 (1997), following Kovacich v. Metals Bank &

Trust Co., 139 M 449, 365 P2d 639 (1961), distinguishing Parrott v. Heller, 171 M 212, 557 P2d 819 (1976), and followed in Weter v. Archambault, 2002 MT 336, 313 M 284, 61 P3d 771 (2002).

Construction — Provisions Relating to Agricultural Tenant Who Holds Over for More Than Sixty Days: The provisions of subsection (2) of this section relating to a tenant on agricultural land who holds over for more than 60 days apply only to a subsection (2) default in rent on agricultural lands and do not apply to a case under subsection (1) or (3) or to a subsection (2) case of a default in rent on nonagricultural lands. Cases to the contrary (cited in the opinion) are overruled. Rasmussen v. Lee, 276 M 84, 916 P2d 98, 53 St. Rep. 263 (1996).

No Right Under Terminated Agreements to Holdover Upon Land: Lee waived his right of first refusal, which had ripened when the owner considered an offer to buy. Lee refused to vacate the property after his lease terminated and the owner asked him to leave. In the owner's unlawful detainer action against Lee, the only obstruction to a sale was Lee's refusal to leave. One cannot benefit from one's own wrong, and Lee could not successfully claim that his possession was lawful under the agreement granting him the right of first refusal. Summary judgment for the owner was proper because the owner initially showed that there were no genuine issues of material fact, and Lee presented nothing to the contrary. Rasmussen v. Lee, 276 M 84, 916 P2d 98, 53 St. Rep. 263 (1996).

Unlawful Detainer Distinguished From Wrongful Occupation — Damages: Personal representative took possession of real property that had been sold under contract by the deceased owner and filed action to rescind the contract because of fraud, misrepresentation, undue influence, and unconscionability. The personal representative's claims were determined to be without merit in a prior appeal of this case. Buyers counterclaimed for recovery of lost rent, based on the personal representative's unlawful possession of the property. Both parties referred to the action as one for forcible or unlawful detainer. The court held that the action was properly described as one for wrongful occupation under 27-1-318. The court further held that, in contrast to damages provided in 70-27-205 for forcible or unlawful detainer, no treble damages are provided in an action for wrongful occupation. Westlake v. Osborne, 230 M 364, 750 P2d 444, 45 St. Rep. 277 (1988).

Unlawful Detainer — Right of Lessor With Unrecorded Title to Sue: Plaintiff leased land to defendants and assigned her interest in the land to a trust. The assignment was recorded. The trust later reassigned the interest back to plaintiff through an unrecorded quitclaim deed. Plaintiff sued defendants when they refused to vacate at the end of the lease. Record title and legal title are not synonymous, and plaintiff had valid legal title even though it was not record title. Recording has the purposes of giving notice to subsequent purchasers and encumbrancers and of establishing priority but has nothing to do with conveying title. Defendants' only interest in the property was a lease, and they were not within the scope of the recording statutes' protection. Plaintiff, contrary to defendants' claim, was the real party in interest, not the trust, and was entitled to bring the suit. The party with legal title is the real party in interest in real property disputes. Blakely v. Kelstrup, 218 M 304, 708 P2d 253, 42 St. Rep. 1601 (1985).

Allegation That Lessee Violated Implied Covenant Not to Create Nuisance on Leased Premises: Plaintiffs, owners of a building in which defendants, lessees, operated a bar, filed an unlawful detainer action against defendants pursuant to 70-27-108. Plaintiffs claimed that defendants, by allowing loud music and noise in the bar, were violating an implied covenant not to operate their bar in such a manner as to create a nuisance. The trial judge ruled that the lease could not be canceled under any theory of nuisance because defendants were doing what they had a right to do, operate a bar. On appeal, the Supreme Court ruled that because substantial credible evidence supported the District Court's finding that the bar was not being operated as a nuisance, it was unnecessary to determine whether Montana law recognizes in real property leases an implied covenant on the part of the lessee to use the leased premises so as not to injure the lessor by creating a nuisance. Martinson v. Thompson, 205 M 264, 667 P2d 423, 40 St. Rep. 1259 (1983).

Termination of Agricultural Lease — Removal of Holdover Tenant — Application of Unlawful Detainer Laws: Defendant sold plaintiff her property. The instrument contained a lease back to defendant of the buildings and 6 acres. Plaintiff gave notice that the lease was to terminate. Defendant refused to vacate. Plaintiff brought an action under the unlawful detainer statutes, which provide for an award of treble damages. Defendant contended the dispute was governed by the Montana Residential Landlord and Tenant Act of 1977. Plaintiff contended the lease was within the "agricultural" exclusion contained in 70-24-104(8). The lease provisions gave no indication of the nature of the buildings or of the intended use of the 6 acres. The trial court allowed the introduction of photographs and oral testimony regarding the lease, which established that the use of the land was for maintenance of defendant's livestock. The trial court properly allowed parol evidence to resolve an ambiguity in the lease. The Supreme Court determined that the legislative intent of 70-24-104 was for a comprehensive coverage of all agricultural operations, whether they are large-scale operations for profit or small-scale operations secondary to the use of the residence. The unlawful detainer provisions were properly applied. Dussault v. Hjelm, 192 M 282, 627 P2d 1237, 38 St. Rep. 738 (1981).

Unlawful Detainer by Tenant in Common — Amendment of Pleading Properly Denied: Where the plaintiff and her sister leased farmland they owned as tenants in common to the defendant for a 6-year period and the sister conveyed her interest in the property to the defendant shortly before the expiration of the lease, the court did not err, in an action by the plaintiff brought in 1974 for an accounting of rents and profits from the defendant, in refusing to allow the plaintiff to plead and prove an unlawful detainer against the defendant. Leave of court should not be granted to allow amendments that present theories totally inapplicable to the case. As a tenant in common is an owner of an undivided interest in the property, a claim of unlawful detainer may not be asserted against a cotenant, but only against a tenant for a term less than life. A cotenant is allowed to possess and use commonly held property, and an action will lie for waste but not unpermitted use. Fry v. Heble, 191 M 272, 623 P2d 963, 38 St. Rep. 228 (1981).

Contract for Deed — Regaining Possession: The plaintiff entered into a contract to sell certain real property and an on-premises beer license. The contract was assigned to Borkoski. Borkoski allowed the beer license to be revoked and as a result was served with notice of default and cancellation of the contract. Plaintiff then brought an action for forcible detainer against Borkoski. On appeal, Borkoski argued that the summary proceeding of forcible detainer may not be used to recover property sold under contract for deed. The court distinguished Kransky v. Hensleigh, 146 M 486, 409 P2d 537 (1965), which held that an unlawful detainer action is proper only where there is a landlord-tenant relationship. The court said that Kransky applied only to actions brought under 70-27-108. The case at bar was brought under 70-27-103, and that section does not require a landlord-tenant relationship. The District Court did not commit error by allowing the forcible detainer action in this case. Kootenai Corp. v. Dayton, 184 M 19, 601 P2d 47 (1979).

Option to Purchase as to Holdover Tenant: An option to purchase contained in an agreement for lease of agricultural lands does not carry over into a holdover tenancy. Upon expiration of the term of the lease, as specified in the lease agreement, the lessee became a holdover tenant and lost his right of first refusal, even though the holdover was by permission of the lessor. Nevala v. McKay, 178 M 327, 583 P2d 1065 (1978). See also Situ v. Smole, 2013 MT 33, 369 Mont. 1, 303 P.3d 747.

Term of Lease Modified: When an agricultural lease containing a provision for automatic renewal was modified to extend the original term of the lease, the modification constituted a new agreement as to the term of the lease, thus abrogating the automatic renewal provision. The lessee was rendered a holdover tenant upon expiration of the term of the lease as modified. Nevala v. McKay, 178 M 327, 583 P2d 1065 (1978).

Unlawful Detainer: When an agricultural tenant held over and received no notice to quit within 60 days, he was free from the action for unlawful detainer for the term of the previous lease, and since the plaintiff prayed for relief solely under the unlawful detainer statute, the court properly dismissed the action without discussing recovery of rent. Holliday Land & Livestock Co. v. Pierce, 174 M 393, 571 P2d 93 (1977), overruled in Rasmussen v. Lee, 276 M 84, 916 P2d 98, 53 St. Rep. 263 (1996), to the extent that it conflicts with Rasmussen's holding that the subsection (2) provisions of this section relating to a tenant on agricultural land who holds over for more than 60 days apply only to a subsection (2) default in rent on agricultural lands and do not apply to a case under subsection (1) or (3) or to a subsection (2) case of a default in rent on nonagricultural lands.

Lease Cancellation — Saving Clause: The general rule is that cancellation and reentry by the landlord terminates the lease agreement. A saving clause imposes a special liability on the tenant which would otherwise not exist but to have effect must be explicit as to the right reserved. Knight v. OMI Corp., 174 M 72, 568 P2d 552 (1977), followed in Grenfell v. Anderson, 1999 MT 272, 296 M 474, 989 P2d 818, 56 St. Rep. 1101 (1999).

State Action — Procedural Due Process — Contents of Notice: Where landlord has freedom to select tenants, receipt of federal benefits in the form of mortgage insurance and rent supplements does not make him an agency of federal government or State of Montana so as to require him to include in his 30-day notice of termination and notice to quit to tenant reasons which would amount to good cause and entitle tenant to a hearing to establish existence of good cause, even though tenant qualified to receive federal rent supplement, as no state action is involved. Flamm v. Real-Blt, Inc., 168 M 351, 543 P2d 190 (1975).

Agricultural Tenant Holding Over:

This section provides relief to the agricultural tenant from a forfeiture of crops because it requires a demand after holding over after the expiration of the lease term. Pipkin v. Connolly, 167 M 284, 538 P2d 347 (1975), overruled in Rasmussen v. Lee, 276 M 84, 916 P2d 98, 53 St. Rep. 263 (1996), to the extent that it conflicts with Rasmussen's holding that the subsection (2) provisions of this section relating to a tenant on agricultural land who holds over for more than 60 days apply only to a subsection (2) default in rent on agricultural lands and do not apply to a case under subsection (1) or (3) or to a subsection (2) case of a default in rent on nonagricultural lands.

Statute gives agricultural tenant right to hold over for no other purpose than to harvest crops and protect investment and does not mean that tenant can exercise option to purchase contained in expired lease. Miller v. Meredith, 149 M 125, 423 P2d 595 (1967), overruled in Rasmussen v. Lee, 276 M 84, 916 P2d 98, 53 St. Rep. 263 (1996), to the extent that it conflicts with Rasmussen's holding that the subsection (2) provisions of this section relating to a tenant on agricultural land who holds over for more than 60 days apply only to a subsection (2) default in rent on agricultural lands and do not apply to a case under subsection (1) or (3) or to a subsection (2) case of a default in rent on nonagricultural lands.

Expiration of Term of Lease — Right of First Refusal Provision: A provision in an agricultural lease which gives the lessees the right to meet any offer for the sale of the land is one which permits the cancellation of the lease upon sale by the lessor, after the lessee declines to exercise his right, since the lessor always has the right to sell the land, and in no other way can the presence of the clause be explained. Pipkin v. Connolly, 167 M 284, 538 P2d 347 (1975), overruled in Rasmussen v. Lee, 276 M 84, 916 P2d 98, 53 St. Rep. 263 (1996), to the extent that it conflicts with Rasmussen's holding that the subsection (2) provisions of this section relating to a tenant on agricultural land who holds over for more than 60 days apply only to a subsection (2) default in rent on agricultural lands and do not apply to a case under subsection (1) or (3) or to a subsection (2) case of a default in rent on nonagricultural lands.

Landlord-Tenant Relationship Required: An action for unlawful detainer can succeed only where the relation of landlord-tenant exists. Kransky v. Hensleigh, 146 M 486, 409 P2d 537 (1965).

Unlawful Ejectment: In case of unlawful ejectment, plaintiff, who had farmed land for 3 years, paying one-third of each crop as rent, was not a sharecropper but a tenant with an interest in the land for a term, and it was proper for the judge to instruct the jury that if plaintiff held without notice to quit more than 60 days after expiration of his term he was considered to be holding by permission of the defendant-landlords and not guilty of unlawful detainer. Kenfield v. Curry, 145 M 174, 399 P2d 999 (1965), overruled in Rasmussen v. Lee, 276 M 84, 916 P2d 98, 53 St. Rep. 263 (1996), to the extent that it conflicts with Rasmussen's holding that the subsection (2) provisions of this section relating to a tenant on agricultural land who holds over for more than 60 days apply only to a subsection (2) default in rent on agricultural lands and do not apply to a case under subsection (1) or (3) or to a subsection (2) case of a default in rent on nonagricultural lands.

Renewal of Lease Under Option: A stay should have been granted in unlawful detainer action by landlord pending determination of tenant's action against landlord for specific performance of alleged option to re-lease premises. Stanisich v. St. Highway Comm'n, 141 M 144, 375 P2d 1019 (1962).

Notice to Quit:

An action in unlawful detainer cannot be maintained under this section if the tenant is lawfully in possession under a tenancy from year to year as provided by 70-26-201 without first giving notice 30 days prior to the anniversary date of the tenancy as prescribed in 70-26-205. Roseneau Foods, Inc. v. Coleman, 140 M 572, 374 P2d 87 (1962).

Subsection (2) of this section, which provides that in the case of agricultural lands there must be a "demand of possession or notice to quit" if the tenant "retained possession for more than sixty days after the expiration of his term", does not apply where there is a failure to establish the term of an oral farm lease. Enott v. Hinkle, 140 M 206, 369 P2d 413 (1962), overruled in Rasmussen v. Lee, 276 M 84, 916 P2d 98, 53 St. Rep. 263 (1996), to the extent that it conflicts with Rasmussen's holding that the subsection (2) provisions of this section relating to a tenant on agricultural land who holds over for more than 60 days apply only to a subsection (2) default in rent on agricultural lands and do not apply to a case under subsection (1) or (3) or to a subsection (2) case of a default in rent on nonagricultural lands.

Whether notice that the deal for the sale of land was off and that if there was any further desire to buy or lease land they should see the party appointed to act as agent for the owner constituted a notice to quit was a question for the jury. Hamilton v. Rock, 121 M 245, 191 P2d 663 (1948), overruled in Rasmussen v. Lee, 276 M 84, 916 P2d 98, 53 St. Rep. 263 (1996), to the extent that it conflicts with Rasmussen's holding that the subsection (2) provisions of this section relating to a tenant on agricultural land who holds over for more than 60 days apply only to a subsection (2) default in rent on agricultural lands and do not apply to a case under subsection (1) or (3) or to a subsection (2) case of a default in rent on nonagricultural lands.

An action in unlawful detainer to recover possession of real property from a tenant at will cannot be maintained, under this section and 70-27-104 through 70-27-106, without first giving 3 days' notice to surrender possession, and the complaint must show that this notice was given. When plaintiff alleged that the 30-day notice terminating the tenancy, as formerly required, was given but failed to aver that the 3-day notice was likewise given, the complaint did not state a cause of action and the Justice's Court before which the action was brought was without jurisdiction to try the cause. Boucher v. St. George, 88 M 162, 293 P 315 (1930).

Change in Use of Building: Change in the use of a building by sublessee from a retail food store to a motor sales and garage did not amount to waste or destruction of building. Turman v. Safeway Stores, Inc., 132 M 273, 317 P2d 302 (1957).

Wrongful Eviction: Where owner, after giving notice under this section, commenced a course of action and conduct which forced the tenant from the premises, instead of filing a complaint as provided by 70-27-113, he was liable for wrongful eviction. Brown v. Grenz, 127 M 49, 257 P2d 246 (1953).

Agricultural Lands: The term "agricultural lands" as used in this section is to distinguish it from mining or urban property, and it includes land used for grazing purposes. Hamilton v. Rock, 121 M 245, 191 P2d 663 (1948), overruled in Rasmussen v. Lee, 276 M 84, 916 P2d 98, 53 St. Rep. 263 (1996), to the extent that it conflicts with Rasmussen's holding that the subsection (2) provisions of this section relating to a tenant on agricultural land who holds over for more than 60 days apply only to a subsection (2) default in rent on agricultural lands and do not apply to a case under subsection (1) or (3) or to a subsection (2) case of a default in rent on nonagricultural lands.

Lessee Unlawfully Detaining:

Where tenant from month to month refused to pay increased rental as required by statutory notice, landlords, by serving upon tenant 3 days' notice to pay the rent or deliver the premises, elected to treat him as a tenant from month to month, and by continuing in possession without paying the rent tenant became guilty of unlawful detainer. State ex rel. Needham v. Justice Court, 119 M 89, 171 P2d 351 (1946).

The complaint in an action for unlawful detainer, alleging a demand for possession unless the defendant pay the rent, his refusal to surrender, and his retention of the premises until he was compelled by legal process to give them up, impliedly set forth that the defendant's possession after such demand was without the plaintiff's permission and sufficiently characterized the action as for an unlawful detainer after default in the payment of rent. Bush v. Baker, 51 M 326, 152 P 750 (1915).

Quiet and Peaceable Possession: Quiet and peaceable possession by defendant for 1 year after default in payment of rent before suit for unlawful detainer did not defeat the action, though it was a good defense against forcible entry charges or forcible detainer action. Mahoney v. Lester, 118 M 551, 168 P2d 339 (1946).

Indian Lands: A lessee of Montana Indian lands continuing in possession after expiration of lease from the United States and after the land was leased to a new tenant lacked the permission necessary under this section where a new lease to him had not been approved as required by 25 U.S.C. 393, even though he met the highest bid, hence he was guilty of unlawful detainer and liable to tenant for three times rental value for such year. Stoltz v. U.S., 99 F2d 283 (9th Cir. 1938).

Corporate Directors' Liability: Under this section, directors of a corporation lessee, who united in refusing to surrender possession after the term and after default in payment of rent, may be joined as defendants and are individually liable, jointly and severally, for the damages awarded, and directors who did not join in such refusal need not be made parties. NW. Theatres Co. v. Hanson, 4 F2d 471 (9th Cir. 1925).

Rent Recovery: To support a recovery of rent in an action for unlawful detainer under subsection (2) of this section, plaintiff must establish and the jury must find that there had been an unlawful detainer. Bush v. Baker, 51 M 326, 152 P 750 (1915).

Holding Over After Term of Lease: In an action for unlawful detainer brought under this section, the complaint should allege specifically that the holding over is without the permission of the plaintiff or state facts sufficient to furnish a clear inference to that effect. Centennial Brewing Co. v. Rouleau, 49 M 490, 143 P 969 (1914).

Termination of Lease: The complaint in an action for unlawful detainer, brought under subsection (1) of this section, need not allege that plaintiff was entitled to the possession of the premises at the time of the commencement of the action or gave notice or demanded possession before bringing action. Centennial Brewing Co. v. Rouleau, 49 M 490, 143 P 969 (1914).

Assignment of Lease: The provision in this section against an assignment of the lease without the lessor's consent is for the benefit of the lessor. If, in case of such assignment, he fails to avail himself of the privilege of declaring the lease ended, he, by his inaction, waives the breach of the condition. Winslow v. Dundom, 46 M 71, 125 P 136 (1912).

Law Review Articles

Stare Decisis in Montana, Renz, 65 Mont. L. Rev. 41 (2004).

70-27-110. Service of notice — how made.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-27-111. Parties defendant.

Compiler's Comments

2011 Amendment: Chapter 19 in (1) in first sentence after "need" inserted "not"; in (4) after "premises" deleted "under the tenant"; and made minor changes in style. Amendment effective October 1, 2011.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-27-112. Applicability of general provisions on parties.

Case Notes

Unlawful Detainer — Right of Lessor With Unrecorded Title to Sue: Plaintiff leased land to defendants and assigned her interest in the land to a trust. The assignment was recorded. The trust later reassigned the interest back to plaintiff through an unrecorded quitclaim deed. Plaintiff sued defendants when they refused to vacate at the end of the lease. Record title and legal title are not synonymous, and plaintiff had valid legal title even though it was not record title. Recording has the purposes of giving notice to subsequent purchasers and encumbrancers and of establishing priority but has nothing to do with conveying title. Defendants' only interest in the property was a lease, and they were not within the scope of the recording statutes' protection. Plaintiff, contrary to defendants' claim, was the real party in interest, not the trust, and was entitled to bring the suit. The party with legal title is the real party in interest in real property disputes. Blakely v. Kelstrup, 218 M 304, 708 P2d 253, 42 St. Rep. 1601 (1985).

70-27-113. Complaint and summons.

Compiler's Comments

1999 Amendment: Chapter 231 at end of (2) after "cases" deleted "returnable at a date designated therein, which shall not be less than 4 days or more than 12 days from its date"; and made minor changes in style. Amendment effective October 1, 1999.

70-27-114. Summons — contents — service.

Compiler's Comments

1999 Amendment: Chapter 231 at end of (1)(a) after "sought" deleted "and also the return day"; in (1)(b) after "within" substituted "10 days of service" for "the time designated"; in (2) after "defendant" deleted "and be served at least 4 days before the return day designated therein"; deleted former second sentence in (3) that read: "The complaint need not be served"; and made minor changes in style. Amendment effective October 1, 1999.

70-27-117. Judgment by default.

Compiler's Comments

1999 Amendment: Chapter 231 at beginning after "If" deleted "at the time appointed" and after "defend" inserted "within 10 days of service"; and made minor changes in style. Amendment effective October 1, 1999.

Part 2
Trial, Judgment, and Appeal

70-27-203. Showings required on trial.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Property Boundary Properly Established Following Accretion and Avulsion of River: The District Court found that the meander channel of the Sun River between plaintiffs' and one defendant's property moved south by accretion from where it was depicted in a 1906 government survey into a channel depicted in a 1937 aerial photograph and that the channel moved north by avulsion to its present channel in 1916. The court further concluded that the Sun River between plaintiffs' and another defendant's property also moved north by avulsion in 1948. The record amply supported the 1906 accretion that created the lots in question, at which time the property boundary moved with the water line. However, when the river avulsed to its present location in 1916, the property boundary did not move. Likewise, when the river avulsed north in 1948, the property boundary also did not move, so the District Court properly determined the boundaries between the lots after considering the avulsion and accretion of the river, and judgment was affirmed. Harding v. Savoy, 2004 MT 280, 323 M 261, 100 P3d 976 (2004).

Proof Required of Plaintiff:

Under this section, plaintiff in a forcible entry action is required only to show, in addition to a forcible entry of the premises, that he was peaceably in the actual possession thereof at the time of the forcible entry. Herzog v. The Texas Co., 88 M 580, 294 P 962 (1930).

If the object of the action is to obtain the remedy for a forcible entry, the proof required by this section is twofold, namely, proof of the forcible entry, as defined in 70-27-102, and proof that the plaintiff "was peaceably in the actual possession at the time of the forcible entry". If the purpose of the action is to obtain relief from a forcible detainer, proof must be made, under this section, of the forcible detainer, as defined in 70-27-103, and of the plaintiff's right to the possession at the time of the forcible detainer. Kennedy v. Dickie, 27 M 70, 69 P 672 (1902).

Quiet Possession by Defendant: A complaint in forcible detainer, showing that defendant has been in possession of the property for over a year, is not bad, as showing a defense within this section, unless it also shows such possession to have been quiet. Kennedy v. Dickie, 27 M 70, 69 P 672 (1902).

Nature of Proceeding: The action for forcible entry and detainer is quasi-criminal. Sheehy v. Flaherty, 8 M 365, 20 P 687 (1889).

70-27-205. Verdict, judgment, and execution.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Award of Restitution and Emotional Distress Damages for Forcible Detainer: The District Court awarded plaintiffs restitution and damages for emotional distress for defendant's forcible detainer. Defendant contended that under 27-1-318, plaintiffs were only entitled to the fair rental value of any land that was wrongfully occupied. The Supreme Court disagreed. Once forcible detainer is proved, damages are recoverable under this section, and 27-1-318 does not apply. In deciding whether emotional distress damages, damages for lost profits, and incidental damages are recoverable under this section, the court relied on San Francisco v. Suburban Home Bldg. Soc'y, 119 P 405 (Calif. 1911), and 36A C.J.S. Forcible Entry and Detainer 60 (2003), in holding that damages that are the natural and proximate consequence of a forcible detainer, including the damages in this case, were recoverable. Harding v. Savoy, 2004 MT 280, 323 M 261, 100 P3d 976 (2004).

No Equitable Exception to American Rule for Parties Forced to Bring Suit to Determine Legal Rights Against Party Presenting Frivolous Defense in Bad Faith: Plaintiffs in a forcible detainer action contended that they should be granted attorney fees as an exception to the American Rule that a party in a civil action is not entitled to attorney fees absent a specific contractual or statutory grant of those fees because plaintiffs were forced to bring a lawsuit to determine their legal property rights against a defendant who presented a frivolous defense asserted in bad faith. The District Court declined to award attorney fees, and on appeal, the Supreme Court affirmed, noting that a malicious or bad faith equitable exception to the American Rule has consistently been denied and that the exception in Langemeier v. Kuehl, 2001 MT 306, 307 M 499, 40 P3d 343 (2001), did not apply. Harding v. Savoy, 2004 MT 280, 323 M 261, 100 P3d 976 (2004).

Unlawful Detainer Distinguished From Wrongful Occupation — Damages: Personal representative took possession of real property that had been sold under contract by the deceased owner and filed action to rescind the contract because of fraud, misrepresentation, undue influence, and unconscionability. The personal representative's claims were determined to be without merit in a prior appeal of this case. Buyers counterclaimed for recovery of lost rent, based on the personal representative's unlawful possession of the property. Both parties referred to the action as one for forcible or unlawful detainer. The court held that the action was properly described as one for wrongful occupation under 27-1-318. The court further held that, in contrast to damages provided in 70-27-205 for forcible or unlawful detainer, no treble damages are provided in an action for wrongful occupation. Westlake v. Osborne, 230 M 364, 750 P2d 444, 45 St. Rep. 277 (1988).

Tenant Default — Not "Expiration by Its Own Terms": Defendant entered a 5-year lease with plaintiff for office space. Defendant failed to make monthly rental payment, and plaintiff sent a notice of default followed by a notice to quit. When defendant refused to give up the premises, plaintiff filed an unlawful detainer action. The trial court held that, since plaintiff had followed the procedures set out in the lease upon tenant's default, the lease had terminated according to its terms and defendant was not entitled to relief from forfeiture or relief from hardship. On appeal, the Supreme Court reversed, distinguishing between a lease which has expired under its terms from one which terminated for default on rental payments. The court held that since this was a 5-year lease, the lease would not "expire" until 5 years from the date entered into. The lease contained provisions allowing it to be "terminated" according to its terms for default in rental payment. The court held that this section recognizes such a distinction. The tenant was therefore within the protection of the statutes offering relief from forfeiture and hardship because the lease had not by its terms expired. Grand Co. v. Jim Slack & Assoc., Inc., 212 M 149, 687 P2d 683, 41 St. Rep. 1654 (1984).

Judicial Proceedings Required: Unlawful detainer and statutory treble damages awarded pursuant to a finding of unlawful detainer are not viable remedies available to a plaintiff/lessor until either expiration of the lease term with a finding of the lessee's wrongful holding over or termination of the lease agreement and forfeiture are established by judicial proceedings. Mont. Williams Double Diamond Corp. v. Hill, 175 M 248, 573 P2d 649 (1978).

Treble Damages:

This section, authorizing judgment to be rendered against defendant guilty of unlawful detainer for three times the amount of damages assessed and of rent found due, is mandatory, imposing duty on trial court to treble amount of damages assessed and amount of rent found due. State ex rel. Needham v. Justice Court, 119 M 89, 171 P2d 351 (1946).

The words "of the damages thus assessed, and of the rent found due" obviously constitute two separate and coordinate prepositional phrases connected by the word "and", the antecedent of both phrases being the noun "amount". The amount which must be trebled in the judgment includes rent as well as damages, the court having no discretion in the matter. Steinbrenner v. Love, 113 M 466, 129 P2d 101 (1942).

In an action in unlawful detainer by the United States against a lessee of Montana Indian lands continuing in possession after expiration of lease and after the land was leased to a new tenant, judgment was authorized, under this section, "for three times the amount of the damages" which are by 27-1-318 "the value of the use of the property for the time of" the occupation by appellant. The latter statute has been construed to mean that "the value of the use of the property" may be measured by the rental value. Stoltz v. U.S., 99 F2d 283 (9th Cir. 1938).

When an unlawful detainer has been proven and damages have been awarded, the trial court has not any discretion under this section but must render judgment for treble the amount of the award. Centennial Brewing Co. v. Rouleau, 49 M 490, 143 P 969 (1914).

Res Judicata: Where, in an unlawful detainer action, a tenant was adjudged to have no right or interest in the property, his wife, whose right to possession was predicated upon that of her husband, had no more right than he had, and in her action against the landlord for assault and battery arising out of the matter of possession was bound by the effect of the judgment though she was not a party to the unlawful detainer action. Vaughn v. Mesch, 107 M 498, 87 P2d 177, 123 ALR 1106 (1939).

Instructions to Jury: Since the province of the jury in an action for forcible entry goes no further than the ascertainment of the amount of the actual damages sustained by plaintiff, and this section makes it the duty of the court to treble that amount in entering judgment, a matter with which the jury is not concerned, refusal to instruct the jury that any amount found by it in favor of the plaintiff would be multiplied by three or to permit counsel for defendant to call the statutory provision relating thereto to their attention in argument was not error. Herzog v. The Texas Co., 88 M 580, 294 P 962 (1930).

Municipal Defendant: A municipal corporation, such as a county, being no more than a political subdivision of the state for governmental purposes, cannot be subjected to a penal liability, and therefore an action for treble damages for unlawful detainer does not lie. Sullivan v. Big Horn County, 66 M 45, 212 P 1105 (1923).

Recovery Interdependent: In proceedings for unlawful detainer, three things are recoverable, namely, rents, restitution of the premises, and damages. While the recovery of all these is dependent on the fact of the unlawful detainer, they are dependent on each other. Bush v. Baker, 51 M 326, 152 P 750 (1915).

Findings to Support Judgment: A money judgment in forcible detainer is not sustained by a verdict which fails to find that defendant detained the property, since under this section, damages may be assessed only when occasioned by forcible detainer. McCleary v. Crowley, 22 M 245, 56 P 227 (1899).

70-27-206. Treble damages.

Case Notes

Sufficient Evidence of Force and Possession to Constitute Forcible Detainer — Treble Damages Proper: Savoy contended that there was insufficient evidence of force and possession to satisfy the definition of forcible detainer, so the award of treble damages was erroneous. Applying Grenfell v. Anderson, 2002 MT 225, 311 M 385, 56 P3d 326 (2002), the Supreme Court agreed with the District Court's conclusion that Savoy's actions in destroying fences around disputed land, digging ditches across disputed roads, denying plaintiffs and the Sheriff access to the disputed land, and calling the Sheriff to complain of trespass whenever plaintiffs attempted to access the disputed property satisfied the definition of force and possession sufficient to constitute forcible detainer, so a treble damage award was warranted. Harding v. Savoy, 2004 MT 280, 323 M 261, 100 P3d 976 (2004).

Termination of Agricultural Lease — Removal of Holdover Tenant — Application of Unlawful Detainer Laws: Defendant sold plaintiff her property. The instrument contained a lease back to defendant of the buildings and 6 acres. Plaintiff gave notice that the lease was to terminate. Defendant refused to vacate. Plaintiff brought an action under the unlawful detainer statutes, which provide for an award of treble damages. Defendant contended the dispute was governed by the Montana Residential Landlord and Tenant Act of 1977. Plaintiff contended the lease was within the "agricultural" exclusion contained in 70-24-104(8). The lease provisions gave no indication of the nature of the buildings or of the intended use of the 6 acres. The trial court allowed the introduction of photographs and oral testimony regarding the lease, which established that the use of the land was for maintenance of defendant's livestock. The trial court properly allowed parol evidence to resolve an ambiguity in the lease. The Supreme Court determined that the legislative intent of 70-24-104 was for a comprehensive coverage of all agricultural operations, whether they are large-scale operations for profit or small-scale operations secondary to the use of the residence. The unlawful detainer provisions were properly applied. Dussault v. Hjelm, 192 M 282, 627 P2d 1237, 38 St. Rep. 738 (1981).

Judicial Proceedings Required: Unlawful detainer and statutory treble damages awarded pursuant to a finding of unlawful detainer are not viable remedies available to a plaintiff/lessor until either expiration of the lease term with a finding of the lessee's wrongful holding over or termination of the lease agreement and forfeiture are established by judicial proceedings. Mont. Williams Double Diamond Corp. v. Hill, 175 M 248, 573 P2d 649 (1978).

70-27-207. Holdover or collusion after notice — treble rent.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Punitive Damages Not Allowed for Breach of Commercial Lease: The lower court determined that the tenant, Rogers, had remained in possession of the property for 6 days for which he owed rent in the amount of $95.85. The court awarded the landlord treble damages in the amount of $95.85 x 3 and $95.85 as rent for the 6-day period. The Supreme Court ruled that the landlord was entitled to only $95.85 x 3 and was not entitled to the additional $95.85. The Supreme Court also held that the additional $95.85 could not be characterized as exemplary damages because exemplary damages are punitive in nature and punitive damages cannot be given for a breach of contract. Sage v. Rogers, 257 M 229, 848 P2d 1034, 50 St. Rep. 244 (1993).

Unlawful Detainer — Right of Lessor With Unrecorded Title to Sue: Plaintiff leased land to defendants and assigned her interest in the land to a trust. The assignment was recorded. The trust later reassigned the interest back to plaintiff through an unrecorded quitclaim deed. Plaintiff sued defendants when they refused to vacate at the end of the lease. Record title and legal title are not synonymous, and plaintiff had valid legal title even though it was not record title. Recording has the purposes of giving notice to subsequent purchasers and encumbrancers and of establishing priority but has nothing to do with conveying title. Defendants' only interest in the property was a lease, and they were not within the scope of the recording statutes' protection. Plaintiff, contrary to defendants' claim, was the real party in interest, not the trust, and was entitled to bring the suit. The party with legal title is the real party in interest in real property disputes. Blakely v. Kelstrup, 218 M 304, 708 P2d 253, 42 St. Rep. 1601 (1985).

Purchaser at Void Foreclosure Sale Held Not Liable in Treble Damages in Absence of Notice: Where a mortgagee bank purchased the property at foreclosure sale, void because the mortgage was subsequently declared void, and during the time it had possession received some income therefrom, such income may be deducted from its claim against the estate for money it loaned it to pay costs of administration, for which debt the mortgage had been given to secure the loan, but could not be held for treble damages under this section for "holding over" in the absence of proof of the required notice. The court did not find it necessary to consider the feasibility of whether appellant's landlord-tenant theory applies to purchasers under void foreclosure sales. In re Anderson's Estate, 113 M 125, 122 P2d 832 (1942).

70-27-208. Holdover after tenant's notice to quit — treble rent.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-27-209. Treble rent exclusive of interest.

Case Notes

Punitive Damages Not Allowed for Breach of Commercial Lease: The lower court determined that the tenant, Rogers, had remained in possession of the property for 6 days for which he owed rent in the amount of $95.85. The court awarded the landlord treble damages in the amount of $95.85 x 3 and $95.85 as rent for the 6-day period. The Supreme Court ruled that the landlord was entitled to only $95.85 x 3 and was not entitled to the additional $95.85. The Supreme Court also held that the additional $95.85 could not be characterized as exemplary damages because exemplary damages are punitive in nature and punitive damages cannot be given for a breach of contract. Sage v. Rogers, 257 M 229, 848 P2d 1034, 50 St. Rep. 244 (1993).

70-27-210. Relief against forfeiture of lease in case of hardship.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Tenant Default — Not "Expiration by Its Own Terms": Defendant entered a 5-year lease with plaintiff for office space. Defendant failed to make monthly rental payment, and plaintiff sent a notice of default followed by a notice to quit. When defendant refused to give up the premises, plaintiff filed an unlawful detainer action. The trial court held that, since plaintiff had followed the procedures set out in the lease upon tenant's default, the lease had terminated according to its terms and defendant was not entitled to relief from forfeiture or relief from hardship. On appeal, the Supreme Court reversed, distinguishing between a lease which has expired under its terms from one which terminated for default on rental payments. The court held that since this was a 5-year lease, the lease would not "expire" until 5 years from the date entered into. The lease contained provisions allowing it to be "terminated" according to its terms for default in rental payment. The court held that 70-27-205 itself recognizes such a distinction. The tenant was therefore within the protection of the statutes offering relief from forfeiture and hardship because the lease had not by its terms expired. Grand Co. v. Jim Slack & Assoc., Inc., 212 M 149, 687 P2d 683, 41 St. Rep. 1654 (1984).

CHAPTER 28
QUIETING TITLE TO REAL PROPERTY

Chapter Case Notes

Public Trust Exception: Because it holds land in public trust and it failed to comply with statutory requirements for land sales, the Department of Highways (now Department of Transportation) was without authority to make the sale of land. The deed derived from the sale without authority was held void. Therefore, the Department of Highways (now Department of Transportation) cannot be estopped from denying the validity of the deed. Norman v. St., 182 M 439, 597 P2d 715 (1979).

Chapter Law Review Articles

Tax Titles in Montana, Swenson, 20 Mont. L. Rev. 73 (1958).

Part 1
Quieting Title Generally

Part Case Notes

Action to Quiet Title in Mining Company Shares — Credible Evidence of Outstanding Shares — District Court Upheld: Safronoff and others were defendants in an action to quiet title to outstanding shares of the defunct Sun Mining, Inc., which was involuntarily dissolved by the state. The District Court reviewed all of the evidence before it, including a list of outstanding shares prepared by Sun Mining's secretary-treasurer shortly before the company was dissolved, the number of shares held by each shareholder according to each shareholder's stock certificate, and oral testimony, and found that the secretary-treasurer's list was the only credible evidence. Safronoff appealed the decision of the District Court, contending that he should have been awarded additional shares. Relying upon Interstate Prod. Credit Ass'n v. DeSaye, 250 M 320, 820 P2d 1285 (1991), and St. v. Bower, 254 M 1, 833 P2d 1106 (1992), the Supreme Court applied the "clearly erroneous" standard to the District Court's findings of fact and held that although there were conflicts in the evidence before it, the District Court reasonably relied upon this evidence and that the District Court's findings of fact were not clearly erroneous. Duncan v. Allen, 1998 MT 316, 292 M 180, 970 P2d 1036, 55 St. Rep. 1296 (1998).

Transfer of Land to Corporation or Trust in Which Grantor Has Interest — Color of Title Not Created: Relying on St. v. King, 87 SE 167 (W. Va. 1915), and St. v. Altizer Coal Land Co., 128 SE 286 (W. Va. 1925), the Supreme Court held that a grantor cannot create color of title in land in which that grantor has no interest by transferring or deeding the land to a corporation or trust in which that grantor has an interest. Y A Bar Livestock Co. v. Harkness, 269 M 239, 887 P2d 1211, 51 St. Rep. 1517 (1994).

Defense of Laches to Quiet Title Action Unavailable Without Valid Claim to Royalty: Defendants in an action to quiet title to a royalty interest raised the defense of laches. The Supreme Court held that laches is a question of the inequity that would result if a claim were to be permitted to be enforced. Because the defendants had always held their title subject to the plaintiffs' royalty interest, no inequity would result if the plaintiffs' claim was enforced. Because the defendants lacked a valid claim to the royalty, the court also held that the defendants lacked standing to assert the defense of laches. Stanford v. Rosebud County, 251 M 128, 822 P2d 1074, 48 St. Rep. 1124 (1991).

Failure to Set Forth Facts Showing Nonresidence — Defective Affidavit for Publication — Quiet Title Actions Void: Plaintiffs brought an action against Rosebud County, claiming that they were entitled to a royalty interest in certain property. The Supreme Court held two previous quiet title actions void because complete service was not achieved under the law (now repealed) that provided for service by publication since in each action, an affidavit was required to show that the defendant resided out of state. Citing Aronow v. Anderson, 110 M 484, 104 P2d 104 (1940), the Supreme Court held that the affidavit in this case was insufficient because it failed to recite the facts supporting the conclusion that the defendant resided out of state and failed to allege the facts describing the search for the defendant. The quiet title actions were thus void for lack of jurisdiction. Stanford v. Rosebud County, 251 M 128, 822 P2d 1074, 48 St. Rep. 1124 (1991).

Federal Statute of Limitations Barring Administrative Suit for Tax Refund: The Supreme Court cited applicable federal law in holding that the 2-year federal statute of limitations barred the bringing of an administrative suit for a refund of taxes 10 years after notice of a tax deficiency was sent. Absent any facts or legitimate contentions to the contrary, the District Court's order granting partial summary judgment quieting title was affirmed. Getter v. Beckman, 236 M 377, 769 P2d 714, 46 St. Rep. 440 (1989).

Jury Trial Not Mandatory in Quiet Title Action: Because quiet title actions are actions in equity, a District Court may impanel an advisory jury but is not required to do so. Getter v. Beckman, 236 M 377, 769 P2d 714, 46 St. Rep. 440 (1989).

Equitable Easement — No Basis for Finding: The plaintiff purchased lakefront property with knowledge that the defendants' summer cabin encroached on the plaintiff's land. The plaintiff sued to quiet title and have the defendants' cabin removed. The District Court granted summary judgment for the defendants and found that the defendants had an equitable easement to keep the building on the land. On appeal, the Supreme Court found that no formerly recognized common equitable theories for the creation of easements support the District Court's finding and that the development of a new doctrine of "relative hardship" is inappropriate on a motion for summary judgment. The Supreme Court reversed and remanded for trial. Penland v. Derby, 220 M 257, 714 P2d 158, 43 St. Rep. 342 (1986).

Intent — Necessary to Abandon Easement: Defendant had a reservoir right-of-way under 43 U.S.C. §§ 946 through 949. The reservoir site was used as a reservoir from 1910 until 1938, when the dam creating the reservoir washed out. Defendant rebuilt the dam in 1976, and the resulting reservoir flooded portions of plaintiff's field in times of heavy runoff. Plaintiff brought a quiet title action. The District Court found that the reservoir right-of-way had been abandoned. The Supreme Court found that the reservoir right-of-way was properly characterized as an easement. The rule in Montana is that in order to constitute an abandonment, an intent to abandon is necessary. The court held that mere nonuse of an easement by grant, no matter how long, does not constitute an abandonment. The question of whether 38 years of nonuse constituted forfeiture of the right-of-way could only be raised by the grantor, the United States. The District Court was reversed. Eggebrecht, Inc. v. Waters, 217 M 291, 704 P2d 422, 42 St. Rep. 1205 (1985).

Adverse Possession — Color of Title — Good Faith: The burden of proving adverse possession under color of title is on the defendant in a quiet title action. Under Montana law, an instruction which purports to convey land or the right to its possession is sufficient color of title as a basis for adverse possession if the claim is made in good faith. When a party's "title" was based on a quitclaim deed from an individual who was known by all parties concerned to have no interest whatsoever in the property, the court concluded that there was not a trace of good faith and no color of title. Further, the party asserting adverse possession must succeed on the strength of his own title and cannot rely on the weakness of his adversary. Russell Realty Co. v. Kenneally, 185 M 496, 605 P2d 1107 (1980), followed in Y A Bar Livestock Co. v. Harkness, 269 M 239, 887 P2d 1211, 51 St. Rep. 1517 (1994).

Quiet Title — Collateral Attack on Judgment — Reasonable Diligence — Invalid Service — Jurisdiction: While it is a general rule that a judgment cannot be attacked in a collateral action, such attack is permissible if the first judgment is void for lack of jurisdiction. If service of process is improperly made, the court acquires no jurisdiction over that party and that party may collaterally attack the judgment. "Reasonable diligence" was not used by appellants in the prior action to locate individuals to be served under former Rule 4D(2)(f), M.R.Civ.P. (now superseded), because they had dealt with such individuals before and should have been able to contact them, and the Secretary of State had the names and addresses of the corporate agent and director on file. Therefore, service upon the Secretary of State did not confer jurisdiction and collateral attack was proper. Russell Realty Co. v. Kenneally, 185 M 496, 605 P2d 1107 (1980).

Quiet Title Action — Punitive Damages and Attorney Fees Awards: Lack of good faith in an adverse possession case will not necessarily support a punitive damages award for slander of title. Testimony of failure to recognize the opposing party in a quiet title action from a previous business transaction and of reliance on the Secretary of State's information that the party corporation had no registered agent for service of process, although part of the determination of a lack of good faith, was sufficient to rebut an allegation of malice as required for the award of punitive damages. There being no statutory or contractual provision for attorney fees in this case, a common-law exception would be required for such an award. Without proof that the defendant acted fraudulently, maliciously, or with bad faith toward the plaintiff in a quiet title action, attorney fees will not be awarded. A decision denying attorney fees will not be disturbed absent abuse of discretion by the trial court. Russell Realty Co. v. Kenneally, 185 M 496, 605 P2d 1107 (1980).

70-28-101. Quiet title action authorized.

Case Notes

Conflicting Property Rights — Surface and Subsurface Rights Included in Mining Patent — Acquired Interest Through Homestead Act Defeated by Earlier Patent: The defendant owned real property received through a homestead patent and the plaintiffs owned patents to mineral claims located within the boundaries of the defendant's property. The plaintiffs filed a quiet title action for the surface rights of their mineral claims. Because the location of the mining claims on the property predated the acquisition of the real property by homestead patent, the District Court granted summary judgment in favor of the plaintiffs. The defendant appealed. Because the mining patents predated the homestead patent, the Supreme Court affirmed, concluding that the mining patent included the surface rights to the property as well as the subsurface rights. Hansard Mining, Inc. v. McLean, 2014 MT 199, 376 Mont. 48, 335 P.3d 711.

Existence of Adverse Claim — Justification for Bringing, Not Precluding, Quiet Title Action: In a dispute over an easement by reservation, the defendants asserted that the plaintiff's complaint should be dismissed under principles of equity because the plaintiff had notice of the adverse claims against its right of access at the time of purchase. The Supreme Court disagreed, noting that the plaintiff sought a determination of its rights to the property described in the plat in dispute, rather than a decree concerning the plaintiff's use of roads in the neighboring subdivision. The court concluded that the plat adequately described an easement for the benefit of the plaintiff's property, and the defendants' belief that the easement was invalid did not constitute an equitable basis to preclude the plaintiff's action, even if the plaintiff knew of the defendants' position. Yorlum Properties, Ltd. v. Lincoln County, 2013 MT 298, 372 Mont. 159, 311 P.3d 748.

Assertion of Ownership Interest Sufficient to Confer Standing: In a federal action, an alleged adjacent landowner's assertion of title to the centerline of an abandoned railroad right-of-way constituted a sufficient stake to confer standing under Montana law for purposes of a declaratory judgment and quiet title claim. Avista Corp. Inc. v. Wolfe, 549 F3d 1239 (9th Cir. 2008).

State Court Jurisdiction Over Real Property Dispute Involving Federal Easement: A public lands access group sued Jones for blocking access to public lands that were previously accessible via a road across Jones's land. When the access group subsequently discovered that the federal Bureau of Reclamation had an express, nonexclusive easement over the road for irrigation and maintenance purposes since the road was constructed, the Bureau was joined as a party defendant. The Bureau and the access group then entered an agreement acknowledging the Bureau's easement, recognizing that the Bureau had never blocked public access to the road, and dismissing the Bureau from the suit. Jones then moved to dismiss the suit on grounds that the access group's claim for a prescriptive easement raised a dispute in title between the group and the United States and that because federal courts have exclusive jurisdiction over such title disputes under the federal Quiet Title Act (FQTA), 28 U.S.C. 2409, et seq., the state District Court lacked subject matter jurisdiction and personal jurisdiction over the claim, so the claim could not proceed in state court. The District Court agreed and dismissed the claim with prejudice. The access group appealed, and the Supreme Court reversed. The United States, through the Bureau, had been named as a defendant, knowingly and expressly disavowed a dispute in title between the Bureau and the access group, and agreed to be voluntarily dismissed from the suit. Therefore, a disputed title between the access group and the federal agency, which is required for jurisdiction under the FQTA, did not exist, nor did Jones provide any authority for the proposition that a defendant in a property dispute can assert a property interest of the United States under the FQTA in order to remove the cause of action to federal District Court. Jones failed to establish that the FQTA applied in this case, so the District Court did have subject matter jurisdiction over the action against Jones, and the action was remanded to District Court for further proceedings. Pub. Lands Access Ass'n, Inc. v. Jones, 2008 MT 12, 341 M 111, 176 P3d 1005 (2008). See also Leisnoi, Inc. v. U.S., 170 F3d 1188 (9th Cir. 1999).

Jurisdiction of Justice's Court in Landlord-Tenant Action — Failure to Timely Assert Quiet Title Action Constituting Waiver of Jurisdictional Claim: Plaintiffs filed an action in Justice's Court to enforce a rental contract that defendant allegedly violated. Both parties initially argued that the case was governed by landlord-tenant law, but defendant subsequently argued in District Court that the case was actually an action to quiet title in a life estate granted to defendant by the contract and that because Justice's Courts may not hear actions concerning title to real property, the Justice's Court did not have subject matter jurisdiction to hear the case. The District Court concluded that the Justice's Court had jurisdiction, and on appeal, the Supreme Court concurred. Plaintiffs' pleadings established that the action was based on landlord-tenant law, and the Justice's Court therefore had subject matter jurisdiction at the onset. If defendant had raised the quiet title action in a proper and timely manner, the Justice's Court could have been divested of jurisdiction, but because defendant did not raise the title question in answer to the pleadings or in a timely amended answer, the Supreme Court held that the question was waived, and the District Court was affirmed. Stanley v. Lemire, 2006 MT 304, 334 M 489, 148 P3d 643 (2006).

Proper Relief in Quiet Title Action: After deciding that defendants were entitled to quiet and peaceful possession of a disputed piece of property, the District Court ordered that an old certificate of survey be removed from county records and that a new instrument be prepared that described accurate boundaries. Plaintiff appealed, but the Supreme Court affirmed. After the correct boundary was determined, there was no justification for not quieting title in defendants' favor and no reason for retaining an erroneous plat in the county records. The relief was therefore appropriate. Olson v. Jude, 2003 MT 186, 316 M 438, 73 P3d 809 (2003).

No Obligation to Extinguish Lien Until Debt Fully Satisfied — Summary Dismissal of Action for Slander of Title Proper: Following a business default, defendant sought to enforce a lease agreement and received a judgment in Justice's Court for $7,156.56, including interest. In an effort to satisfy the judgment, plaintiff's wife paid $7,121.14. Plaintiff later attempted to refinance the disputed property and found that defendant's lien had not been extinguished, so plaintiff requested a partial satisfaction of judgment to his wife and release of the lien on the judgment. When defendant refused to release the lien, plaintiff sued for slander of title. Slander of title is an action in which one maliciously publishes false matter that brings into question or disparages the title to property, thereby causing special damages to the owner. Defendant was under no obligation to extinguish the lien until the judgment was fully satisfied. Because the wife's payment was $35.42 short of completely satisfying the judgment, defendant could not be said to have maliciously published false matter regarding the lien, so slander of title was not proved, and summary judgment for defendant was proper. Pryor v. Babcock Bldg. Corp., 2002 MT 68, 309 M 222, 45 P3d 35 (2002). See also First Sec. Bank of Bozeman v. Tholkes, 169 M 422, 547 P2d 1328 (1976), and Felska v. Goulding, 238 M 224, 776 P2d 530 (1989).

Finding of Permissive Use of Cotenants' Fractional Interest Not Clearly Erroneous: Foley brought an action to quiet title to ranch property, claiming that title had been acquired from the cotenants by adverse possession of fractional interests acquired by two siblings in the distribution of their father's estate. Foley had operated the ranch since 1947, paid all taxes on the property, and built two homes, a garage, haysheds, barns, irrigation works, and fences. None of the surviving siblings ever claimed an interest in the profits from the ranch, and Foley never offered to share them. Foley never sought permission from the siblings to build any structure on the ranch or to use the property other than as he wished. The siblings professed that they always wanted Foley to operate the ranch as he saw fit, provided that the property not be mortgaged or sold. When Foley and his wife divorced in 1996, the District Court ordered the sale of the ranch to satisfy the settlement agreement. Title problems frustrated the sale, prompting the quiet title action. Following a bench trial, the District Court concluded that as a matter of law, Foley was a tenant in common with the two surviving siblings who had not quitclaimed their interests to Foley and that one cotenant could not gain title to another cotenant's interest by adverse possession. The court also found as a matter of fact that Foley's use of the cotenant's interests had been permissive. Foley contended on appeal that the findings and conclusions were erroneous. The testimony on the question of whether Foley's use was permissive was conflicting, with Foley testifying that he had always asserted his complete ownership of the ranch and that his longstanding arguments with his siblings established his claim as hostile, while the wife of Foley's deceased brother testified that until these proceedings, Foley had never asserted that she or her late husband had no interest in the ranch, but instead had asked her to sign over her interest on several occasions. Her testimony provided substantial credible evidence that, at least until he tried to sell the property, Foley's use of his siblings' fractional interests was in conformity with their wishes and was permissive. The District Court was in the best position to evaluate the credibility of the witnesses and to give each its proper weight. The finding that Foley was a permissive user of his cotenants' fractional interest was not clearly erroneous and was thus affirmed. Foley v. Arvidson, 2000 MT 388, 304 M 43, 16 P3d 389, 57 St. Rep. 1650 (2000).

Burden of Proof on Plaintiff to Establish Title and Boundary Line in Quiet Title Action: In an action to quiet title to real property, the burden is on plaintiff on all issues arising upon the essential allegations of the complaint. If the answer denies plaintiff's title, plaintiff must prove title in himself. Want of title in plaintiff renders an examination of defendant's title unnecessary. The burden of proof is also on plaintiff to establish the true location of a disputed boundary line.

Here, the plain language of the deed conveying the property to plaintiff in 1951 established that an old county road rather than a newer state highway was the legal boundary of the property. Plaintiff failed to establish the location of the boundary as the state highway and thus did not meet the burden of proof. The trial court's conclusion that the state highway was the true legal boundary was reversible error. Tester v. Tester, 2000 MT 130, 300 M 5, 3 P3d 109, 57 St. Rep. 538 (2000). See also McAlpin v. Smith, 123 M 391, 213 P2d 602 (1950), and Brady v. St. Highway Comm'n, 163 M 416, 517 P2d 738 (1973).

Examination of Chain of Title and Circumstances of Making of Deed in Establishing Legal Boundary: Plaintiff sought to quiet title in a strip of land in Bridger Canyon, alleging that a state highway formed the western boundary of the property rather than an older county road. The District Court agreed. The Supreme Court examined plaintiff's chain of title back to 1903 and found that a deed conveying the property in 1951 unambiguously established the county road as the western boundary of the property. An unambiguous deed must be interpreted according to its written language, without resort to extrinsic evidence of the grantor's intent. Further, under 1-4-102, the Supreme Court may examine the circumstances under which a deed was made. Here, the section plats and state highway records, coupled with the plain language of the deed, established that the old county road was the legal western boundary, so the District Court was reversed. Tester v. Tester, 2000 MT 130, 300 M 5, 3 P3d 109, 57 St. Rep. 538 (2000), followed in Ethen Revocable Trust v. River Resource Outfitters, LLC, 2011 MT 143, 361 Mont. 57, 256 P.3d 913.

Specification of Acreage Quantities by Approximation Indicative of Sale of Property in Gross: Language in a deed conveyed property described as "about 7 acres" and "approximately 7 acres". The actual legal description of the property was omitted from the chain of title beginning in 1950 and was not included in any subsequent deed, although the property was resold two more times. In a quiet title action, the District Court ruled that the size of the parcel was unimportant because the property had been conveyed in gross, with each party taking the risk of the actual quantity varying, so the exact quantity was immaterial. The Supreme Court agreed. Although words of estimation alone do not necessarily create a sale in gross, the plain meaning of the words "about" and "approximately" indicated that the parties did not intend to convey a precise number of acres, and the specification of acreage quantities, when qualified by words of approximation, rendered the acreage quantities merely descriptive rather than material to the agreement, thus indicating a sale in gross. Because the conveyance was a sale in gross, the variation in acreage was not grounds for rescission, nor did the acreage discrepancies in the relevant conveyances raise a genuine issue of material fact precluding summary judgment because the grantor's acreage-consistent description of the property boundaries controlled over the inconsistent acreage estimates in the conveyances. Cedar Lane Ranch, Inc. v. Lundberg, 1999 MT 299, 297 M 145, 991 P2d 440, 56 St. Rep. 1207 (1999), following Hardin v. Hill, 149 M 68, 423 P2d 309 (1967), and Turner v. Ferrin, 232 M 146, 757 P2d 335, 45 St. Rep. 946 (1988).

Standing to Challenge Tax Deed Proceeding: A person claiming title to real estate against another person who claims an adverse interest meets the criteria in this section and has standing to bring a quiet title action. In addition, to establish standing to challenge a tax deed proceeding, the following criteria set out in Stewart v. Bd. of County Comm'rs, 175 M 197, 573 P2d 184 (1977), must be satisfied: (1) the complaining party must clearly allege past, present, or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party. Further, no Montana statute or case law requires a complaining party to have an interest in the subject property at the time of issuance of the tax deed in order to institute a quiet title action. Sanders v. Yellowstone County, 276 M 116, 915 P2d 196, 53 St. Rep. 305 (1996), distinguishing Bowen v. McDonald, 276 M 193, 915 P2d 201, 53 St. Rep. 343 (1996).

Contract Provision Unambiguous: A contract among tenants in common stated unambiguously that all decisions regarding the property were to be determined by a majority vote, unless otherwise specified. By signing the agreement, defendant expressly agreed to be bound by a majority vote to sell the property, even though he was not available when the other owners voted to sell and abstained from signing the sale documents. Felska v. Goulding, 238 M 224, 776 P2d 530, 46 St. Rep. 1222 (1989).

Easement by Way of Necessity — Incompatible With Prescriptive Easement: A way of necessity is incompatible with a prescriptive right for the same easement. A prescriptive right never accrues in a way of necessity as long as the necessity continues. There are two basic elements of easements by way of necessity: (1) unity of ownership; and (2) strict necessity. The necessity must exist at the time the unified tracts are severed. The way granted must be over the grantor's land and never over the land of a third party or stranger to the title, and finally there must be strict unity of ownership. Woods v. Houle, 235 M 158, 766 P2d 250, 45 St. Rep. 2273 (1988), followed in Big Sky Hidden Village Owners Ass'n, Inc. v. Hidden Village, Inc., 276 M 268, 915 P2d 845, 53 St. Rep. 379 (1996).

No Implied Easement: Courts are reluctant to find easements by implication because such an action results in depriving a person of the use of his property by imposing a servitude by mere implication. To create an easement by implication from a preexisting use imposed on one part of the property for the benefit of another party, unity of title at the time of the severance thereof is required. Woods v. Houle, 235 M 158, 766 P2d 250, 45 St. Rep. 2273 (1988).

Prescriptive Easement Established — Summary Judgment — Burden of Proof: In a quiet title action, once defendant filed affidavits reciting facts that would fulfill the requirements for a prescriptive easement, it became the duty of the plaintiff not to rest upon mere allegations or denials but to respond by affidavit or otherwise, setting forth specific facts showing there was a genuine issue of material fact for trial. It was the plaintiff's burden to show that defendant's use was permissive. Summary judgment for the defendant was proper due to the plaintiff's failure to establish a genuine issue of material fact. Defendant was under no duty to communicate by word of mouth to the plaintiff or his predecessors in interest that she was using the roadway over plaintiff's property under a claim of right and adversely to them. Woods v. Houle, 235 M 158, 766 P2d 250, 45 St. Rep. 2273 (1988).

Return of Personal Property Upon Default: The District Court properly found that plaintiffs in a quiet title action for termination of deed were entitled to have personal property returned to them, despite defendant's contentions that the parties were bound by an oral agreement in a bankruptcy proceeding that was dismissed, that the bill of sale never went into escrow, and that monthly payments were made, but taxes were not paid. LeClair v. Reiter, 233 M 332, 760 P2d 740, 45 St. Rep. 1531 (1988).

Claim of Prescriptive Easement as Not Constituting Quiet Title Action: Entry of default judgment in favor of claimant of a prescriptive easement is not prohibited under 70-28-108 since the judgment did not adjudicate ownership of property or easement but addressed only the use of the property and as such was not a quiet title action to which 70-28-108 applies. Griffin v. Scott, 218 M 410, 710 P2d 1337, 42 St. Rep. 1695 (1985).

Quiet Title Action — Record Taken as a Whole: A landowner filed an action to quiet title to a county road established 80 years earlier, claiming that defects in the 1902 proceedings prevented establishment of a statutorily created 60-foot-wide public highway and that the existing public road was acquired by prescriptive use and was limited to the greatest width actually used. The record contained the actual petition to establish a road, signed by more than 20 residents of the area, including the appellant's predecessor in interest. The District Court decreed the road to be a 60-foot-wide declared county right-of-way, and the Supreme Court affirmed. The county is not required to prove on the face of the record that public officials had jurisdiction to create a public road if the record, taken as a whole, shows that a public road was created. Sheldon v. Flathead County, 218 M 270, 707 P2d 540, 42 St. Rep. 1573 (1985).

Ambiguous Assignment — Construction of Document as a Whole: Peterson sold property to the Blairs under a contract for deed that reserved one-half the mineral rights in Peterson. Peterson then assigned her rights under the contract to Hopkins. The Blairs paid Hopkins and recorded. Peterson sued Hopkins to quiet title when the lessee of Peterson's one-half mineral rights claimed Peterson had assigned them to Hopkins by mistake. Hopkins was granted summary judgment because the assignment conveyed all of Peterson's right, title, and interest in the property, together with the contract for deed. The judgment was reversed, and judgment was granted Peterson. The assignment stated that it was subject to the contract for deed, thus creating an ambiguity. Taken as a whole, it appeared that the assignment was of the contract for deed and was not itself a deed of the entire surface and mineral interests to Hopkins. This was supported by the conduct of the parties, for Peterson leased her reserved interest for the 22 years following the assignment until lessee raised the alleged mistake, and at no time up to his death in the 17th year of the 22 years did Hopkins claim all the mineral rights or demand Peterson's one-half interest. Peterson v. Hopkins, 210 M 429, 684 P2d 1061, 41 St. Rep. 1140 (1984).

Quiet Title Action — Limitation of Actions: Some causes of action do not clearly fall within the provisions of the specific Statutes of Limitation found in this Code. Normally, the residual Statute of Limitations in 27-2-215 (renumbered 27-2-231) would then be applicable. This is not the case, however, when the cause concerns real estate. Under 70-19-402, it appears that seizure or possession within the 5 years prior to the commencement of the action is the only limitation imposed by statute on plaintiff in this case, who sued to quiet title. Since she was seized of a mineral interest during that period, she was entitled to wait until her title was questioned before filing suit. The running of time (here, more than 25 years) tends to strengthen rather than destroy title determined by decree. Peterson v. Hopkins, 210 M 429, 684 P2d 1061, 41 St. Rep. 1140 (1984).

Sufficiency of Interest to Maintain Action: Since the filing of a quiet title action freezes the rights of the parties at the time of the commencement of the action, when the plaintiff purchased a purported title interest 2 weeks after the commencement of the quiet title action, he could not improve his position by events occurring after the action was filed and the court properly granted summary judgment against him. Alden v. Johnson, 167 M 60, 535 P2d 168 (1975).

Boundary Dispute: In an action to quiet title and establish the boundary between two tracts of land, where the owners of the tracts received their deeds according to governmental surveys and a fence was in existence but the fence was never described as a boundary, the parties are bound by the true line as ascertained by the survey. Reel v. Walter, 131 M 382, 309 P2d 1027 (1957), distinguished in Thibault v. Flynn, 133 M 461, 325 P2d 914 (1958).

Scope of Inquiry:

As this section permits inquiry into the whole title of property in question, it was proper for plaintiff in his reply to an answer alleging an oil and gas interest to seek the cancellation of the oil and gas leases. Schumacher v. Cole, 131 M 166, 309 P2d 311 (1957), distinguished in Johnson v. Heirs of Frisbie, 140 M 128, 368 P2d 577 (1962).

In action to quiet title to realty, plaintiff under short form of complaint alleging in general terms plaintiff's title and unfounded claim of title by purchasers from county to which County Treasurer issued a tax deed may introduce evidence of irregularities, defects, and omissions in tax title proceedings affecting validity of deed as well as in deed itself, and court should consider all irregularities, etc., in determining validity of deed. Miller v. Murphy, 119 M 393, 175 P2d 182 (1946).

An action to quiet title is not aimed at particular instruments but at the pretensions of individuals claiming adversely, while a suit to remove a cloud on title is directed at instruments rather than at adverse claims and preserves in statutory form one of the remedies afforded by courts of equity upon the principle of quia timet. Slette v. Review Publishing Co., 71 M 518, 230 P 580 (1924), explained in Ryan v. Bloom, 120 M 443, 186 P2d 879 (1947).

Stockholder's Action: A single stockholder cannot bring suit to quiet title to land to which he claims the corporation is the sole and exclusive owner. Noble v. Farmers Union Trading Co., 123 M 518, 216 P2d 925 (1950), distinguished in Malcom v. Stondall Land & Inv. Co., 129 M 142, 284 P2d 258 (1955).

Lienholder as Plaintiff: City claiming to be holder of lien for unpaid sewer assessments was not "claiming title to real estate" within this section and hence did not have sufficient interest in the land to maintain an action to quiet title. Cut Bank v. Clapper Motor Co., 120 M 274, 182 P2d 474 (1947).

Indian Land: In an action to quiet title brought by purchaser of Indian land acquired by the county under tax deed, a trust patent which had been issued to a half-blood Indian allottee and 3 years thereafter changed to a fee simple patent at his request, the fee simple patent removed the land from immunity of taxation, and collateral attack upon such patent was improper. Chatterton v. Lukin, 116 M 419, 154 P2d 798 (1944).

Tax Sale Repurchase Rights: In an action to quiet title against former owner of tract of farm land, title to which had been acquired by county by tax deed, the former continuing in possession and farming it under a lease from the county authorized by section 2208.1, R.C.M. 1935 (since repealed), and containing provision that in case the county after two futile attempts to sell the property should place it on sale, lessee should receive notice so as to enable him to buy it, but when another purchased it at private sale without making inquiry of the occupant or inspection of the county records, he was not an innocent purchaser as against any rights of lessee. Berger v. Johnson, 116 M 270, 151 P2d 586 (1944).

Receivership: In an action to quiet title to mining property owned by a common-law trust of five trustees, the interest of one of whom had allegedly been transferred to cross complainant who had never received his stock, resulting in a hopeless deadlock of the remaining four in business matters by a vote of two to two, the remedies provided by the trust agreement should have been exhausted before appointing a receiver, and under 72-23-507 (now repealed) the court could appoint a successor to fill the vacancy if the agreement does not provide a method. Demos v. Doepker, 116 M 264, 149 P2d 544 (1944).

Extent of Interest Adjudged: In a suit by a judgment creditor against the judgment debtor and others who claimed an interest in the property involved, where the plaintiff alleged that such interest was unknown to him and therefore prayed not that the title be quieted but that the extent of his interest and the amount of his judgment lien be adjudged, complaint was sufficient against general demurrer. While he could have had recourse to 25-14-103 relating to supplementary proceedings or to this chapter relative to quieting title, neither proceeding is necessarily exclusive. Christie v. Morris, 116 M 210, 149 P2d 250 (1944), distinguished in Cut Bank v. Clapper Motor Co., 120 M 274, 182 P2d 474 (1947).

Forfeiture of Drilling Rights: In an action to quiet title to a 40-acre tract excepting two 5-acre parcels which under a clause in a drilling agreement comprised the acreage surrounding each well not subject to forfeiture, judgment quieting title and terminating defendants' rights in the remaining 30-acre tract was correct. Ellingson v. Shaw, 114 M 550, 138 P2d 947 (1943).

Payment as Condition of Decree: As a condition precedent to the right of plaintiffs to a decree in their favor in an action to quiet title to land allegedly unlawfully sold under execution, they were required to offer repayment to defendant purchaser of any money expended by him in payment of delinquent taxes on the land, as well as a sum of money paid to the widow of the owner for release of her dower right therein. Andrews v. Smithson, 114 M 360, 136 P2d 531 (1943).

Alternative Remedies: Title may be cleared under this section for the purpose of quieting title or 27-1-433(1), providing for cancellation of instruments, the latter being aimed at a particular instrument under a complaint pointing out the specific grounds relied upon to establish invalidity, while under this section inquiry into the whole title to the property is permissible, the court being given broad powers, including that of removing clouds and canceling instruments to quiet title; the rule against collateral attack upon judgments does not apply to tax deeds issued under 15-18-202 (repealed, 1987) in such proceeding. Sanborn v. Lewis & Clark County, 113 M 1, 120 P2d 567 (1941).

Pleadings:

The rule announced in Glacier County v. Schlinski, 90 M 136, 300 P 270 (1931), that in attacking a tax deed, the particular defects on which the pleader relies to defeat the deed must be clearly and specifically pointed out, applies only to an action brought under 27-1-433, authorizing cancellation of written instruments. Sanborn v. Lewis & Clark County, 113 M 1, 120 P2d 567 (1941).

In an action to quiet title under this section, as distinguished from one brought under 27-1-433(1), to remove a cloud on title, a complaint alleging that the defendant claims an adverse estate or interest is sufficient without further defining it, whereas under the latter section the pleader must state facts disclosing the apparent validity of the instrument attacked and its actual invalidity. Slette v. Review Publishing Co., 71 M 518, 230 P 580 (1924), explained in Ryan v. Bloom, 120 M 443, 186 P2d 879 (1947).

Contract of Sale:

A mere contract to convey land will not divest the vendor of his right to maintain an action to quiet title or remove a cloud therefrom when the legal title remains in him. Kern v. Robertson, 92 M 283, 12 P2d 565 (1932).

An executor, as holder of the naked legal title to real property sold by his testate on deferred payments, charged with the duty to make conveyance on compliance by the purchaser with the terms of his contract, was a proper party to prosecute an action to quiet title to remove a cloud thereon in the shape of a Sheriff's certificate on execution sale of the property levied upon as real property after its conversion into personalty. Kern v. Robertson, 92 M 283, 12 P2d 565 (1932).

Burden of Proof:

In suit to quiet title to certain mineral claims, burden was upon defendants to disprove plaintiff's title, where record fair upon its face showed chain of title running to plaintiff. Maury v. Jones, 25 F2d 412 (9th Cir. 1928).

In suit to quiet title to mining claims, in which defendants claimed as purchasers under sale of property of estate, evidence of attempted transfer by plaintiff of mining property to father's estate was insufficient to sustain defendants' burden to disprove plaintiff's record title. Maury v. Jones, 25 F2d 412 (9th Cir. 1928).

Federal Court Jurisdiction: Suit to quiet title to mining claims brought under this section is within equitable cognizance of federal courts. Maury v. Jones, 25 F2d 412 (9th Cir. 1928).

Probate Jurisdiction: State court sitting in probate was without jurisdiction to determine questions of title between estate and persons claiming adversely, and order and judgment for sale of estate's property in probate court was therefore not res judicata of question of title in subsequent suit to quiet title under this section. Maury v. Jones, 25 F2d 412 (9th Cir. 1928).

Easement:

The complaint in an action to quiet title to land claimed as a private road or way of necessity is sufficient if it alleges ownership in plaintiff, obstruction of it by defendant, assertion and claim of right or interest therein by him adverse to plaintiff, that defendant's claim is without authority of law and invalid, and that the same constitutes a cloud upon plaintiff's title. Violet v. Martin, 62 M 335, 205 P 221 (1922).

An action lies to quiet title to an easement to a right-of-way for a ditch as against a county claiming exclusive use of the land for highway purposes. (Mr. Chief Justice Brantly dissenting.) Mannix v. Powell County, 60 M 510, 199 P 914 (1921).

70-28-102. General procedural provisions applicable.

Compiler's Comments

Code Commissioner Correction: Substituted "Rules 4 and 12(a)" for "Rules 4, 12(a), and 41(e)" to reflect revisions adopted by Supreme Court Order No. AF 07-0157 dated April 26, 2011, and by Supreme Court Order dated September 28, 1999.

70-28-103. Venue.

Case Notes

In Rem Action: An action to remove a cloud on title is one in rem and one to quiet title, which must be tried in the county in which the realty is situated. Heinecke v. Scott, 95 M 200, 26 P2d 167 (1933).

70-28-104. Parties defendant — unknown claimants.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Deleted "thereto" after "plaintiff's title" in (1); deleted "or any thereof" after "described in the complaint" in (1) and (2); deleted "including any claim or possible claim of dower, inchoate or accrued" after "contingent" in (1) and (2).

Case Notes

Required Service in Quiet Title Action — Decree Without Service on Affected Party Not Binding: Defendants instituted an action to quiet title to property that bordered plaintiff's land along a river, but plaintiff was not served in the action. Title was adjudicated in favor of defendants, but plaintiff was not aware of the adjudication until after commencing the present action to determine ownership of the same property. Plaintiff claimed that the prior adjudication was not binding, and the District Court agreed. On appeal, the Supreme Court affirmed. Defendants did not inspect the property or notify plaintiff of the action, even though plaintiff's deed was a matter of public record. Because defendants failed to conduct a diligent search and inquiry regarding parties that would be affected by the quiet title action and failed to notify plaintiff as an affected party, plaintiff was not bound by the quiet title adjudication in the case at bar. Andersen v. Monforton, 2005 MT 310, 329 M 460, 125 P3d 614 (2005).

Misnomer of Defendant: In an action to quiet title to a house and lot, which included unknown claimants as defendants, where the scrivener of the deed erred in misnaming the corporate grantee, it was error to strike demurrer of corporate defendant alleging that the complaint failed to state a cause of action against the defendant and defendant was not required to intervene. Williams v. Widows & Orphans Home, Veterans of Foreign Wars, 140 M 259, 373 P2d 948 (1962).

Form of Complaint:

As enacted in 1915 there was no comma after the word "estate" in the quoted words at the end of this section, and the added comma is unnecessary. Clinton v. Miller, 124 M 463, 226 P2d 487 (1951).

It is not necessary that the quoted words at the end of this section be used in exactly that form, but any other apt words might be used. Clinton v. Miller, 124 M 463, 226 P2d 487 (1951).

70-28-106. Notice of action to be filed with clerk and recorder.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Lis Pendens Not Unconstitutional Taking: The filing of a lis pendens does not constitute an unconstitutional taking because a lis pendens does not create substantive rights; it only serves to put prospective purchasers of real property on notice of a pending lawsuit involving a title issue. LeMond v. Yellowstone Dev., LLC, 2014 MT 181, 375 Mont. 402, 336 P.3d 345.

Lis Pendens — Purpose — Application: The purpose underlying lis pendens statutes is to provide a better form of notice of pending litigation to those interested in the subject property. The doctrine applies to all persons acquiring an interest in the subject of the litigation during the pendency of the action. Fox v. Clarys, 227 M 194, 738 P2d 104, 44 St. Rep. 1004 (1987), followed in LeMond v. Yellowstone Dev., LLC, 2014 MT 181, 375 Mont. 402, 336 P.3d 345.

Proof of Lis Pendens: This section specifies no particular or exclusive kind of proof to establish the fact that lis pendens was filed in the County Clerk's office. Clinton v. Miller, 124 M 463, 226 P2d 487 (1951).

Publication of Summons: The order for publication of summons referred to in this section is that provided for in section 93-6207, R.C.M. 1947 (since repealed and superseded by former Rule 4D(5)(c), M.R.Civ.P., now superseded). Clinton v. Miller, 124 M 463, 226 P2d 487 (1951).

70-28-107. Jurisdiction acquired by service — complete adjudication — judgment.

Case Notes

Required Service in Quiet Title Action — Decree Without Service on Affected Party Not Binding: Defendants instituted an action to quiet title to property that bordered plaintiff's land along a river, but plaintiff was not served in the action. Title was adjudicated in favor of defendants, but plaintiff was not aware of the adjudication until after commencing the present action to determine ownership of the same property. Plaintiff claimed that the prior adjudication was not binding, and the District Court agreed. On appeal, the Supreme Court affirmed. Defendants did not inspect the property or notify plaintiff of the action, even though plaintiff's deed was a matter of public record. Because defendants failed to conduct a diligent search and inquiry regarding parties that would be affected by the quiet title action and failed to notify plaintiff as an affected party, plaintiff was not bound by the quiet title adjudication in the case at bar. Andersen v. Monforton, 2005 MT 310, 329 M 460, 125 P3d 614 (2005).

Creation of County Road — Applicability of Curative Statute of 1895: Garrison brought an action against Lincoln County, alleging that the county had no right or interest in a road that crossed Garrison's property. The District Court held that the road was a county road or, alternatively, that even if the road was not a county road, the public had obtained a prescriptive easement covering the road. Garrison appealed, arguing that County Commissioners in 1912 and 1913 failed to strictly comply with the statutory requirements for creating a county road, rendering the road private property, despite the fact that the road was declared public in 1913 and had been used extensively by the public and maintained by the county for over 50 years. The District Court properly relied on Reid v. Park County, 192 M 231, 627 P2d 1210 (1981), to conclude that the record taken as a whole presented clear evidence that despite discrepancies in its description or location, a county road was created and that any defects in the procedure used to create the road were remedied by the curative statute 2600 of the Political Code of 1895 that provided that all roads laid out, traveled, or used by the public were considered public highways. Garrison v. Lincoln County, 2003 MT 227, 317 M 190, 77 P3d 163 (2003), distinguishing Pederson v. Dawson County, 2000 MT 339, 303 M 158, 17 P3d 393 (2000).

County Right-of-Way Considered Easement — Injunction Proper Remedy to Ensure Access to Right-of-Way: Jefferson County filed a complaint for a temporary injunction, an order allowing entry upon land to survey McCarty Creek Road, which passed through McCauley's land to public land beyond, and an order setting a show cause hearing. The District Court issued the injunction allowing the survey and set a date for hearing. At the hearing, the court found extensive documentary evidence, dating back to 1883, confirming the existence of McCarty Creek Road and, in its final order, determined that the road, as it crossed McCauley's property, was a dedicated and established county road. The court further enjoined McCauley from interfering with access or obstructing ingress and egress on the road. The Supreme Court affirmed, finding substantial credible evidence to support the District Court's determination and finding no abuse of discretion in enjoining McCauley from interfering with the public use of McCarty Creek Road. Jefferson County v. McCauley Ranches, 1999 MT 333, 297 M 392, 994 P2d 11, 56 St. Rep. 1329 (1999), following Bolinger v. Bozeman, 158 M 507, 493 P2d 1062 (1972), Reid v. Park County, 192 M 231, 627 P2d 1210, 38 St. Rep. 631 (1981), and Bailey v. Ravalli County, 201 M 138, 653 P2d 139, 39 St. Rep. 2010 (1982), and distinguishing Porter v. K & S Partnership, 192 M 175, 627 P2d 836 (1981), Knudson v. McDunn, 271 M 61, 894 P2d 295 (1995), and Lurie v. Sheriff, 284 M 207, 944 P2d 205, 54 St. Rep. 847 (1997).

Quiet Title to Public Road — Jurisdictional Defects Cured: In an action by a landowner to quiet title in a road crossing his property, the Supreme Court held that despite jurisdictional defects, such as failure to require production of a copy of a petition to the County Commissioners showing a description of the road or proof that the petition was signed by ten qualified petitioners, the record taken as a whole shows that a public road was created. Reid v. Park County, 192 M 231, 627 P2d 1210, 38 St. Rep. 631 (1981), followed in Jefferson County v. McCauley Ranches, 1999 MT 333, 297 M 392, 994 P2d 11, 56 St. Rep. 1329 (1999), Lee v. Musselshell County, 2004 MT 64, 320 M 294, 87 P3d 423 (2004), and Sayers v. Chouteau County, 2013 MT 45, 369 Mont. 98, 297 P.3d 312.

Quiet Title — Collateral Attack on Judgment — Reasonable Diligence — Invalid Service — Jurisdiction: While it is a general rule that a judgment cannot be attacked in a collateral action, such attack is permissible if the first judgment is void for lack of jurisdiction. If service of process is improperly made, the court acquires no jurisdiction over that party and that party may collaterally attack the judgment. "Reasonable diligence" was not used by appellants in the prior action to locate individuals to be served under former Rule 4D(2)(f), M.R.Civ.P. (now superseded), because they had dealt with such individuals before and should have been able to contact them, and the Secretary of State had the names and addresses of the corporate agent and director on file. Therefore, service upon the Secretary of State did not confer jurisdiction and collateral attack was proper. Russell Realty Co. v. Kenneally, 185 M 496, 605 P2d 1107 (1980), followed in Baertsch v. Lewis & Clark County, 256 M 114, 845 P2d 106, 49 St. Rep. 1162 (1992).

Equitable Interest as Basis for Action: In a quiet title action plaintiff is not required to deraign his title in the complaint, but may, under his general allegation of ownership, prove that if defendant held any title to it he held it in trust for plaintiff. The holder of an equitable title may maintain an action against the holder of the legal title. Polson Sheep Co. v. Owen, 110 M 601, 106 P2d 181 (1940).

Scope of Adjudication: Under this section the District Court has jurisdiction to make a complete adjudication of the title to lands involved in an action to quiet title, irrespective of whether the claim asserted by defendant under an instrument in writing constitutes a cloud on plaintiff's title. If the claim is adverse to plaintiff's interest the action may be maintained. Hochsprung v. Stevenson, 82 M 222, 266 P 406 (1928).

70-28-108. Prerequisites to decree against defendant not present.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Claim of Prescriptive Easement as Not Constituting Quiet Title Action: Entry of default judgment in favor of claimant of a prescriptive easement is not prohibited under 70-28-108 since the judgment did not adjudicate ownership of property or easement but addressed only the use of the property and as such was not a quiet title action to which 70-28-108 applies. Griffin v. Scott, 218 M 410, 710 P2d 1337, 42 St. Rep. 1695 (1985).

Default by Defendant: In action to quiet title in which defendants default, plaintiff must, under this section, to sustain his action, produce sufficient evidence to prima facie entitle him to relief, and where the evidence is insufficient the court may properly decree that plaintiff take nothing and order dismissal of the action. Le Vasseur v. Roullman, 93 M 552, 20 P2d 250 (1933).

70-28-109. Who bound by judgment.

Case Notes

Service by Publication Held Sufficient: The plaintiffs argued that a previous quiet title action filed by a former owner in 1948 extinguished the defendants' alleged easement at that time. The defendants claimed that their easement was not negated by the 1948 action because they had not been personally served at that time. The Supreme Court held that there was no evidence that the former owner knew of the defendants' use and therefore they were "persons unknown" and properly served by publication. Brown v. Tintinger, 245 M 373, 801 P2d 607, 47 St. Rep. 2179 (1990).

Quiet Title Action Not Res Judicata Where Deed Executed After Action: A quiet title action as to mineral interests reserved by the county was not res judicata because the quiet title action occurred before the deed in question was executed, delivered, and accepted. McSweyn v. Musselshell County, 193 M 525, 632 P2d 1095, 38 St. Rep. 1260 (1981), distinguishing Smith v. Musselshell County, 155 M 376, 472 P2d 878 (1970).

70-28-110. When value of improvements may be allowed as setoff.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Holdover Tenants Not Entitled to Restitution: Holdover tenants on agricultural land sought restitution for planting and harvesting costs under a theory of unjust enrichment when their lessors foreclosed on the property. The tenants were not holding over in good faith under color of title and had no right to remain on the property during the time for which they sought restitution. Because they did not come to court with clean hands, the tenants clearly were not entitled to restitution. Ruegsegger v. Welborn, 237 M 317, 773 P2d 305, 46 St. Rep. 833 (1989).

Offset of Improvements — Unjust Enrichment Principles: Michunovich purchased a tract of land under contract for deed from the Brangers. Michunovich entered a contract for deed to sell a portion of that tract to Owen. Owen fulfilled his part of the contract. Michunovich defaulted on the Branger contract. Brangers filed a breach of contract suit against Michunovich. Michunovich served Owen a notice of termination since he was unable to secure a deed release from Brangers. Michunovich did not refund Owen's downpayment as required by the contract. Owen refused to vacate the property. Michunovich assigned all his interest in the Branger contract to Stevenson with the Brangers' consent. Since Stevenson was able to bring the Branger contract current, the Brangers stipulated to the dismissal of their suit against Michunovich. Owen filed a purchaser's lien on the property under his contract from Michunovich. Stevenson then filed a quiet title action. The trial court found for Stevenson and allowed him to offset the reasonable rental value of the property against the downpayment owed Owen by Michunovich. The trial court also held that Owen was not entitled to offset the value of his improvements against the rental. The Supreme Court held that under the conditions of this section, Owen obviously held under color of title. The trial court was instructed to determine if the improvements were placed on the property in good faith. The court stated that the allowance of a recovery from the owner for the value of improvements mistakenly put on the owner's premises is an application of the equitable rule which prevents unjust enrichment. Stevenson v. Owen, 212 M 287, 687 P2d 1010, 41 St. Rep. 1743 (1984).

Color of Title: A tax deed and quitclaim deed which did not describe the land did not constitute "color of title" which would enable defendant to set off the value of improvements against the damages. Pritchard Petroleum Co. v. Farmers Co-op Oil & Supply Co., 121 M 1, 190 P2d 55 (1948).

Common-Law Setoff: This statute does not prescribe the exclusive method by which an occupying claimant may recoup the value of improvements, but a setoff may be obtained under the rules of the common law. Pritchard Petroleum Co. v. Farmers Co-op Oil & Supply Co., 121 M 1, 190 P2d 55 (1948).

70-28-111. Termination of plaintiff's right during action — damages for withholding.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-28-112. Costs — attorney fees.

Compiler's Comments

2019 Amendment: Chapter 148 inserted (2) concerning recovery of costs and fees when a defendant wrongfully filed a statement regarding a severed joint tenancy; and made minor changes in style. Amendment effective October 1, 2019.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Federal Statute: For section 2326 Revised Statutes of the United States referred to in this section, see 30 U.S.C. 30, 17 Stat. 93.

Case Notes

Proper Relief in Quiet Title Action: After deciding that defendants were entitled to quiet and peaceful possession of a disputed piece of property, the District Court ordered that an old certificate of survey be removed from county records and that a new instrument be prepared that described accurate boundaries. Plaintiff appealed, but the Supreme Court affirmed. After the correct boundary was determined, there was no justification for not quieting title in defendants' favor and no reason for retaining an erroneous plat in the county records. The relief was therefore appropriate. Olson v. Jude, 2003 MT 186, 316 M 438, 73 P3d 809 (2003).

70-28-113. Order for survey or measurement.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Constitutionality: This section contravenes neither the "due process" clause of the federal Constitution nor the provision of the state Constitution prohibiting the taking or damaging of private property without just compensation. State ex rel. Parrott Silver & Copper Co. v. District Court, 28 M 528, 73 P 230 (1903).

Expenses of Inspection: It was error to allow an inspection of defendant's working, requiring defendant to use its appliances to lower and raise plaintiff's agents in making such inspection, without providing for the payment by the plaintiff of the expenses incident thereto, upon the presentation of a claim therefor by the defendant. State ex rel. Parrott Silver & Copper Co. v. District Court, 28 M 528, 73 P 230 (1903).

Mining — Access Through Either Party's Shafts: Where, in an action to determine the extralateral rights of the owner of lode mining property, it appeared that most of the workings in one of defendant's claims could be readily reached through plaintiff's shaft, it was error for the court, in granting an order of inspection and survey, to allow the plaintiff access to defendant's workings exclusively through defendant's shafts and by means of the latter's appliances. State ex rel. Parrott Silver & Copper Co. v. District Court, 28 M 528, 73 P 230 (1903).

Motion for Order: Where it is made to appear from the allegations of the petition, either alone or by reference to the complaint, that there is good cause to believe that an examination of the property will aid the parties in the presentation of their case, and such allegations are supported by substantial evidence, it is sufficient to warrant the making of a proper order of inspection and survey under this section. The filing of a petition is not required. A motion sufficient to move the discretion of the court is all that is required. State ex rel. Parrott Silver & Copper Co. v. District Court, 28 M 528, 73 P 230 (1903).

Order Should Be Made: Where the evidence indicates conditions to justify a well-grounded belief that the adverse party is trespassing upon applicant's rights, the order of inspection and survey should be made. State ex rel. Parrott Silver & Copper Co. v. District Court, 28 M 528, 73 P 230 (1903); State ex rel. Geyman v. District Court, 26 M 483, 68 P 861 (1902).

Purpose of Section:

If a stranger, under claim of title, encroaches upon the exterior portions of a lode by means of openings of which he has the exclusive control, this section grants the owner of such exterior portions entry through and a proper inspection and survey of such underground workings of his adversary as are necessary to the ascertainment of the facts necessary to enable the owner to protect his rights. State ex rel. Parrott Silver & Copper Co. v. District Court, 28 M 528, 73 P 230 (1903).

The purpose of this section is to enable the parties to present the facts of the case to the court so that it may intelligently adjudicate the rights involved. State ex rel. Heinze v. District Court, 26 M 416, 68 P 794 (1902); State ex rel. Anaconda Copper Min. Co. v. District Court, 25 M 504, 65 P 1020 (1901).

Survey Erroneous Where Issues Do Not Require Examination: Where the issues do not render necessary an examination of all of defendant's workings, an order authorizing the plaintiffs to survey all the underground workings in the entire group of defendant's claims is erroneous. State ex rel. Parrott Silver & Copper Co. v. District Court, 28 M 528, 73 P 230 (1903).

Inspection and Survey — Showing Necessary to Support a Search Warrant: The evidence upon which an order of inspection and survey is made need go no further than would be necessary to support a search warrant in a given case. State ex rel. Geyman v. District Court, 26 M 483, 68 P 861 (1902).

Discretion of Trial Court: The propriety of granting an order of inspection and survey under this section lies very largely in the discretion of the trial court. State ex rel. Heinze v. District Court, 26 M 416, 68 P 794 (1902).

Injunction: The granting of a temporary injunction does not preclude the issuance of an inspection order. State ex rel. Heinze v. District Court, 26 M 416, 68 P 794 (1902).

Mining Works: Where the respective parties assert title to certain ore bodies, each basing his claim on an asserted ownership of the apex of a vein, to determine which will necessitate a following of the vein from the surface, a court may properly grant an order requiring the owner of the surface openings to allow the other party to enter such openings for the purpose of surveying beneath the surface, though the latter party had complete maps up to the commencement of the suit, after which the party was excluded, and work of removing the ores rapidly pushed. State ex rel. Heinze v. District Court, 26 M 416, 68 P 794 (1902).

Necessity for Inspection: Inspection orders should always be limited by the necessities of the case. State ex rel. Heinze v. District Court, 26 M 416, 68 P 794 (1902).

Time of Granting Order: Under this section an inspection order may be granted before the issues are framed. State ex rel. Heinze v. District Court, 26 M 416, 68 P 794 (1902).

Equitable Power of Court: This section is but declaratory of the inherent power of courts of equity and rests upon the principle that the parties should be enabled to put the court in possession of all the facts touching the controversy, to the end that their rights may be properly adjudicated. The power of the court under this section is limited only by the necessities of the pending action. State ex rel. Anaconda Copper Min. Co. v. District Court, 26 M 396, 68 P 570, 69 P 103 (1902).

Evidence Required for Order: Where the evidence showed the prima facie right to a mining claim to be in relators, it was error for the District Court to make an order granting defendant and his employees the right to enter and inspect all of relators' surrounding mines for the period of 40 days to obtain evidence. State ex rel. Anaconda Copper Min. Co. v. District Court, 25 M 504, 65 P 1020 (1901). See also Anaconda Copper Min. Co. v. Pilot Butte Min. Co., 52 M 165, 156 P 409 (1915).

Part 2
Property Granted to Heirs of Deceased Entryman — Quiet Title

70-28-201. Action authorized.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Relief Granted: An action brought under this section is essentially equitable in character and the court, once having obtained jurisdiction over the subject matter and the parties, will retain jurisdiction for the purpose of administering complete relief and doing entire justice. Raistakka v. Fagerstrom, 64 M 173, 208 P 949 (1922).

70-28-206. Affidavit to accompany complaint.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Substituted "judicial record" for "judgment roll" in (3).

70-28-207. Summons — issuance and form.

Compiler's Comments

1999 Amendment: Chapter 51 at end of sixth paragraph after "day of ...." substituted "20..." for "A.D. 19..."; and made minor changes in style. Amendment effective January 1, 2000.

70-28-209. Personal service of summons — service by mail.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-28-212. Time for appearance by defendant — answer.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-28-213. Recording of notice by plaintiff and defendant.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-28-215. Judgment — nature and effect — recording.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Substituted "judicial record" for "judgment roll" in (2); made a minor change in punctuation.

Part 3
Entry Townsite Deeds

70-28-303. Notice requirements.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

CHAPTER 29
PARTITION OF REAL PROPERTY

Part 1
Preliminary Procedure

70-29-101. Action for partition authorized — who may bring.

Case Notes

Division of Property of Tenants in Common — Presumptions and Intent: Assets held by tenants in common are presumed to be divided equally because the assets are presumed to be owned equally, but that presumption shifts when there is evidence of unequal contribution. When the preponderance of evidence establishes that the cotenants contributed unequally to the value of the property, it is presumed that the property will be divided in proportion to each cotenant's contribution. When there is an indication that one party intended to gift property to the other, the party who seeks to establish a disproportionate distribution based on gifted property has the burden of demonstrating that intent, and all relevant evidence of the parties' intent is admissible to sustain or rebut the presumptions. Intent of the parties may be demonstrated by conduct over the course of time, sharing of other expenses, labor, or other admissible means. In this case, the District Court's finding that the parties intended to split their assets equally was supported by substantial evidence and affirmed. However, the court erroneously adjusted a previous settlement of the parties regarding the distribution of the proceeds of a money market account when that asset was not in dispute and erred in awarding rent payments to one cotenant in contravention of the general rule that a tenant in common is not liable for the use and occupation of the premises until a tenant out of possession brings an action demanding the equivalent of joint possession. Thus, the case was remanded for entry of proper judgment on those issues. Flood v. Kalinyaprak, 2004 MT 15, 319 M 280, 84 P3d 27 (2004), following In re Estate of Dern, 279 M 138, 928 P2d 123 (1996), and followed in Anderson v. Woodward, 2009 MT 144, 350 M 343, 207 P3d 329 (2009), and LeFeber v. Johnson, 2009 MT 188, 351 M 75, 209 P3d 254 (2009). See also Lawrence v. Harvey, 186 M 314, 607 P2d 551 (1980).

Collateral Estoppel Applied to Preclude Reopening Settlement Agreement Regarding Disposition of Jointly Owned Marital Property — Property Interest Not Altered by Filing of Partition Action: When the husband and wife separated, they entered a property settlement agreement dividing all their real and personal property, agreeing that they would continue to jointly own their residence, with the right of survivorship. In the decree of dissolution, the District Court affirmed that the property settlement agreement was fair and equitable. Several years after the divorce, seeking to wrap up financial affairs with her former husband, the wife moved to partition the residence and obtain an equal division of the value of the property. At trial, the husband argued that the property settlement agreement was unfair and that the wife should be denied any recovery for her interest in the residence because it was purchased prior to the marriage and because she did not contribute to the marriage financially. The wife moved in limine to preclude the husband from reopening matters that should have been raised in the divorce proceedings. The court denied her motion, reasoning that the property was not divided in the divorce and that because the partition action was an action at equity, surrounding circumstances could be considered. The court found that the filing of the partition action severed the joint tenancy, and the husband was then allowed to introduce evidence regarding the marital equities. The court ultimately concluded that the wife's interest in the residence was not compensable because she had not contributed significantly to the acquisition or improvement of the property or contributed to the parties' assets during the marriage. The wife appealed. The Supreme Court found that res judicata and equitable estoppel barred relitigation of the fairness of the joint ownership issue, which was considered and approved in the decree of dissolution. Further, the mere filing of the partition action does not sever one's interest in property. Rather, the parties' respective interests remain intact until the judgment severing the tenancy is entered. The rebuttable presumption that underlies a joint tenancy in property is equal shares, and there was nothing in the evidence to rebut that presumption and no evidence of postdecree events that would justify a different result. The husband failed to carry the burden of rebutting the presumption of equal shares, and the Supreme Court remanded for a 50-50 partition of the value of the residence. Rausch v. Hogan, 2001 MT 123, 305 M 382, 28 P3d 460 (2001).

Partition Proceeding — Injunction May Be Granted: A court of equity may, in a partition proceeding, grant an injunction to preserve the property pending the proceeding. Granting a preliminary injunction is within the discretion of the trial court and will not be interfered with unless a manifest abuse of discretion is shown. Frame v. Frame, 227 M 439, 740 P2d 655, 44 St. Rep. 1216 (1987), followed in Tillett v. Lippert, 275 M 1, 909 P2d 1158, 53 St. Rep. 1 (1996).

Leased Land — No Implied Waiver or Resulting Trust Barring Partition — Lease Not Given Partial Effect: Parents gifted their ranch one-third to each child as tenants in common, and children leased it back to parents by 1-year lease automatically renewed unless terminated in writing by a party at least 30 days before expiration of an annual term. In affirming decision that wife who inherited her husband's one-third interest when he died was entitled to partition, the Supreme Court held that: (1) in the absence of evidence, an agreement waiving children's right to partition would not be implied; (2) no resulting trust in favor of the parents was created that would bar partition; and (3) the property should not be sold subject to a lease on two-thirds of it from the other two children. Jarrett v. Jarrett, 202 M 471, 659 P2d 839, 40 St. Rep. 222 (1983).

Devising Life Estate to Cotenant Not to Defeat Right to Partition: Plaintiff and her husband acquired the property in question as tenants in common, each acquiring an undivided one-half interest. The husband died, devising a life estate in the property to plaintiff, with the remainder to their children, the defendants. Plaintiff sought partition of the property so that she could hold in fee-simple her undivided one-half interest. Defendants contended that plaintiff was no longer a tenant in common and therefore lacked standing to bring the action. The Supreme Court adopted the rule that a tenant in common may not deprive his cotenant of the right to a partition by conveying or devising a life estate to his cotenant. The court held that a testator's desire that property held by a surviving spouse be devised to their children is not grounds for defeating a right to partition. Equitable principles support the finding that a decedent not be allowed to defeat a property right of his survivor by a mere desire that a subsequent disposition occur. Lawrence v. Donovan, 190 M 150, 619 P2d 1183, 37 St. Rep. 1756 (1980).

When Partition Is Proper — Open Divorce Decree: An open divorce decree failed to make a final disposition of the family residence which the husband and wife owned as joint tenants. The wife quitclaimed her interest to her children. The wife later died. The children and their father became tenants in common. The father sought the sale and partition of the property. A cotenant is entitled to partition as a matter of right, although it may be denied where it would be against public policy or legal or equitable principles. Here, where all the cotenants were of legal age, it was an abuse of discretion to deny partition. Lawrence v. Harvey, 186 M 314, 607 P2d 551 (1980).

Partition Statute Not Statute of Limitations — Real Property Statute Applicable: Two brothers were partners in a ranching operation. One brother died and the surviving brother purchased the deceased brother's interest from his estate in 1940. In 1973 the deceased partner's sons found a note from their mother stating they had a one-third interest in the property. In April, 1978, they instituted action for partition of the property, claiming they were cotenants. Plaintiffs contended that 70-29-101, which states no time limit, was the applicable Statute of Limitations. Section 70-29-101 is not a Statute of Limitations but merely sets forth the right of a cotenant in possession to file a partition action. Section 70-19-401 is the applicable Statute of Limitations, a

5-year period for the recovery of an interest in real property. The action was barred by 70-19-401. Glennie v. Glennie Ranches, 184 M 77, 601 P2d 699 (1979).

Sufficiency of Evidence — Parol Partition: Evidence was sufficient to support judgment of parol partition. Johnson v. Johnson, 172 M 94, 560 P2d 1331 (1977).

Separate Owners of Land and Building: Where land and building on land had separate owners, owner of building had no right to an order that the land and building be sold together and the proceeds apportioned between the owners, because the owners were not cotenants of the whole property but sole owners of parts of the property. Allman v. Stuart, 158 M 402, 492 P2d 909 (1972).

Statutory Basis for Action: An action for partition is a special statutory proceeding. The statute must be looked to for the authority to bring the action and for the procedure to be followed both in bringing the action and after it is instituted. Hurley v. O'Neill, 31 M 595, 79 P 242 (1905).

70-29-102. Action by minor.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1983 Amendment: Throughout section, changed "infant" to "minor".

70-29-104. Who must be parties — permissible plaintiffs.

Case Notes

Devising Life Estate to Cotenant Not to Defeat Right to Partition: Plaintiff and her husband acquired the property in question as tenants in common, each acquiring an undivided one-half interest. The husband died, devising a life estate in the property to plaintiff, with the remainder to their children, the defendants. Plaintiff sought partition of the property so that she could hold in fee-simple her undivided one-half interest. Defendants contended that plaintiff was no longer a tenant in common and therefore lacked standing to bring the action. The Supreme Court adopted the rule that a tenant in common may not deprive his cotenant of the right to a partition by conveying or devising a life estate to his cotenant. The court held that a testator's desire that property held by a surviving spouse be devised to their children is not grounds for defeating a right to partition. Equitable principles support the finding that a decedent not be allowed to defeat a property right of his survivor by a mere desire that a subsequent disposition occur. Lawrence v. Donovan, 190 M 150, 619 P2d 1183, 37 St. Rep. 1756 (1980).

Wife of Tenant in Common: The wife of a defendant tenant in common, having an inchoate right of dower in an undivided share of the property, is an indispensable party to a suit for partition. Hurley v. O'Neill, 31 M 595, 79 P 242 (1905).

70-29-105. Who may be joined as defendants.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-29-108. Lienholders of record to be notified.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-29-109. Notice of action to be filed with clerk — lis pendens.

Case Notes

Lis Pendens Not Unconstitutional Taking: The filing of a lis pendens does not constitute an unconstitutional taking because a lis pendens does not create substantive rights; it only serves to put prospective purchasers of real property on notice of a pending lawsuit involving a title issue. LeMond v. Yellowstone Dev., LLC, 2014 MT 181, 375 Mont. 402, 336 P.3d 345.

Involuntary Satisfaction of Judgment — Request for Stay of Execution Not Required: Following entry and satisfaction of judgment in District Court, the parties were aware of a contemplated appeal, but no stay of execution was requested or supersedeas bond posted. After plaintiff acquired title to the disputed property pursuant to the judgment, defendant filed a notice of appeal and lis pendens, effectively preserving the status quo pending appeal. Plaintiff moved to dismiss, contending that by voluntarily satisfying the judgment, defendants waived their right to appeal. Applying Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996), the Supreme Court held that the parties' course of conduct illustrated the involuntary, rather than voluntary nature of the satisfaction of judgment. Because satisfaction was involuntary, the right to appeal was not waived. Further, under former Rule 7, M.R.App.P. (now superseded), a party may request a stay of execution, but the request is not mandatory, even though a party choosing not to seek a stay runs the risk of having the appeal become moot. Plaintiff's motion to dismiss was denied. Kennedy v. Dawson, 1999 MT 265, 296 M 430, 989 P2d 390, 56 St. Rep. 1078 (1999).

Slander of Title by Filing Lis Pendens — Action Properly Dismissed After Extension of Closing Date: As a result of the failure of Cash and Konopacki to sign or initial an amendment to the original offer to sell certain real estate, a contract to sell and buy was not actually formed between Cash and Konopacki as sellers and the Austins as buyers. Nevertheless, the Austins reduced the price of other real estate that they owned in California, and when Cash and Konopacki indicated their belief that no contract existed, the Austins filed a lis pendens against the Cash/Konopacki property, preventing Cash and Konopacki from accepting an offer from another buyer. However, Cash and Konopacki did agree with the other buyer to extend the date for closing of the sale. When the Austins brought an action to compel performance, Cash and Konopacki counterclaimed for slander of title caused by the lis pendens. The Supreme Court held that because an extension of the closing date had been agreed to by Cash and Konopacki and their buyer, Cash and Konopacki were not harmed by the filing of the lis pendens and the District Court had therefore properly dismissed the counterclaim for slander of title. Austin v. Cash, 274 M 54, 906 P2d 669, 52 St. Rep. 1119 (1995).

70-29-112. Answer — contents.

Case Notes

Statute of Frauds — Partition: When Statute of Frauds was not raised as defense at court level in partition action, it will not be considered for the first time on appeal. Johnson v. Johnson, 172 M 94, 560 P2d 1331 (1977).

Relief Sought by Defendant: In actions for the partition of real property, the defendant is not required to plead facts sufficient to constitute a counterclaim in order to obtain affirmative relief. In such actions the plaintiffs must set out specifically and particularly, so far as may be known to them, the interests of all persons in the property. The defendants must set forth in their answers fully and particularly the origin, nature, and extent of their respective interests. The rights of all parties may be put in issue, tried, and determined. An answer stating the matters required to be pleaded by the statute will, when established, entitle the defendants to full relief. State ex rel. Cornue v. Lindsay, 24 M 352, 61 P 883 (1900).

70-29-113. Death or incompetency of parties — proceedings not delayed.

Compiler's Comments

1997 Amendment: Chapter 490 in (1), in first sentence after "dies", substituted "is committed pursuant to 53-21-127" for "or becomes seriously mentally ill"; in (2), near beginning of first sentence after "attorney", substituted "appointed pursuant to subsection (1) must" for "so appointed shall"; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 40, Ch. 490, L. 1997, was a saving clause.

Part 2
Trial and Judgment

Part Case Notes

Collateral Estoppel Applied to Preclude Reopening Settlement Agreement Regarding Disposition of Jointly Owned Marital Property — Property Interest Not Altered by Filing of Partition Action: When the husband and wife separated, they entered a property settlement agreement dividing all their real and personal property, agreeing that they would continue to jointly own their residence, with the right of survivorship. In the decree of dissolution, the District Court affirmed that the property settlement agreement was fair and equitable. Several years after the divorce, seeking to wrap up financial affairs with her former husband, the wife moved to partition the residence and obtain an equal division of the value of the property. At trial, the husband argued that the property settlement agreement was unfair and that the wife should be denied any recovery for her interest in the residence because it was purchased prior to the marriage and because she did not contribute to the marriage financially. The wife moved in limine to preclude the husband from reopening matters that should have been raised in the divorce proceedings. The court denied her motion, reasoning that the property was not divided in the divorce and that because the partition action was an action at equity, surrounding circumstances could be considered. The court found that the filing of the partition action severed the joint tenancy, and the husband was then allowed to introduce evidence regarding the marital equities. The court ultimately concluded that the wife's interest in the residence was not compensable because she had not contributed significantly to the acquisition or improvement of the property or contributed to the parties' assets during the marriage. The wife appealed. The Supreme Court found that res judicata and equitable estoppel barred relitigation of the fairness of the joint ownership issue, which was considered and approved in the decree of dissolution. Further, the mere filing of the partition action does not sever one's interest in property. Rather, the parties' respective interests remain intact until the judgment severing the tenancy is entered. The rebuttable presumption that underlies a joint tenancy in property is equal shares, and there was nothing in the evidence to rebut that presumption and no evidence of postdecree events that would justify a different result. The husband failed to carry the burden of rebutting the presumption of equal shares, and the Supreme Court remanded for a 50-50 partition of the value of the residence. Rausch v. Hogan, 2001 MT 123, 305 M 382, 28 P3d 460 (2001).

Presumption That Referee's Valuation Was Arrived at Fairly and Honestly: A partition action was filed by one cotenant of a piece of real property, the wife, after the death of the other, the husband. The decedent had willed a life estate in his one-half interest to his wife and the remainder interest to their children. The children appealed the District Court's partition decree, claiming, among other things, that the referee had undervalued a certain parcel of the property. The referee had set a value of $7,500 for the parcel. The children contended that because they had received an offer of $24,500 for the parcel, on the condition that a fee simple interest be conveyed, the referee's valuation was erroneous. The Supreme Court upheld the partition decree. The court ruled that the children had not presented evidence sufficient to overcome the presumption that the referee's valuation was arrived at fairly and honestly, because the $24,500 offer was dependent on the transfer of a fee simple title and this was not possible because of the wife's life estate in the property. Lawrence v. Donovan, 207 M 130, 673 P2d 130, 40 St. Rep. 1944 (1983).

70-29-201. Trial of title or interest of parties.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Partition Order Extinguishes Life Estate: Parents deeded a portion of their ranch to their son and retained a life estate in the entire ranch property. Subsequently, the parties entered into a partition agreement awarding part of the property to the son. The parents claimed that their life estate continued in force with respect to the son's portion of the property. The Supreme Court affirmed the District Court's ruling that the life estate was dissolved by the partition agreement. Hughes v. Hughes, 2013 MT 176, 370 Mont. 499, 305 P.3d 772. See also Britton v. Brown, 2013 MT 30, 368 Mont. 379, 300 P.3d 667.

Division of Property of Tenants in Common — Presumptions and Intent: Assets held by tenants in common are presumed to be divided equally because the assets are presumed to be owned equally, but that presumption shifts when there is evidence of unequal contribution. When the preponderance of evidence establishes that the cotenants contributed unequally to the value of the property, it is presumed that the property will be divided in proportion to each cotenant's contribution. When there is an indication that one party intended to gift property to the other, the party who seeks to establish a disproportionate distribution based on gifted property has the burden of demonstrating that intent, and all relevant evidence of the parties' intent is admissible to sustain or rebut the presumptions. Intent of the parties may be demonstrated by conduct over the course of time, sharing of other expenses, labor, or other admissible means. In this case, the District Court's finding that the parties intended to split their assets equally was supported by substantial evidence and affirmed. However, the court erroneously adjusted a previous settlement of the parties regarding the distribution of the proceeds of a money market account when that asset was not in dispute and erred in awarding rent payments to one cotenant in contravention of the general rule that a tenant in common is not liable for the use and occupation of the premises until a tenant out of possession brings an action demanding the equivalent of joint possession. Thus, the case was remanded for entry of proper judgment on those issues. Flood v. Kalinyaprak, 2004 MT 15, 319 M 280, 84 P3d 27 (2004), following In re Estate of Dern, 279 M 138, 928 P2d 123 (1996), and followed in Anderson v. Woodward, 2009 MT 144, 350 M 343, 207 P3d 329 (2009), and LeFeber v. Johnson, 2009 MT 188, 351 M 75, 209 P3d 254 (2009). See also Lawrence v. Harvey, 186 M 314, 607 P2d 551 (1980).

Not Error to Refuse to Combine Partnership Accounting With Partition Action: DeHaan argued that the lower court erred in not combining the accounting of partnership assets with a real property partition action. The Supreme Court held that the lower court had not erred in refusing to combine the two actions because nothing in the partition statutes required that the actions be combined. Frank DeHaan, Inc. v. Gallatin-Madison Ranch Co., 250 M 304, 820 P2d 423, 48 St. Rep. 963 (1991).

Appreciated Value of Property to Be Partitioned: Payments for support under a divorce decree were not shown to have been intended as returnable to the father in the form of an equity in the house after the children of the marriage were emancipated. The father was a cotenant in the property, however, and as such was entitled to a pro rata share of the property's appreciation in value. The children who received their mother's interest in the form of a quitclaim deed should be credited with payments in excess of their share expended by them after the divorce for principal and interest and taxes on the property. The father is not entitled to an offset against this credit for the reasonable rental value of the property during the period of time before the partition action was begun. It was an abuse of the District Court's discretion to deny the father a pro rata share in the increased value of the property. Lawrence v. Harvey, 186 M 314, 607 P2d 551 (1980).

70-29-202. Court to order sale or partition — appointment of referees.

Case Notes

Authority of District Court to Impose Servitude Forbidding Building as Part of Property Partition — Owelty Applied: Plaintiff requested that the District Court partition some adjoining property, the division of which the parties, as tenants in common, could not agree upon. The court appointed referees to survey the property and recommend how best to divide it. The referees settled on a plan of division, including a recommendation to impose no-build zones on sections of each party's parcel in order to reduce the need for new permanent service roads and to alleviate future discord between the parties. The court adopted the referees' report, including the imposition of the no-build zones. Plaintiff appealed on grounds that under 70-29-205, neither the referees nor the court possessed the power to impose a no-build zone. The Supreme Court disagreed, noting that under 70-29-209, the District Court has broad powers when a partition cannot be made equally, including application of the practice of owelty, wherein a court may adjudge compensation to be made by one party to another on account of the inequality. Although the compensation is often in the form of a monetary award, the court's equitable powers also include the power to impose servitudes. In this case, the facts were sufficient to support the referees' no-build zone recommendation, and the imposition of the servitude fell within the equitable power of the District Court. The Supreme Court affirmed the partition, including the no-build zones. Kellogg v. Dearborn Information Serv., LLC, 2005 MT 188, 328 M 83, 119 P3d 20 (2005).

Appointment of Three Referees Necessary Absent Consent to Appoint Fewer: The District Court found that defendants did not object until posttrial motions to a motion to appoint one referee instead of three and that the failure to object constituted a waiver of the right to have three referees appointed by the court. However, it is not a matter of objecting but rather a matter of consent, which defendants did not give. Under the clear language of this section, if consent for a lesser number is not given, the court must appoint three referees. Ciotti v. Hoover, 237 M 462, 774 P2d 406, 46 St. Rep. 969 (1989).

Partition by Sale Found to Be Appropriate: Evidence set forth at trial indicated that partition of a ranch would result in restrictions on access and unavailability of water. Further, the record indicated that the plan for proposed division did not include a provision for valuation for different uses of the properties. The District Court directed a partition by sale pursuant to this section, and the Supreme Court affirmed. Palmer v. Palmer, 202 M 182, 657 P2d 92, 40 St. Rep. 21 (1983).

When Partition Is Proper — Open Divorce Decree: An open divorce decree failed to make a final disposition of the family residence which the husband and wife owned as joint tenants. The wife quitclaimed her interest to her children. The wife later died. The children and their father became tenants in common. The father sought the sale and partition of the property. A cotenant is entitled to partition as a matter of right, although it may be denied where it would be against public policy or legal or equitable principles. Here, where all the cotenants were of legal age, it was an abuse of discretion to deny partition. Lawrence v. Harvey, 186 M 314, 607 P2d 551 (1980).

Order for Sale: Where property is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof. Hurley v. O'Neill, 31 M 595, 79 P 242 (1905).

70-29-204. Partial partition.

Case Notes

Not Error to Apply Statute to Parties That Never Had Actual Joint Ownership: In a partition action, the lower court awarded certain property to DeHaan's corporation and to his wife. DeHaan argued that the lower court erred in applying this section because his corporation and his wife had never been actual joint owners of the property. The Supreme Court held that while DeHaan's argument had technical merit, it would have been highly impracticable for the lower court to have partitioned the property as prescribed by DeHaan's reading of this section. Frank DeHaan, Inc. v. Gallatin-Madison Ranch Co., 250 M 304, 820 P2d 423, 48 St. Rep. 963 (1991).

70-29-205. Partition according to rights of parties — roads.

Case Notes

Authority of District Court to Impose Servitude Forbidding Building as Part of Property Partition — Owelty Applied: Plaintiff requested that the District Court partition some adjoining property, the division of which the parties, as tenants in common, could not agree upon. The court appointed referees to survey the property and recommend how best to divide it. The referees settled on a plan of division, including a recommendation to impose no-build zones on sections of each party's parcel in order to reduce the need for new permanent service roads and to alleviate future discord between the parties. The court adopted the referees' report, including the imposition of the no-build zones. Plaintiff appealed on grounds that under this section, neither the referees nor the court possessed the power to impose a no-build zone. The Supreme Court disagreed, noting that under 70-29-209, the District Court has broad powers when a partition cannot be made equally, including application of the practice of owelty, wherein a court may adjudge compensation to be made by one party to another on account of the inequality. Although the compensation is often in the form of a monetary award, the court's equitable powers also include the power to impose servitudes. In this case, the facts were sufficient to support the referees' no-build zone recommendation, and the imposition of the servitude fell within the equitable power of the District Court. The Supreme Court affirmed the partition, including the no-build zones. Kellogg v. Dearborn Information Serv., LLC, 2005 MT 188, 328 M 83, 119 P3d 20 (2005).

Sufficient Evidence of Referees' Use of Quality and Quantity Standard: The plaintiff, DeHaan, in a property partition suit, alleged that the lower court erred in adopting the referees' report on the basis that the referees had applied a "needs and wishes" standard. The Supreme Court held that although there was evidence that the referees may have considered the needs and wishes of the parties, there was sufficient evidence indicating that the referees had applied the "quality and quantity" standard required by this section. Frank DeHaan, Inc. v. Gallatin-Madison Ranch Co., 250 M 304, 820 P2d 423, 48 St. Rep. 963 (1991), overruled, with respect to the holding that a referee's report must be rejected by the court only for reasons that would justify the reversal of a jury's verdict, in Tillett v. Lippert, 275 M 1, 909 P2d 1158, 53 St. Rep. 1 (1996).

Sufficiency of Evidence — Parol Partition: Evidence was sufficient to support judgment of parol partition. Johnson v. Johnson, 172 M 94, 560 P2d 1331 (1977).

70-29-206. Procedure in relation to lots and subdivisions.

Case Notes

Sufficiency of Evidence — Parol Partition: Evidence was sufficient to support judgment of parol partition. Johnson v. Johnson, 172 M 94, 560 P2d 1331 (1977).

70-29-207. Allotment of shares of land — improvements.

Case Notes

Statute Applicable When Property Partitioned — Valuation Correctly Included Improvements: Plaintiff appealed from a District Court order allocating a cotenant $24,450 for land and improvements from a public sale of recreational property, claiming that under this section, the land must be valued without regard to improvements. In affirming the District Court decision that included improvements, the Supreme Court ruled that because the statute applies to partitioned property, the District Court, in deciding not to partition, is not bound by the statute's directive to evaluate the land separately from improvements. Troglia v. Bartoletti, 266 M 240, 879 P2d 1169, 51 St. Rep. 783 (1994).

Partition When Cotenant Has Life Estate in Improvements: A partition action was filed by one cotenant of a piece of real property, the wife, after the death of the other, the husband. The decedent had willed a life estate in his one-half interest to his wife and the remainder interest to their children. In allocating the property between the wife and the children, the referee allotted to the wife the land on which the family residence was located. The children appealed the District Court's adoption of the referee's recommendation, claiming that the referee erred by failing to take into account value of the improvements when dividing the land and that it was improper to award the wife that portion of the property containing all of the improvements. On appeal, the Supreme Court ruled that under 70-29-207, it was proper for the referee to exclude the improvements in appraising the property but to include the improvements in allocating the two parcels between the two parties. Further, the court held that although the children may have a remainder interest in the improvements that were in existence at the time of their father's death, because the improvements were all near the residence, it was not error to award that site to the wife. Lawrence v. Donovan, 207 M 130, 673 P2d 130, 40 St. Rep. 1944 (1983).

70-29-208. Allotment of land to grantee of tenant in common.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-29-209. Compensation of one party by another in certain cases of partition.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1983 Amendment: Near end of (1), changed "infant" to "minor" twice.

Case Notes

Authority of District Court to Impose Servitude Forbidding Building as Part of Property Partition — Owelty Applied: Plaintiff requested that the District Court partition some adjoining property, the division of which the parties, as tenants in common, could not agree upon. The court appointed referees to survey the property and recommend how best to divide it. The referees settled on a plan of division, including a recommendation to impose no-build zones on sections of each party's parcel in order to reduce the need for new permanent service roads and to alleviate future discord between the parties. The court adopted the referees' report, including the imposition of the no-build zones. Plaintiff appealed on grounds that under 70-29-205, neither the referees nor the court possessed the power to impose a no-build zone. The Supreme Court disagreed, noting that under this section, the District Court has broad powers when a partition cannot be made equally, including application of the practice of owelty, wherein a court may adjudge compensation to be made by one party to another on account of the inequality. Although the compensation is often in the form of a monetary award, the court's equitable powers also include the power to impose servitudes. In this case, the facts were sufficient to support the referees' no-build zone recommendation, and the imposition of the servitude fell within the equitable power of the District Court. The Supreme Court affirmed the partition, including the no-build zones. Kellogg v. Dearborn Information Serv., LLC, 2005 MT 188, 328 M 83, 119 P3d 20 (2005).

Equitable Division of Property and Water Rights — No Compensation or Attorney Fee: The court held that under the clearly established standard of review of a nonjury civil action, the trial court did not err in finding in a partition action that the defendants were entitled to the one-half share in the West Gallatin Canal Company, that the plaintiff was not entitled to compensation for the water right awarded, and that plaintiff was not entitled to attorney fees for bringing the partition action. The court examined the equity of the proceeding in its entirety and concluded that the fact that one party may have received less water than it started with does not make the partition inequitable. The partition of the property and appurtenant water rights was based on substantial credible evidence and resulted in an equitable division among the cotenants. Kravik v. Lewis, 213 M 448, 691 P2d 1373, 41 St. Rep. 2228 (1984).

70-29-210. Consent of guardian to share of ward.

Compiler's Comments

1997 Amendment: Chapter 490 in first sentence, after "estate of a", substituted "person committed pursuant to 53-21-127" for "seriously mentally ill person"; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 40, Ch. 490, L. 1997, was a saving clause.

1983 Amendment: Changed "infant" to "minor" twice.

70-29-211. Referees to make report.

Case Notes

District Court Discretion in Review and Adoption of Referee's Report: Pursuant to 70-29-212, a District Court has discretion in reviewing or adopting the report of a referee. The Supreme Court overruled prior holdings that a referee's report is to be rejected by the court only for reasons that would justify the reversal of a jury's verdict, as set out in Ivins v. Hardy, 123 M 513, 217 P2d 204 (1950), Ivins v. Hardy, 134 M 445, 333 P2d 471 (1958), and DeHaan v. Gallatin-Madison Ranch, 250 M 304, 820 P2d 423 (1991). Tillett v. Lippert, 275 M 1, 909 P2d 1158, 53 St. Rep. 1 (1996).

70-29-212. Judgment upon confirmation of report — effect.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Partition Hearing Required if Substantiated Claims of Factual or Legal Error Submitted By Party — Parties May Call Referee as Witness: In a partition action concerning real property on Flathead Lake owned by two sisters, the District Court entered a final partition judgment adopting recommendations by the partition referees and one of the parties. The District Court entered the judgment although the other party objected to the referees' final report, requested a hearing on the partition action, filed affidavits attacking conclusions in the referees' report, and asked that she be allowed to depose the referees. The Supreme Court found that because there was no evidentiary hearing and therefore no documents were entered into evidence, it could not discern whether the District Court's judgment was supported by substantial credible evidence. The Supreme Court found that if a party makes a substantiated claim of factual or legal error in the referees' report, due process and equitable concerns require that a court hold a hearing before confirming, changing, or modifying the report pursuant to 70-29-212. The court also held that any party to a partition may call a referee as a witness during the evidentiary hearing. Britton v. Brown, 2013 MT 30, 368 Mont. 379, 300 P.3d 667, distinguished in Morley v. Morley, 2022 MT 12, 407 Mont. 241, 502 P.3d 666, affirming the District Court's adoption of the referees' report without holding an evidentiary hearing and acceptance of the referees' division of costs.

District Court Discretion in Review and Adoption of Referee's Report: Pursuant to this section, a District Court has discretion in reviewing or adopting the report of a referee. The Supreme Court overruled prior holdings that a referee's report is to be rejected by the court only for reasons that would justify the reversal of a jury's verdict, as set out in Ivins v. Hardy, 123 M 513, 217 P2d 204 (1950), Ivins v. Hardy, 134 M 445, 333 P2d 471 (1958), DeHaan v. Gallatin-Madison Ranch, 250 M 304, 820 P2d 423 (1991), and Kellogg v. Dearborn Information Serv., LLC, 2005 MT 188, 328 M 83, 119 P3d 20 (2005). Tillett v. Lippert, 275 M 1, 909 P2d 1158, 53 St. Rep. 1 (1996).

Discrepancy Between Acreage Figures in Referee's Report and Acreage Figures in District Court Decree: When there was a discrepancy between the amount of acreage partitioned by the referee in his report and the amount of acreage awarded by the District Court in its decree confirming partition, the Supreme Court remanded the case for correction of the land descriptions. Lawrence v. Donovan, 207 M 130, 673 P2d 130, 40 St. Rep. 1944 (1983).

Presumption That Referee's Valuation Was Arrived at Fairly and Honestly: A partition action was filed by one cotenant of a piece of real property, the wife, after the death of the other, the husband. The decedent had willed a life estate in his one-half interest to his wife and the remainder interest to their children. The children appealed the District Court's partition decree, claiming, among other things, that the referee had undervalued a certain parcel of the property. The referee had set a value of $7,500 for the parcel. The children contended that because they had received an offer of $24,500 for the parcel, on the condition that a fee simple interest be conveyed, the referee's valuation was erroneous. The Supreme Court upheld the partition decree. The court ruled that the children had not presented evidence sufficient to overcome the presumption that the referee's valuation was arrived at fairly and honestly, because the $24,500 offer was dependent on the transfer of a fee simple title and this was not possible because of the wife's life estate in the property. Lawrence v. Donovan, 207 M 130, 673 P2d 130, 40 St. Rep. 1944 (1983).

Sufficiency of Evidence — Parol Partition: Evidence was sufficient to support judgment of parol partition. Johnson v. Johnson, 172 M 94, 560 P2d 1331 (1977).

Appellate Review: In proceedings to partition large ranching property, confirming order of the District Court must stand in the absence of any substantial showing of gross inequality or the use of wrong principles in the referees' report. On appeal, the report of the referees may not be rereferred for lesser reasons. Ivins v. Hardy, 134 M 445, 333 P2d 471 (1958), overruled, both in this case and in Ivins v. Hardy, 134 M 445, 333 P2d 471 (1958), with respect to the holding that a referee's report must be rejected by the court only for reasons that would justify the reversal of a jury's verdict, in Tillett v. Lippert, 275 M 1, 909 P2d 1158, 53 St. Rep. 1 (1996).

70-29-216. Abstract of title — when cost of allowed — filing and inspection.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-29-217. Abstract — how made and verified.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-29-218. Costs of partition — apportionment among parties — lien.

Case Notes

Equitable Division of Property and Water Rights — No Compensation or Attorney Fee: The court held that under the clearly established standard of review of a nonjury civil action, the trial court did not err in finding in a partition action that the defendants were entitled to the one-half share in the West Gallatin Canal Company, that the plaintiff was not entitled to compensation for the water right awarded, and that plaintiff was not entitled to attorney fees for bringing the partition action. The court examined the equity of the proceeding in its entirety and concluded that the fact that one party may have received less water than it started with does not make the partition inequitable. The partition of the property and appurtenant water rights was based on substantial credible evidence and resulted in an equitable division among the cotenants. Kravik v. Lewis, 213 M 448, 691 P2d 1373, 41 St. Rep. 2228 (1984).

Meaning of "Common Benefit": A partition action was filed by one cotenant of a piece of real property, the wife, after the death of the other, the husband. The decedent had willed a life estate in his one-half interest to his wife and the remainder interest to their children. The Supreme Court rejected the children's claim, on appeal, that all costs of partition should be borne by the wife because she alone would benefit from the partition. The court ruled that there was benefit to the children in the establishment of the exact boundaries of the portion of the property which is subject to the remainder interest. Lawrence v. Donovan, 207 M 130, 673 P2d 130, 40 St. Rep. 1944 (1983).

Attorney Fees: The services of plaintiff's attorney in preparing the complaint and conducting the trial should be included in the costs of the action, as they are for the common benefit. Murray v. Conlon, 19 M 389, 48 P 743 (1897).

Law Review Articles

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, V. Non-Secured Real Estate Transactions, Williams, 46 Mont. L. Rev. 136 (1985).

70-29-219. Expenses of referees and surveyor.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-29-221. Expenses of previous litigation.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 3
Sale and Disposition of Proceeds

70-29-301. Sale to be at public auction — notice.

Case Notes

Court Making Sale: This section does not forbid sales by the court on confirmation. Cont. Oil Co. v. McNair Realty Co., 137 M 410, 353 P2d 100 (1960).

70-29-303. Who may not be purchasers.

Compiler's Comments

1983 Amendment: In (1), changed "infant" to "minor" twice.

70-29-304. Party or encumbrancer as purchaser.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-29-305. Court to direct terms of credit and investment.

Compiler's Comments

1983 Amendment: Near end of section, changed "infants" to "minors".

70-29-306. Security for sales on credit.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1983 Amendment: In (2), changed "infant" to "minor" twice.

70-29-307. Security taken and investment made in name of clerk.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-29-326. Tenant for life or years — compensation upon sale.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-29-327. Minor's share of proceeds — payment to guardian.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1983 Amendment: Changed "an infant" to "a minor".

70-29-328. Incompetent's share of proceeds — payment to guardian.

Compiler's Comments

1997 Amendment: Chapter 490 in first sentence, after "estate of a", substituted "person committed pursuant to 53-21-127" for "seriously mentally ill person"; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 40, Ch. 490, L. 1997, was a saving clause.

70-29-330. Duty of clerk as to security and investments.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 4
Uniform Partition of Heirs Property Act

Part Compiler's Comments

Effective Date: This part is effective October 1, 2013.

Applicability: Section 15, Ch. 263, L. 2013, provided: "[This act] applies to proceedings begun on or after [the effective date of this act]." Effective October 1, 2013.

CHAPTER 30
EMINENT DOMAIN

Chapter Compiler's Comments

Saving Clause: Section 13, Ch. 622, L. 1983, provided: "This act does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun prior to the effective date of this act." Effective October 1, 1983.

Chapter Case Notes

Condemnation of Private Water System: The city of Missoula filed a complaint to condemn the water system privately owned by the defendant water company. The city previously lost an attempt to condemn the water system in Missoula v. Mtn. Water Co. (Mountain Water I), 228 Mont. 404, 743 P.2d 590 (1987), and Missoula v. Mtn. Water Co. (Mountain Water II), 236 Mont. 442, 771 P.2d 103 (1989). The District Court issued a preliminary order of condemnation. On appeal, the Supreme Court affirmed, finding that the defendants presented no compelling evidence that they were deprived of due process, that the District Court properly refused to grant a continuance and no actual prejudice resulted, that the defendants did not make a compelling case that they were not ready for trial because they were able to present a full and well-prepared defense, that the District Court properly declined to admit all of the proposed valuation evidence and the Legislature clearly intended for valuation to be determined by unbiased fact finders after the necessity determination, that the District Court properly refused to dismiss a party, that collateral estoppel was inappropriate because there was a change of circumstances sufficient to warrant a new analysis of whether public ownership of the water system was more necessary than private ownership and the city's previous attempt to acquire the water system did not bar the new action, that the District Court properly found that the effect of condemnation on employees was one of several nondispositive factors that must be considered, and that the District Court correctly determined that public ownership of the water system was more necessary than private ownership. Missoula v. Mtn. Water Co., 2016 MT 183, 384 Mont. 193, 378 P.3d 1113.

Denial of Subdivision — No Taking: Plaintiff claimed that the county's denial of his subdivision constituted a regulatory taking. The Supreme Court affirmed the District Court's grant of summary judgment to the county, concluding that the plaintiff could not allege economic loss when he purchased his property fully aware that he could subdivide the land only with county approval. Richards v. Missoula County, 2012 MT 236, 366 Mont. 416, 288 P.3d 175.

Implied Easement by Necessity — Negated by Eminent Domain Power: In the context of federal checkerboard land grants to railroads, the claimant of an implied easement by necessity traced common ownership of the dominant and servient parcels to the federal government, and the necessity for the easement arose when the parcels were severed from the federal government's common ownership, thus satisfying the unity of ownership requirement. However, the easement failed because the United States' power of eminent domain negated the "strict necessity" requirement, and the claimant failed to produce evidence regarding the government's intent to reserve an easement and its inability to condemn an easement. Yellowstone River, LLC v. Meriwether Land Fund I, LLC, 2011 MT 263, 362 Mont. 273, 264 P.3d 1065.

Independent Eminent Domain Proceeding by Joint Airport Board Member — No Due Process Violation: It was not a violation of due process for a member municipality of a joint airport board to pursue independent eminent domain proceedings as long as the procedures in this chapter were complied with. Lake v. Lake County, 233 M 126, 759 P2d 161, 45 St. Rep. 1354 (1988).

Condemnation of Land for Conduct of Water Subject to Eminent Domain Proceedings: An action to condemn land pursuant to 85-2-414 must follow the eminent domain proceedings set out in Title 70, ch. 30. A water appropriator could not contend that his right of eminent domain was taken away when he had not even initiated the proper procedures to pursue the action. Careless Creek Ranch Co. v. Murnion, 230 M 216, 748 P2d 475, 45 St. Rep. 154 (1988).

Statutory Requirements to Be Followed: Madison County attempted to establish a county road across defendants' land. The county invoked eminent domain. Section 70-30-108 requires compliance with the statutory provisions relating to the establishment of county roads. Title 7, ch. 14, generally requires a chain of events involving: (1) the filing of a proper petition with the county; (2) the option of the county surveying a specific route; (3) the county determination of the affected landowners and assessment of their damages; (4) the county offer of an award of damages; and (5) if the award is rejected, the beginning of condemnation proceedings. In this case the county did not receive a proper petition. The county offered damages for one proposed route but began condemnation on a different route for which no offer was made. The proceedings did not comply with the statutes and were not cured by 7-14-2609. The county may not ignore the mandates of the statutes, or they would be of no consequence. Madison County v. Elford, 203 M 293, 661 P2d 1266, 40 St. Rep. 457 (1983).

Chapter Attorney General's Opinions

Reference Intended Only to Designate Law Governing State Condemnation: The parenthetical reference to Title 70, chapter 30, in 76-3-201 does not limit the term "law of eminent domain" to proceedings under the state statute. The reference was intended only to designate that provision of Montana law which largely governs condemnation matters and was not designed to foreclose applicability of the exemption to agreements providing for divisions of land which could have been effected through federal condemnation proceedings. 42 A.G. Op. 36 (1987).

Chapter Law Review Articles

An Essay on "Takings", Clifford & Huff, 59 Mont. L. Rev. 9 (1998).

Montana Supreme Court Unnecessarily Misconstrues Takings Law, Horwich & Lund, 55 Mont. L. Rev. 455 (1994).

Regulatory Takings: The Search for a Definitive Standard, Dringman, 55 Mont. L. Rev. 245 (1994).

Eminent Domain: Exploitation of Montana's Natural Resources, Kaze, 35 Mont. L. Rev. 279 (1974).

The Montana Law of Valuation in Eminent Domain, Sullivan, 34 Mont. L. Rev. 90 (1973).

"Necessity" in Eminent Domain Proceedings, Carl, 29 Mont. L. Rev. 69 (1967).

Review of Route Selections for the Federal Aid Highway Systems, Tippy, 27 Mont. L. Rev. 131 (1966).

Compensation for Taking of Flowage Easements by Condemnation, Corontzos, 23 Mont. L. Rev. 212 (1962).

Evidence of Revenue Produced From Property Taken by Eminent Domain Held Relevant to Determining Market Value, Fredricks, 22 Mont. L. Rev. 80 (1960).

The Environment, the Free Market, and Property Rights: Post-Lucas Privatization of the Public Trust, Jaunich, 15 Pub. Land L. Rev. 167 (1994).

Eminent Domain Due Process, Hudson, 119 Yale L.J. 1280 (2010).

Reviving Necessity in Eminent Domain, Bird, 33 Harv. J.L. & Pub. Pol'y 239 (2010).

Part 1
General and Substantive Provisions

Part Case Notes

No Showing of Irreparable Injury — Mandatory Injunction Inappropriate: The Department of Highways reconstructed the highway across Curran's property, including removing a bridge across Flat Creek and replacing it with twin culverts. During a flood the following spring, the culverts were blocked by ice and debris and the creek overflowed, covering 17 acres of Curran's grazing land, causing erosion, and leaving debris and gravel on the land that rendered the property unusable for its ordinary purposes. Curran's amended complaint waived damages, seeking only a mandatory injunction requiring the Department to replace the stream crossing in a manner that would abate the nuisance. The District Court denied the injunction and dismissed Curran's complaint, finding no act that would produce irreparable injury to justify a mandatory injunction. Relying on Riddock v. Helena, 212 M 390, 687 P2d 1386 (1984), the Supreme Court stated the theory that to allow a landowner injunctive relief would defeat a public entity's power of eminent domain. As a matter of public policy, the better alternative is to ensure compensation to a damaged landowner by requiring the state to purchase any property it takes for a public purpose. Citing Wilhite v. Billings, 39 M 1, 101 P 168 (1909), the court found no basis for an order compelling the Department to reconstruct the stream crossing. If Curran could show that the crossing caused the inundation of his land, he might be entitled to compensation in an inverse condemnation action. However, if his loss could be compensated, it is not an irreparable injury, nor did the voluntary waiver of damages create an irreparable injury. Absent a showing of irreparable injury, Curran was not entitled to a mandatory injunction, the proper remedy being an action for condemnation or damages. Curran v. Dept. of Highways, 258 M 105, 852 P2d 544, 50 St. Rep. 450 (1993). See also Gabriel v. Wood, 261 M 171, 862 P2d 42, 50 St. Rep. 1246 (1993).

Private Deed Restriction Not Bar to Inverse Condemnation: Where property became unsuitable for use as residential property because of city's action in developing a major arterial street, the fact that use was limited by private deed restriction to residential use does not bar an inverse condemnation action. Supreme Court held it was not the restriction that rendered plaintiff's property unusable and unmarketable as residential property but rather the action of the city in developing the street. Knight v. Billings, 197 M 165, 642 P2d 141, 39 St. Rep. 385 (1982).

Restriction of Access by Street Closure Not Compensable: Under 7-14-4114, the abutting lot owners do not suffer compensable damage when a street closure restricts their access to their property as long as some "adequate and reasonable" means of access is preserved. Wynia v. Great Falls, 183 M 458, 600 P2d 802, 36 St. Rep. 1589 (1979).

Moving or Raising Utility Wires — Police Power, Not Eminent Domain: Under 69-4-603, a utility was required to move or raise utility wires so that oversized objects could be moved through public streets. The statute was determined to be an exercise of police power rather than sounding in eminent domain. Therefore, due process requirements of the 14th amendment may be met without compensation. Four factors were cited in the determination that the statute exercised police power: (1) public safety is concerned; (2) a public benefit is conferred; (3) a reasonable and necessary public use is allowed; and (4) the public's right to use the highways is recognized under the statute. Yellowstone Valley Elec. Co-op, Inc. v. Ostermiller, 187 M 8, 608 P2d 491 (1980).

70-30-101. Eminent domain defined.

Case Notes

Inverse Condemnation — Sanitary Sewer Overflow Into Plaintiffs' Basement — Plaintiffs Failed to Show Damage Caused by Deliberate Actions of City — Public Use. Wittman v. Billings, 2022 MT 129, 409 Mont. 111, 512 P.3d 1209.

Condemnation of Private Water System: The city of Missoula filed a complaint to condemn the water system privately owned by the defendant water company. The city previously lost an attempt to condemn the water system in Missoula v. Mtn. Water Co. (Mountain Water I), 228 Mont. 404, 743 P.2d 590 (1987), and Missoula v. Mtn. Water Co. (Mountain Water II), 236 Mont. 442, 771 P.2d 103 (1989). The District Court issued a preliminary order of condemnation. On appeal, the Supreme Court affirmed, finding that the defendants presented no compelling evidence that they were deprived of due process, that the District Court properly refused to grant a continuance and no actual prejudice resulted, that the defendants did not make a compelling case that they were not ready for trial because they were able to present a full and well-prepared defense, that the District Court properly declined to admit all of the proposed valuation evidence and the Legislature clearly intended for valuation to be determined by unbiased fact finders after the necessity determination, that the District Court properly refused to dismiss a party, that collateral estoppel was inappropriate because there was a change of circumstances sufficient to warrant a new analysis of whether public ownership of the water system was more necessary than private ownership and the city's previous attempt to acquire the water system did not bar the new action, that the District Court properly found that the effect of condemnation on employees was one of several nondispositive factors that must be considered, and that the District Court correctly determined that public ownership of the water system was more necessary than private ownership. Missoula v. Mtn. Water Co., 2016 MT 183, 384 Mont. 193, 378 P.3d 1113.

Statutory Purpose of Television District Is to Serve Public Interest and Convenience — Public Use With Respect to Condemnation Laws: Adams argued that the District Court had erred in granting the condemnation order requested by the county with respect to his property, which he had purchased with an existing lease on the land covering the transmitters already located on the land. When Adams and the county were unable to negotiate a new lease or sale of the property, even though the county offered to purchase the land for more than the appraised value, the county obtained the condemnation order. The Supreme Court held that the statutes governing television districts established that the districts were to be created to serve the public interest, convenience, and necessity in the construction, maintenance, and operation of television translator stations and therefore the statutory mandate to serve the public interest did constitute public use with respect to eminent domain laws. Park County v. Adams, 2004 MT 295, 323 M 370, 100 P3d 640, (2004).

Eminent Domain — Highway Interchange and Visitor Center Public Use — Chamber of Commerce Building Not: The state attempted to condemn an 8.72-acre parcel to build a highway interchange and visitor center. Forty percent of the proposed building was to be used by the local Chamber of Commerce, a private, nonprofit organization. The District Court held that the highway interchange and visitor center are public purposes and that the state had lawfully exercised its power of eminent domain as to the entire 8.72-acre parcel but that the Chamber of Commerce could not be a part of the planned highway interchange building complex. Property owners appealed on the grounds that by including the Chamber in the plans, the entire taking is unlawful. The Supreme Court held that the District Court did not err in severing the Chamber's participation in the building plan and granting the condemnation order because the Chamber's presence was not a part of the request for condemnation. Bozeman v. Vaniman, 271 M 514, 898 P2d 1208, 52 St. Rep. 543 (1995).

No Recovery if No Actual Taking: When a public improvement is made on property adjoining that of one who claims to be damaged by general factors like change of neighborhood, noise, dust, change of view, increased traffic, pollution, and inconvenience of ingress and egress, there can be no recovery if there has been no actual taking or severance of the claimant's property. Adams v. Dept. of Highways, 230 M 393, 753 P2d 846, 45 St. Rep. 298 (1988). However, see Knight v. Missoula, 252 M 232, 827 P2d 1270, 49 St. Rep. 230 (1992), wherein the District Court erred in its broad reading and application of Adams by summarily dismissing a case involving a dirt road in a residential area. The Supreme Court found that limited circumstances could arise in which problems associated with increased traffic may be compensable, and the court remanded for a finding of whether the increased traffic and resulting problems caused a depreciation in the value of adjoining residential property sufficient to give rise to compensation under the doctrine of inverse condemnation. See also Wittman v. Billings, 2022 MT 129, 409 Mont. 111, 512 P.3d 1209.

Inverse Condemnation, Trespass, and Injunctive Relief — City Water Pipeline: City openly and visibly constructed a water supply line across land owned by plaintiff's predecessor in interest outside the easement granted to the city. The Supreme Court affirmed District Court's decision that plaintiff may not maintain an action for inverse condemnation, trespass, or injunctive relief against the city. The only remedy available to a landowner for such taking is an action for inverse condemnation, and only the landowner at the time of taking is entitled to recover damages for the taking. To allow a landowner injunctive relief would allow the landowner to defeat the city's power of eminent domain. Riddock v. Helena, 212 M 390, 687 P2d 1386, 41 St. Rep. 1817 (1984).

Inverse Condemnation Prior to Sale: When inverse condemnation of land occurs prior to its sale, purchaser is not entitled to claim damages for the condemnation. Howard v. St., 198 M 470, 647 P2d 828, 39 St. Rep. 1111 (1982).

"Taking" — Interference With Right to Use Property: In 1978, developers purchased 183 acres of land for the purpose of subdividing and selling it. They were unaware that for 20 years the National Guard, by permit of the state and the Bureau of Land Management, had conducted training sessions involving dangerous weapons on land surrounding the parcel to be developed. Because they could not sell the land, developers sued the state for inverse condemnation. After a jury found in favor of the state, the trial judge granted developers' motion for a new trial. The Supreme Court reversed, ruling that a "taking" occurs not only when there is an interference with the actual use of the property but also when there is an interference with the right to use the property. Thus the taking occurred when the National Guard first began to use the land rather than when the land was developed. Therefore, inverse condemnation had already occurred when the developers bought the land and they were not entitled to damages. Howard v. St., 198 M 470, 647 P2d 828, 39 St. Rep. 1111 (1982).

Inverse Condemnation by City: Where the city of Billings widened and developed a major arterial street adjacent to plaintiff's residentially zoned property, where property on opposite side of street was condemned by city in process of developing the street, and where plaintiff's property was significantly reduced in value because of the city's refusal to rezone plaintiff's property, the city, although exercising its police power properly, nonetheless interfered with plaintiff's private property interests so as to constitute taking by inverse condemnation. Knight v. Billings, 197 M 165, 642 P2d 141, 39 St. Rep. 385 (1982), distinguished in Adams v. Dept. of Highways, 230 M 393, 753 P2d 846, 45 St. Rep. 298 (1988), and in McElwain v. Flathead County, 248 M 231, 811 P2d 1267, 48 St. Rep. 410 (1991). See also Wohl v. Missoula, 2013 MT 46, 369 Mont. 108, 300 P.3d 1119.

Requisite Necessity to Condemn Road: Plaintiff could not prevail in his condemnation action for a private road across defendant's tract to plaintiff's property because the evidence did not show that the land is presently being used as a farm or residence, and without such a showing the requisite necessity to condemn a road across another's land is absent. Groundwater v. Wright, 180 M 27, 588 P2d 1003 (1979), followed in Myers v. Dee, 2011 MT 244, 362 Mont. 178, 261 P.3d 1054.

Strict Compliance Required:

The jurisdiction of courts over eminent domain proceedings is wholly statutory, the Due Process of Law Clause, in addition to its requirement of public use and just compensation, protecting the landowner from the adoption of any form of procedure which deprives him of a reasonable opportunity to be heard. The provisions of the law granting the right of eminent domain must be complied with. Housing Authority v. Bjork, 109 M 552, 98 P2d 324 (1940).

The right to take private property from its owner against his will can be invoked only pursuant to law. Authority for the exercise of such right must be clearly expressed in the law before it will be allowed, and when the right is sought to be exercised, the provisions of the law must be rigorously complied with. St. v. Aitchison, 96 M 335, 30 P2d 805 (1934); State ex rel. McMaster v. District Court, 80 M 228, 260 P 134 (1927).

Special Proceedings: Condemnation proceedings are special proceedings provided for by the statute. State ex rel. Davis v. District Court, 29 M 153, 74 P 200 (1903).

70-30-102. Public uses enumerated.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 3, Ch. 238, L. 2023. Amendment effective April 24, 2023.

Applicability: Section 7, Ch. 238, L. 2023, provided: "[This act] does not apply to condemnation proceedings commenced pursuant to 70-30-206 before [the effective date of this act]." Effective April 24, 2023.

2009 Amendment: Chapter 286 in (16) near beginning after "purposes" substituted "pursuant to 7-11-1021" for "as provided in 7-35-2201". Amendment effective July 1, 2009.

Saving Clause: Section 42, Ch. 286, L. 2009, was a saving clause.

Transition — Repealed: Section 43, Ch. 286, L. 2009, provided: "(1) Subject to subsection (2), a special district in existence on [the effective date of this act] [effective July 1, 2009] must comply with the provisions of [sections 1 through 20] [Title 7, ch. 11, part 10] upon alteration of its boundaries or a change in its amount or method of assessment. If dissolution is proposed for a special district in existence on [the effective date of this act] [effective July 1, 2009], the proposal is subject to the provisions of [section 20] [7-11-1029].

(2) A special district in existence on [the effective date of this act] [effective July 1, 2009] is required to comply with the provisions of [section 10] [7-11-1014] only upon alteration of its boundaries." This transition section was repealed by sec. 2, Ch. 97, L. 2019. See the code commissioner explanation under 7-11-1004.

2007 Amendments — Composite Section: Chapter 193 in (37) at end inserted exception clause. Amendment effective April 11, 2007.

Chapter 512 in (7) after "facilities" substituted "and other publicly owned buildings and facilities" for "and all other public uses"; in (12) after "parts 42 and 43" inserted exception clause restricting urban renewal projects; and made minor changes in style. Amendment effective October 1, 2007.

2005 Amendment: Chapter 300 in (11) near beginning after "airport" deleted "and landing field" and near end substituted reference to 67-7-210 for reference to 67-5-202 and 67-6-301. Amendment effective April 19, 2005.

2003 Amendment: Chapter 451 in (16) inserted "state veterans' cemetery purposes as provided in 10-2-604"; and made minor changes in style. Amendment effective April 21, 2003.

2001 Amendment: Chapter 125 inserted (6) relating to local water supply systems; in (7) inserted "controlled-access facilities"; inserted (8) through (29) enumerating specific public uses; at end of (31) deleted "public transportation"; in (33) after "tunnels" deleted "ditches, flumes, pipes"; in (37) substituted "electrical energy" for "electric light"; deleted former (11) that read: "(11) electric power lines"; in (44) near beginning substituted "condemnor" for "plaintiff"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Case Notes

Condemnation of Private Water System: The city of Missoula filed a complaint to condemn the water system privately owned by the defendant water company. The city previously lost an attempt to condemn the water system in Missoula v. Mtn. Water Co. (Mountain Water I), 228 Mont. 404, 743 P.2d 590 (1987), and Missoula v. Mtn. Water Co. (Mountain Water II), 236 Mont. 442, 771 P.2d 103 (1989). The District Court issued a preliminary order of condemnation. On appeal, the Supreme Court affirmed, finding that the defendants presented no compelling evidence that they were deprived of due process, that the District Court properly refused to grant a continuance and no actual prejudice resulted, that the defendants did not make a compelling case that they were not ready for trial because they were able to present a full and well-prepared defense, that the District Court properly declined to admit all of the proposed valuation evidence and the Legislature clearly intended for valuation to be determined by unbiased fact finders after the necessity determination, that the District Court properly refused to dismiss a party, that collateral estoppel was inappropriate because there was a change of circumstances sufficient to warrant a new analysis of whether public ownership of the water system was more necessary than private ownership and the city's previous attempt to acquire the water system did not bar the new action, that the District Court properly found that the effect of condemnation on employees was one of several nondispositive factors that must be considered, and that the District Court correctly determined that public ownership of the water system was more necessary than private ownership. Missoula v. Mtn. Water Co., 2016 MT 183, 384 Mont. 193, 378 P.3d 1113.

Compressor Station — Public Use: A compressor station used to transport natural gas qualifies as a public use under this section. McEwen v. MCR, LLC, 2012 MT 319, 368 Mont. 38, 291 P.3d 1253.

Definition of "Residence" in Eminent Domain Proceeding — Existence of Residence a Question for Jury: Pursuant to 70-30-102(36), the plaintiff sought to exercise the right of eminent domain to create a private road leading to his property, which contains a historic, uninhabited cabin. The plaintiff argued the uninhabited cabin constituted a "residence" under 70-30-102(36). The District Court granted summary judgment to the defendants, concluding 70-30-102(36) requires that the residence be presently in use. Applying Groundwater v. Wright, 180 Mont. 27, 588 P.2d 1003 (1979), and Richter v. Rose, 1998 MT 165, 289 Mont. 379, 962 P.2d 583, the Supreme Court affirmed, concluding that the term "residence" requires ongoing use or physical activity and refers to a habitable structure or dwelling place — a place where people are living. Although the existence of a residence and the necessity of a road to access a residence are generally questions for a jury under 70-30-107, summary judgment was proper because the parties did not dispute that the historic cabin was uninhabitable and, therefore, did not constitute a residence under 70-30-102(36). Myers v. Dee, 2011 MT 244, 362 Mont. 178, 261 P.3d 1054.

Public Utility — Authority for Condemnation: In a condemnation proceeding, the District Court dismissed a public utility's complaint for condemnation on the basis that the utility did not possess the power of eminent domain and had no authority to take private property. The Supreme Court reversed on the basis that the District Court's order conflicted with HB 198 (Ch. 321, L. 2011), which clarified a public utility's eminent domain power, codified that authority into the Major Facility Siting Act, and applied retroactively to the issues in the case. MATL, LLP v. Salois, 2011 MT 126, 360 Mont. 510, 255 P.3d 158.

Oil Well Not Considered Mine to Which Right-of-Way May Be Obtained Through Eminent Domain — No Condemnation Power of Private Individuals and Corporation Except Through Legislative Grant — Condemnation Statutes Strictly Construed: Plaintiff filed a federal action seeking to condemn an access easement and right-of-way across defendant's ranch land for access to drill and operate oil wells. The federal District Court certified two questions to the Montana Supreme Court regarding whether: (1) exploration and development of a federal oil and gas lease are considered a mine that constitutes a public use under this section; and (2) 82-2-201 grants the owner of a federal oil and gas lease the power, as the owner of a "mining claim", to condemn a right-of-way across land of another for access to explore and develop the lease. The Supreme Court answered both questions in the negative. Private individuals and corporations, like state agencies, have no inherent power of eminent domain, so their authority to condemn derives only from a legislative grant. Public uses for which the power of eminent domain are granted must be interpreted pursuant to the plain language set forth by the Legislature and may not be implied. Because eminent domain interferes with the fundamental constitutional right to the private ownership of real property, any statute that allows condemnation of private property must be strictly construed, giving the statute its plain interpretation but favoring the person's fundamental rights. Under the plain meaning of this section, oil wells are not considered mines to which rights-of-way for roads may be obtained through eminent domain proceedings. Further, exploration and development of a federal oil and gas lease are not a mine that constitutes a public use, so the owner of an oil and gas lease has no power under 82-2-201 to condemn a right-of-way. McCabe Petroleum Corp. v. N Bar Ranch, LLC, 2004 MT 73, 320 M 384, 87 P3d 995 (2004), following St. v. Aitchison, 96 M 335, 30 P2d 805 (1934), and Bozeman v. Vaniman, 264 M 76, 869 P2d 790 (1994), and distinguishing Mid-Northern Oil Co. v. Walker, 65 M 414, 211 P 353 (1922), Rice Oil Co. v. Toole County, 86 M 427, 284 P 145 (1930), and Mont. Talc Co. v. Cyprus Mines Corp., 229 M 491, 748 P2d 444 (1987).

Definition of Farm for Purposes of Eminent Domain — Use of Otherwise Inapplicable Definition — Use of Ordinary Meaning of Undefined Term: The Richters brought an action in District Court to condemn an easement across the land of a neighbor that surrounded their property on three sides. The District Court held that the definition of farm in 72-16-331(7) (now repealed) applied to the use of that term in subsection (6) of this section, reasoning that because the term "farm" was undefined in this chapter, the definition in 72-16-331(7) (now repealed) should be applied because 1-2-107 provides that a definition contained in one section of law should be used for the purposes of other sections of law unless "a contrary intention plainly appears". The District Court then entered a preliminary condemnation order in favor of the Richters. The Supreme Court held that a contrary intention did in fact appear because the Legislature had, by use of the phrase "as used in 72-16-331 through 72-16-349" (all now repealed), limited the application of the terms defined in 72-16-331 (now repealed) to only 72-16-331 through 72-16-349 (all now repealed). Because farm was then left undefined for the purposes of this chapter, the Supreme Court applied the definition found in the American Heritage Dictionary and held that the Richters' property did not qualify as a farm, as defined in that dictionary, because the Richters had not prepared, fertilized, or tilled the soil on their property nor had they cited any authority for the Supreme Court to hold that naturally occurring timber on the property was a crop. The Supreme Court therefore reversed the condemnation order of the District Court. Richter v. Rose, 1998 MT 165, 289 M 379, 962 P2d 583, 55 St. Rep. 663 (1998), followed in Myers v. Dee, 2011 MT 244, 362 Mont. 178, 261 P.3d 1054.

Easement Necessary for Electric Power Lines — Condemnation Proper: Burlington Northern (BN) offered Montana Power Company (MPC) a wire line permit across BN property that would have allowed location, construction, operation, maintenance, replacement, and removal of a $2.2 million power transmission line. MPC rejected the offer because of the lack of permanence and allowance for rent escalation and because the permit was revocable without cause 100 days after notice and contained onerous indemnification and relocation provisions. Instead, MPC sought an easement without restrictions and condemnation, producing uncontroverted testimony about the area's need for the transmission facility as well as the practicality of locating the lines on BN's right-of-way. BN produced no evidence to contradict the choice of location or the public's need for the proposed line. The District Court properly held that an easement was necessary for the intended use, as compared to a wire line permit, and that the property was subject to condemnation. Mont. Power Co. v. Burlington N. RR Co., 272 M 224, 900 P2d 888, 52 St. Rep. 625 (1995).

Open-Pit Excavation Necessary for Backslope as Authorized Public Use — Landowner Notification Act Ineffectual to Prevent Condemnation: An open-pit excavation necessary to backslope the mining of an ore body is an authorized public use for which condemnation may be had. The Landowner Notification Act appears to preclude this kind of condemnation because under 82-2-303, an open-pit mine operator must obtain from the surface owner of private lands specific written approval of proposed work before commencing operations. However, the Supreme Court noted that the Act was aimed at the protection of private persons, while eminent domain law, constitutionally grounded and deriving from the power of sovereignty, was enacted to protect the public good. The court found it inconceivable that the Legislature intended provisions enacted for the benefit of private persons to overcome and supersede provisions preserving the public good. Therefore, the Landowner Notification Act was found not to adversely affect the right to use eminent domain against a nonconsenting landowner. Mont. Talc Co. v. Cyprus Mines Corp., 229 M 491, 748 P2d 444, 44 St. Rep. 2161 (1987), followed in Bozeman v. Vaniman, 264 M 76, 869 P2d 790, 51 St. Rep. 154 (1994). See also McCabe Petroleum Corp. v. N Bar Ranch, LLC, 2004 MT 73, 320 M 384, 87 P3d 995 (2004), wherein the Supreme Court held that eminent domain condemnation provisions applicable to open-pit mines in Mont. Talc Co. did not apply to oil and gas leases and wells.

Constitutionality — Equal Protection — Copper Mining Versus Strip Mining of Coal: Plaintiff contended that 70-30-102 was an unconstitutional violation of the Equal Protection Clause in that it allows the mining of copper to be a public use and disallows the strip mining of coal as a public use. It is well established that the Equal Protection Clause is very limited in cases involving eminent domain statutes. This is especially so when the statute merely declares the legislative determination as to what is considered to be a public use. All that is required is that there be a reasonable basis for the distinction. The basis for the Legislature's distinction is set forth in 70-30-106, which the court found to be an adequate reasonable basis. Schara v. The Anaconda Co., 187 M 377, 610 P2d 132 (1980).

Mining Permit Not Required Prior to Condemnation: Plaintiff contends that since 70-30-111 requires the use for condemned property to be "authorized by law" before condemnation is allowed, the obtaining of a valid mining permit is a condition precedent to condemnation. Section 70-30-102 declares mining to be a public use. It is unquestioned that the Anaconda Company is engaged in mining operations. To find that a mining permit must be obtained prior to condemnation would be inconsistent with statutory authority and contrary to the public policy of providing expediency in eminent domain proceedings. Schara v. The Anaconda Co., 187 M 377, 610 P2d 132 (1980).

Condemnation: Plaintiff could not prevail in his condemnation action for a private road across defendant's tract to plaintiff's property because the evidence did not show that the land is presently being used as a farm or residence, and without such a showing the requisite necessity to condemn a road across another's land is absent. Groundwater v. Wright, 180 M 27, 588 P2d 1003 (1979), followed in Myers v. Dee, 2011 MT 244, 362 Mont. 178, 261 P.3d 1054.

Electric Power: Legislature has specifically declared that an electric power line is public use for which private property may be taken by eminent domain proceedings under this section, and public use is not confined to actual use by public but is measured in terms of right of public to use proposed facilities for which condemnation is sought. Mont. Power Co. v. Bokma, 153 M 390, 457 P2d 769 (1969).

Mining Use:

The aid of eminent domain granted by this section to operators of mining property is extended to the industry of mining, not to the individual, and necessity must be shown to obtain exclusive control, and that contemplated use is more important public use than that for which the owner could lawfully use it. State ex rel. Butte-Los Angeles Min. Co. v. District Court, 103 M 30, 60 P2d 380 (1936).

Subsection (5) of this section was designed to favor the mining industry of the state. Kipp v. Davis-Daly Copper Co., 41 M 509, 110 P 237 (1910).

Legislation for Private Use: The taking of private property for the private use of another violates the 14th amendment to the federal Constitution, and the Legislature has not the power to declare that that which is in truth a private use shall be a public one, the question whether a particular use is a private or public one being determinable by the courts. Komposh v. Powers, 75 M 493, 244 P 298 (1926).

Express Business: A domestic corporation engaged in the express business is not authorized to invoke the power of eminent domain to any greater extent than a private individual, and the power is not open to the one for any purpose for which it is not open to the other. Wells Fargo & Co. v. Harrington, 54 M 235, 169 P 463 (1917).

Electric Power:

A power plant is one of the public uses for which land may be condemned; and the complaint, in a proceeding for that purpose, need not allege a promise of accomplishment in respect to the use or that there was a present or prospective demand for its products but only that the plaintiff is one of the agencies chosen by the state to exercise the power of eminent domain and that the use for which the property is to be taken is one of the public uses enumerated in the statute. Interstate Power Co. v. Anaconda Copper Min. Co., 52 M 509, 159 P 408 (1916).

The taking of land for the purpose of flooding it, rendered necessary by the construction of a dam for generating electric power to be sold to industrial enterprises and to the public generally, the power also to be utilized for pumping water upon arid lands, is for such public use as will support the right to acquire the land by condemnation. Helena Power Transmission Co. v. Spratt, 35 M 108, 88 P 773 (1907).

Necessity of Use Required: Complainant must allege the necessity of the use for which the condemnation is sought. Helena v. Harvey, 6 M 114, 9 P 903 (1886).

Law Review Articles

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, VI. Eminent Domain, Williams, 46 Mont. L. Rev. 137 (1985).

70-30-103. What property may be taken.

Compiler's Comments

2001 Amendment: Chapter 125 in (1) at beginning substituted "property" for "private property"; in (1)(e) near beginning substituted "public use mentioned in 70-30-102" for "all the purposes mentioned in 70-30-102"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Case Notes

Court Determination of Terms of Compatible Use to Be Included in Final Order of Condemnation: Although eminent domain statutes do not require protective conditions in an easement, courts do have the power under 70-30-206 to set forth protective provisions in an order for condemnation. In this case, the court found the use of property to be compatible for use both for a railroad and for electric power lines. Thus, failure by the court to include any requested protective provisions in its order of possession did not constitute reversible error, but the Supreme Court nevertheless remanded to the trial court for a hearing to determine what protective provisions requested by either party, if any, should be included in its final order of condemnation. Mont. Power Co. v.

Burlington N. RR Co., 272 M 224, 900 P2d 888, 52 St. Rep. 625 (1995), following St. Highway Comm'n v. Lavoie, 155 M 39, 466 P2d 594 (1970).

Easement Necessary for Electric Power Lines — Condemnation Proper: Burlington Northern (BN) offered Montana Power Company (MPC) a wire line permit across BN property that would have allowed location, construction, operation, maintenance, replacement, and removal of a $2.2 million power transmission line. MPC rejected the offer because of the lack of permanence and allowance for rent escalation and because the permit was revocable without cause 100 days after notice and contained onerous indemnification and relocation provisions. Instead, MPC sought an easement without restrictions and condemnation, producing uncontroverted testimony about the area's need for the transmission facility as well as the practicality of locating the lines on BN's right-of-way. BN produced no evidence to contradict the choice of location or the public's need for the proposed line. The District Court properly held that an easement was necessary for the intended use, as compared to a wire line permit, and that the property was subject to condemnation. Mont. Power Co. v. Burlington N. RR Co., 272 M 224, 900 P2d 888, 52 St. Rep. 625 (1995).

Public Recreational Use of Dearborn River — No Inverse Condemnation: Landowner along Dearborn River was sued by parties seeking a determination of the public's right to use the river for recreational uses. Landowner counterclaimed for inverse condemnation, basing the counterclaim on his claim to ownership of the riverbed. The Supreme Court held that the question of title to the bed was irrelevant to determining navigability for use by the public; that landowner had no claim to the waters; that since there was no claim to the waters, nothing was taken and thus there was no ground for an inverse condemnation claim; and that, consequently, the District Court did not err in dismissing the counterclaim. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Owner of Undivided Part Interest Entitled to Full Amount of Homestead Exemption: Where the plaintiff owned an undivided one-half interest in property upon which the defendant bank sought to levy for the satisfaction of a deficiency judgment, the Supreme Court held that the plaintiff was entitled to apply the full amount of the $40,000 homestead exemption on her equity in her undivided half interest in her homestead property. The court agreed with the rationale of Strangman v. Duke, 140 Cal. App. 2d 185, 295 P2d 12 (1956), that as there was no provision in state law for apportionment of the exemption, a joint tenant with an undivided interest is to receive the benefit of the entire exemption. The court also relied upon its previous decision that homesteads could be claimed on undivided interests in land, that tenants in common are entitled to the full homestead exemption, and that the homestead exemption is to be liberally construed. Neel v. First Fed. S&L Ass'n, 207 M 376, 675 P2d 96, 41 St. Rep. 18 (1984).

Effect of Restrictive Covenant on Condemnation Proceedings: The restrictive covenant on the land in question is at most a part of the fee or something less than a fee. Therefore, it is the proper subject of a condemnation proceeding. Once it is determined that the property sought is a proper subject of condemnation, the trial court must find that the taking is necessary to the public interest and consistent with the greatest public good and the least private injury. A restrictive covenant action is therefore moot when a preliminary condemnation action involving the same property is pending. If the condemnor is not entitled to a preliminary condemnation award, the covenantee may proceed with a suit on the restrictive covenant. Schara v. The Anaconda Co., 187 M 377, 610 P2d 132 (1980).

Removal of Personalty: When the State condemns realty it is required to pay for removal of any personalty from the condemned realty and also to pay for any damages to the personalty. Dept. of Highways v. Schumacher, 180 M 329, 590 P2d 1110 (1979).

More Necessary Public Use:

Public property held by city and taken by state for more necessary public use should be taken and compensated as if it had been taken from a private owner. Three Forks v. St. Highway Comm'n, 156 M 392, 480 P2d 826 (1971).

Requirement under 70-30-101 that taking of private property by condemnation proceedings must be compatible with greatest public good and least private injury applies specifically to easements and rights-of-way under this section. Mont. Power Co. v. Bokma, 153 M 390, 457 P2d 769 (1969).

The provision prohibiting the taking of property except for a more necessary public use does not apply in an action to condemn a right-of-way through an irrigation ditch for the purpose of conveying water to irrigate plaintiff's adjoining land, where the joint use will not interfere with use by the owner after enlargement by plaintiff; the Legislature in requiring "a more necessary public use" evidently meant a use that would destroy the prior one, dispossess the owner, and deprive him of its use altogether. Mere inconvenience or compensable damage is not sufficient to deny the relief. Cocanougher v. Zeigler, 112 M 76, 112 P2d 1058 (1941). See also Mont. Talc Co. v. Cyprus Mines Corp., 229 M 491, 748 P2d 444, 44 St. Rep. 2161 (1987).

Under subsection (1)(c) it is necessary to show that plaintiff's use for which it asks that defendant's portion of a tunnel be condemned is a more necessary public use than that for which it is employed by the defendant. State ex rel. Butte-Los Angeles Min. Co. v. District Court, 103 M 30, 60 P2d 380 (1936).

Judicial Review: In condemnation proceeding involving access to portion of farm divided by interstate highway, District Court had power to require state to incorporate in its construction plans such structures as would allow two-lane access across county road where access road benefited general public as well as private property owner; but District Court did not have power to require state to submit such plans to court for its approval since such matters were within purview of activities of Highway Commission (now Transportation Commission). State ex rel. St. Highway Comm'n v. Lavoie, 155 M 39, 466 P2d 594 (1970), explained in St. v. Parini, 159 M 248, 496 P2d 1140 (1972).

Discretionary Actions: Action brought to compel Highway Commission (now Transportation Commission) to construct two interchanges on new interstate highway near town, instead of one interchange as planned, was improperly brought under this section since this section pertains to eminent domain proceedings and issues presented by action were matters of administrative law under 60-2-201. Erie v. St., 154 M 150, 461 P2d 207 (1969), distinguished in State ex rel. St. Highway Comm'n v. Lavoie, 155 M 39, 466 P2d 594 (1970).

Underpass: Where 40.89 acres of ranchland were taken by the Highway Commission (now Transportation Commission) as a right-of-way for an interstate highway, consisting of four lanes in width and fully controlled access, which split the remaining land into two divisions, leaving 432.69 acres, on which farm headquarters was located, on the north side of the highway and 393.42 acres on the south side of the highway, trial court in its preliminary order of condemnation properly ordered the Commission to construct and maintain at its own expense an underpass leading from one side of the highway to the other. State ex rel. St. Highway Comm'n v. Wheeler, 148 M 246, 419 P2d 492 (1966).

Relocation of Highway: Under section 32-1615, R.C.M. 1947 (now repealed), the Highway Commission (now Transportation Commission) is the only tribunal authorized to condemn land for relocating highways, and even assuming that the taking of an existing highway is justified as a more necessary public use where the purpose is to build a dam and a reservoir, yet the public utility building the dam cannot acquire land for relocating the highway since that function is exclusively within the power of the Commission. State ex rel. Bartholomew v. District Court, 126 M 183, 248 P2d 215 (1952).

Cemetery Land:

Land owned by a cemetery association organized for profit is private property, which under this section may be taken by eminent domain for public cemetery purposes. Forestvale Cemetery Ass'n v. Helena Cemetery Ass'n, 62 M 52, 203 P 359 (1921).

Under the rule that a public corporation may by condemnation take property of an individual or a private corporation used for the same public purpose as that for which it is sought to be condemned, unsold lots of a cemetery association whose corporate existence had expired and 99% of whose stock was held by one individual could properly be acquired by eminent domain by a corporation for public cemetery purposes. Forestvale Cemetery Ass'n v. Helena Cemetery Ass'n, 62 M 52, 203 P 359 (1921).

State Lands:

Lands belonging to the state, except as otherwise indicated in subsection (1)(b) of this section, may be taken by the exercise of the power of eminent domain, and the State may properly be made a party to the action; in other words, the State has expressly consented to be sued under such circumstances. State ex rel. Galen v. District Court, 42 M 105, 112 P 706 (1910).

Lands granted to the state for common school purposes cannot be taken under condemnation proceedings. Congress commanded that sections 16 and 36 in each township should be sold at public sale, and the framers of the state Constitution expressly agreed, for the state, not to dispose of them, except in the manner prescribed, without the consent of the United States. State ex rel. Galen v. District Court, 42 M 105, 112 P 706 (1910).

Water Rights: A beneficial use of the water flowing in the streams of the state is a public use; but it may be appropriated to a more necessary public use, and it is not necessary that the new public use should, in all cases, be a different public use. It does not follow, however, that a city can acquire the exclusive right to the use of the water in a particular stream; it must first be shown that the use for which it is sought is a more necessary use, and the city must then be able financially to make compensation to the person or persons entitled to the present use. Carlson v. Helena, 39 M 82, 102 P 39 (1909).

Attorney General's Opinions

Exercise of Eminent Domain by County Precluded With Regard to Municipal Property: A county water and sewer district may not exercise the right of eminent domain with respect to municipal property located within the district and used by the municipality to provide sewer services. 43 A.G. Op. 13 (1989).

70-30-104. What estates and rights in land may be taken.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 19 in (1)(a) at beginning inserted reference to subsection (2) and near end after "fee simple" inserted "interest"; near middle of (1)(a)(iv) substituted "condemnor" for "plaintiff"; in (1)(a)(v) in three places substituted reference to taking or taken for reference to appropriation or appropriated; in (1)(c) after "fee simple" inserted "interest"; inserted (2) creating presumption that easement is preferred interest to be taken except in certain cases; and made minor changes in style. Amendment effective February 19, 2001.

Chapter 125 in (1)(a)(iv) substituted "condemnor" for "plaintiff"; and made minor changes in style. Amendment effective October 1, 2001.

Saving Clause: Section 4, Ch. 19, L. 2001, was a saving clause.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1983 Amendment: In (3), after "easement" inserted "leasehold ... fee simple".

Saving Clause: Section 13, Ch. 622, L. 1983, was a saving clause.

Case Notes

Oil Well Not Considered Mine to Which Right-of-Way May Be Obtained Through Eminent Domain — No Condemnation Power of Private Individuals and Corporation Except Through Legislative Grant — Condemnation Statutes Strictly Construed: Plaintiff filed a federal action seeking to condemn an access easement and right-of-way across defendant's ranch land for access to drill and operate oil wells. The federal District Court certified two questions to the Montana Supreme Court regarding whether: (1) exploration and development of a federal oil and gas lease are considered a mine that constitutes a public use under 70-30-102; and (2) 82-2-201 grants the owner of a federal oil and gas lease the power, as the owner of a "mining claim", to condemn a right-of-way across land of another for access to explore and develop the lease. The Supreme Court answered both questions in the negative. Private individuals and corporations, like state agencies, have no inherent power of eminent domain, so their authority to condemn derives only from a legislative grant. Public uses for which the power of eminent domain are granted must be interpreted pursuant to the plain language set forth by the Legislature and may not be implied. Because eminent domain interferes with the fundamental constitutional right to the private ownership of real property, any statute that allows condemnation of private property must be strictly construed, giving the statute its plain interpretation but favoring the person's fundamental rights. Under the plain meaning of 70-30-102, oil wells are not considered mines to which rights-of-way for roads may be obtained through eminent domain proceedings. Further, exploration and development of a federal oil and gas lease are not a mine that constitutes a public use, so the owner of an oil and gas lease has no power under 82-2-201 to condemn a right-of-way. McCabe Petroleum Corp. v. N Bar Ranch, LLC, 2004 MT 73, 320 M 384, 87 P3d 995 (2004), following St. v. Aitchison, 96 M 335, 30 P2d 805 (1934), and Bozeman v. Vaniman, 264 M 76, 869 P2d 790 (1994), and distinguishing Mid-Northern Oil Co. v. Walker, 65 M 414, 211 P 353 (1922), Rice Oil Co. v. Toole County, 86 M 427, 284 P 145 (1930), and Mont. Talc Co. v. Cyprus Mines Corp., 229 M 491, 748 P2d 444 (1987).

Easement Necessary for Electric Power Lines — Condemnation Proper: Burlington Northern (BN) offered Montana Power Company (MPC) a wire line permit across BN property that would have allowed location, construction, operation, maintenance, replacement, and removal of a $2.2 million power transmission line. MPC rejected the offer because of the lack of permanence and allowance for rent escalation and because the permit was revocable without cause 100 days after notice and contained onerous indemnification and relocation provisions. Instead, MPC sought an easement without restrictions and condemnation, producing uncontroverted testimony about the area's need for the transmission facility as well as the practicality of locating the lines on

BN's right-of-way. BN produced no evidence to contradict the choice of location or the public's need for the proposed line. The District Court properly held that an easement was necessary for the intended use, as compared to a wire line permit, and that the property was subject to condemnation. Mont. Power Co. v. Burlington N. RR Co., 272 M 224, 900 P2d 888, 52 St. Rep. 625 (1995).

Open-Pit Excavation Necessary for Backslope as Authorized Public Use — Landowner Notification Act Ineffectual to Prevent Condemnation: An open-pit excavation necessary to backslope the mining of an ore body is an authorized public use for which condemnation may be had. The Landowner Notification Act appears to preclude this kind of condemnation because under 82-2-303, an open-pit mine operator must obtain from the surface owner of private lands specific written approval of proposed work before commencing operations. However, the Supreme Court noted that the Act was aimed at the protection of private persons, while eminent domain law, constitutionally grounded and deriving from the power of sovereignty, was enacted to protect the public good. The court found it inconceivable that the Legislature intended provisions enacted for the benefit of private persons to overcome and supersede provisions preserving the public good. Therefore, the Landowner Notification Act was found not to adversely affect the right to use eminent domain against a nonconsenting landowner. Mont. Talc Co. v. Cyprus Mines Corp., 229 M 491, 748 P2d 444, 44 St. Rep. 2161 (1987). See also McCabe Petroleum Corp. v. N Bar Ranch, LLC, 2004 MT 73, 320 M 384, 87 P3d 995 (2004), wherein the Supreme Court held that eminent domain condemnation provisions applicable to open-pit mines in Mont. Talc Co. did not apply to oil and gas leases and wells.

Public Recreational Use of Dearborn River — No Inverse Condemnation: Landowner along Dearborn River was sued by parties seeking a determination of the public's right to use the river for recreational uses. Landowner counterclaimed for inverse condemnation, basing the counterclaim on his claim to ownership of the riverbed. The Supreme Court held that the question of title to the bed was irrelevant to determining navigability for use by the public; that landowner had no claim to the waters; that since there was no claim to the waters, nothing was taken and thus there was no ground for an inverse condemnation claim; and that, consequently, the District Court did not err in dismissing the counterclaim. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

"Taking" — Interference With Right to Use Property: In 1978, developers purchased 183 acres of land for the purpose of subdividing and selling it. They were unaware that for 20 years the National Guard, by permit of the state and the Bureau of Land Management, had conducted training sessions involving dangerous weapons on land surrounding the parcel to be developed. Because they could not sell the land, developers sued the state for inverse condemnation. After a jury found in favor of the state, the trial judge granted developers' motion for a new trial. The Supreme Court reversed, ruling that a "taking" occurs not only when there is an interference with the actual use of the property but also when there is an interference with the right to use the property. Thus, the taking occurred when the National Guard first began to use the land rather than when the land was developed. Therefore, inverse condemnation had already occurred when the developers bought the land and they were not entitled to damages. Howard v. St., 197 M 470, 647 P2d 828, 39 St. Rep. 1111 (1982).

Effect of Restrictive Covenant on Condemnation Proceedings: The restrictive covenant on the land in question is at most a part of the fee or something less than a fee. Therefore, it is the proper subject of a condemnation proceeding. Once it is determined that the property sought is a proper subject of condemnation, the trial court must find that the taking is necessary to the public interest and consistent with the greatest public good and the least private injury. A restrictive covenant action is therefore moot when a preliminary condemnation action involving the same property is pending. If the condemnor is not entitled to a preliminary condemnation award, the covenantee may proceed with a suit on the restrictive covenant. Schara v. The Anaconda Co., 187 M 377, 610 P2d 132 (1980).

Compensation for Leasehold Interest: The owner of a leasehold interest in land being acquired by the state for public purposes is entitled to just compensation for the property condemned. Dept. of Highways v. Schumacher, 180 M 329, 590 P2d 1110 (1979).

Figuring Market Value of Leasehold: The market value of a lease determines the compensation due a lessee. In figuring market value, the factors to be considered include length of the lease, rent to be paid, type of business operated on the property and expenses associated with it, advantages or disadvantages of the operation of the business in that location, and revenue produced from the property. Dept. of Highways v. Schumacher, 180 M 329, 590 P2d 1110 (1979).

70-30-105. Taking of underground natural gas storage reservoir — effect on owner's right to drill.

Compiler's Comments

2009 Amendment: Chapter 474 inserted (3) providing that sand, stratum, or formation used as a geologic storage reservoir may not be taken for use as an underground natural gas storage reservoir. Amendment effective on occurrence of contingency.

Saving Clause: Section 29, Ch. 474, L. 2009, was a saving clause.

Transition — Contingent Implementation: Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

2001 Amendment: Chapter 125 in (2) at end substituted "corporation owning the underground natural gas storage reservoir at the time of the boring or drilling" for "corporation then owning such underground gas storage reservoir"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

70-30-106. Eminent domain not to be used for coal mining in certain cases — policy.

Compiler's Comments

2001 Amendment: Chapter 125 in (1) substituted "condemnor" for "plaintiff"; in (3) near beginning substituted "certain areas" for "many areas"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Case Notes

Constitutionality — Equal Protection — Copper Mining Versus Strip Mining of Coal: Plaintiff contended that 70-30-102 was an unconstitutional violation of the Equal Protection Clause in that it allows the mining of copper to be a public use and disallows the strip mining of coal as a public use. It is well established that the Equal Protection Clause is very limited in cases involving eminent domain statutes. This is especially so when the statute merely declares the legislative determination as to what is considered to be a public use. All that is required is that there be a reasonable basis for the distinction. The basis for the Legislature's distinction is set forth in 70-30-106, which the court found to be an adequate reasonable basis. Schara v. The Anaconda Co., 187 M 377, 610 P2d 132 (1980).

70-30-107. Private roads.

Compiler's Comments

2001 Amendment: Chapter 125 near middle substituted "opening of the road must be first determined by a jury, and the amount of damages" for "opening thereof shall be first determined by a jury, and such amount"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Case Notes

Definition of "Residence" in Eminent Domain Proceeding — Existence of Residence a Question for Jury: Pursuant to 70-30-102(36), the plaintiff sought to exercise the right of eminent domain to create a private road leading to his property, which contains a historic, uninhabited cabin. The plaintiff argued the uninhabited cabin constituted a "residence" under 70-30-102(36). The District Court granted summary judgment to the defendants, concluding 70-30-102(36) requires that the residence be presently in use. Applying Groundwater v. Wright, 180 Mont. 27, 588 P.2d

1003 (1979), and Richter v. Rose, 1998 MT 165, 289 Mont. 379, 962 P.2d 583, the Supreme Court affirmed, concluding that the term "residence" requires ongoing use or physical activity and refers to a habitable structure or dwelling place — a place where people are living. Although the existence of a residence and the necessity of a road to access a residence are generally questions for a jury under 70-30-107, summary judgment was proper because the parties did not dispute that the historic cabin was uninhabitable and, therefore, did not constitute a residence under 70-30-102(36). Myers v. Dee, 2011 MT 244, 362 Mont. 178, 261 P.3d 1054.

Elements of Implied Easement by Necessity Established — Easement Properly Granted — Interference Claim Properly Dismissed: Plaintiffs sought an easement by necessity across defendants' property. The District Court held that an easement by necessity existed and defined the scope of the easement, and both parties appealed. The Supreme Court affirmed. There was sufficient clear and convincing evidence of both unity of ownership and strict necessity to establish an easement by necessity. Additionally, nothing in the history or condition of the property at the time of severance supported a finding that the extent of the implied easement by necessity across the servient estate should be unlimited, so plaintiffs were entitled to cross defendants' land to reach a public road. However, plaintiffs' claim that defendants interfered with the easement failed. The essential acts that gave rise to the easement by necessity arose in the 1930s, but plaintiffs' right to the easement was not established until 2007, so defendants could not have wrongfully interfered with the easement. Ashby v. Maechling, 2010 MT 80, 356 Mont. 68, 229 P.3d 1210. See also Albert G. Hoyem Trust v. Galt, 1998 MT 300, 292 Mont. 56, 968 P.2d 1135, Watson v. Dundas, 2006 MT 104, 332 Mont. 164, 136 P.3d 973, and Wolf v. Owens, 2007 MT 302, 340 Mont. 74, 172 P.3d 124.

Informal Apparent Easement — Reasonable Necessity: For a use to give rise to an implied easement from existing use, it must be apparent and continuous at the time that the tract is divided. An easement is apparent when it may be discovered upon reasonable inspection. An apparent easement need not be so formal as to be an improved, paved, or even graveled two-way road but may be as simple as a path, roadway of sorts, trail, or primitive road. In addition to the requirement that the use be apparent and continuous at the time that the tract is divided, an implied easement from existing use must also have a use that is reasonably necessary for the enjoyment of the dominant parcel. An implied easement from existing use passes to all future owners of the property pursuant to 70-20-308. In the present case, the District Court properly held that an easement from existing use, not an implied easement by necessity, existed in favor of the Hoyem Trust over and across Galts' property. The easement by necessity requirement of "strict necessity" did not exist at the time that the property was severed in 1944 because a road existed that provided practical access to a public road for ingress and egress. The presence of an implied easement from existing use necessarily defeats the strict necessity requirement of an easement by necessity. Albert G. Hoyem Trust v. Galt, 1998 MT 300, 292 M 56, 968 P2d 1135, 55 St. Rep. 1230 (1998), following Michaelson v. Wardell, 186 M 278, 607 P2d 100 (1980), and followed in Tungsten Holdings, Inc. v. Kimberlin, 2000 MT 24, 298 M 176, 994 P2d 1114, 57 St. Rep. 125 (2000), and Wolf v. Owens, 2007 MT 302, 340 M 74, 172 P3d 124 (2007). See also Waters v. Blagg, 2008 MT 451, 348 M 48, 202 P3d 110 (2008), wherein the Supreme Court clarified that a connection to a public road is not required when a landowner seeks declaration of an implied easement by preexisting use, overruled in part in Earl v. Pavex Corp., 2013 MT 343, 372 Mont. 476, 313 P.3d 154,

Attorney and Witness Fees: "Expenses of the proceeding" include attorney fees and witness fees. Callant v. Fed. Land Bank of Spokane, 181 M 400, 593 P2d 1036 (1979).

Condemnation: Plaintiff could not prevail in his condemnation action for a private road across defendant's tract to plaintiff's property because the evidence did not show that the land is presently being used as a farm or residence, and without such a showing the requisite necessity to condemn a road across another's land is absent. Groundwater v. Wright, 180 M 27, 588 P2d 1003 (1979), followed in Myers v. Dee, 2011 MT 244, 362 Mont. 178, 261 P.3d 1054.

Implied Reserved Easement of Necessity: Where all witnesses agreed that there was no visible sign of a roadway or path over defendant's property at the time when plaintiff bought the adjoining property, there could have been no implied reserved easement for the roadway. Godfrey v. Pilon, 165 M 439, 529 P2d 1372 (1974).

Necessity of Easement: The necessity of an easement to landlocked parcel of real property must appear at the time of the conveyance of the property, and where grantor conveyed a tract of land to plaintiff but retained other land over which plaintiff could have made entry, there was no necessity for easement over land of a third party. Godfrey v. Pilon, 165 M 439, 529 P2d 1372 (1974).

Implied Right-of-Way: There are no implied grants or reservations of rights-of-way of necessity in Montana. Property for roads must be condemned. Simonson v. McDonald, 131 M 494, 311 P2d 982 (1957), overruling Herrin v. Sieben, 46 M 226, 127 P 323 (1912); Violet v. Martin, 62 M 335, 205 P 221 (1922).

Expenses of Proceedings:

Attorney's fees are not allowed as an expense of a proceeding in condemnation for a private road of necessity under this section or section 32-1401, R.C.M. 1947 (now repealed). Section 70-30-201 adopts 25-10-201 and 25-10-301 to the proceedings. Under 25-10-301 attorney's fees in condemnation proceedings are not enumerated, nor are they allowed under 25-10-201 as a cost or disbursement unless specifically authorized by law or according to the course and custom of the court. In Montana it is not customary to include attorney's fees as a cost; and in this section the term "expenses" is synonymous with the term "costs". Tomten v. Thomas, 125 M 159, 232 P2d 723, 26 ALR 2d 1285 (1951).

The provisions in this section for an award of expenses of the proceedings to defendant apply only where the plaintiff is successful. Kendrick v. Powell, 119 M 622, 178 P2d 859 (1947).

Constitutionality: Whether a way is a public or private one is determined by the extent of the right to use it, not by the extent to which that right is actually exercised; and if a private road sought to be established under this section, leading from a public highway through lands of a private owner to those owned by plaintiff, may be used by the public generally, although others than plaintiff may have only slight occasion to use it, the statute authorizing its establishment, as this section does under such circumstances, is not open to constitutional objection. Komposh v. Powers, 75 M 493, 244 P 298 (1926).

70-30-108. No abrogation of provisions relating to city or county roads.

Compiler's Comments

2001 Amendment: Chapter 125 at beginning substituted "This chapter may not" for "Nothing in this code must"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Case Notes

Statutory Requirements to Be Followed: Madison County attempted to establish a county road across defendants' land. The county invoked eminent domain. Section 70-30-108 requires compliance with the statutory provisions relating to the establishment of county roads. Title 7, ch. 14, generally requires a chain of events involving: (1) the filing of a proper petition with the county; (2) the option of the county surveying a specific route; (3) the county determination of the affected landowners and assessment of their damages; (4) the county offer of an award of damages; and (5) if the award is rejected, the beginning of condemnation proceedings. In this case the county did not receive a proper petition. The county offered damages for one proposed route but began condemnation on a different route for which no offer was made. The proceedings did not comply with the statutes and were not cured by 7-14-2609. The county may not ignore the mandates of the statutes, or they would be of no consequence. Madison County v. Elford, 203 M 293, 661 P2d 1266, 40 St. Rep. 457 (1983).

70-30-109. Temporary logging roads and banking grounds.

Compiler's Comments

2001 Amendment: Chapter 125 in (3) near beginning substituted "any road or land taken or used as provided in this section" for "any such land"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

70-30-110. Survey and location of property to be taken — greatest public good — least private injury.

Compiler's Comments

2013 Amendment: Chapter 371 in (2) substituted "70-30-111(1)(d)" for "70-30-111(4)". Amendment effective April 30, 2013.

Saving Clause: Section 6, Ch. 371, L. 2013, was a saving clause.

Severability: Section 7, Ch. 371, L. 2013, was a severability clause.

Applicability: Section 9, Ch. 371, L. 2013, provided: "[This act] applies to complaints for condemnation filed on or after [the effective date of this act]." Effective April 30, 2013.

2001 Amendments — Composite Section: Chapter 20 in (1) near end of second sentence inserted "the location is" and at end of fourth sentence substituted "negligence or intentional acts" for "negligence, wantonness, or malice"; inserted (2) relating to condemnee's claim of appropriate measures to minimize damages; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 125 at end of fourth sentence substituted "from negligence or intentional acts" for "from negligence, wantonness, or malice"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1985 Amendment: In second sentence inserted "after giving 30 days' written notice to the owners and persons in possession of the land", and inserted last two sentences explaining notice requirements of landowner and Department.

Case Notes

Condemnation Including Private Offices — Evidence to Be Considered — Due Process of Law: The state condemned part of the Vanimans' land for a highway interchange, rest area, and visitor center. The city of Bozeman, which funded part of the project, agreed with the Bozeman Chamber of Commerce that the Chamber would locate its corporate offices in the visitor center. The Vanimans objected to the condemnation as not being for a public purpose. The Supreme Court held that the District Court erred when it failed to consider evidence showing that the Bozeman Chamber of Commerce intended to locate its corporate offices in the proposed visitor center and that this failure constituted a denial of due process of law. Bozeman v. Vaniman, 264 M 76, 869 P2d 790, 51 St. Rep. 154 (1994).

Highway Department (now Department of Transportation) Failure to Consider Alternate Routes — Condemnation Order Reversed: After being asked in 1975 by the county to improve a road, the State Highway Department (now Department of Transportation) had surveyed and located a proposed route by 1978. Prior to its choice of a proposed route, the Department had met informally with the Department of State Lands (now Department of Natural Resources and Conservation) because a portion of the route bordered on school trust lands. The Department of State Lands (now Department of Natural Resources and Conservation) was planning the installation of pivot sprinkler irrigation systems on the land. Although no record of the meeting exists, apparently both Departments were satisfied that the proposed highway would not interfere with the proposed irrigation development. In 1981 the Standley brothers entered into a lease of the school trust land, and the Department began negotiations with them to acquire a portion of their leasehold interest. Upon learning that proposed route would interfere with the irrigation system, the Standley brothers asked for the route to be moved. The Department assessed the cost of a change in route, decided not to change it, and brought a successful condemnation action in District Court. The Supreme Court reversed because the Highway Department (now Department of Transportation) had violated 60-4-104 and 70-30-110 by failing to consider the possibility of alternate routes reasonably equal in terms of public good that would reduce private injury. The court directed the Highway Department (now Department of Transportation), in its reconsideration, to take into account only actual construction costs of the alternate route, not those costs created by the failure to consider an alternate route in the first place. State ex rel. Dept. of Highways v. Standley Bros., 215 M 475, 699 P2d 60, 42 St. Rep. 563 (1985).

Condemnor's Choice of Location Given Great Weight: The taking of private property by condemnation proceedings must be compatible with the greatest public good and the least private injury. Since the condemnor has the expertise and detailed knowledge of considerations involved in determining location of the improvement, its choice of location is given great weight. The record discloses that Anaconda studied all other alternatives and rejected them as being economically infeasible. There is substantial credible evidence to support the District Court findings. Schara v. The Anaconda Co., 187 M 377, 610 P2d 132 (1980), following Mont. Power Co. v. Bokma, 153 M 390, 457 P2d 769 (1969). See also Cenex Pipeline LLC v. Fly Creek Angus, Inc., 1998 MT 334, 292 M 300, 971 P2d 781, 55 St. Rep. 1358 (1998).

Balancing Test: All other factors being equal, routing a highway over public lands would be compatible with the greatest public good and would involve the least private injury, but private injury is but one consideration, and the consideration of cost as an element of the public good can outweigh the private injury factor. Dept. of Highways v. Higgins, 166 M 90, 530 P2d 776 (1975).

Compatible With Public Good: Where power company had studied alternate routes for power lines, surveyed surrounding area, and determined that best possible route for such line was across defendant's property, utility had complied with this section in that taking of private property was compatible with greatest public good and least private injury. Mont. Power Co. v. Bokma, 153 M 390, 457 P2d 769 (1969), followed in Cenex Pipeline LLC v. Fly Creek Angus, Inc., 1998 MT 334, 292 M 300, 971 P2d 781, 55 St. Rep. 1358 (1998).

Trespass by Public Agency: In taking, by a proper proceeding, the land of a private individual for a public use, the greatest possible good to the public and the least possible harm to the individual are alone to be considered; but where the taking is by a naked trespass, the individual can say to the trespasser: "You have no right whatever on my property." Postal Telegraph-Cable Co. v. Nolan, 53 M 129, 162 P 169 (1916).

70-30-111. Facts necessary to be found before condemnation.

Compiler's Comments

2013 Amendment: Chapter 371 in (1)(d) substituted "final written offer prior to initiating condemnation proceedings and the final written offer" for "written offer and the offer"; inserted (2) regarding offers after the final written offer; and made minor changes in style. Amendment effective April 30, 2013.

Saving Clause: Section 6, Ch. 371, L. 2013, was a saving clause.

Severability: Section 7, Ch. 371, L. 2013, was a severability clause.

Applicability: Section 9, Ch. 371, L. 2013, provided: "[This act] applies to complaints for condemnation filed on or after [the effective date of this act]." Effective April 30, 2013.

2007 Amendment: Chapter 512 in (1) substituted "a public use pursuant to 70-30-102" for "a use authorized by law"; and in (2) before "use" inserted "public". Amendment effective October 1, 2007.

2001 Amendment: Chapter 125 in introductory clause substituted "condemnor" for "plaintiff"; in (3) substituted "being used for a public use" for "appropriated to some public use"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1983 Amendment: In lead-in after "taken" substituted "the plaintiff ... findings" for "it must appear"; and inserted (4) requiring a showing that a written offer to obtain interest was made and rejected.

Case Notes

Condemnation of Private Water System: The city of Missoula filed a complaint to condemn the water system privately owned by the defendant water company. The city previously lost an attempt to condemn the water system in Missoula v. Mtn. Water Co. (Mountain Water I), 228 Mont. 404, 743 P.2d 590 (1987), and Missoula v. Mtn. Water Co. (Mountain Water II), 236 Mont. 442, 771 P.2d 103 (1989). The District Court issued a preliminary order of condemnation. On appeal, the Supreme Court affirmed, finding that the defendants presented no compelling evidence that they were deprived of due process, that the District Court properly refused to grant a continuance and no actual prejudice resulted, that the defendants did not make a compelling case that they were not ready for trial because they were able to present a full and well-prepared defense, that the District Court properly declined to admit all of the proposed valuation evidence and the Legislature clearly intended for valuation to be determined by unbiased fact finders after the necessity determination, that the District Court properly refused to dismiss a party, that collateral estoppel was inappropriate because there was a change of circumstances sufficient to warrant a new analysis of whether public ownership of the water system was more necessary than private ownership and the city's previous attempt to acquire the water system did not bar the new action, that the District Court properly found that the effect of condemnation on employees was one of several nondispositive factors that must be considered, and that the District Court correctly determined that public ownership of the water system was more necessary than private ownership. Missoula v. Mtn. Water Co., 2016 MT 183, 384 Mont. 193, 378 P.3d 1113.

Motion for Preliminary Condemnation Properly Granted Following Unaccepted Offer to Purchase Right-of-Way: Seeking to improve and expand a roadway, the city offered Taylens $25,500 for the right-of-way across their property. The offer included an appraisal, an engineer's drawing of the land that the city wanted to purchase, a legal description of the property, and a proposed purchase agreement and set a date by which the offer had to be accepted. When the date passed without a response from the Taylens, the city began condemnation proceedings, while continuing to negotiate with the Taylens for a purchase price. Ultimately, no agreement was reached, the property was condemned, and the city took possession and completed the road improvements. The Taylens appealed on grounds that the city did not properly follow the condemnation process, but the Supreme Court affirmed. The District Court correctly concluded that the city's offer met the requirements of subsection (4) of this section and did not err in granting the city's motion for preliminary condemnation. In addition, the Taylens failed to avail themselves of appropriate legal remedies to preserve the status quo, such as a stay pending appeal or a request that the city give a bond or sufficient sureties during the appeal, and the city completed the improvements, so the Taylens lost the right to raise the issue of whether the court should have granted the city immediate possession following the order for preliminary condemnation. Bozeman v. Taylen, 2007 MT 256, 339 M 274, 170 P3d 939 (2007).

Consideration of Alternative Sites Not Required in All Cases Prior to Finding That Taking of Property Is Necessary Under Eminent Domain Laws: Adams argued that the District Court had erred in granting the condemnation order requested by the county with respect to his property, which he had purchased with an existing lease on the land covering the transmitters already located on the land. When Adams and the county were unable to negotiate a new lease or sale of the property, even though the county offered to purchase the land for more than the appraised value, the county obtained the condemnation order. Adams argued that the county had failed to show that it had looked at alternative sites prior to obtaining a condemnation order for taking his land. The Supreme Court ruled that in the case before it, it was not necessary to look at alternative sites because the structures were already on the property and the cost of moving or replacing the structures on new land would result in a substantial cost to the public and therefore the county had demonstrated by a preponderance of the evidence that the taking was necessary. Park County v. Adams, 2004 MT 295, 323 M 370, 100 P3d 640, (2004).

Oil Well Not Considered Mine to Which Right-of-Way May Be Obtained Through Eminent Domain — No Condemnation Power of Private Individuals and Corporation Except Through Legislative Grant — Condemnation Statutes Strictly Construed: Plaintiff filed a federal action seeking to condemn an access easement and right-of-way across defendant's ranch land for access to drill and operate oil wells. The federal District Court certified two questions to the Montana Supreme Court regarding whether: (1) exploration and development of a federal oil and gas lease are considered a mine that constitutes a public use under 70-30-102; and (2) 82-2-201 grants the owner of a federal oil and gas lease the power, as the owner of a "mining claim", to condemn a right-of-way across land of another for access to explore and develop the lease. The Supreme Court answered both questions in the negative. Private individuals and corporations, like state agencies, have no inherent power of eminent domain, so their authority to condemn derives only from a legislative grant. Public uses for which the power of eminent domain are granted must be interpreted pursuant to the plain language set forth by the Legislature and may not be implied. Because eminent domain interferes with the fundamental constitutional right to the private ownership of real property, any statute that allows condemnation of private property must be strictly construed, giving the statute its plain interpretation but favoring the person's fundamental rights. Under the plain meaning of 70-30-102, oil wells are not considered mines to which rights-of-way for roads may be obtained through eminent domain proceedings. Further, exploration and development of a federal oil and gas lease are not a mine that constitutes a public use, so the owner of an oil and gas lease has no power under 82-2-201 to condemn a right-of-way. McCabe Petroleum Corp. v. N Bar Ranch, LLC, 2004 MT 73, 320 M 384, 87 P3d 995 (2004), following St. v. Aitchison, 96 M 335, 30 P2d 805 (1934), and Bozeman v. Vaniman, 264 M 76, 869 P2d 790 (1994), and distinguishing Mid-Northern Oil Co. v. Walker, 65 M 414, 211 P 353 (1922), Rice Oil Co. v. Toole County, 86 M 427, 284 P 145 (1930), and Mont. Talc Co. v. Cyprus Mines Corp., 229 M 491, 748 P2d 444 (1987).

Easement Necessary for Electric Power Lines — Condemnation Proper: Burlington Northern (BN) offered Montana Power Company (MPC) a wire line permit across BN property that would have allowed location, construction, operation, maintenance, replacement, and removal of a $2.2 million power transmission line. MPC rejected the offer because of the lack of permanence and allowance for rent escalation and because the permit was revocable without cause 100 days after notice and contained onerous indemnification and relocation provisions. Instead, MPC sought an easement without restrictions and condemnation, producing uncontroverted testimony about the area's need for the transmission facility as well as the practicality of locating the lines on BN's right-of-way. BN produced no evidence to contradict the choice of location or the public's need for the proposed line. The District Court properly held that an easement was necessary for the intended use, as compared to a wire line permit, and that the property was subject to condemnation. Mont. Power Co. v. Burlington N. RR Co., 272 M 224, 900 P2d 888, 52 St. Rep. 625 (1995).

Electric Power Line as Compatible but More Necessary Public Use Than Railroad: Under this section, if property is already appropriated to a public use, the use to which it is to be applied must be determined by a preponderance of the evidence to be a more necessary public use. The determination of which use is more necessary affects condemnation proceedings only when there are two public uses that are incompatible. In this case, the District Court properly found that the two uses were compatible but that the power line was more necessary. Even though the court was not required to make that determination because use of the property for a power line would not destroy the prior use of the property for a railroad or materially injure that prior use, the "more necessary" determination was not reversible error because the court also found the uses compatible. Mont. Power Co. v. Burlington N. RR Co., 272 M 224, 900 P2d 888, 52 St. Rep. 625 (1995), following Cocanougher v. Zeigler, 112 M 76, 112 P2d 1058 (1941).

Condemnation Including Private Offices — Evidence to Be Considered — Due Process of Law: The state condemned part of the Vanimans' land for a highway interchange, rest area, and visitor center. The city of Bozeman, which funded part of the project, agreed with the Bozeman Chamber of Commerce that the Chamber would locate its corporate offices in the visitor center. The Vanimans objected to the condemnation as not being for a public purpose. The Supreme Court held that the District Court erred when it failed to consider evidence showing that the Bozeman Chamber of Commerce intended to locate its corporate offices in the proposed visitor center and that this failure constituted a denial of due process of law. Bozeman v. Vaniman, 264 M 76, 869 P2d 790, 51 St. Rep. 154 (1994).

Time for Determining "Necessity": The city appealed the lower court's ruling against the condemnation of a private water company. Upon remand, the city attempted to introduce economic factors that had occurred subsequent to the original trial. The Supreme Court stated that since the value of the property if condemned would have been set at the time of the service of the summons and the water company would not have been able to show subsequent increases in value then, in fairness, factors affecting the issue of necessity should also be limited to those existing as of the same date. Missoula v. Mtn. Water Co., 236 M 442, 771 P2d 103, 46 St. Rep. 494 (1989).

Open-Pit Excavation Necessary for Backslope as Authorized Public Use — Landowner Notification Act Ineffectual to Prevent Condemnation: An open-pit excavation necessary to backslope the mining of an ore body is an authorized public use for which condemnation may be had. The Landowner Notification Act appears to preclude this kind of condemnation because under 82-2-303, an open-pit mine operator must obtain from the surface owner of private lands specific written approval of proposed work before commencing operations. However, the Supreme Court noted that the Act was aimed at the protection of private persons, while eminent domain law, constitutionally grounded and deriving from the power of sovereignty, was enacted to protect the public good. The court found it inconceivable that the Legislature intended provisions enacted for the benefit of private persons to overcome and supersede provisions preserving the public good. Therefore, the Landowner Notification Act was found not to adversely affect the right to use eminent domain against a nonconsenting landowner. Mont. Talc Co. v. Cyprus Mines Corp., 229 M 491, 748 P2d 444, 44 St. Rep. 2161 (1987), followed in Bozeman v. Vaniman, 264 M 76, 869 P2d 790, 51 St. Rep. 154 (1994). See also McCabe Petroleum Corp. v. N Bar Ranch, LLC, 2004 MT 73, 320 M 384, 87 P3d 995 (2004), wherein the Supreme Court held that eminent domain condemnation provisions applicable to open-pit mines in Mont. Talc Co. did not apply to oil and gas leases and wells.

City Ordinance Not Conclusive Presumption of Necessity — Standard of Proof: A city ordinance adopted pursuant to 7-5-4106 did not establish a conclusive presumption that the taking of private property for a water system was necessary. The controlling statutes are in Title 7, chapter 13, part 44, and absent an agreement to purchase, 7-13-4404 requires that the standard of proof outlined in 70-30-111 be met before private property may be taken for a public use. Since the District Court has the power to determine whether a condemnation is necessary, the votes of the people and the city council cannot be considered as dispositive of the issue of necessity; however, the public interest as expressed in these votes must be considered and weighed with the other factors in determining whether acquisition is necessary. Missoula v. Mtn. Water Co., 228 M 404, 743 P2d 590, 44 St. Rep. 1633 (1987), affirmed in Missoula v. Mtn. Water Co., 236 M 442, 771 P2d 103, 46 St. Rep. 494 (1989).

Issuance of Certificate of Environmental Compatibility and Public Need — No District Court Jurisdiction to Determine Public Necessity: Once a certificate of environmental compatibility and public need was issued by the Board of Natural Resources and Conservation (now Board of Environmental Review), the District Court had no jurisdiction to determine the existence of public necessity with respect to a proposed electric transmission line under the Montana Utility Siting Act of 1973 (now the Montana Major Facility Siting Act) since that determination had already been made by the Board pursuant to the Act. Mont. Power Co. v. Fondren, 226 M 500, 737 P2d 1138, 44 St. Rep. 850 (1987).

Limitation of Court Jurisdiction in Centerline Determination and Eminent Domain — Noncontested Case Procedure: The Legislature did not intend the final electric transmission line centerline determination by the Board of Natural Resources and Conservation (now Board of Environmental Review) to be subject to judicial review, and once the Board sets the specific route, no court has jurisdiction to hear challenges to the location. Through enactment of 75-20-205(2) (now repealed) and 75-20-407, court jurisdiction in eminent domain cases was limited to hearing challenges to the necessity of taking private property. The preponderance of the evidence on 70-30-111 findings that must be proven to the court before a preliminary condemnation order is issued is satisfied by appending to the complaint the Board's certificate of environmental compatibility and public need and the Board's findings of fact, opinion, decision, order, and recommendations. In cases where landowners feel conditions of the certificate were breached, proper remedy lies in a mandamus action under 75-20-404. Mont. Power Co. v. Fondren, 226 M 500, 737 P2d 1138, 44 St. Rep. 850 (1987).

Interpretation of "Necessary": When the evidence presented at trial indicated that the proposed location of an improved road was the shortest, most direct, and least expensive route consistent with the design objectives, the District Court properly found that the interest sought by the Highway Department (now Department of Transportation) was necessary for the improvement. The word "necessary" in this statute does not mean an absolute or indispensable necessity but rather a reasonable, requisite, and proper means to accomplish the improvement. State ex rel. Dept. of Highways v. Standley Bros., 215 M 475, 699 P2d 60, 42 St. Rep. 563 (1985).

Burden of Proof — No Necessity for Utility Easements: The condemnor must initially produce sufficient evidence to establish facts indicating the taking is necessary. The burden then falls upon the one seeking to show that the taking has been excessive or arbitrary. The trial court found that the sewer district had not shown necessity for the taking of defendants' properties because it failed to demonstrate a reasonable present need or even a need in the reasonably foreseeable future to connect defendants to the sewer system. The condemnor had not carried its burden, and the order of the trial court was affirmed. Lincoln/Lewis & Clark County Sewer District v. Bossing, 215 M 235, 696 P2d 989, 42 St. Rep. 318 (1985).

Scope of Authority of Trial Court's Review in Condemnation Action: Prior cases, along with 70-30-111 and 70-30-206, clearly reflect that the trial judge has the power to determine necessity and make findings on whether the public interest requires the taking in an eminent domain proceeding. Thus, to the extent the trial judge's findings go to a determination of the necessity of a taking of defendants' property, those findings are within the trial court's scope of authority and can be affirmed. The trial court made two findings that are outside its scope of authority. Two prior District Court actions had already made determinations on the validity of the district and that the project was in the public interest. In addition, the issues before this trial court involved only the necessity of taking the particular property of the defendants for septic tanks and connection lines. Since these findings exceeded the trial court's authority, they are set aside. Lincoln/Lewis & Clark County Sewer District v. Bossing, 215 M 235, 686 P2d 989, 42 St. Rep. 318 (1985), followed in Bozeman v. Vaniman, 264 M 76, 869 P2d 790, 51 St. Rep. 154 (1994).

Condemnor's Choice of Location Given Great Weight: The taking of private property by condemnation proceedings must be compatible with the greatest public good and the least private injury. Since the condemnor has the expertise and detailed knowledge of considerations involved in determining location of the improvement, its choice of location is given great weight. The record discloses that Anaconda studied all other alternatives and rejected them as being economically infeasible. There is substantial credible evidence to support the District Court findings. Schara v. The Anaconda Co., 187 M 377, 610 P2d 132 (1980), following Mont. Power Co. v. Bokma, 153 M 390, 457 P2d 769 (1969). See also Cenex Pipeline LLC v. Fly Creek Angus, Inc., 1998 MT 334, 292 M 300, 971 P2d 781, 55 St. Rep. 1358 (1998).

Mining Permit Not Required Prior to Condemnation: Plaintiff contends that since 70-30-111 requires the use for condemned property to be "authorized by law" before condemnation is allowed, the obtaining of a valid mining permit is a condition precedent to condemnation. Section 70-30-102 declares mining to be a public use. It is unquestioned that the Anaconda Company is engaged in mining operations. To find that a mining permit must be obtained prior to condemnation would be inconsistent with statutory authority and contrary to the public policy of providing expediency in eminent domain proceedings. Schara v. The Anaconda Co., 187 M 377, 610 P2d 132 (1980).

Easement Sufficient — Condemnation of Fee Error: Where an easement to remove obstructions and prevent future obstructions would have been sufficient to assure safe flight to and from an airport runway, preliminary order of condemnation of fee simple was error. Silver Bow County v. Hafer, 166 M 330, 532 P2d 691 (1975).

Necessity of Eminent Domain — Balancing Test: When an easement to insure safe flight would adequately serve public need, it was not necessary for the county to acquire a fee simple title. Silver Bow County v. Hafer, 166 M 330, 532 P2d 691 (1975).

Burden of Proof:

Highway Department (now Department of Transportation) resolution of public interest and necessity established a disputable presumption that requirements for condemnation had been satisfied, which presumption was not overcome by evidence that a possible alternative route might have been selected. Dept. of Highways v. Higgins, 166 M 90, 530 P2d 776 (1975).

Where Commission condemned defendant's land to build bypass through it rather than reconstruct highway through town, it became incumbent upon the defendant to show fraud, abuse of discretion, or arbitrary action in order to defeat the Commission's action, while the Commission had only to establish that the taking of the property was reasonably necessary for rebuilding the highway and that its decision appeared to be compatible with the greatest public good and least private injury on the basis of conflicting evidence. St. Highway Comm'n v. Crossen-Nissen Co., 145 M 251, 400 P2d 283 (1965), distinguished in State ex rel. St. Highway Comm'n v. Lavoie, 155 M 39, 466 P2d 594 (1970).

More Necessary Public Use — Protection of Children: Condemnation of city-owned property between sidewalk and boundary of schoolyard for the purpose of erecting a fence was a more necessary public use than the existing use, in view of the protection for the children. State ex rel. Smart v. Big Timber, 165 M 328, 528 P2d 688 (1974).

Necessity of Use:

Before District Court may order condemnation, this section requires that it must find that proposed taking is necessary to public use under circumstances of individual case. Mont. Power Co. v. Bokma, 153 M 390, 457 P2d 769 (1969).

The word "necessary" as used in this section does not mean that the property must be indispensable to the proposed project but that it must be reasonably requisite and proper for the accomplishment of the purpose for which it is sought under the peculiar circumstances of each case. St. Highway Comm'n v. Crossen-Nissen Co., 145 M 251, 400 P2d 283 (1965).

The necessity of the taking or using the roadbed or right-of-way, built or secured by another railroad company through a canyon or defile, is a question for decision by the District Court of the county in which the canyon is located. Mont. Cent. Ry. v. Helena & R. M. R.R., 6 M 416, 12 P 916 (1887).

Condemnor's Discretion: Highway Commission (now Transportation Commission) did not abuse its discretion in taking farmland by eminent domain even though it was shown that town through which old highway had passed would be financially harmed and bypass would cost more to build, since the resulting savings in travel costs to highway users, in addition to the compensation paid the petitioners, offset disadvantages claimed by them. St. Highway Comm'n v. Crossen-Nissen Co., 145 M 251, 400 P2d 283 (1965), distinguished in St. Highway Comm'n v. Danielsen, 146 M 539, 409 P2d 443 (1965); State ex rel. St. Highway Comm'n v. Lavoie, 155 M 39, 466 P2d 594 (1970).

Trial Court to Determine Public Necessity: In an action by the state to condemn land for interstate highway or controlled access facility the trial judge has the power to determine the public necessity of the proposed highway or facility. Necessity was properly denied where trial court found that proposed highway would not benefit the people living in its vicinity or the public in general and that the construction of the road was not in the public interest. St. v. Yost Farm Co., 142 M 239, 384 P2d 277 (1963).

Necessity Not Found: In condemnation proceedings instituted by a mutual irrigation company, insolvency of plaintiff (which had acquired canal of defendant mutual irrigation company by contract containing covenants, as consideration for conveyance, under which it obligated itself to furnish defendant company and its users with the same amount of water they had been receiving) was not a "good cause" or "necessity" for condemnation of such covenants by plaintiff. Cove Irrigation Co. v. Yellowstone Ditch Co., 139 M 281, 362 P2d 543 (1961).

Federal Condemnation: In proceeding by federal government in federal court to condemn land located in Montana, Montana statute requiring finding that taking was necessary did not relate to "forms and methods of procedure" required to be followed by federal court but was a rule of "substantive law" which was not controlling, and federal statute which made question depend solely on opinion of federal officer was controlling. U.S. v. Mont., 134 F2d 194 (9th Cir. 1943).

Rule of Necessity — Must Be Determinative: The provisions of Title 69, ch. 14, part 5, are exceedingly liberal in bestowing upon railroad corporations the power to appropriate the property of the citizen to carry forward the public service; but they must, nevertheless, be interpreted in the light of this section, and the rule of necessity must be determinative in each instance. N. Pac. Ry. v. McAdow, 44 M 547, 121 P 473 (1912).

Water Right — More Necessary Public Use: Water appropriated for irrigation purposes may be condemned to procure a water supply where the use for which it is to be taken is more necessary than the existing use, and a complaint in proceedings to condemn for a city water supply water already appropriated to a public use must allege this latter fact, the relative degrees of necessity being a question for judicial determination. Helena v. Rogan, 26 M 452, 68 P 798 (1902).

More Necessary Public Use — Railroad Right-of-Way: Where a railroad that traverses the side of a mountain in a mining section has within its right-of-way tracts not necessary to the operation of its system and which have not been used by it in connection with any such operations and in all reasonable probability are not necessary for any future use and another road is obliged to take parts of such unused right-of-way to avoid a considerably more circuitous route at a different grade, at very much greater cost and of serious damage to many mining properties, and would, in any event, be obliged to parallel the adversary road a part of the way, under such conditions the taking of the unused parts of the one railroad by the other is a more necessary public use. Butte, Anaconda & Pac. Ry. v. Mont. Union Ry., 16 M 504, 41 P 232 (1895).

"Necessity" Explained: The word "necessary", as used in a statute of this character, does not mean an absolute necessity for the particular location sought but a reasonable necessity to be determined from the considerations of practicability, economy, and facilities, under the particular circumstances of the case, having regard to senior rights and the benefits to the public. Butte, Anaconda & Pac. Ry. v. Mont. Union Ry., 16 M 504, 41 P 232 (1895).

Law Review Articles

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, VI. Eminent Domain, Williams, 46 Mont. L. Rev. 137 (1985).

70-30-112. Eminent domain not to be used for certain recreational purposes.

Compiler's Comments

Effective Date: Section 6, Ch. 238, L. 2023, provided: "[This act] is effective on passage and approval." Approved April 24, 2023.

Applicability: Section 7, Ch. 238, L. 2023, provided: "[This act] does not apply to condemnation proceedings commenced pursuant to 70-30-206 before [the effective date of this act]." Effective April 24, 2023.

Part 2
Preliminary Procedure

70-30-201. Applicable rules of practice.

Compiler's Comments

1983 Amendment: After "25" inserted "and 26, including the Montana Rules of Civil Procedure and the Montana Rules of Evidence".

Case Notes

Opening and Closing Case: The party upon whom the burden of proof rests is entitled to open and close, and this is the defendant where the only issue is the amount of compensation. St. v. Peterson, 134 M 52, 328 P2d 617 (1958).

Attorney Fees: Under this section, the provisions of 25-10-201 and 25-10-301 are made applicable to condemnation proceedings for a private road of necessity and therefore attorney's fees are not includable as an expense under 70-30-107. Tomten v. Thomas, 125 M 159, 232 P2d 723, 26 ALR 2d 1285 (1951).

Federal Court Practice: Where United States District Court did not make findings of fact and state conclusions of law before entry of judgment, case was remanded with directions to make such findings of fact and state conclusions of law. Dawson County v. Hagen, 172 F2d 387 (9th Cir. 1948).

Motion to Set Aside Report: In case commissioners to assess damages in eminent domain proceedings do not perform their whole duty, the injured party may move to set aside their report. Spratt v. Helena Power Transmission Co., 37 M 60, 94 P 631 (1908).

70-30-202. Jurisdiction and venue — complaint and summons required.

Compiler's Comments

2001 Amendment: Chapter 125 in third sentence substituted "condemnee" for "defendant" and in fourth sentence substituted "lengthens" for "enlarges"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1983 Amendment: Inserted last two sentences requiring notice by summons to defendant and allowing trial commencement within 6 months of service of summons.

Case Notes

Condemnation of Private Water System: The city of Missoula filed a complaint to condemn the water system privately owned by the defendant water company. The city previously lost an attempt to condemn the water system in Missoula v. Mtn. Water Co. (Mountain Water I), 228 Mont. 404, 743 P.2d 590 (1987), and Missoula v. Mtn. Water Co. (Mountain Water II), 236 Mont. 442, 771 P.2d 103 (1989). The District Court issued a preliminary order of condemnation. On appeal, the Supreme Court affirmed, finding that the defendants presented no compelling evidence that they were deprived of due process, that the District Court properly refused to grant a continuance and no actual prejudice resulted, that the defendants did not make a compelling case that they were not ready for trial because they were able to present a full and well-prepared defense, that the District Court properly declined to admit all of the proposed valuation evidence and the Legislature clearly intended for valuation to be determined by unbiased fact finders after the necessity determination, that the District Court properly refused to dismiss a party, that collateral estoppel was inappropriate because there was a change of circumstances sufficient to warrant a new analysis of whether public ownership of the water system was more necessary than private ownership and the city's previous attempt to acquire the water system did not bar the new action, that the District Court properly found that the effect of condemnation on employees was one of several nondispositive factors that must be considered, and that the District Court correctly determined that public ownership of the water system was more necessary than private ownership. Missoula v. Mtn. Water Co., 2016 MT 183, 384 Mont. 193, 378 P.3d 1113.

Service of Complaint With Summons: Requirement, contained in former law (repealed in 1983), that a copy of the complaint must be served with the summons is effectively met, so long as both are served at least 20 days prior to the time designated for hearing, and there is no requirement that they be served on the same day. St. Highway Comm'n v. District Court, 160 M 35, 499 P2d 1228 (1972), explained in Walker v. Tschache, 162 M 213, 510 P2d 9 (1973).

Venue of Trial: The provision of this section, that condemnation proceedings must be brought in the county where the land is situated, implies that they must also be tried there, unless transferred by the court or judge in some manner authorized by law. State ex rel. Davis v. District Court, 29 M 153, 74 P 200 (1903).

Water Rights: Proceedings to condemn water appropriated for irrigation purposes may be brought and tried in the county in which the land is situated, though the water is to be taken in another county. Helena v. Rogan, 26 M 452, 68 P 798 (1902).

70-30-203. Contents of complaint.

Compiler's Comments

2013 Amendments — Composite Section: Chapter 103 inserted (2) requiring a specific EQC publication to be attached to a complaint for condemnation; and made minor changes in style. Amendment effective October 1, 2013.

Chapter 371 in (1)(d) substituted "70-30-111(1)" for "70-30-111"; in (1)(f) inserted last sentence regarding condemnor's claim being the same as the rejected final written offer; and in (4)(b)(v) at beginning deleted "a statement that". Amendment effective April 30, 2013.

Saving Clause: Section 6, Ch. 371, L. 2013, was a saving clause.

Severability: Section 7, Ch. 371, L. 2013, was a severability clause.

Applicability: Section 2, Ch. 103, L. 2013, provided: "[This act] applies to complaints filed on or after [the effective date of this act]." Effective October 1, 2013.

Section 9, Ch. 371, L. 2013, provided: "[This act] applies to complaints for condemnation filed on or after [the effective date of this act]." Effective April 30, 2013.

2001 Amendments — Composite Section: Chapter 20 throughout section substituted references to taken or being taken for references to appropriated or appropriation; in (1) substituted "complaint for condemnation must contain" for "complaint must allege"; in (1)(b) substituted "claimants of record of the property sought to be taken" for "claimants of the property of record"; in (1)(c) after "plaintiff" inserted "to take the property for public use"; inserted (1)(e) requiring description of interest sought and allowing consolidation or separation of proceedings; inserted (1)(f) relating to condemnor's claim of appropriate payment for damages; near beginning of (2) inserted "in addition to the items listed in subsection (1)"; deleted former (6) that read: "(6) a description of each interest in real property sought to be taken and whether the same includes the whole or only a part of the entire parcel or tract and a statement that the interest sought is the minimum necessary interest. All parcels lying in the county and required for the same public use may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of the parties"; in (3)(a) near middle inserted reference to subsection (1) and near end before "right" deleted "appropriation of the"; in (3)(b)(i) before "reservoir" deleted "underground"; in (3)(b)(ii) at beginning deleted "also stating that"; in (3)(b)(iii) before "reservoir" deleted "underground"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 125 in (2) and (3)(a) inserted "in addition to the items listed in subsection (1)"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1985 Amendment: In (6) at end of first sentence, inserted "and a statement that the interest sought is the minimum necessary interest".

1983 Amendments: Chapter 526, in (2), after "owners" inserted "purchasers under contracts for deed".

Chapter 622, in lead-in, after "must" changed "contain" to "allege"; inserted (4) requiring statements of facts necessary to be found under 70-30-111; in (6) near beginning after "each" substituted "interest in real property" for "piece of land", and deleted last sentence, which read: "When application for the condemnation of a right-of-way for the purposes of sewerage is made on behalf of a settlement or a town or a county, the county commissioners of the county may be named as plaintiff."

Case Notes

Condemnation of Private Water System: The city of Missoula filed a complaint to condemn the water system privately owned by the defendant water company. The city previously lost an attempt to condemn the water system in Missoula v. Mtn. Water Co. (Mountain Water I), 228 Mont. 404, 743 P.2d 590 (1987), and Missoula v. Mtn. Water Co. (Mountain Water II), 236 Mont. 442, 771 P.2d 103 (1989). The District Court issued a preliminary order of condemnation. On appeal, the Supreme Court affirmed, finding that the defendants presented no compelling evidence that they were deprived of due process, that the District Court properly refused to grant a continuance and no actual prejudice resulted, that the defendants did not make a compelling case that they were not ready for trial because they were able to present a full and well-prepared defense, that the District Court properly declined to admit all of the proposed valuation evidence and the Legislature clearly intended for valuation to be determined by unbiased fact finders after the necessity determination, that the District Court properly refused to dismiss a party, that collateral estoppel was inappropriate because there was a change of circumstances sufficient to warrant a new analysis of whether public ownership of the water system was more necessary than private ownership and the city's previous attempt to acquire the water system did not bar the new action, that the District Court properly found that the effect of condemnation on employees was one of several nondispositive factors that must be considered, and that the District Court correctly determined that public ownership of the water system was more necessary than private ownership. Missoula v. Mtn. Water Co., 2016 MT 183, 384 Mont. 193, 378 P.3d 1113.

Description of Secondary Access Right-of-Way Within Statutory Requirements: In its complaint for condemnation for a pipeline and fiber optic right-of-way access across plaintiff's property, Cenex incorporated by reference the "minimum necessary interest" requirement and included a map of the pipeline route and a description of the primary easement sought. When the District Court granted condemnation of the 50-foot easement, plaintiff appealed, alleging that the District Court erred because Cenex had failed in its description to set forth a fixed way of access. In affirming the condemnation grant, the Supreme Court held that because Cenex was entitled only to the "minimum necessary interest", the description of the secondary right of access complied with the requirement of this section through incorporation by reference of the requirement. Cenex Pipeline LLC v. Fly Creek Angus, Inc., 1998 MT 334, 292 M 300, 971 P2d 781, 55 St. Rep. 1358 (1998).

Description of Land:

Complaint describing three parcels of land by metes and bounds and alleging that only a portion thereof was desired was sufficient, as against the contention that it did not appear that plaintiff commission intended to use a considerable portion of a given piece of land. St. v. Whitcomb, 94 M 415, 22 P2d 823 (1933). (See 1985 amendment.)

Description of lands sought to be condemned for a private road is sufficient if it is definite enough to identify the lands. Komposh v. Powers, 75 M 493, 244 P 298 (1926).

The area of the land sought to be acquired by condemnation proceedings is not required to be stated in the petition. The requirement of the statute is met when the description is definite enough to identify the land sought to be taken, even though it be conceded that the statement of the area would materially aid in its identification. Interstate Power Co. v. Anaconda Copper Min. Co., 52 M 509, 159 P 408 (1916).

Where the complaint, in a proceeding to condemn land, sets forth definitely the bounds on three sides of a tract sought to be taken and designates a well-known navigable stream as the boundary on the fourth side, this designation is sufficient without express reference to high or low watermark; in any event, it meets the requirements of the rule that "that is certain which can be made certain by means of the description or references contained in the petition". Interstate Power Co. v. Anaconda Copper Min. Co., 52 M 509, 159 P 408 (1916).

Default by Defendant: Where plaintiff railroad company failed to take default against defendants, who had not answered or demurred but permitted the case to proceed as if pleadings had been filed and issues properly made, and found no fault with any of the proceedings until hearing in the District Court, it will be presumed that issues were made and properly determined. Yellowstone Park R.R. v. Bridger Coal Co., 34 M 545, 87 P 963 (1906).

Access to Property Condemned: A complaint by a city for the condemnation of water rights in a stream for a water supply is not defective for failing to allege that it has a right-of-way to the stream or will be able to acquire such right. Helena v. Rogan, 26 M 452, 68 P 798 (1902).

Necessity of Use: To condemn private land for an alleyway, the complainant must allege the necessity of the use for which the condemnation is sought; otherwise, evidence of such necessity is inadmissible. Helena v. Harvey, 6 M 114, 9 P 903 (1886).

70-30-206. Powers of court — preliminary condemnation order.

Compiler's Comments

2013 Amendment: Chapter 371 in (2) near middle substituted "70-30-111(1)" for "70-30-111". Amendment effective April 30, 2013.

Saving Clause: Section 6, Ch. 371, L. 2013, was a saving clause.

Severability: Section 7, Ch. 371, L. 2013, was a severability clause.

Applicability: Section 9, Ch. 371, L. 2013, provided: "[This act] applies to complaints for condemnation filed on or after [the effective date of this act]." Effective April 30, 2013.

2001 Amendments — Composite Section: Chapter 19 at beginning of (1) inserted introductory clause; in (1)(b) at beginning inserted reference to 70-30-104(2) and near middle substituted "taken" for "appropriated"; in (2) substituted "condemnor" for "plaintiff"; in (3)(a) in two places substituted "taken" for "appropriated", in two places substituted "condemnor" for "plaintiff", and near middle before "commissioners" inserted "condemnation" and before "determine" deleted "ascertain and"; in (3)(b) inserted "In addition to or in lieu of the amount paid under subsection (3)(a), the court may direct the commissioners to determine"; in (3)(b)(iii) after "reservoir" deleted "as compensation and damages by reason of the appropriation of such property"; in (4) in two places substituted "condemnor" for "plaintiff" and substituted "taken" for "appropriated"; and made minor changes in style. Amendment effective February 19, 2001.

Chapter 125 throughout section substituted "condemnor" for "plaintiff"; in (3)(b) substituted "In addition to or in lieu of the amount paid under subsection (3)(a), the court may direct the commissioners to determine the annual rental" for "and/or as the annual rental"; and made minor changes in style. Amendment effective October 1, 2001.

Saving Clause: Section 4, Ch. 19, L. 2001, was a saving clause.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1983 Amendment: In introductory portion of (1), after "court" deleted "or judge"; in (1)(b) substituted present language relating to court's power to limit a property interest if determined to be an unnecessary interest for "determine whether or not the use for which the property is sought to be appropriated is a public use within the meaning of the laws of this state"; deleted former (1)(c), which read: "limit the amount of property sought to be appropriated if in the opinion of the court or judge the quantity sought to be appropriated is not necessary"; in (2) at beginning substituted "If the court finds and concludes" for "If the court or judge is satisfied", after "presented" deleted "at the hearing provided for in 70-30-204", near middle after "taking of" changed "such lands" to "such interest in real property", after "and that the" substituted "plaintiff has met his burden of proof under 70-30-111" for "facts necessary to be found before condemnation appear", after "condemnation of the" changed "land or other real property" to "interest in real property"; in (3) near beginning after "court" deleted "or judge"; and inserted (4) requiring expeditious consideration of a preliminary condemnation proceeding.

Case Notes

Condemnation of Private Water System: The city of Missoula filed a complaint to condemn the water system privately owned by the defendant water company. The city previously lost an attempt to condemn the water system in Missoula v. Mtn. Water Co. (Mountain Water I), 228 Mont. 404, 743 P.2d 590 (1987), and Missoula v. Mtn. Water Co. (Mountain Water II), 236 Mont. 442, 771 P.2d 103 (1989). The District Court issued a preliminary order of condemnation. On appeal, the Supreme Court affirmed, finding that the defendants presented no compelling evidence that they were deprived of due process, that the District Court properly refused to grant a continuance and no actual prejudice resulted, that the defendants did not make a compelling case that they were not ready for trial because they were able to present a full and well-prepared defense, that the District Court properly declined to admit all of the proposed valuation evidence and the Legislature clearly intended for valuation to be determined by unbiased fact finders after the necessity determination, that the District Court properly refused to dismiss a party, that collateral estoppel was inappropriate because there was a change of circumstances sufficient to warrant a new analysis of whether public ownership of the water system was more necessary than private ownership and the city's previous attempt to acquire the water system did not bar the new action, that the District Court properly found that the effect of condemnation on employees was one of several nondispositive factors that must be considered, and that the District Court correctly determined that public ownership of the water system was more necessary than private ownership. Missoula v. Mtn. Water Co., 2016 MT 183, 384 Mont. 193, 378 P.3d 1113.

Court Determination of Terms of Compatible Use to Be Included in Final Order of Condemnation: Although eminent domain statutes do not require protective conditions in an easement, courts do have the power under this section to set forth protective provisions in an order for condemnation. In this case, the court found the use of property to be compatible for use both for a railroad and for electric power lines. Thus, failure by the court to include any requested protective provisions in its order of possession did not constitute reversible error, but the Supreme Court nevertheless remanded to the trial court for a hearing to determine what protective provisions requested by either party, if any, should be included in its final order of condemnation. Mont. Power Co. v. Burlington N. RR Co., 272 M 224, 900 P2d 888, 52 St. Rep. 625 (1995), following St. Highway Comm'n v. Lavoie, 155 M 39, 466 P2d 594 (1970).

Easement Necessary for Electric Power Lines — Condemnation Proper: Burlington Northern (BN) offered Montana Power Company (MPC) a wire line permit across BN property that would have allowed location, construction, operation, maintenance, replacement, and removal of a $2.2 million power transmission line. MPC rejected the offer because of the lack of permanence and allowance for rent escalation and because the permit was revocable without cause 100 days after notice and contained onerous indemnification and relocation provisions. Instead, MPC sought an easement without restrictions and condemnation, producing uncontroverted testimony about the area's need for the transmission facility as well as the practicality of locating the lines on BN's right-of-way. BN produced no evidence to contradict the choice of location or the public's need for the proposed line. The District Court properly held that an easement was necessary for the intended use, as compared to a wire line permit, and that the property was subject to condemnation. Mont. Power Co. v. Burlington N. RR Co., 272 M 224, 900 P2d 888, 52 St. Rep. 625 (1995).

Burden of Proof — No Necessity for Utility Easements: The condemnor must initially produce sufficient evidence to establish facts indicating the taking is necessary. The burden then falls upon the one seeking to show that the taking has been excessive or arbitrary. The trial court found that the sewer district had not shown necessity for the taking of defendants' properties because it failed to demonstrate a reasonable present need or even a need in the reasonably foreseeable future to connect defendants to the sewer system. The condemnor had not carried its burden, and the order of the trial court was affirmed. Lincoln/Lewis & Clark County Sewer District v. Bossing, 215 M 235, 696 P2d 989, 42 St. Rep. 318 (1985).

Scope of Authority of Trial Court's Review in Condemnation Action: Prior cases, along with 70-30-111 and 70-30-206, clearly reflect that the trial judge has the power to determine necessity and make findings on whether the public interest requires the taking in an eminent domain proceeding. Thus, to the extent the trial judge's findings go to a determination of the necessity of a taking of defendants' property, those findings are within the trial court's scope of authority and can be affirmed. The trial court made two findings that are outside its scope of authority. Two prior District Court actions had already made determinations on the validity of the district and that the project was in the public interest. In addition, the issues before this trial court involved only the necessity of taking the particular property of the defendants for septic tanks and connection lines. Since these findings exceeded the trial court's authority, they are set aside. Lincoln/Lewis & Clark County Sewer District v. Bossing, 215 M 235, 686 P2d 989, 42 St. Rep. 318 (1985), followed in Bozeman v. Vaniman, 264 M 76, 869 P2d 790, 51 St. Rep. 154 (1994).

Access Rights: In condemnation proceeding involving access to portion of farm divided by interstate highway, District Court had power to require state to incorporate in its construction plans such structures as would allow two-lane access across county road; but District Court did not have power to require state to submit such plans to court for its approval since such matters were within purview of activities of Highway Commission (now Transportation Commission). State ex rel. St. Highway Comm'n v. Lavoie, 155 M 39, 466 P2d 594 (1970), distinguished in St. Highway Comm'n v. Roth, 159 M 268, 496 P2d 1136 (1972).

Necessity of Use: Before District Court may order condemnation, this section requires that it must find that proposed taking is necessary to public use under circumstances of individual case. Mont. Power Co. v. Bokma, 153 M 390, 457 P2d 769 (1969).

Underpass: Where 40.89 acres of ranchland were taken by the Highway Commission (now Transportation Commission) as a right-of-way for an interstate highway, consisting of four lanes in width and fully controlled access, which split the remaining land into two divisions, leaving 432.69 acres, on which farm headquarters was located, on the north side of the highway and 393.42 acres on the south side of the highway, trial court in its preliminary order of condemnation properly ordered the Commission to construct and maintain at its own expense an underpass leading from one side of the highway to the other. State ex rel. St. Highway Comm'n v. Wheeler, 148 M 246, 419 P2d 492 (1966).

Determination of Necessity: In an action by the state to condemn land for interstate highway or controlled access facility the trial judge has the power to determine the public necessity of the proposed highway or facility. Under this section and 70-30-111, the trial judge not only has the power to determine the question of necessity but has been directed to make a finding that the public interest requires the taking of the lands before he has power to issue an order of condemnation. St. v. Yost Farm Co., 142 M 239, 384 P2d 277 (1963).

Necessity Denied: Necessity was properly denied where trial court found that proposed highway would not benefit the people living in its vicinity or the public in general and that the construction of the road was not in the public interest. St. v. Yost Farm Co., 142 M 239, 384 P2d 277 (1963).

Valuation of Property: Income could be used as a basis for arriving at market value in condemnation case where testimony of the various witnesses for both the landowners and the state, who explained their method of valuation, used the same general approach in determining the loss in value, which approach was labeled the "capitalization of income" approach. St. v. Heltborg, 140 M 196, 369 P2d 521 (1962).

Appeal From Commissioners' Award: A Commissioner's assessment is not a judgment but merely an award by the lay Commissioners of damages contained in their report, and, where an appeal has been perfected by the condemner from the assessment, the condemner is entitled to have a necessary party added as a party defendant. State ex rel. St. Highway Comm'n v. District Court, 136 M 362, 348 P2d 132 (1959).

Removal of Improvements: In proceedings to condemn tract of land for new highway which would leave defendant's business on old highway, testimony concerning removal of gas tanks was wholly incompetent. Landowner was not required to remove his buildings or fixtures from the land taken and accept an amount of money to defray costs of removal. St. v. Peterson, 134 M 52, 328 P2d 617 (1958).

Taking of Private Property for Private Use: The taking of private property for the private use of another violates the 14th amendment to the federal Constitution, and the Legislature has not the power to declare that that which is in truth a private use shall be a public one, the question whether a particular use is a private or public one being determinable by the courts. Komposh v. Powers, 75 M 493, 244 P 298 (1926).

Waiver of Objections to Commissioners' Report: Where commissioners, appointed to assess damages occasioned by the taking of land through eminent domain proceedings, do not perform their whole duty in the premises, either by reason of their nonfeasance or malfeasance, the injured party may appeal or move to set aside their report. Upon failure to invoke either of these remedies, such party may not thereafter be heard to say that his property was taken without due process of law. Spratt v. Helena Power Transmission Co., 37 M 60, 94 P 631 (1908).

Default by Defendant: Failure of defendant in condemnation proceedings to appear, either by demurrer or answer, does not relieve the court of the duty of determining whether the use for which the property sought to be condemned is a public use, limiting the amount taken to the necessities of the case, and ascertaining the damages as provided in this section, 70-30-301, and 70-30-304. Yellowstone Park R.R. v. Bridger Coal Co., 34 M 545, 87 P 963 (1906).

70-30-207. Appointment of condemnation commissioners — affidavit — compensation.

Compiler's Comments

2001 Amendment: Chapter 125 throughout section substituted references to condemnor for references to plaintiff and references to condemnee for references to defendant; in (3)(c) inserted "of consanguinity"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1985 Amendment: In (1) increased claim period from 10 days to 30 days.

1983 Amendments: Chapter 122, inserted (3)(b) establishing residency requirements; inserted (5) specifying compensation to be paid to commissioners by the condemning party; in (3), deleted former subsections (a), (b), (c), (e), and (f), which provided the following qualifications:

"(a) a citizen of the United States and over 18 years of age;

(b) that he is not more than 70 years of age;

(c) that he is in possession of natural faculties, of ordinary intelligence, and not decrepit;

(e) that he was assessed on the last assessment roll of a county within the judicial district in which the action is pending;

(f) that he has not been convicted of malfeasance in office or any felony or other high crime".

Chapter 622, in (1), at beginning substituted "Within 10 days ... the court must appoint" for "Immediately upon making and entering the preliminary condemnation order, the judge must meet with the respective parties or their attorneys of record for the purpose of appointing condemnation commissioners to ascertain and determine the amount to be paid by the plaintiff to each owner or other persons interested in such property by reason of the appropriation of such property. The appointment of".

Case Notes

Condemnation of Private Water System: The city of Missoula filed a complaint to condemn the water system privately owned by the defendant water company. The city previously lost an attempt to condemn the water system in Missoula v. Mtn. Water Co. (Mountain Water I), 228 Mont. 404, 743 P.2d 590 (1987), and Missoula v. Mtn. Water Co. (Mountain Water II), 236 Mont. 442, 771 P.2d 103 (1989). The District Court issued a preliminary order of condemnation. On appeal, the Supreme Court affirmed, finding that the defendants presented no compelling evidence that they were deprived of due process, that the District Court properly refused to grant a continuance and no actual prejudice resulted, that the defendants did not make a compelling case that they were not ready for trial because they were able to present a full and well-prepared defense, that the District Court properly declined to admit all of the proposed valuation evidence and the Legislature clearly intended for valuation to be determined by unbiased fact finders after the necessity determination, that the District Court properly refused to dismiss a party, that collateral estoppel was inappropriate because there was a change of circumstances sufficient to warrant a new analysis of whether public ownership of the water system was more necessary than private ownership and the city's previous attempt to acquire the water system did not bar the new action, that the District Court properly found that the effect of condemnation on employees was one of several nondispositive factors that must be considered, and that the District Court correctly determined that public ownership of the water system was more necessary than private ownership. Missoula v. Mtn. Water Co., 2016 MT 183, 384 Mont. 193, 378 P.3d 1113.

Motion for Preliminary Condemnation Properly Granted Following Unaccepted Offer to Purchase Right-of-Way: Seeking to improve and expand a roadway, the city offered Taylens $25,500 for the right-of-way across their property. The offer included an appraisal, an engineer's drawing of the land that the city wanted to purchase, a legal description of the property, and a proposed purchase agreement and set a date by which the offer had to be accepted. When the date passed without a response from the Taylens, the city began condemnation proceedings, while continuing to negotiate with the Taylens for a purchase price. Ultimately, no agreement was reached, the property was condemned, and the city took possession and completed the road improvements. The Taylens appealed on grounds that the city did not properly follow the condemnation process, but the Supreme Court affirmed. The District Court correctly concluded that the city's offer met the requirements of 70-30-111(4) and did not err in granting the city's motion for preliminary condemnation. In addition, the Taylens failed to avail themselves of appropriate legal remedies to preserve the status quo, such as a stay pending appeal or a request that the city give a bond or sufficient sureties during the appeal, and the city completed the improvements, so the Taylens lost the right to raise the issue of whether the court should have granted the city immediate possession following the order for preliminary condemnation. Bozeman v. Taylen, 2007 MT 256, 339 M 274, 170 P3d 939 (2007).

Part 3

Hearing, Judgment, and Subsequent Proceedings

70-30-301. Hearing — judge to preside — determinations by condemnation commissioners.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 20 at beginning of (1) substituted "The condemnation commissioners shall meet" for "Immediately upon nomination and appointment of commissioners under 70-30-207, the same shall proceed to meet"; in (3)(a) near beginning substituted "judge" for "court or judge" and at end inserted reference to appropriate findings under subsections (3)(b) through (3)(d); in (3)(b) at beginning inserted "The commissioners shall determine", before "property" inserted "real", and substituted "real property" for "realty"; in (3)(c)(i) inserted "the commissioners shall determine", substituted "accrue to the remaining parcel by reason of the condemnation" for "accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned", and at end substituted "condemnor" for "plaintiff"; in (3)(c)(ii) at beginning substituted "The commissioners shall also determine how much the remaining parcel and each estate or interest in the remaining parcel will be benefited" for "separately, how much the portion not sought to be condemned and each estate or interest therein will be benefited", substituted "condemnor" for "plaintiff", substituted "the compensation to the condemnee is limited to the value" for "the owner of the parcel shall be allowed no compensation except the value", and substituted "the benefit to the condemnee must be deducted from the amount assessed under subsection (3)(c)(i)" for "the former shall be deducted from the latter"; in (3)(d) substituted "sought to be taken is" for "sought to be condemned be" and inserted "the commissioners shall also determine"; inserted (3)(e) requiring commissioners to determine appropriate payment for damages; in (4) in first sentence in two places substituted "condemnor" for "plaintiff", substituted "taken" for "condemned", after "first determined" deleted "as hereinbefore stated" and in first and second sentences substituted "condemnees" for "defendants"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 125 throughout section substituted references to condemnor for references to plaintiff and references to condemnee for references to defendant; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1981 Amendment: Inserted "current fair market" before "value" throughout the section.

Case Notes

General 408
Measure of Damages 410

GENERAL

Compensation When Damaged Land Has Been Leased: In condemnation actions, compensation accrues only to the one suffering loss or damage. When a lessee paid the landowner the entire, normal lease payment each year that the state used landowner's land, any damages for temporary loss of use of the leased land accrued to the lessee rather than the landowner. State ex rel. Dept. of Highways v. Donnes, 219 M 182, 711 P2d 805, 42 St. Rep. 1938 (1985).

Landowner — Witness Rule Inapplicable to Proof of Causation of Damages: Where the State condemned a piece of the defendant's land as right-of-way for an interstate frontage road, the District Court did not err in admitting the defendant's testimony that the heat, noise, and dust from the road would damage the defendant's pig rearing business and testimony of the resulting reduction in value of the property. The landowner-witness rule relied on by the State to exclude that testimony is not directly applicable to this case. What is at issue is the competency of the landowner to testify on the causal link between the taking and any damages to the remainder, and, ultimately, to the depreciation in market value. The record indicates that the defendant was informed regarding the facts of construction and use of the highway. When a landowner is so informed, he is competent to estimate before-and-after value as to that particular use of his property or the causes of damage to the remaining property. St. v. Howery, 204 M 417, 664 P2d 1387, 40 St. Rep. 975 (1983).

Landowner-Witness Rule: The landowner-witness rule in valuation of property in a condemnation proceeding consists of two parts: the landowner on prima facie showing of ownership may testify as to value so long as his testimony is reasonable and the value testified to is for the use to which he is putting the land; if the landowner desires to testify as to value when used for other purposes, he must have some peculiar means of forming an intelligent and correct judgment beyond what is presumed to be possessed by men generally. Highway Comm'n v. Marsh, 175 M 460, 575 P2d 38 (1978), followed in K&R Partnership v. Whitefish, 2008 MT 228, 344 M 336, 189 P3d 593 (2008).

Evidence of Comparable Sales: Evidence of comparable sales is within the discretion of the court and will not be reversed unless there was manifest abuse of that discretion. Dept. of Highways v. Schreckendgust, 170 M 161, 551 P2d 1019 (1976).

Severance Damage to Remainder of Land When Condemnation Results in Excising Very Heart of Ranch: Damage award to remainder of ranch was inadequate for not allowing compensation for permanent interference with farming, as distinguished from temporary interference or inconvenience, when heart of ranch was excised by condemnation as just compensation for a public taking of private land is computed by adding fair market value of land taken to "value of remainder before taking minus value of remainder after taking". Meagher County Newlan Creek Water District v. Walter, 169 M 358, 547 P2d 850 (1976).

Bifurcated Trial Not Required: It was not error for jury to determine a total award and thereafter apportion award among the lessor and lessee as jury was properly admonished to first ascertain entire award as though property were owned by one person, then to apportion this sum between lessor and lessee. Bifurcated trial is not required as court will presume that jury, in reaching its verdict, followed instructions given to it by trial judge. Dept. of Highways v. Hy-Grade Auto Court, 169 M 340, 546 P2d 1050 (1976).

Sales Comparable in Size but Not in Shape: It was proper for the District Court to admit evidence of sales comparable in size but not in shape as the basis for an expert's opinion, where the differences were thoroughly developed on both direct and cross-examination allowing the jury to determine the weight to be given the comparable sales and the expert's appraisal. Mont. Power Co. v. Wolfe, 169 M 234, 545 P2d 674 (1976).

Lack of Certainty: In action for condemnation where none of the witnesses agreed as to the exact amount of acreage to be taken and the engineers did not have all of the facts and figures so as to enable counsel to be exact, the cause was remanded for a new trial. St. Highway Comm'n v. Marsh, 165 M 198, 527 P2d 573 (1974).

Lessee's Testimony: In condemnation action court properly permitted testimony of lessee for the purpose of showing how the operation of the ranch would be affected but refused to allow testimony as to lessee's damage, since the fact of lessee's loss had not been offered in evidence and the lease provided that any condemnation award would go to the owner. St. Highway Comm'n v. Marsh, 165 M 198, 527 P2d 573 (1974).

Noncontiguous Lands: Although the general rule in eminent domain proceedings requires that the land for which depreciation damages are sought be contiguous to that from which severance is made, the landowner may claim, as an exception to the general rule, that the unity of use within an integrated operation to which he applies noncontiguous lands is of such a character that after severance they cannot be fully utilized to their best and most valuable use; where highway right-of-way traversed a tract of ranchland so as to separate it into two parcels with no access for 6½ miles, court properly permitted testimony concerning damage to two other noncontiguous tracts used as a part of landowner's ranching operation. St. Highway Comm'n v. Renfro, 161 M 251, 505 P2d 403 (1973).

"Remainder": To determine what is "remainder" of property taken under statute providing for damages for depreciation in value of portion of land not sought to be condemned, there are generally three tests: (1) unity of ownership, (2) contiguity, (3) unity of use; claimant who conveyed part of tract of subsequently condemned land to corporation was not entitled to compensation for depreciation in value to land he still held because claimant and corporation were two distinct owners and hence unity of ownership was absent even though claimant was majority shareholder of corporation and lands were contiguous. St. Highway Comm'n v. Robertson & Blossom, Inc., 151 M 205, 441 P2d 181 (1968), distinguished in St. Highway Comm'n v. Renfro, 161 M 251, 505 P2d 403 (1973).

Extent Access Impaired for the Jury: While it is proper for the trial court to determine whether there has been an impairment of access, the question of the extent to which access has been impaired is for the jury, and it was not error for the court to refuse to give instructions to the effect that all means of access to the defendant's property had been destroyed. St. Highway Comm'n v. Manry, 143 M 382, 390 P2d 97 (1963).

Verdict Form: It was not prejudicial error for the trial judge to give the jury a verdict form which was in accord with this section and which verdict was not out of proportion to the damage done the defendant. St. Highway Comm'n v. Manry, 143 M 382, 390 P2d 97 (1963).

Damages Caused by Severance: To fully determine damages caused by severance of condemned land, subsection (3)(b) is not read alone; rather it must be read in connection with 70-30-302, as amended. St. v. Milanovich, 142 M 410, 384 P2d 752 (1963).

Unity of Use: Where defendants owned seven contiguous lots upon which they had constructed their home and an income-producing residence, planning to build a multiple-family dwelling on three of the vacant lots, the seven lots constituted a single unit; and in action by state to condemn part of the three vacant lots for highway purposes, the unity of use doctrine allowing depreciation of value of remaining land was applicable in assessing damages. St. v. Milanovich, 142 M 410, 384 P2d 752 (1963).

Alteration of Commissioners' Award: Although this section as amended in 1961 gives the presiding judge supervision over the commissioners, it does not grant to the court the right to amend or alter their award. State ex rel. Frelich v. District Court, 141 M 169, 375 P2d 1016 (1962).

Expert Testimony: Testimony of right-of-way agents who had been engaged in the process of appraising real estate for some time all over the state and had extensive experience in and knowledge of real estate values in community and elsewhere should have been admitted by court to establish value of property taken by plaintiff for new highway. St. v. Peterson, 134 M 52, 328 P2d 617 (1958).

Error in Admitting Evidence as to Damage to All Land Whether Contiguous or Not: By eminent domain proceedings the state sought to acquire a strip of land containing 85 acres for highway purposes from a body of land comprising more than 21,000 acres used for livestock purposes. While the major body of the land was inclosed by a common fence, a number of tracts therein were owned by others, and the common fence was maintained by mere license, acquiescence, or failure to protest. A number of tracts controlled by defendant were noncontiguous, and some were more than 9 miles from the desired right-of-way. Error was committed in admitting evidence showing damage to all the lands, whether contiguous or not, on the theory that they were used as a unit as grazing lands in defendant's livestock operations. St. v. Bradshaw Land & Livestock Co., 99 M 95, 43 P2d 674 (1935).

Independent Parcels: Within the meaning of this section, parts of the whole tract separated by intervening private lands are generally considered as independent parcels. St. v. Bradshaw Land & Livestock Co., 99 M 95, 43 P2d 674 (1935).

Discontinuance of Highway: The owner of land abutting on a country highway, as distinguished from a city street, has no property or other vested right in the continuance of it as a highway and may not claim damages for its discontinuance, caused by the laying out of a new road by the

Highway Commission (now Transportation Commission), for inconvenience caused to the owner in marketing his farm products, or for diverting traffic from his door, diminishing his trade and thus depreciating the value of his land. St. v. Hoblitt, 87 M 403, 288 P 181 (1930).

Default by Defendant: The defendant in condemnation proceedings is required to appear, either by demurrer or answer. If he fails so to do, he has no standing in court for any purpose and may not be heard in the subsequent proceedings, notwithstanding the provisions of this section that the commissioners shall hear the allegations and evidence of all persons interested, this section having reference to cases where the parties defendant are not in default. State ex rel. Culbertson Ferry Co. v. District Court, 49 M 595, 144 P 159 (1914); Yellowstone Park R.R. v. Bridger Coal Co., 34 M 545, 87 P 963 (1906).

Examination of Premises: Where land, sought to be condemned by a corporation for the construction of a dam to be used in the generation of electric power, had been flooded prior to the appointment of commissioners to determine the damages, an objection to their appointment was properly overruled, in the absence of any evidence that the water could not or would not be withdrawn to enable an examination of the premises. Spratt v. Helena Power Transmission Co., 37 M 60, 94 P 631 (1908).

Adjacent Property Damaged: Damages accruing to adjacent property from improper construction of a railroad are not allowable in condemnation proceedings for a railroad right-of-way. Mont. R.R. v. Freeser, 29 M 210, 74 P 407 (1903).

Railroad Crossings: In condemnation proceedings by a railroad company to obtain parts of the right-of-way of another road, the question of damages for crossings may be properly referred to commissioners. Butte, Anaconda & Pac. Ry. v. Mont. Union Ry., 16 M 504, 41 P 232 (1895).

MEASURE OF DAMAGES

Determination of Fair Market Value Proper — Expert Testimony Properly Allowed: In condemning a parcel of defendants' property for a state highway project, the state's expert testified considering possible depreciation of the remainder of the property based on how the property was being used, the impact of any buildings on the property, no unreasonable impairment of access to the remainder of the property, comparable land sales in the area, and the value of comparable land without highway access. This testimony regarding fair market value was not considered speculative or conjectural, and the District Court properly allowed it. Dept. of Transportation v. Simonson, 2004 MT 60, 320 M 249, 87 P3d 416 (2004).

Lack of Evidence on Impact of Taking on Value of Remaining Property — Jury Instructions on Compensation for Taking of Access Proper: The District Court instructed the jury that defendants were not entitled to compensation merely because traffic access was diverted because of road construction or for defendants' loss of business resulting from the taking of a part of defendants' property. Defendants contended that the instructions were an abuse of discretion because they were not seeking compensation for access impairment, traffic diversion, or loss of business, but rather that those factors had caused severance damages when the remaining property's commercial value sustained a permanent market value loss, entitling defendants to a new trial. The Supreme Court disagreed. Defendants failed to offer any evidence of a loss of revenue from their business and the impact of the loss on the fair market value of the remainder of the property. Thus, the jury instructions did not materially affect defendants' substantial rights, and the motion for a new trial was properly denied. Dept. of Transportation v. Simonson, 2004 MT 60, 320 M 249, 87 P3d 416 (2004).

Measure of Damages for Loss of Use of Land Leased From State: The landowner was entitled to compensation for loss of use of land leased from the state only in the amount of her lease payments to the state. Section 77-6-208 provides that any sublease of state leased lands may not be upon terms less advantageous to the sublessee than the terms given by the state. Since the landowner herself was not using the land, the only possible compensable loss she suffered was the amount for which she could have subleased the land. State ex rel. Dept. of Highways v. Donnes, 219 M 182, 711 P2d 805, 42 St. Rep. 1938 (1985).

Ascertainable Damages:

Where the defendant and others testified in an eminent domain proceeding to the fact that heat, noise, and dirt associated with the construction of an interstate frontage road would cause "pig stress" to the hogs in the defendant's pig rearing business and the defendant's testimony regarding decreased property values was consonant with the testimony of a professional, experienced property appraiser, the Supreme Court held that the jury's verdict for the defendant was not based on speculative or conjectural evidence and was not excessive in light of the evidence presented. St. v. Howery, 204 M 417, 664 P2d 1387, 40 St. Rep. 975 (1983).

Evidence that the taking of land for highway purposes through cattle country would, after constructing fences, result in cattle breaking through the fences in search of water or when alarmed by automobiles, necessitating employment of additional help to make repairs, etc., was inadmissible as referring to an element of damage too remote, speculative, and conjectural. St. v. Bradshaw Land & Livestock Co., 99 M 95, 43 P2d 674 (1935).

Recoverable damages in eminent domain proceedings must be the natural and proximate consequence of the taking of the lands; they must be readily ascertainable and not remote, speculative, or contingent. St. v. Bradshaw Land & Livestock Co., 99 M 95, 43 P2d 674 (1935).

It is not every possible element of depreciation in value of land a portion of which is taken for highway purposes for which compensation may be awarded; recoverable damages must be the natural and proximate consequence of the taking; they must be direct and certain, actual, reasonable, and readily ascertainable, not remote, speculative, or contingent. Lewis & Clark County v. Nett, 81 M 261, 263 P 418 (1928).

Measure of Damages When Change in Access Has Caused Change in Value of Condemnee's Remaining Land: In an action to condemn 20.45 acres of land for the purpose of expanding a municipal airport, landowners appealed the commissioners' assessment to the District Court. Prior to trial, the District Court granted the airport board's motion in limine and excluded evidence on diminution of value of landowners' remaining land due to the abandonment of a county road contained in the condemned parcel, ruling that landowners had no legal interest in the continuance of a county road unless discontinuance of that road deprived them of access to their remaining property. The Supreme Court reversed, ruling that although condemnees cannot recover damages for a reduction in traffic flow caused by discontinuance of a county road, they can recover damages if the change in access has caused a substantial change in value in the condemnees' land and landowners should have been permitted to introduce evidence on this issue. McCone County v. James, 198 M 430, 646 P2d 1209, 39 St. Rep. 1107 (1982).

Just Compensation Computed: Just compensation for a public taking of private land is to be computed as follows: the fair market value of the land taken, plus value of remainder before taking minus value of remainder after taking. Meagher County Newlan Creek Water District v. Walter, 169 M 358, 547 P2d 850 (1976).

Income Capitalization Method of Valuation Permissible: When income capitalization method entails less conjecture and uncertainty than alternative methods, it is the appropriate valuation method because, even though it is generally held that the best method of arriving at market value is recent sales of comparable property, where there are no comparable sales, evidence based upon revenue and valuation based in part thereon is competent and admissible. Dept. of Highways v. Hy-Grade Auto Court, 169 M 340, 546 P2d 1050 (1976).

Method of Calculating Value: Once proper foundation has been laid as to the witness's expertise, he should be permitted to give his opinion using any of the accepted means of calculating value, such as market data, reproduction costs, or income capitalization. Dept. of Highways v. Olsen, 166 M 139, 531 P2d 1330 (1975).

Valuation of Property by Owner: An owner of real property shall be qualified to estimate in a reasonable way the value of his property for the use to which he has been putting it. St. Highway Comm'n v. Marsh, 165 M 198, 527 P2d 573 (1974).

Award Greater Than Requested: Where jury in condemnation action awarded damages for land taken in excess of amount requested by landowner and testified to by expert appraisers, trial court properly granted a new trial, notwithstanding fact that total award was equal to amount sought by landowner as total damages. St. Highway Comm'n v. Emery, 156 M 507, 481 P2d 686 (1971).

Expert Testimony as to Value: Testimony of expert witnesses showing that although presently used for agricultural purposes, highest and best use of land was for residential subdivision, showing comparative values of similar land in same geographical area and showing how property could have been subdivided and how highway running through it detracted from its suitability for subdivision, was sufficient to sustain jury's verdict as against contention of state that expert witnesses based their opinions on mere speculation. St. Highway Comm'n v. Jacobs, 150 M 322, 435 P2d 274 (1967), explained in St. Highway Comm'n v. Wilcox, 155 M 176, 468 P2d 749 (1970).

Apportionment of Damages: It was not error for the jury to express its award of damages separately to lessor and lessee rather than state a single lump sum when such award was not excessive, was supported by substantial evidence, and did not reflect an increased valuation due solely to a distribution of interest. St. Highway Comm'n v. City Serv. Co., 142 M 559, 385 P2d 604 (1963), distinguished in St. Highway Comm'n v. Barnes, 151 M 300, 443 P2d 16 (1968).

Measure of Damages — Leasehold Interests: The proper value of a leasehold interest is the fair market value, not the market value less future rent to be paid. St. Highway Comm'n v. City Serv. Co., 142 M 559, 385 P2d 604 (1963).

Severance Damages: While ordinarily damages for the taking of land for highway purposes may be awarded for injury done to the particular lot or tract of land from which the right-of-way strip is taken regardless of what other lands the owner may possess, where a small tract from which the strip is sought to be taken is isolated from a ranch proper by a railroad but used for the pasturing of dairy cows milked upon the ranch, the additional inconvenience and danger in the use of the pasture by the construction of a highway on which automobiles are constantly passing may be considered as an item of damages, as may also the construction of a fence along the highway to maintain the inclosure. St. v. Hoblitt, 87 M 403, 288 P 181 (1930).

Fencing Costs: In the absence of statutory provision therefor, in determining the damages incident to the taking of ranchland for highway purposes, allowance may not be made for a fence as such, and proof of the necessity of fencing and its cost is proper only as a means of showing the depreciation in market value of the remaining land by reason of the taking of the highway strip. Lewis & Clark County v. Nett, 81 M 261, 263 P 418 (1928).

Measure of Damages: The measure of damages in a proceeding for the condemnation of land for a public highway is the fair cash market value of the land sought to be condemned with the depreciation of such value of the land from which the strip is to be taken, less allowable deductions for benefits proven, the values to be determined as of the date of the commencement of the proceeding. Lewis & Clark County v. Nett, 81 M 261, 263 P 418 (1928).

Benefits Offset: Where land is taken by a railroad company for right-of-way purposes, general neighborhood benefits resulting to the owner in common with others from the construction of the road, the building of a depot, elevator, etc., but not peculiar or special to himself, may not be set off against the damages resulting to him from the taking of the land; hence evidence of such general benefits was properly excluded. Gallatin Valley Elec. Ry. v. Neible, 57 M 27, 186 P 689 (1919).

70-30-302. Assessing compensation — date and measure — interest.

Compiler's Comments

2003 Amendment: Chapter 330 in (2) inserted reference to 60-4-104(4) and (5); and made minor changes in style. Amendment effective April 15, 2003.

Applicability: Section 5, Ch. 330, L. 2003, provided: "[This act] applies to actions initiated on or after [the effective date of this act]." Effective April 15, 2003.

2001 Amendment: Chapter 125 in (2) substituted "condemnor" for "plaintiff"; in (2)(b) and (3) substituted "condemnee" for "property owner"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

1981 Amendments: Chapter 257 substituted "date of the service of the summons" for "date on which the property owner surrenders possession of the property in accordance with the terms of such order" in (2).

Chapter 531 substituted "current fair market value" for "actual value" in the first sentence of (1) and inserted "current fair market" before "value" where it appears throughout the rest of the section.

Highway Beautification Act: The Federal Highway Beautification Act of 1965, referred to in this section, is found at 23 U.S.C. §§ 131, 136, 139.

Case Notes

Availability of Interest — Interest Not Due Unless Possession Acquired Pursuant to Court Order: The city of Missoula sought condemnation of a water delivery system operated by the defendant. After a ruling by the District Court stating that a compensation award that did not include improvements would be unconstitutional, the city and the defendant reached a settlement agreement based on the fair market value of the delivery system. The settlement provided that the city would take possession of the condemned property simultaneously with presenting payment. The defendant argued that it was entitled to interest pursuant to 70-30-302(2). The District Court rejected this argument, finding that 70-30-311 is a necessary condition precedent to the application of 70-30-302(2) and that this condition precedent was not satisfied because the city never took interlocutory possession and did not make payment into the court. On appeal, the Supreme Court affirmed. Missoula v. Mtn. Water Co., 2018 MT 114, 391 Mont. 288, 417 P.3d 321.

Inverse Condemnation Compensation Based on Value of Land When Land Is Seized: Due to inconsistencies between original surveys and actual square footage found near a right-of-way, Missoula claimed extra area belonged to the city rather than to adjacent landowners, and during litigation, the city completed improvements on the disputed land. The District Court determined that landowners should be compensated for the encumbrance and awarded compensation based on the amount the land was worth after the improvements. On appeal, the city cited 70-30-302, which provides that compensation should be based on value on the date of the summons. The Supreme Court declined to apply 70-30-302 to an inverse condemnation, noting that the proper compensation for an inverse condemnation is the value of the land at the time it is seized. Wohl v. Missoula, 2013 MT 46, 369 Mont. 108, 300 P.3d 1119.

Interest Accruing From Date of Determination of Property Value According to Terms of Condemnation Agreement: The parties entered into an agreement that granted possession of condemned property to defendant, and plaintiff subsequently filed an inverse condemnation action and was awarded a judgment. Plaintiff asserted that pursuant to 70-30-302, interest on the judgment should be paid from the date of the service of summons, preceding the order granting possession. Defendant disagreed, and the Supreme Court held that 70-30-302 does not apply to inverse condemnation proceedings. Rather, 70-30-302 assesses interest when the process described in 70-30-311 puts a condemning plaintiff into possession of the condemned property, but in this case, that process was not used. Instead, the parties' agreement provided that interest would not accrue until the final determination of value was made, which occurred when the jury arrived at its verdict. Therefore, the District Court properly decided that, pursuant to the condemnation agreement, interest began on the date of the jury's verdict. K&R Partnership v. Whitefish, 2008 MT 228, 344 M 336, 189 P3d 593 (2008).

Total Compensation in Condemnation to Include Value of Condemned Property and Severance Damages: The city of Whitefish condemned 7,234 square feet of plaintiff's property, but conveyed to plaintiff 10,175 square feet of city property contiguous to plaintiff's lot. The conveyance was intended as severance damages to offset the harm of condemnation. The parties entered an agreement that plaintiff would grant possession of the condemned property to the city and that the city would pay plaintiff $130,000 to convey the 10,175 square foot adjacent lot. The agreement also stated that the parties were unable to agree on the value of the condemned property, the severance damages to plaintiff's remaining property, and the value of the conveyed property. Eventually plaintiff filed a complaint for inverse condemnation and breach of the agreement when the parties were unable to agree on the property values and severance damages. The District Court held that the only issue for the jury was to determine the amount that plaintiff was entitled to for compensation, and the jury was not asked to determine any severance damages owing to plaintiff. The court also disallowed any evidence of the $130,000 payment because that money was considered for severance damages only and could not be considered by the jury in determining plaintiff's compensation for the condemned property. The court further disallowed the city from presenting any evidence regarding the conveyed property because it had not yet been deeded to plaintiff, and absent unity of ownership, the conveyed property could not be considered when determining the fair market value of plaintiff's remaining property after the condemnation. Last, the court determined that plaintiff's "cost-to-cure" damages were noncompensable because plaintiff's access remained the same after condemnation. During trial, various experts presented differing values for the condemned property. The jury ultimately found for plaintiff and held that the city owed $161,000 for the condemned property. The District Court also awarded plaintiff $94,788.23 as litigation expenses. The city appealed, and plaintiff cross-appealed. The Supreme Court held that the District Court misinterpreted the agreement and improperly limited the issues presented to the jury. The court noted that total compensation in an eminent domain case involves both the value of the condemned property and severance damages, including depreciation suffered as a result of condemnation. In order for the jury to consider all circumstances surrounding the condemnation, a new trial was required, so the case was reversed and remanded. K&R Partnership v. Whitefish, 2008 MT 228, 344 M 336, 189 P3d 593 (2008).

Determination of Fair Market Value Proper — Expert Testimony Properly Allowed: In condemning a parcel of defendants' property for a state highway project, the state's expert testified considering possible depreciation of the remainder of the property based on how the property was being used, the impact of any buildings on the property, no unreasonable impairment of access to the remainder of the property, comparable land sales in the area, and the value of comparable land without highway access. This testimony regarding fair market value was not considered speculative or conjectural, and the District Court properly allowed it. Dept. of Transportation v. Simonson, 2004 MT 60, 320 M 249, 87 P3d 416 (2004).

Lack of Evidence on Impact of Taking on Value of Remaining Property — Jury Instructions on Compensation for Taking of Access Proper: The District Court instructed the jury that defendants were not entitled to compensation merely because traffic access was diverted because of road construction or for defendants' loss of business resulting from the taking of a part of defendants' property. Defendants contended that the instructions were an abuse of discretion because they were not seeking compensation for access impairment, traffic diversion, or loss of business, but rather that those factors had caused severance damages when the remaining property's commercial value sustained a permanent market value loss, entitling defendants to a new trial. The Supreme Court disagreed. Defendants failed to offer any evidence of a loss of revenue from their business and the impact of the loss on the fair market value of the remainder of the property. Thus, the jury instructions did not materially affect defendants' substantial rights, and the motion for a new trial was properly denied. Dept. of Transportation v. Simonson, 2004 MT 60, 320 M 249, 87 P3d 416 (2004).

Interest Owed on State Highway Right-of-Way Condemnation Agreement Pursuant to Clear Language of Stipulation: The Department of Transportation filed a condemnation action against defendants in connection with a highway construction project. As part of the action, the parties entered a stipulation granting the Department possession of the right-of-way in exchange for $35,780, $11,000 payable immediately and $24,780 still owing, plus interest, at 10% a year, on the final award or settlement from the date of service of summons until the date of withdrawal by defendants. A dispute arose over the amount of interest owed. The District Court applied this section and determined that the Department owed interest on $7,187 of the total remainder, the amount of land-leveling costs, which the Department paid. Defendants appealed the order, contending that interest was actually owed on the entire $24,780 remaining settlement. The Supreme Court agreed. The language in the stipulation was clear and unambiguous and required the Department to pay interest on the excess of the final settlement award, which was $24,780. The District Court erred in applying the statute to the exclusion of the actual stipulation language to which the parties agreed. The clear language of the stipulation and the intent of the parties controlled. The case was remanded with instructions to order the Department to pay interest on the entire final settlement, with credit for amounts already paid. St. v. Asbeck, 2003 MT 337, 318 M 431, 80 P3d 1272 (2003).

Condemnation of Parking Lot — Error in Refusing Instruction Regarding Prior Stipulation on Minimum Parking Spaces: Prior to trial of a condemnation action by the city of Great Falls against the Temple Baptist Church to condemn the church's parking lot, the city and church stipulated that 272 parking spaces were the minimum necessary for the church under the city zoning ordinances. In the course of the trial on the issue of damages, the District Court allowed city employees to testify and the city attorney to argue that it was conceivable that less than 272 spaces would be required or that a variance from that number could be obtained. However, the District Court refused to give a requested instruction informing the jury that the city had agreed to 272 spaces. The Supreme Court held that under these circumstances, it was error for the District Court to refuse to give the instruction and remanded the case for a new trial. Great Falls v. Temple Baptist Church, Inc., 260 M 319, 859 P2d 1015, 50 St. Rep. 1078 (1993).

Valuation of Property — No Error in District Court's Limitation of Expert's and Owner's Testimony: In the course of condemnation proceedings by the city of Great Falls against the Temple Baptist Church, the District Court limited the testimony of the church's expert witness and the testimony of the church's owner. The Supreme Court held that the District Court did not err in not allowing the church's expert to present testimony on the "cost to cure" method of valuation of the property. This method of compensation would have required the city to compensate the church for additional property purchased by the church. The Supreme Court relied on the method of valuation approved in Meagher County Water District v. Walter, 169 M 358, 547 P2d 850 (1976), and held that the District Court was under no obligation to allow discussion of another method of valuation. The District Court also properly exercised its discretion in striking the testimony concerning sales that the District Court felt were not comparable and in limiting the speculative and conjectural testimony of the church's owner concerning the history of the church and its plans for the future. Great Falls v. Temple Baptist Church, Inc., 260 M 319, 859 P2d 1015, 50 St. Rep. 1078 (1993), followed in K&R Partnership v. Whitefish, 2008 MT 228, 344 M 336, 189 P3d 593 (2008).

Interest Prior to "Taking" Included in Condemnation Award: After landowners rejected the city's offer for vacant land, the city of Billings initiated a condemnation proceeding to take the property. At trial, the District Court did not instruct the jury to include interest from the date of the summons as part of the fair market price in the condemnation award despite a request from the landowners for such an instruction. On appeal, the Supreme Court reversed, holding that landowners who are deprived of all economically viable use of their property as a result of a condemnation proceeding are entitled to interest from the date of service of the takings summons. Billings v. Hunt, 257 M 99, 847 P2d 715, 50 St. Rep. 175 (1993), distinguished in Missoula v. Mtn. Water Co., 2018 MT 114, 391 Mont. 288, 417 P.3d 321, in which the condemnor did not take actual or constructive possession of property during condemnation proceedings and the property owner was a public utility entitled to all economic use, including revenue derived from property, during proceedings.

State as Condemning Agency — Compensation for Vagrant Surface Waters Required: The state, as a condemning agency, is held to a standard of paying just compensation for land when the diversion of vagrant surface waters causes damage to private lands. St. v. Feenan, 231 M 255, 752 P2d 182, 45 St. Rep. 589 (1988).

Burden of Proof: The landowner has the burden in eminent domain proceedings to prove entitlement to just compensation in excess of that offered by the condemnor. State ex rel. Dept. of Highways v. Donnes, 219 M 182, 711 P2d 805, 42 St. Rep. 1938 (1985).

Fair Market Value — Inconvenience: The amount of compensation to be awarded must be based on the market value of the property at the time of taking. Only when inconvenience results in a diminution of the market value of the property is it compensated. Compensation cannot be for inconvenience per se. The damage being compensated must be to the value of the property itself. State ex rel. Dept. of Highways v. DeTienne, 218 M 249, 707 P2d 534, 42 St. Rep. 1557 (1985).

Fair Market Value — Location of Building: When a landowner objected to the Highway Department's (now Department of Transportation's) motion to exclude evidence of the location of a building on the condemned land and the jury found the landowner was "negligent" in constructing a building as close to the highway as he did, the landowner cannot later complain. There is no evidence that the jury based its decision on the legal doctrine of negligence rather than the evidence, and the jury statement does not constitute reversible error. State ex rel. Dept. of Highways v. DeTienne, 218 M 249, 707 P2d 534, 42 St. Rep. 1557 (1985).

Fair Market Value — Sales to Condemnors: In a condemnation action, the District Court granted the Highway Department's (now Department of Transportation's) motion to prevent testimony from other landowners along the project regarding their sales to the Department. The Supreme Court affirmed and held that sales to condemnors are not admissible to establish fair market value when the sales are part of the same project which resulted in the condemnation of other property, however similar the property may be to that in controversy, and regardless of whether the payment was the result of a settlement, an award, or a jury verdict. State ex rel. Dept. of Highways v. DeTienne, 218 M 249, 707 P2d 534, 42 St. Rep. 1557 (1985).

Severance Damages — Change in Access to Uncondemned Parcel: In an action to condemn 20.45 acres of land for the purpose of expanding a municipal airport, landowners appealed the commissioners' assessment to the District Court. Prior to trial, the District Court granted the airport board's motion in limine and excluded evidence on diminution of value of landowners' remaining land due to the abandonment of a county road contained in the condemned parcel, ruling that landowners had no legal interest in the continuance of a county road unless discontinuance of that road deprived them of access to their remaining property. The Supreme Court reversed, ruling that although condemnees cannot recover damages for a reduction in traffic flow caused by discontinuance of a county road, they can recover damages if the change in access has caused a substantial change in value in the condemnees' land, and landowners should have been permitted to introduce evidence on this issue. McCone County v. James, 198 M 430, 646 P2d 1209, 39 St. Rep. 1107 (1982).

Cross-Examination of Witness: When opportunity is afforded on cross-examination to develop facts on which a witness based his valuation of property but the opportunity is not taken, a party cannot claim prejudice on the ground that the witness had not stated the facts sufficiently so that the jury could weigh them. Dept. of Highways v. Schumacher, 180 M 329, 590 P2d 1110 (1979).

Figuring Market Value of Leasehold: The market value of a lease determines the compensation due a lessee. In figuring market value, the factors to be considered include length of the lease, rent to be paid, type of business operated on the property and expenses associated with it, advantages or disadvantages of the operation of the business in that location, and revenue produced from the property. Dept. of Highways v. Schumacher, 180 M 329, 590 P2d 1110 (1979).

Interest Rate: The proper method of calculating interest in eminent domain cases is to apply the 6% interest rate for all periods before July 1, 1975, when the interest rate was increased to 10%, and to apply the 10% interest rate after that date. Dept. of Highways v. Schumacher, 180 M 329, 590 P2d 1110 (1979).

Jury Award: The jury award will not be disturbed on appeal unless it is so obviously out of proportion to the injury done as to be in excess of just compensation. Dept. of Highways v. Schumacher, 180 M 329, 590 P2d 1110 (1979).

Market Value: The test of just compensation for property condemned is "market value", which is what a willing buyer would pay to a willing seller for the estate or interest being valued. Dept. of Highways v. Schumacher, 180 M 329, 590 P2d 1110 (1979).

Testimony as to Market Value: One who knows the real property in question and is familiar with the uses to which it may be put may testify as to its market value, even if the witness does not know of any sales and is not a technical expert. Dept. of Highways v. Schumacher, 180 M 329, 590 P2d 1110 (1979).

Interest to Run From Date of Possession: In an eminent domain action, interest on judgment (prior to the 1981 amendment) does not run from date of preliminary order of condemnation but from date possession of property is granted to condemnor by court. Dept. of Highways v. Hy-Grade Auto Court, 169 M 340, 546 P2d 1050 (1976).

Method of Calculating Value — Capitalization of Income Method: Income capitalization is an appropriate valuation method in cases where it entails less conjecture and uncertainty than alternative methods. Its applicability is determined less by the type of property taken than by a comparison of the relative certainty resulting from the use of various methods. Dept. of Highways v. Olsen, 166 M 139, 531 P2d 1330 (1975).

Market Value:

Where actual value as determined by jury is based on credible testimony as to market value of highest and best use for which land is available, the verdict and the judgment will not be set aside. St. Highway Comm'n v. Vaughan, 155 M 277, 470 P2d 967 (1970).

When there is a market for the type of property being condemned and the property has no other intrinsic value, courts will adopt a market value in determining the actual value of the property, which is nothing more than the price resulting from fair negotiations between a willing seller and buyer. St. Highway Comm'n v. Tubbs, 147 M 296, 411 P2d 739 (1966).

Where state not only took part of plaintiff's land but also eliminated an old channel of water and diked up a new channel, thus creating a flood basin on plaintiff's land, evidence of actual results of taking was proper, even though land values are usually measured as of the date of summons. St. Highway Comm'n v. Biastoch Meats, Inc., 145 M 261, 400 P2d 274 (1965).

The proper value of a leasehold interest is the fair market value, not the market value less future rent to be paid. St. Highway Comm'n v. City Serv. Co., 142 M 559, 385 P2d 604 (1963).

"Actual value" spoken of in this section (prior to the 1981 amendment) is the market value or the price that would in all probability result from fair negotiation, where the seller is willing to sell and the buyer desires to buy. St. v. Milanovich, 142 M 410, 384 P2d 752 (1963).

Lessee is entitled to be reimbursed for the taking of his lease, and the measure is the actual market value of said lease at the time of taking. No lesser measure may be permitted. St. v. Crow, 142 M 270, 384 P2d 273 (1963).

"Actual value" as used in this section (prior to the 1981 amendment) means market value. St. v. Peterson, 134 M 52, 328 P2d 617 (1958).

In attempting to ascertain market value, the location of the land, the character of the neighborhood, and all things surrounding the property may be shown. St. v. Peterson, 134 M 52, 328 P2d 617 (1958).

The "actual value" which under this section (prior to the 1981 amendment) shall be the measure of compensation for land taken under the power of eminent domain is the price which would in all probability result from fair negotiation, where the seller is willing to sell and the buyer desires to buy—the market value. St. v. Lee, 103 M 482, 63 P2d 135 (1936); St. v. Hoblitt, 87 M 403, 288 P 181 (1930).

The test for determining the market value of land sought to be acquired by condemnation is "What is its value for any commercial use in the immediate present, or in reasonable anticipation in the near future?" St. v. Hoblitt, 87 M 403, 288 P 181 (1930).

Commercial Use: Where Highway Commission (now Transportation Commission) in order to show public access to highway presented two appraisal witnesses to show that there was access at a certain exit, in which case there would be no loss of commercial usefulness, it was quite proper and necessary to rebut this testimony and to let the jury know the type of easement provided for the access exit. State ex rel. St. Highway Comm'n v. Wheeler, 148 M 246, 419 P2d 492 (1966).

Improvements:

In eminent domain proceeding trial court did not err in excluding evidence concerning improvement of sole access road to ranch property remaining after Highway Commission (now Transportation Commission) had taken part of the property for right-of-way for interstate highway, where any changes in access were made after the date of service of the summons in the condemnation action. State ex rel. St. Highway Comm'n v. Wheeler, 148 M 246, 419 P2d 492 (1966).

"Improvements" upon property are a part thereof. St. v. Peterson, 134 M 52, 328 P2d 617 (1958).

Assessment of Compensation: Where condemnee's house was between 50 and 60 years old and had been converted into a multiple-family dwelling, court did not err in excluding evidence of reconstruction costs or comparable sales elsewhere in determining value of the property since there was no way of determining depreciation of the old house in arriving at reconstruction cost figures, nor were there sufficient comparable sales in the area. St. Highway Comm'n v. Tubbs, 147 M 296, 411 P2d 739 (1966).

Appeal: In eminent domain proceedings the findings of the District Court will generally not be disturbed on appeal unless they are so obviously and palpably out of proportion to the injury done as to be in excess of just compensation provided for by Art. III, sec. 14, 1889 Mont. Const. (now Art. II, sec. 29, 1972 Mont. Const.). St. Highway Comm'n v. Woodcock, 147 M 291, 411 P2d 357 (1966).

Cost of Moving Personal Property: Where friends of condemnees gratuitously aided them in moving personal property from condemned realty, condemnees were not entitled to recover the costs of their friends' labor as an element of damages. St. Highway Comm'n v. Manry, 143 M 382, 390 P2d 97 (1963).

Depreciation on Inventory: This section requires the state to pay for any damage to personal property removed from condemned land, including any depreciation in the inventory value of such property. St. Highway Comm'n v. City Serv. Co., 142 M 559, 385 P2d 604 (1963).

Severance Damages: To fully determine damages caused by severance of condemned land, 70-30-301 is not read alone; rather it must be read in connection with this section as amended. St. v. Milanovich, 142 M 410, 384 P2d 752 (1963).

Depreciation Without Taking: No cause of action existed in favor of plaintiff for taking or damaging his property where complaint alleged depreciation of plaintiff's real property and personal hardship by reason of proposed construction of interstate highway through city. Plaintiff had no right to compensation until his property was actually taken or damaged. Bakken v. St., 142 M 166, 382 P2d 550 (1963).

Income as Basis for Value: Income could be used as a basis for arriving at market value in condemnation case where testimony of the various witnesses for both the landowners and the state, who explained their method of valuation, used the same general approach in determining the loss in value, which approach was labeled the "capitalization of income" approach. St. v. Heltborg, 140 M 196, 369 P2d 521 (1962).

Potential Use of Property:

Evidence may be introduced as to the various uses to which the property is adapted, even though it has never been put to such use in fact. St. v. Peterson, 134 M 52, 328 P2d 617 (1958).

The owner of land sought to be condemned has the right to obtain its market value, based upon its availability for the most valuable purpose for which it can be used, whether so used or not, and since under this section the market value at the date of the summons controls, the land must be shown to have been marketable for the purpose stated at that time; the showing must be that the use is one to which the land may reasonably be applied; speculative uses or remote and conjectural possibilities, such as that farmlands might be platted into town lots or as to what they would bring if certain fruit trees were planted thereon, are not to be taken into consideration. St. v. Hoblitt, 87 M 403, 288 P 181 (1930), followed in In re Creation of W. Great Falls Flood Control & Drainage District, 199 M 261, 648 P2d 297, 39 St. Rep. 1333 (1982).

Interest on Award: Where damages are assessed by a jury in condemnation proceedings after and in excess of an award by commissioners, it is proper for the court to add and fix the date and rate of interest in its judgment, since interest is a matter regulated by statute with which the jury has nothing to do. Helena Power Transmission Co. v. Spratt, 40 M 254, 106 P 5 (1910).

Improper Construction of Improvements: This section and 70-30-301 definitely fix the time when compensation and damages accrue and also establish the right to recover damages which will accrue to that portion of a larger tract not sought to be condemned; the basis for the appraisal is the proper construction of the improvements as to the entire tract, and additional damages cannot be given by reason of an improper construction of the improvements. Mont. R.R. v. Freeser, 29 M 210, 74 P 407 (1903).

70-30-303. Final report and award of condemnation commissioners — procedure on failure to agree.

Compiler's Comments

2001 Amendment: Chapter 125 in (1) in two places substituted "parties" for "parties interested"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Case Notes

Motion to Dismiss for Failure to Pay Commissioners' Award — Notice of Award: The District Court properly denied the condemnee's motion to dismiss based on failure to pay the commissioners' award since no final judgment had occurred because of the failure of the District Court clerk to serve a notice of the award, together with a true copy of the report, upon the parties in the manner required by 70-30-303. Service of that notice provides a definitely ascertainable time which marks the start of the time for appeal. In this case there was no legal duty upon the condemnor to make payment in the absence of a final judgment. It is only when a condemnor has failed to make payment of a final judgment that the condemnee is entitled to an order of dismissal of the action under 70-30-308. Bozeman Parking Comm'n v. First Trust Co. of Mont., 190 M 107, 619 P2d 168, 37 St. Rep. 1610 (1980).

Notice of Report Mailed to Party — When Time to Appeal Begins to Run: Where notice of the commissioner's report was mailed, the time for appeal of the report, as provided for in 70-30-304, begins to run upon receipt of notice of filing. Where a party receives actual notice of the filing of the report and fails to file a notice of appeal within the time provided by law, the court is without jurisdiction to hear the appeal. St. v. Rogers, 184 M 181, 602 P2d 560 (1979).

Alteration of Award: A District Court cannot alter or amend a commissioners' award after it has been filed with the District Court and notice thereof given to the parties by the Clerk. State ex rel. Frelich v. District Court, 141 M 169, 375 P2d 1016 (1962).

Appeal From Commissioners' Award: A commissioner's assessment is not a judgment but merely an award by the lay commissioners of damages contained in their report, and where an appeal has been perfected by the condemner from the assessment, the condemner is entitled to have a necessary party added as a party defendant. State ex rel. St. Highway Comm'n v. District Court, 136 M 362, 348 P2d 132 (1959).

70-30-304. Appeal to district court from assessment of condemnation commissioners.

Compiler's Comments

2001 Amendment: Chapter 125 in (2) in first sentence substituted "public use project and to take the property" for "highway, railroad, or other public work or improvement and to take, use, and appropriate the property"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Case Notes

Property Tax Proration Must Occur During Condemnation Proceeding — Equitable Doctrine of Unjust Enrichment Inapplicable — Contractual Waiver of Property Tax Relief by Utility: The plaintiff utility appealed the District Court's summary judgment ruling that the equitable doctrine of unjust enrichment precluded the plaintiff's claim under 70-30-315 for a general property tax refund pursuant to 15-1-402 and 15-1-406 on taxes that accrued during the pendency of a condemnation action initiated by the city of Missoula to take the plaintiff's property for public use. The city and Missoula County separately cross-appealed the District Court's related ruling that 70-30-315 entitled the plaintiff to a general property tax refund but for application of the equitable doctrine of unjust enrichment. On appeal, the Supreme Court affirmed on different grounds and held that the District Court erroneously concluded that the equitable doctrine of unjust enrichment precluded or defeated relief on the plaintiff's claim for property tax proration and related relief under 70-30-315. However, the Supreme Court held that 70-30-315 required the specified property tax proration to occur in the condemnation proceeding, without involvement of the Montana Department of Revenue, as an incident of the final judgment and order of condemnation otherwise required by 70-30-304 and 70-30-309. Additionally, the District Court erroneously concluded that, but for application of equitable unjust enrichment, 70-30-315 entitled the plaintiff to a general property tax refund under 15-1-402 and 15-1-406. In that regard, the Supreme Court held further that the plaintiff contractually waived its right to property tax proration and reimbursement from or against the city under 70-30-315. Mtn. Water Co. v. Dept. of Revenue, 2020 MT 194, 400 Mont. 484, 469 P.3d 136.

Final Judgment for Appellant Greater Than Value Commission Award — Appellee Costs Not Recoverable: The Department of Transportation offered the Simonsons an amount for their condemned property that exceeded the amount ultimately awarded by a jury. The District Court concluded that under this section, the Simonsons were not entitled to any expenses of litigation, but that the state was entitled to costs because the Simonsons received less than the state offered. The Supreme Court disagreed and reversed. Although the Simonsons' judgment award was less than the original offer by the Department of Transportation, it was more than the amount offered by the condemnation commission, which was the amount actually appealed. Because the Simonsons succeeded in changing the final award to their advantage on appeal, the state was not entitled to costs. Dept. of Transportation v. Simonson, 2004 MT 60, 320 M 249, 87 P3d 416 (2004).

Burden of Proof: The landowner has the burden in eminent domain proceedings to prove entitlement to just compensation in excess of that offered by the condemnor. State ex rel. Dept. of Highways v. Donnes, 219 M 182, 711 P2d 805, 42 St. Rep. 1938 (1985).

Motion to Dismiss for Failure to Pay Commissioners' Award — Notice of Award: The District Court properly denied the condemnee's motion to dismiss based on failure to pay the commissioners' award since no final judgment had occurred because of the failure of the District Court clerk to serve a notice of the award, together with a true copy of the report, upon the parties in the manner required by 70-30-303. Service of that notice provides a definitely ascertainable time which marks the start of the time for appeal. In this case there was no legal duty upon the condemnor to make payment in the absence of a final judgment. It is only when a condemnor has failed to make payment of a final judgment that the condemnee is entitled to an order of dismissal of the action under 70-30-308. Bozeman Parking Comm'n v. First Trust Co. of Mont., 190 M 107, 619 P2d 168, 37 St. Rep. 1610 (1980).

Actual Notice by Mail of Filing — Untimely Appeal: Although 70-30-303 requires that notice that the commissioners' report has been filed be given in the same manner as a summons, where a party receives actual notice of the commissioners' report and fails to file notice of appeal within the time provided by law, the court is without jurisdiction to hear the appeal. St. v. Rogers, 184 M 181, 602 P2d 560 (1979).

When Time for Appeal Extended: In computing the time period for the purposes of appeal of the report of the commissioners, if the notice is mailed, the Montana Rules of Civil Procedure provide for a 3-day extension. Furthermore, the Montana Rules of Civil Procedure provide for an extension if the last day of the period falls on a Sunday. St. v. Rogers, 184 M 181, 602 P2d 560 (1979).

Expert Appraisal Based on Use Other Than Highest: The court did not err in admitting testimony of the landowner's appraiser relative to valuation of the landowner's property for a recreational use in small tracts rather than as a whole because that portion of the cattle ranch subject to condemnation had a strong potential for river frontage tracts. St. Highway Comm'n v. Marsh, 175 M 460, 575 P2d 38 (1978).

Landowner-Witness Rule: The landowner-witness rule in valuation of property in a condemnation proceeding consists of two parts: the landowner on prima facie showing of ownership may testify as to value so long as his testimony is reasonable and the value testified to is for the use to which he is putting the land; if the landowner desires to testify as to value when used for other purposes, he must have some peculiar means of forming an intelligent and correct judgment beyond what is presumed to be possessed by men generally. St. Highway Comm'n v. Marsh, 175 M 460, 575 P2d 38 (1978), followed in K&R Partnership v. Whitefish, 2008 MT 228, 344 M 336, 189 P3d 593 (2008).

Timely Notice of Appeal: State allowed 3 additional days to file notice of appeal because notice was served by mail and last day of period fell on a Sunday. Dept. of Highways v. Helehan, 171 M 473, 559 P2d 817 (1977).

Apportionment of Damages:

The requirement of 70-30-301 that the entire award be determined first and then allocated between respective defendants is applicable to jury awards under this section, but where the jury was instructed to first determine the total award and then apportion it in a single proceeding and the jury did so in a single verdict, there was no error in the absence of a showing of prejudice or excessiveness. Dept. of Highways v. Hy-Grade Auto Court, 169 M 340, 546 P2d 1050 (1976).

It was not error for the jury to express its award of damages separately to lessor and lessee rather than state a single lump sum when such award was not excessive, was supported by substantial evidence, and did not reflect an increased valuation due solely to a distribution of title. St. Highway Comm'n v. City Serv. Co., 142 M 559, 385 P2d 604 (1963), distinguished in St. Highway Comm'n v. Barnes, 151 M 300, 443 P2d 16 (1968).

Bifurcated Trial Not Required: It was not error for jury to determine a total award and thereafter apportion award among the lessor and lessee as jury was properly admonished to first ascertain entire award as though property were owned by one person, then to apportion this sum between lessor and lessee. Bifurcated trial is not required as court will presume that jury, in reaching its verdict, followed instructions given to it by trial judge. Dept. of Highways v. Hy-Grade Auto Court, 169 M 340, 546 P2d 1050 (1976).

Method of Calculating Value — Evidence: The application of the income capitalization method goes to the weight of the expert's testimony and not to its admissibility. When alternative methods of valuation were presented to the jury by experts, there was no error in permitting the use of the income capitalization method. Dept. of Highways v. Olsen, 166 M 139, 531 P2d 1330 (1975).

Witnesses on Appeal: On appeal by state from condemnation award, where it was made clear on direct examination that expert witness for landowner had been one of the commissioners appointed to appraise damages, it was reversible error for the state to try to impeach the witness by using the commission award in order to get the whole commission award before the jury. St. v. Bare, 141 M 288, 377 P2d 357 (1962).

Issues Considered on Appeal:

The state cannot appeal from decision of commissioners, contesting right of county to receive damages, when it did not raise the issue in the pleading stage. St. v. Park County, 141 M 220, 376 P2d 998 (1962).

The sole question presented to the District Court on appeal from the award of commissioners in condemnation proceedings, under this section, is as to the amount of damages to be allowed, and the judgment should determine that issue and no other. Great N. Ry. v. Benjamin, 51 M 167, 149 P 968 (1915).

If commissioners appointed to assess damages in eminent domain proceedings do not perform their whole duty, the injured party may appeal. Spratt v. Helena Power Transmission Co., 37 M 60, 94 P 631 (1908).

Alteration of Award: Improper order of District Court in striking certain damages from commissioners' award could not be corrected where an appeal had been taken from the award. State ex rel. Frelich v. District Court, 141 M 169, 375 P2d 1016 (1962).

Parties Added on Appeal: A commissioner's assessment is not a judgment but merely an award by the lay commissioners of damages contained in their report, and where an appeal has been perfected by the condemner from the assessment, the condemner is entitled to have a necessary party added as a party defendant. State ex rel. St. Highway Comm'n v. District Court, 136 M 362, 348 P2d 132 (1959).

View of Premises by Jury: A view by the jury of premises involved in an eminent domain proceeding does not amount to the taking of testimony but is allowed to enable the jury better to understand the evidence received at the hearing. St. v. Lee, 103 M 482, 63 P2d 135 (1936).

Costs on Appeal: The provision for award of costs to the respondent if the party appealing to the District Court does not succeed in changing to his advantage the amount of damages awarded applies only to an appeal by defendant; hence, where plaintiff State appealed and the court exercised the discretion vested in it by section 93-9921, R.C.M. 1947 (now repealed), and awarded costs against plaintiff, the damages awarded by the jury being substantially the same as those awarded by the commissioners, the Supreme Court will not interfere. St. v. Bradshaw Land & Livestock Co., 99 M 95, 43 P2d 674 (1935).

Assessment of Damages:

The provision that upon appeal from the award of the commissioners the damages "shall be reassessed upon the same principle as hereinbefore prescribed for the assessment of such damages by commissioners" simply means that the assessment shall be made conformably to

70-30-301, which has to do with a finding on the separate items of damages. St. v. Anderson, 92 M 313, 13 P2d 228 (1932).

Findings of the jury in condemnation proceedings, with relation to the amount of damages sustained by defendants by the taking of a railroad right-of-way through their lands, complained of as excessive, will not be disturbed on appeal unless they are so obviously and palpably out of proportion to the injury done as to be in excess of the "just compensation" provided for by Art. III, sec. 14, 1889 Mont. Const. (now Art. II, sec. 29, 1972 Mont. Const.). Yellowstone Park R.R. v. Bridger Coal Co., 34 M 545, 87 P 963 (1906). See also Lewis v. N. Pac. Ry., 36 M 207, 92 P 469 (1907).

Constitutional Rights:

In condemnation proceedings, the right to appeal is purely statutory and may be granted to or withheld from either party or both, at the discretion of the Legislature, if no constitutional provision is thereby infringed. Great N. Ry. v. Fiske, 54 M 231, 169 P 44 (1917).

Where a railroad company pays a sum into court on an award of damages made by commissioners for right-of-way for railroad purposes, this is to be regarded as a "just compensation", within Art. III, sec. 14, 1889 Mont. Const. (now Art. II, sec. 29, 1972 Mont. Const.), although the owner has appealed from the award; and the granting of an order by the court, allowing the railroad company possession and use of such right-of-way pending such appeal, is proper. State ex rel. Volunteer Min. Co. v. McHatton, 15 M 159, 38 P 711 (1894).

Entire Award as Subject of Appeal: If there is any right to appeal under this section, given to a railroad company, from the judgment on an award by commissioners in condemnation proceedings instituted by the company, such appeal must, in view of 70-30-301 through 70-30-303 and 70-30-307 through 70-30-311, be taken from the entire award; it cannot be taken from such portions of the award only as the condemner is dissatisfied with. Great N. Ry. v. Fiske, 54 M 231, 169 P 44 (1917).

Title of Defendant: Where, in a proceeding to condemn a right-of-way, plaintiff alleges title in defendant, a contention that the verdict for damages was not supported by the evidence because there was no evidence that defendant's title was valid cannot be considered by the Supreme Court. Helena & Livingston Smelting & Reduction Co. v. Lynch, 25 M 497, 65 P 919 (1901).

70-30-305. Condemnor to make offer upon appeal — award of expenses of litigation.

Compiler's Comments

2013 Amendment: Chapter 371 in (2) substituted "prevails either by the court not allowing condemnation or by the condemnee" for "prevails by", after "final" inserted "written", and after "condemnor" inserted "that was rejected pursuant to the facts necessary in 70-30-111(1)(d)". Amendment effective April 30, 2013.

Saving Clause: Section 6, Ch. 371, L. 2013, was a saving clause.

Severability: Section 7, Ch. 371, L. 2013, was a severability clause.

Applicability: Section 9, Ch. 371, L. 2013, provided: "[This act] applies to complaints for condemnation filed on or after [the effective date of this act]." Effective April 30, 2013.

2001 Amendment: Chapter 125 in (2) substituted "condemnee" for "private property owner"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Case Notes

Ownership Necessary for Award of Attorney Fees: The defendant had an interest in property subject to condemnation and sold that interest. In litigation over the condemnation, the District Court awarded attorney fees to the defendant as a prevailing condemnee for expenses incurred after the sale. On appeal, the Supreme Court reversed, holding that upon sale of the property, the defendant ceased being an owner and condemnee and could not recover expenses incurred after the sale. Missoula v. Mtn. Water Co., 2018 MT 245, 393 Mont. 68, 427 P.3d 1018.

Application of Cap Limiting Hourly Rate of Out-Of-State Counsel to Local County Rate in Condemnation Suit — Violation of Right to Just Compensation: At the conclusion of a long and complex condemnation suit in which both parties hired out-of-state counsel, the District Court held that the defendants were entitled to attorney fees. The defendants sought the actual expenses paid to their attorneys, including the out-of-state counsel, who charged much higher hourly rates than Montana counsel. However, the District Court capped the rates for out-of-state counsel to the customary rates for the county pursuant to 70-30-306 over the defendants' objection that the caps violated their right to just compensation under Art. II, sec. 29, Mont. Const. On appeal, the Supreme Court agreed that the defendants' facial challenge to the cap was correctly denied but also held that the cap did violate the defendants' right to reimburse for necessary litigation expenses and accordingly reversed and remanded for further proceedings. Missoula v. Mtn. Water Co., 2018 MT 139, 391 Mont. 422, 419 P.3d 685.

Attorney Fees on Prior Appeal: The plaintiffs sued the city related to the widening of a city road and the taking of their property for that purpose. The city lost in District Court and appealed the decision to the Supreme Court. The Supreme Court affirmed in part and reversed in part and remanded the case to the District Court to recalculate the amount of damages owed to the plaintiffs. The city claimed that the plaintiffs were not entitled to fees and costs incurred during the appeal because they did not prevail on their cross-appeal. The plaintiffs argued that they were the prevailing party and thus were entitled to fees and costs incurred during both the underlying litigation and the appeal. The District Court agreed and awarded fees and costs as requested by the plaintiffs. The city appealed. The Supreme Court affirmed the award, noting that the plaintiffs had a constitutional right to be made whole in a condemnation case in which the landowner prevails. Wohl v. Missoula, 2014 MT 310, 377 Mont. 148, 339 P.3d 58.

Attorney Fees — Customary Hourly Rates: The Department of Transportation initiated a condemnation action concerning a portion of the bank's property. After a hearing, the District Court dismissed the complaint with prejudice and awarded the bank all necessary expenses of litigation. The court ordered the bank to submit a request for reasonable and necessary attorney fees, expert witness fees, exhibit costs, and court costs. Instead, the bank filed affidavits from two of its attorneys in support of the award of fees and necessary expenses of litigation. The Department objected based upon 70-30-306(2) and also submitted affidavits from local attorneys supporting lower hourly rates. The court held a hearing and applied jurisprudential factors and awarded fees based on varying hourly rates for the attorneys involved in the case. The Department appealed, contending that 70-30-306(2) does not require the consideration of the jurisprudential factors enumerated in Forrester & MacGinniss v. B&M Co., 29 M 397, 74 P 1088 (1904). The Supreme Court held that the plain "customary hourly rates" language in 70-30-306(2) means that reasonable and necessary attorney fees are to be computed in a condemnation case based on hourly rates typical or common for a nonspecific attorney's services in the county in which the trial is held. The District Court erred in considering the jurisprudential factors. The case was remanded for computation of attorney fees. St. v. American Bank of Montana, 2008 MT 362, 346 M 405, 195 P3d 844 (2008).

Costs of Litigation in Inverse Condemnation Cases: In providing for costs of litigation in condemnation cases, the Montana Constitution does not distinguish between condemnation litigation initiated by a government entity and condemnation cases initiated by the property owner, and Montana statutes do not distinguish between inverse condemnation and traditional condemnation cases. The only requirement for an award of litigation expenses is that the condemnee prevail by obtaining a judgment in excess of the condemnor's pretrial offer. In the present case, defendant asserted that under 70-31-303, plaintiff was not entitled to litigation expenses in an inverse condemnation case because federal money was not involved, but the Supreme Court affirmed that litigation expenses must be awarded in inverse condemnation cases when the condemnee prevails, as provided in 70-30-305. K&R Partnership v. Whitefish, 2008 MT 228, 344 M 336, 189 P3d 593 (2008).

Property Taxes Properly Not Awarded as Litigation Expense: Plaintiff asserted that the District Court erred by not awarding property taxes as necessary litigation expenses as part of an inverse condemnation judgment. The Supreme Court disagreed and affirmed. Under 70-30-305 and 70-30-306, property taxes are not designated as a necessary cost of litigation. The court noted that 70-30-315 does allow for proration of property taxes in certain condemnation cases, but because the 1997 version of the statute applicable in this case used the word "plaintiff" to describe the party condemning the property, the statute did not apply to inverse condemnation cases in which the plaintiff was the condemnee. (Note that the 2001 Legislature amended 70-30-315 by changing "plaintiff" to "condemnor".) K&R Partnership v. Whitefish, 2008 MT 228, 344 M 336, 189 P3d 593 (2008).

Proper Award of Attorney Fees and Costs in Condemnation Case: The Slacks owned a piece of land that the Department of Transportation wanted in order to expand Highway 2 into a four-lane highway near Kalispell. The Department offered the Slacks $43,150 for the property, but the Slacks refused to sell, so in 1993, the Department filed a complaint seeking to condemn the property. The Slacks hired an attorney, on a contingent fee basis, to represent them. Nearly a year later and about 1 month before a condemnation commission hearing, the Department offered the Slacks $168,069, plus interest and necessary litigation expenses as defined in 70-30-306. The

Slacks accepted, and judgment was entered. The Slacks' attorney requested litigation expenses totaling $41,657.03. The Department considered the fees to be excessive, unnecessary, and unreasonable and moved to retax the fees. About 2 ½ years later, the Department offered the Slacks $26,000 to settle the claim for litigation expenses. The next day, the Slacks filed a supplemental memorandum of litigation expenses requesting an additional $50,407.84 for expenses incurred in the action for fees. The District Court awarded the Slacks $115,493 in litigation expenses and interest, including $46,577 in expenses incurred in settling the condemnation case, of which $29,483 was for attorney and paralegal fees calculated at 1996 rates, plus $62,547 for expenses incurred in the fee litigation. The Department appealed the award. The Supreme Court examined the award for attorney fees related to the condemnation case and concluded that the number of hours claimed by the Slacks was reasonable and not clearly erroneous. The 1996 rates applied by the District Court were affirmed, even though the work was done in 1993, because the court had discretion to adjust the expenses by awarding fees at current rates to account for delay in payment. Compensation awarded at historic hourly rates years after services are provided is not equivalent to the same amount received promptly as the services are performed. State ex rel. Dept. of Transportation v. Slack, 2001 MT 137, 305 M 488, 29 P3d 503 (2001).

Attorney Fees for Proving Amount of Attorney Fees Incurred in Litigation Generally Not Recoverable: After the condemnation proceeding between the parties was set for trial, the Department of Highways (now Department of Transportation) made a final offer of settlement that included an offer to pay the plaintiffs' necessary litigation expenses up to the date of the settlement offer. The plaintiffs accepted the offer, but both sides disagreed on the amount to be given for necessary litigation expenses. The lower court awarded the plaintiffs' litigation expenses in an amount greater than that offered by the state but refused to award the plaintiffs' attorney fees for proving the amount of attorney fees incurred prior to the settlement offer date. The Supreme Court affirmed, holding that in general the attorney fees for proving the amount of attorney fees incurred during litigation should be borne by the attorney and not his client or the other party. The court went on to state that other expenses incurred in proving necessary litigation expenses could be awarded to the party incurring them. St. v. McGuckin, 242 M 81, 788 P2d 926, 47 St. Rep. 590 (1990).

Time Spent With Consultants and With Experts Not Called as Witnesses — Cost of Litigation: Plaintiffs own a farm surrounded on three sides by the Flathead River and Flathead Lake. After Kerr Dam was built in 1939, the water table in the area began to rise. In 1960 plaintiffs filed suit claiming inverse condemnation of their land and damages due to the rising of the water table. The complaint was amended four times over the years and was finally tried in 1979. Defendant claimed that the cause was barred by prescription and the Statute of Limitations. Plaintiffs were awarded damages. Counsel's time spent with consultants examining scientific information is a proper cost of litigation, as are costs for experts never called as witnesses where they are necessary and proper for the case. Blasdel v. Mont. Power Co., 196 M 417, 640 P2d 889, 39 St. Rep. 219 (1982).

Attorney Fees and Costs Taxed After Final Judgment: When the condemnee filed its motion to tax costs and attorney fees, it was not entitled to a judgment on the award of the commissioners because the time for appeal had not begun to run on the day that the motion was filed. The Supreme Court rejected the condemnor's contention that an appeal from the commissioners' award must be perfected by one of the parties, and thereafter, within 30 days the condemnor must submit to the condemnee a written final offer of judgment before the condemnee is entitled to attorney fees and costs. That result is inconsistent with Art. II, sec. 29, Mont. Const. If a condemnee prevails in litigation, he is entitled to recover his expenses. Bozeman Parking Comm'n v. First Trust Co. of Mont., 190 M 107, 619 P2d 168, 37 St. Rep. 1610 (1980).

Attorney Fees and Costs — Verdict Lower Than Final Offer: The right to recover necessary costs of litigation does not vest when the suit is filed but vests only when the private property owner prevails, securing a higher verdict than the State's final offer. The State is not confined, as the landowner contends, to an offer of $6,000 made before the commissioners' value hearing. Before trial the State offered $20,100 as its final offer, which the landowner rejected. Because the jury proceeded to award a lesser amount, the landowner was not entitled to attorney fees and costs of litigation. St. v. Donnes, 187 M 338, 609 P2d 1213 (1980).

Payment of Attorney's Fees Before Trial: Where appellant in a condemnation action was awarded preliminary payment for his property interests prior to trial and withdrew $23,194.50 and paid $7,000 to his lawyer, the payment to the lawyer did not constitute "necessary expenses of litigation" pursuant to 70-30-305 and 70-30-306. St. v. Helehan, 186 M 286, 607 P2d 537 (1980).

Costs to Private Property Owner Denied When Final Award Not in Excess of Final Offer — Law of the Case Not Applicable: When the defendant did not receive an award in excess of the final offer of the condemnor, he was not entitled to the necessary expenses of litigation and was therefore not entitled to costs. The fact that on a previous appeal in the same case the Supreme Court mentioned attorney's fees and inadvertently failed to mention costs did not invoke the "law of the case" principle as between the parties involved. Dept. of Highways v. Burlingame, 185 M 183, 605 P2d 176 (1980).

Necessity of Expense of Appraiser Who Does Not Testify: The expense of an appraiser is a necessary expense and was properly awarded to the landowner even if the appraiser did not testify at the commission hearing. St. v. Rogers, 184 M 181, 602 P2d 560 (1979).

Reasonableness of Contingent Attorney's Fee Based on Agreement Made Prior to 1977 Amendment Precluding Contingent Fees: In eminent domain proceeding, attorney's fee of $9,600 based on a contingent fee agreement entered into in May of 1977 was properly awarded where respondent had introduced evidence as to the reasonableness of the contingent percentage and the appellant offered no evidence as to either a reasonable hourly rate or the reasonableness of the contingent percentage. St. v. Rogers, 184 M 181, 602 P2d 560 (1979).

Attorney Fees — When Right Thereto Arises: The right to necessary costs of litigation provided by 70-30-305 does not arise when the suit is filed but vests only when the private property owner prevails, securing a verdict higher than the state's final offer. St. v. Burlingame, 182 M 298, 597 P2d 51 (1979).

Attorney Fees: Because there is a clear constitutional requirement that attorney fees be paid in condemnation cases whenever the landowner prevails and because the words "condemnor" and "condemnee" were used in the statute implementing the constitutional provision, attorney fees were permitted in an inverse condemnation case. Rauser v. Toston Irrigation District, 172 M 530, 565 P2d 632 (1977).

Application to Cases Arising Prior to Effective Date: When the case arose prior to the effective date of this section but a verdict in favor of the private landowner was entered after the effective date, the landowner was entitled to compensation for necessary costs of litigation since the right vests when the private property owner prevails and secures a verdict higher than the state's final offer. Dept. of Highways v. Olsen, 166 M 139, 531 P2d 1330 (1975).

Law Review Articles

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, VI. Eminent Domain, Williams, 46 Mont. L. Rev. 137 (1985).

70-30-306. Necessary expenses of litigation defined.

Compiler's Comments

2001 Amendment: Chapter 125 in (2) at end deleted "entered into after July 1, 1977"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Case Notes

Application of Cap Limiting Hourly Rate of Out-Of-State Counsel to Local County Rate in Condemnation Suit — Violation of Right to Just Compensation: At the conclusion of a long and complex condemnation suit in which both parties hired out-of-state counsel, the District Court held that the defendants were entitled to attorney fees. The defendants sought the actual expenses paid to their attorneys, including the out-of-state counsel, who charged much higher hourly rates than Montana counsel. However, the District Court capped the rates for out-of-state counsel to the customary rates for the county pursuant to 70-30-306 over the defendants' objection that the caps violated their right to just compensation under Art. II, sec. 29, Mont. Const. On appeal, the Supreme Court agreed that the defendants' facial challenge to the cap was correctly denied but also held that the cap did violate the defendants' right to reimburse for necessary litigation expenses and accordingly reversed and remanded for further proceedings. Missoula v. Mtn. Water Co., 2018 MT 139, 391 Mont. 422, 419 P.3d 685.

Computation of Attorney Fees in Condemnation Action: A property condemnation action was resolved by agreement of the parties, and the state agreed to pay defendants' necessary expenses of litigation. Defense counsel charged $250 an hour for 1,906 hours. The state challenged both the rate and the number of hours. Following a hearing, the District Court adjusted the number of hours to 1,205 but adopted the hourly rate, and the state appealed. The Supreme Court reversed. The District Court did not have the benefit of the later decision in Mont. Dept. of Transportation

v. Am. Bank of Mont., 2008 MT 362, 346 M 405, 195 P3d 844 (2008), which stated that reasonable and necessary attorney fees awarded in a condemnation action must be computed on hourly rates typical or common for a nonspecific attorney's services in the county in which the trial is held. In this case, the state presented testimony from two attorneys in Flathead County that the usual and customary fee for an attorney in that county was $150 an hour, and that was the evidence upon which the District Court should have relied in setting the hourly fee. Therefore, the case was remanded for an adjustment of the rate to $150 an hour. St. v. Skyline Broadcasters, Inc., 2009 MT 193, 351 M 127, 211 P3d 189 (2009).

Attorney Fees — Customary Hourly Rates: The Department of Transportation initiated a condemnation action concerning a portion of the bank's property. After a hearing, the District Court dismissed the complaint with prejudice and awarded the bank all necessary expenses of litigation. The court ordered the bank to submit a request for reasonable and necessary attorney fees, expert witness fees, exhibit costs, and court costs. Instead, the bank filed affidavits from two of its attorneys in support of the award of fees and necessary expenses of litigation. The Department objected based upon 70-30-306(2) and also submitted affidavits from local attorneys supporting lower hourly rates. The court held a hearing and applied jurisprudential factors and awarded fees based on varying hourly rates for the attorneys involved in the case. The Department appealed, contending that 70-30-306(2) does not require the consideration of the jurisprudential factors enumerated in Forrester & MacGinniss v. B&M Co., 29 M 397, 74 P 1088 (1904). The Supreme Court held that the plain "customary hourly rates" language in 70-30-306(2) means that reasonable and necessary attorney fees are to be computed in a condemnation case based on hourly rates typical or common for a nonspecific attorney's services in the county in which the trial is held. The District Court erred in considering the jurisprudential factors. The case was remanded for computation of attorney fees. St. v. American Bank of Montana, 2008 MT 362, 346 M 405, 195 P3d 844 (2008).

Costs of Litigation in Inverse Condemnation Cases: In providing for costs of litigation in condemnation cases, the Montana Constitution does not distinguish between condemnation litigation initiated by a government entity and condemnation cases initiated by the property owner, and Montana statutes do not distinguish between inverse condemnation and traditional condemnation cases. The only requirement for an award of litigation expenses is that the condemnee prevail by obtaining a judgment in excess of the condemnor's pretrial offer. In the present case, defendant asserted that under 70-31-303, plaintiff was not entitled to litigation expenses in an inverse condemnation case because federal money was not involved, but the Supreme Court affirmed that litigation expenses must be awarded in inverse condemnation cases when the condemnee prevails, as provided in 70-30-305. K&R Partnership v. Whitefish, 2008 MT 228, 344 M 336, 189 P3d 593 (2008).

Property Taxes Properly Not Awarded as Litigation Expense: Plaintiff asserted that the District Court erred by not awarding property taxes as necessary litigation expenses as part of an inverse condemnation judgment. The Supreme Court disagreed and affirmed. Under 70-30-305 and 70-30-306, property taxes are not designated as a necessary cost of litigation. The court noted that 70-30-315 does allow for proration of property taxes in certain condemnation cases, but because the 1997 version of the statute applicable in this case used the word "plaintiff" to describe the party condemning the property, the statute did not apply to inverse condemnation cases in which the plaintiff was the condemnee. (Note that the 2001 Legislature amended 70-30-315 by changing "plaintiff" to "condemnor".) K&R Partnership v. Whitefish, 2008 MT 228, 344 M 336, 189 P3d 593 (2008).

Computation of Award of Attorney Fees on Basis of Contingent Fee Precluded — Use of Contingent Fee Agreement by Condemnee Not Precluded: The Slacks owned a piece of land that the Department of Transportation wanted in order to expand Highway 2 into a four-lane highway near Kalispell. The Department offered the Slacks $43,150 for the property, but the Slacks refused to sell, so in 1993, the Department filed a complaint seeking to condemn the property. The Slacks hired an attorney, on a contingent fee basis, to represent them. The Department ultimately settled the condemnation action and agreed to pay the Slacks $168,069, plus interest and necessary litigation expenses as defined in this section. After a disagreement arose regarding the amount of attorney fees, the Department argued that the Slacks' contingent fee agreement violated this section. The Supreme Court found that the plain language of this section unambiguously precludes the computation of an award of reasonable and necessary attorney fees on the basis of a contingent fee contract, but does not preclude condemnees from entering into contingent fee agreements with their attorneys. State ex rel. Dept. of Transportation v. Slack, 2001 MT 137, 305 M 488, 29 P3d 503 (2001).

Improper Award of Attorney Fees Incurred in Proving Attorney Fees: About 2½ years after settling a condemnation case, the Department of Transportation offered the Slacks $26,000 to settle their claim for litigation expenses. The next day, the Slacks filed a supplemental memorandum of litigation expenses requesting an additional $50,407.84 for expenses incurred in the action for fees. The District Court concluded that the Department had pursued litigation over the appropriate amount of litigation expenses in bad faith and awarded the Slacks $62,547 for expenses incurred in the fee litigation. The Department appealed the award of fees in the fee action. The Supreme Court examined the fees awarded for the fee litigation, applying St. v. McGuckin, 242 M 81, 788 P2d 926 (1990), for the proposition that the District Court has the authority to award attorney fees as a rare exception in which extraordinary circumstances justify the award of attorney fees incurred in proving the amount of attorney fees incurred in the underlying litigation. However, this was not one of those extraordinary circumstances that arises when the state's objection to the condemnee's fee claim is unreasonable. Here, the Department presented testimony from two experts who asserted that the attorney fees claimed in the fee litigation were excessive and duplicative, and although the District Court did not find the testimony compelling enough to grant a reduction in fees, the Department's claim could not be characterized as unreasonable. The District Court abused its discretion in awarding the Slacks attorney fees incurred in proving attorney fees, and that award was reversed. State ex rel. Dept. of Transportation v. Slack, 2001 MT 137, 305 M 488, 29 P3d 503 (2001), followed in K&R Partnership v. Whitefish, 2008 MT 228, 344 M 336, 189 P3d 593 (2008), regarding the necessity to demonstrate extraordinary circumstances to justify a request for fees on fees.

Proper Award of Attorney Fees and Costs in Condemnation Case: The Slacks owned a piece of land that the Department of Transportation wanted in order to expand Highway 2 into a four-lane highway near Kalispell. The Department offered the Slacks $43,150 for the property, but the Slacks refused to sell, so in 1993, the Department filed a complaint seeking to condemn the property. The Slacks hired an attorney, on a contingent fee basis, to represent them. Nearly a year later and about 1 month before a condemnation commission hearing, the Department offered the Slacks $168,069, plus interest and necessary litigation expenses as defined in this section. The Slacks accepted, and judgment was entered. The Slacks' attorney requested litigation expenses totaling $41,657.03. The Department considered the fees to be excessive, unnecessary, and unreasonable and moved to retax the fees. About 2½ years later, the Department offered the Slacks $26,000 to settle the claim for litigation expenses. The next day, the Slacks filed a supplemental memorandum of litigation expenses requesting an additional $50,407.84 for expenses incurred in the action for fees. The District Court awarded the Slacks $115,493 in litigation expenses and interest, including $46,577 in expenses incurred in settling the condemnation case, of which $29,483 was for attorney and paralegal fees calculated at 1996 rates, plus $62,547 for expenses incurred in the fee litigation. The Department appealed the award. The Supreme Court examined the award for attorney fees related to the condemnation case and concluded that the number of hours claimed by the Slacks was reasonable and not clearly erroneous. The 1996 rates applied by the District Court were affirmed, even though the work was done in 1993, because the court had discretion to adjust the expenses by awarding fees at current rates to account for delay in payment. Compensation awarded at historic hourly rates years after services are provided is not equivalent to the same amount received promptly as the services are performed. State ex rel. Dept. of Transportation v. Slack, 2001 MT 137, 305 M 488, 29 P3d 503 (2001).

Attorney Fees for Proving Amount of Attorney Fees Incurred in Litigation Generally Not Recoverable: After the condemnation proceeding between the parties was set for trial, the Department of Highways (now Department of Transportation) made a final offer of settlement that included an offer to pay the plaintiffs' necessary litigation expenses up to the date of the settlement offer. The plaintiffs accepted the offer, but both sides disagreed on the amount to be given for necessary litigation expenses. The lower court awarded the plaintiffs' litigation expenses in an amount greater than that offered by the state but refused to award the plaintiffs' attorney fees for proving the amount of attorney fees incurred prior to the settlement offer date. The Supreme Court affirmed, holding that in general the attorney fees for proving the amount of attorney fees incurred during litigation should be borne by the attorney and not his client or the other party. The court went on to state that other expenses incurred in proving necessary litigation expenses could be awarded to the party incurring them. St. v. McGuckin, 242 M 81, 788 P2d 926, 47 St. Rep. 590 (1990).

Time Spent With Consultants and With Experts Not Called as Witnesses — Cost of Litigation: Plaintiffs own a farm surrounded on three sides by the Flathead River and Flathead Lake. After

Kerr Dam was built in 1939, the water table in the area began to rise. In 1960 plaintiffs filed suit claiming inverse condemnation of their land and damages due to the rising of the water table. The complaint was amended four times over the years and was finally tried in 1979. Defendant claimed that the cause was barred by prescription and the Statute of Limitations. Plaintiffs were awarded damages. Counsel's time spent with consultants examining scientific information is a proper cost of litigation, as are costs for experts never called as witnesses where they are necessary and proper for the case. Blasdel v. Mont. Power Co., 196 M 417, 640 P2d 889, 39 St. Rep. 219 (1982).

Attorneys' Fees — Award for Services of Two Attorneys: An award for attorneys' fees for work of both an attorney representing respondent up to the appellate stage and a second attorney representing respondent through the appellate stage may properly be granted. Within the contemplation of Art. II, sec. 29, Mont. Const., "reasonable, necessary expenses of litigation" include fees paid to two attorneys representing the same party, particularly where the work does not overlap and there is no prejudice to the appellant. St. v. Helehan, 189 M 339, 615 P2d 925 (1980).

Attorneys' Fees — Evidence of Value of Services: Evidence must be adduced to support an award of attorneys' fees. A hearing allowing for oral testimony, the introduction of exhibits, and the opportunity of a responsible party to cross-examine to test the reasonableness of the attorneys' fees claimed must support the award. St. v. Helehan, 189 M 339, 615 P2d 925 (1980).

Attorneys' Fees — Reliance by Courts on Experts: In determining attorneys' fees, the court as a jury is not bound absolutely to the testimony of expert witnesses. It can reduce or increase the figures submitted to it by experts as reasonable attorneys' fees, and, as long as its findings are not clearly erroneous, the determination made in its discretion will not be disturbed. St. v. Helehan, 189 M 339, 615 P2d 925 (1980).

Necessary Expense — Exhibit Costs: Exhibit costs are a "necessary expense" of litigation under 70-30-306, and the cost of preparing an exhibit such as hiring an expert is included in exhibit costs. St. v. Helehan, 189 M 339, 615 P2d 925 (1980).

Timeliness of Motion for Necessary Litigation Costs: Defendant/respondent filed a motion for determination of necessary expenses of litigation under 70-30-306. He filed the motion 11 calendar days after a jury verdict was rendered in his favor. Plaintiff filed a motion to retax costs on the ground that respondent's motion was untimely filed under the "5 days after the verdict" clause of 25-10-501. The Supreme Court held former Rule 6(a) and (e), M.R.Civ.P. (now superseded), eliminating Saturdays and Sundays and granting 3 business days, must be given effect since defendant was required to take some "action by virtue of papers served upon him by mail" and since defendant was served by mail. Defendant's motion was timely filed. St. v. Helehan, 189 M 339, 615 P2d 925 (1980).

Payment of Attorney's Fees Before Trial: Where appellant in a condemnation action was awarded preliminary payment for his property interests prior to trial and withdrew $23,194.50 and paid $7,000 to his lawyer, the payment to the lawyer did not constitute "necessary expenses of litigation" pursuant to 70-30-305 and 70-30-306. St. v. Helehan, 186 M 286, 607 P2d 537 (1980).

Costs to Private Property Owner Denied When Final Award Not in Excess of Final Offer — Law of the Case Not Applicable: When the defendant did not receive an award in excess of the final offer of the condemnor, he was not entitled to the necessary expenses of litigation and was therefore not entitled to costs. The fact that on a previous appeal in the same case the Supreme Court mentioned attorney's fees and inadvertently failed to mention costs did not invoke the "law of the case" principle as between the parties involved. Dept. of Highways v. Burlingame, 185 M 183, 605 P2d 176 (1980).

Necessity of Expense of Appraiser Who Does Not Testify: The expense of an appraiser is a necessary expense and was properly awarded to the landowner even if the appraiser did not testify at the commission hearing. St. v. Rogers, 184 M 181, 602 P2d 560 (1979).

70-30-307. When payment of compensation to be made — deposit of bond.

Compiler's Comments

2001 Amendment: Chapter 125 at beginning of first sentence substituted "In a proceeding for condemnation for a railroad, the condemnor shall" for "The plaintiff must", in second sentence after "cattle guards shall execute to the" substituted "condemnee" for "defendant", and in fourth sentence after "In an action on the bond, the" substituted "condemnee" for "plaintiff"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Case Notes

Delay in Payment of Damages: In eminent domain proceedings where the Highway Commission (now Transportation Commission) did not move within 30 days as required by this section, it could not excuse its failure to pay by alleging that it had no notice of the entry of judgment when the Commission itself had caused the judgment to be entered. Robertson v. St. Highway Comm'n, 148 M 275, 420 P2d 21 (1966).

70-30-308. How payment made — execution or annulment for nonpayment.

Compiler's Comments

2001 Amendment: Chapter 125 throughout section substituted references to condemnor for references to plaintiff, and references to condemnee for references to defendant; in (1) at end of first sentence substituted "pursuant to the assessment or judgment" for "to those entitled thereto"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1983 Amendment: In (1)(a), at beginning deleted "if a fee simple interest in the defendant's land is taken"; and deleted former (1)(c), which read: "if an easement over or through the defendants' property is involved, in either a single payment or in not more than five consecutive annual installments."; in (2) after "the court" deleted "or judge".

1981 Amendment: Added the last sentence as an introductory clause in (1); inserted (1)(a), (1)(b), and (1)(c) providing optional forms of payment at the defendants' discretion.

Case Notes

Computation of Attorney Fees in Condemnation Action: A property condemnation action was resolved by agreement of the parties, and the state agreed to pay defendants' necessary expenses of litigation. Defense counsel charged $250 an hour for 1,906 hours. The state challenged both the rate and the number of hours. Following a hearing, the District Court adjusted the number of hours to 1,205 but adopted the hourly rate, and the state appealed. The Supreme Court reversed. The District Court did not have the benefit of the later decision in Mont. Dept. of Transportation v. Am. Bank of Mont., 2008 MT 362, 346 M 405, 195 P3d 844 (2008), which stated that reasonable and necessary attorney fees awarded in a condemnation action must be computed on hourly rates typical or common for a nonspecific attorney's services in the county in which the trial is held. In this case, the state presented testimony from two attorneys in Flathead County that the usual and customary fee for an attorney in that county was $150 an hour, and that was the evidence upon which the District Court should have relied in setting the hourly fee. Therefore, the case was remanded for an adjustment of the rate to $150 an hour. St. v. Skyline Broadcasters, Inc., 2009 MT 193, 351 M 127, 211 P3d 189 (2009).

Deposit of Money With District Court: There is no requirement for a deposit of money with the District Court until it is necessary that the condemnor make payment of a final judgment, with one exception. The exception is when the condemnor seeks an interlocutory order putting the condemnor in possession of the condemned lands. When that occurs, 70-30-311 comes into play and the condemnor must deposit with the District Court for the condemnee the amount of compensation claimed by him in his answer or the amount assessed by the commissioners or by the jury, as the case may be. Bozeman Parking Comm'n v. First Trust Co. of Mont., 190 M 107, 619 P2d 168, 37 St. Rep. 1610 (1980).

Delay in Payment of Damages: In eminent domain proceeding where the Highway Commission (now Transportation Commission) did not move within 30 days as required by 70-30-307, it could not excuse its failure to pay by alleging that it had no notice of the entry of the judgment when the Commission itself had caused the judgment to be entered. Robertson v. St. Highway Comm'n, 148 M 275, 420 P2d 21 (1966).

Stay of Execution: Where Highway Commission (now Transportation Commission) filed notice of appeal and perfected its appeal after Writ of Execution under this section had issued, the appeal stayed the judgment although no bond was filed as required by section 93-8011, R.C.M. 1947 (since repealed), since under former Rule 62(e), M.R.Civ.P. (now superseded), no security was required from the state. Robertson v. St. Highway Comm'n, 148 M 275, 420 P2d 21 (1966).

Constitutionality: This section, 70-30-309, 70-30-311, and 70-30-312, authorizing an appeal by plaintiff after payment of the judgment into court for defendant and after securing possession of the land, do not contravene Art. III, sec. 14, 1889 Mont. Const. (now Art. II, sec. 29, 1972 Mont. Const.), prohibiting the taking of private property for public use without paying just compensation therefor. St. v. Bradshaw Land & Livestock Co., 99 M 95, 43 P2d 674 (1935).

Payment to Trustee: A trustee, as holder of the legal title to land taken by a railroad company in condemnation proceedings, is prima facie entitled to the money ordered paid to him. Forbis v. Cannon, 35 M 424, 90 P 161 (1907).

70-30-309. Final order of condemnation — contents — vesting upon filing.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 20 in (1) in first sentence substituted "the bond, if appropriate, has been given" for "the bond given, if the plaintiff elects to give one" and at end of second sentence inserted reference to appropriate payment for damages; in (2) substituted "condemnor" for "plaintiff"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 125 in (1) in first sentence substituted "the bond, if appropriate, has been given" for "the bond given, if the plaintiff elects to give one"; in (2) substituted "condemnor" for "plaintiff"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1983 Amendment: In (1), near middle after "the court" deleted "or judge".

Case Notes

Property Tax Proration Must Occur During Condemnation Proceeding — Equitable Doctrine of Unjust Enrichment Inapplicable — Contractual Waiver of Property Tax Relief by Utility: The plaintiff utility appealed the District Court's summary judgment ruling that the equitable doctrine of unjust enrichment precluded the plaintiff's claim under 70-30-315 for a general property tax refund pursuant to 15-1-402 and 15-1-406 on taxes that accrued during the pendency of a condemnation action initiated by the city of Missoula to take the plaintiff's property for public use. The city and Missoula County separately cross-appealed the District Court's related ruling that 70-30-315 entitled the plaintiff to a general property tax refund but for application of the equitable doctrine of unjust enrichment. On appeal, the Supreme Court affirmed on different grounds and held that the District Court erroneously concluded that the equitable doctrine of unjust enrichment precluded or defeated relief on the plaintiff's claim for property tax proration and related relief under 70-30-315. However, the Supreme Court held that 70-30-315 required the specified property tax proration to occur in the condemnation proceeding, without involvement of the Montana Department of Revenue, as an incident of the final judgment and order of condemnation otherwise required by 70-30-304 and 70-30-309. Additionally, the District Court erroneously concluded that, but for application of equitable unjust enrichment, 70-30-315 entitled the plaintiff to a general property tax refund under 15-1-402 and 15-1-406. In that regard, the Supreme Court held further that the plaintiff contractually waived its right to property tax proration and reimbursement from or against the city under 70-30-315. Mtn. Water Co. v. Dept. of Revenue, 2020 MT 194, 400 Mont. 484, 469 P.3d 136.

Court Determination of Terms of Compatible Use to Be Included in Final Order of Condemnation: Although eminent domain statutes do not require protective conditions in an easement, courts do have the power under 70-30-206 to set forth protective provisions in an order for condemnation. In this case, the court found the use of property to be compatible for use both for a railroad and for electric power lines. Thus, failure by the court to include any requested protective provisions in its order of possession did not constitute reversible error, but the Supreme Court nevertheless remanded to the trial court for a hearing to determine what protective provisions requested by either party, if any, should be included in its final order of condemnation. Mont. Power Co. v. Burlington N. RR Co., 272 M 224, 900 P2d 888, 52 St. Rep. 625 (1995), following St. Highway Comm'n v. Lavoie, 155 M 39, 466 P2d 594 (1970).

Constitutionality: Section 70-30-308, this section, 70-30-311, and 70-30-312, authorizing an appeal by plaintiff after payment of the judgment into court for defendant and after securing possession of the land, do not contravene Art. III, sec. 14, 1889 Mont. Const. (now Art. II, sec. 29, 1972 Mont. Const.), prohibiting the taking of private property for public use without paying just compensation therefor. St. v. Bradshaw Land & Livestock Co., 99 M 95, 43 P2d 674 (1935).

Time of Payment: The final order of condemnation follows the payment of an award and cannot be entered in advance without infringing the constitutional provision that private property shall not be taken without just compensation having been first made to or paid into court for the owner. Great N. Ry. v. Benjamin, 51 M 167, 149 P 968 (1915).

70-30-310. New proceedings to cure defective title.

Compiler's Comments

2001 Amendment: Chapter 125 substituted "condemnor" for "plaintiff"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

70-30-311. Putting condemnor in possession.

Compiler's Comments

2003 Amendment: Chapter 330 in (1) inserted references to 70-30-206 and 60-4-104(4) and (5); and made minor changes in style. Amendment effective April 15, 2003.

Applicability: Section 5, Ch. 330, L. 2003, provided: "[This act] applies to actions initiated on or after [the effective date of this act]." Effective April 15, 2003.

2001 Amendment: Chapter 125 throughout section substituted references to condemnor for references to plaintiff, and references to condemnee for references to defendant; in (1) near beginning substituted "and while it retains jurisdiction" for "or after the report and assessment of the commissioners have been made and filed in the court and either before or after appeal from such assessment or from any other order or judgment in the proceedings"; in (5) at beginning inserted "Subject to subsection (5)(b)"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1983 Amendment: In introductory portion of (1), near middle after "the court" deleted "or any judge thereof at chambers", after "by the defendant in his" changed "answer" to "statement of claim of just compensation under 70-30-207"; inserted (2) allowing plaintiff to obtain an order of possession in certain circumstances upon defendant's failure to file a timely claim of just compensation; and in (3) twice after "the court" deleted "or judge" and changed "the judge" to "the court".

Case Notes

Transfer of Possession Described in Voluntary Settlement Agreement — This Section Does Not Govern: The city of Missoula sought condemnation of a water delivery system operated by the defendant. After the District Court's ruling stating that a compensation award that did not include improvements would be unconstitutional, the city and the defendant reached a settlement agreement based on the fair market value of the delivery system. The settlement provided that the city would take possession of the condemned property simultaneously with presenting payment, and the city took possession in the agreed-upon manner. The District Court found that when two parties voluntarily enter into an agreement that grants possession of the condemned property to the condemnor, the transfer of possession does not fall within the parameters of 70-3-311. Missoula v. Mtn. Water Co., 2018 MT 114, 391 Mont. 288, 417 P.3d 321.

Computation of Attorney Fees in Condemnation Action: A property condemnation action was resolved by agreement of the parties, and the state agreed to pay defendants' necessary expenses of litigation. Defense counsel charged $250 an hour for 1,906 hours. The state challenged both the rate and the number of hours. Following a hearing, the District Court adjusted the number of hours to 1,205 but adopted the hourly rate, and the state appealed. The Supreme Court reversed. The District Court did not have the benefit of the later decision in Mont. Dept. of Transportation v. Am. Bank of Mont., 2008 MT 362, 346 M 405, 195 P3d 844 (2008), which stated that reasonable and necessary attorney fees awarded in a condemnation action must be computed on hourly rates typical or common for a nonspecific attorney's services in the county in which the trial is held. In this case, the state presented testimony from two attorneys in Flathead County that the usual and customary fee for an attorney in that county was $150 an hour, and that was the evidence upon which the District Court should have relied in setting the hourly fee. Therefore, the case was remanded for an adjustment of the rate to $150 an hour. St. v. Skyline Broadcasters, Inc., 2009 MT 193, 351 M 127, 211 P3d 189 (2009).

Secured Lenders Not Liable for Overage Judgment: Lender defendants were secured creditors with mortgages on condemned property and perfected UCC liens on the condemnation proceeds. The District Court concluded that the lenders were jointly and severally liable for excess proceeds withdrawn from the condemnor's deposit with the court. The District Court noted that the lenders did not file a claim for relief against any other party in the action and that an attorney's withdrawal from the deposit was done in the attorney's role as counsel for all defendants; thus, judgment for the lenders was not appropriate. The lenders appealed and the Supreme Court reversed. Under 70-30-311, the liability on an overage judgment is limited to the amount of excess actually received by a condemnee. Here, the only amount received by the lenders was the amount of their mortgages. Further, the lenders had no written fee agreement with the attorney, so even though the attorney represented to the District Court that he appeared on behalf of all defendants and the attorney's services were paid through withdrawals made from the deposit, the lenders did not bear responsibility for the attorney's fees and costs. St. v. Skyline Broadcasters, Inc., 2009 MT 193, 351 M 127, 211 P3d 189 (2009). See also Grand River Dam Authority v. Jarvis, 124 F2d 914 (10th Cir. 1942), and St. v. Teuscher, 761 P2d 49 (Wash. 1988).

Interest Accruing From Date of Determination of Property Value According to Terms of Condemnation Agreement: The parties entered into an agreement that granted possession of condemned property to defendant, and plaintiff subsequently filed an inverse condemnation action and was awarded a judgment. Plaintiff asserted that pursuant to 70-30-302, interest on the judgment should be paid from the date of the service of summons, preceding the order granting possession. Defendant disagreed, and the Supreme Court held that 70-30-302 does not apply to inverse condemnation proceedings. Rather, 70-30-302 assesses interest when the process described in 70-30-311 puts a condemning plaintiff into possession of the condemned property, but in this case, that process was not used. Instead, the parties' agreement provided that interest would not accrue until the final determination of value was made, which occurred when the jury arrived at its verdict. Therefore, the District Court properly decided that, pursuant to the condemnation agreement, interest began on the date of the jury's verdict. K&R Partnership v. Whitefish, 2008 MT 228, 344 M 336, 189 P3d 593 (2008).

Motion for Preliminary Condemnation Properly Granted Following Unaccepted Offer to Purchase Right-of-Way: Seeking to improve and expand a roadway, the city offered Taylens $25,500 for the right-of-way across their property. The offer included an appraisal, an engineer's drawing of the land that the city wanted to purchase, a legal description of the property, and a proposed purchase agreement and set a date by which the offer had to be accepted. When the date passed without a response from the Taylens, the city began condemnation proceedings, while continuing to negotiate with the Taylens for a purchase price. Ultimately, no agreement was reached, the property was condemned, and the city took possession and completed the road improvements. The Taylens appealed on grounds that the city did not properly follow the condemnation process, but the Supreme Court affirmed. The District Court correctly concluded that the city's offer met the requirements of 70-30-111(4) and did not err in granting the city's motion for preliminary condemnation. In addition, the Taylens failed to avail themselves of appropriate legal remedies to preserve the status quo, such as a stay pending appeal or a request that the city give a bond or sufficient sureties during the appeal, and the city completed the improvements, so the Taylens lost the right to raise the issue of whether the court should have granted the city immediate possession following the order for preliminary condemnation. Bozeman v. Taylen, 2007 MT 256, 339 M 274, 170 P3d 939 (2007).

Deposit of Money With District Court: There is no requirement for a deposit of money with the District Court until it is necessary that the condemnor make payment of a final judgment, with one exception. The exception is when the condemnor seeks an interlocutory order putting the condemnor in possession of the condemned lands. When that occurs, 70-30-311 comes into play and the condemnor must deposit with the District Court for the condemnee the amount of compensation claimed by him in his answer or the amount assessed by the commissioners or by the jury, as the case may be. Bozeman Parking Comm'n v. First Trust Co. of Mont., 190 M 107, 619 P2d 168, 37 St. Rep. 1610 (1980).

Excess Collected by State — No Separate Action Required: Where appellant in an eminent domain action was awarded preliminary payment prior to trial and withdrew $23,194.50 of the preliminary award and paid one-third to his attorney and where appellant was later awarded $5,000 by a jury, the District Court properly ordered the appellant to repay the excess withdrawn, with interest, without a separate legal action being brought by the state. The fact that one-third of the preliminary award was paid to plaintiff's lawyer was a matter between plaintiff and the lawyer and did not require an action to recover the excess from the lawyer. St. v. Helehan, 186 M 286, 607 P2d 537 (1980).

Mootness Due to Completion of Use and Possession: If use and possession are complete on defendant's lands, his motion to stay condemnation is moot since the acts sought to be enjoined are accomplished fact. Mont. Power Co. v. Charter, 173 M 429, 568 P2d 118 (1976).

Payment Pending Appeal: In eminent domain proceeding state was forced to deposit amount of award granted by condemnation commission pending appeal. Dept. of Highways v. Scrivani, 172 M 177, 561 P2d 1321 (1976).

Constitutionality: Sections 70-30-308, 70-30-309, this section, and 70-30-312, authorizing an appeal by plaintiff after payment of the judgment into court for defendant and after securing possession of the land, do not contravene Art. III, sec. 14, 1889 Mont. Const. (now Art. II, sec. 29, 1972 Mont. Const.), prohibiting the taking of private property for public use without paying just compensation therefor. St. v. Bradshaw Land & Livestock Co., 99 M 95, 43 P2d 674 (1935).

Recovery of Excess From Defendant: A recital in condemnation proceedings that plaintiff have judgment and execution against defendant for any sum theretofore paid by plaintiff to defendant in accordance with the award, which award was appealed from, is improper, as the statute gives an ample remedy if plaintiff is entitled to recover any amount from defendant. Great N. Ry. v. Benjamin, 51 M 167, 149 P 968 (1915).

Reversal of Order of Condemnation:

After the report and assessment of the commissioners appointed to determine the damages in eminent domain proceedings had been made and filed and the amount of damages so assessed had been paid into court for the owner of the property, the court properly permitted plaintiff to continue in possession of the property which had theretofore been obtained under an order in a like proceeding, the judgment in which had been reversed on appeal. Spratt v. Helena Power Transmission Co., 37 M 60, 94 P 631 (1908).

Merely because a corporation had become a trespasser by reason of the reversal of an order of the District Court empowering it to take lands under condemnation proceedings, it was not thereafter, while still a trespasser, deprived of the right to again invoke the power of eminent domain. Spratt v. Helena Power Transmission Co., 37 M 60, 94 P 631 (1908).

70-30-312. Appeal to supreme court.

Compiler's Comments

2001 Amendment: Chapter 125 in (1) at beginning deleted "The plaintiff or defendant or"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Case Notes

Appeal:

Since this section allows appeals from any finding or judgment made or rendered under this chapter, as in other cases, and section 93-8003, R.C.M. 1947 (since repealed), allows appeals from final judgments or orders, an appeal does not lie from the court's finding of fact or conclusions of law. Sheridan County Elec. Co-op, Inc. v. Anhalt, 127 M 71, 257 P2d 889 (1953).

This section, 70-30-308, 70-30-309, and 70-30-311, authorizing an appeal by plaintiff after payment of the judgment into court for defendant and after securing possession of the land, do not contravene Art. III, sec. 14, 1889 Mont. Const. (now Art. II, sec. 29, 1972 Mont. Const.), prohibiting the taking of private property for public use without paying just compensation therefor. St. v. Bradshaw Land & Livestock Co., 99 M 95, 43 P2d 674 (1935).

Certiorari: The provision authorizing any party to appeal to the Supreme Court from any findings or judgment, as in other cases, precludes a resort to certiorari. State ex rel. Davis v. District Court, 29 M 153, 74 P 200 (1903), distinguished in Sheridan County Elec. Co-op, Inc. v. Anhalt, 127 M 71, 257 P2d 889 (1953).

70-30-313. Current fair market value.

Compiler's Comments

1983 Amendment: In (1), after "available use" deleted "of the property", and after "such use" inserted "provided current use may not be presumed to be the highest and best use".

70-30-314. Weed control responsibility.

Compiler's Comments

2001 Amendment: Chapter 125 substituted "condemnor" for "plaintiff"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

70-30-315. Proration of taxes.

Compiler's Comments

2001 Amendment: Chapter 125 throughout section substituted references to condemnor for references to plaintiff; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Case Notes

Property Tax Proration Must Occur During Condemnation Proceeding — Equitable Doctrine of Unjust Enrichment Inapplicable — Contractual Waiver of Property Tax Relief by Utility: The plaintiff utility appealed the District Court's summary judgment ruling that the equitable doctrine of unjust enrichment precluded the plaintiff's claim under 70-30-315 for a general property tax refund pursuant to 15-1-402 and 15-1-406 on taxes that accrued during the pendency of a condemnation action initiated by the city of Missoula to take the plaintiff's property for public use. The city and Missoula County separately cross-appealed the District Court's related ruling that 70-30-315 entitled the plaintiff to a general property tax refund but for application of the equitable doctrine of unjust enrichment. On appeal, the Supreme Court affirmed on different grounds and held that the District Court erroneously concluded that the equitable doctrine of unjust enrichment precluded or defeated relief on the plaintiff's claim for property tax proration and related relief under 70-30-315. However, the Supreme Court held that 70-30-315 required the specified property tax proration to occur in the condemnation proceeding, without involvement of the Montana Department of Revenue, as an incident of the final judgment and order of condemnation otherwise required by 70-30-304 and 70-30-309. Additionally, the District Court erroneously concluded that, but for application of equitable unjust enrichment, 70-30-315 entitled the plaintiff to a general property tax refund under 15-1-402 and 15-1-406. In that regard, the Supreme Court held further that the plaintiff contractually waived its right to property tax proration and reimbursement from or against the city under 70-30-315. Mtn. Water Co. v. Dept. of Revenue, 2020 MT 194, 400 Mont. 484, 469 P.3d 136.

Order Allowing Utility to Not Pay Taxes During Condemnation Action Improper — Utility to Pay Until Transfer of Title by Final Order: The city of Missoula filed a condemnation action against the plaintiff, a utility. The plaintiff filed an action asking the District Court to declare that it did not need to pay taxes during the condemnation action and that the taxes would instead shift to the city. The District Court granted the plaintiff summary judgment, and the defendant, the Department of Revenue, appealed. The Supreme Court reversed, holding that the District Court had erred in its interpretation of 70-30-315 regarding the proration of taxes. The Supreme Court further agreed with the defendant that the plaintiff would pay taxes on its property until such time as a transfer of the property's title by entry of final order in the other case had been issued. Mtn. Water Co. v. Dept. of Revenue, 2017 MT 117, 387 Mont. 394, 394 P.3d 922.

Property Taxes Properly Not Awarded as Litigation Expense: Plaintiff asserted that the District Court erred by not awarding property taxes as necessary litigation expenses as part of an inverse condemnation judgment. The Supreme Court disagreed and affirmed. Under 70-30-305 and 70-30-306, property taxes are not designated as a necessary cost of litigation. The court noted that 70-30-315 does allow for proration of property taxes in certain condemnation cases, but because the 1997 version of the statute applicable in this case used the word "plaintiff" to describe the party condemning the property, the statute did not apply to inverse condemnation cases in which the plaintiff was the condemnee. (Note that the 2001 Legislature amended 70-30-315 by changing "plaintiff" to "condemnor".) K&R Partnership v. Whitefish, 2008 MT 228, 344 M 336, 189 P3d 593 (2008).

70-30-321. Sale of property acquired for public use when use abandoned — procedure.

Compiler's Comments

2001 Amendment: Chapter 125 in (2) in two places after "real property" deleted "interest"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1983 Amendment: At beginning of (1), inserted exception clause; and inserted (3) providing for reversion of property to the original owner or a successor in interest when an interest is abandoned or purpose is terminated.

Saving Clause: Section 3, Ch. 689, L. 1983, provided: "This act does not affect rights and duties that matured, property that was acquired, penalties that were incurred, or proceedings that were begun before the effective date of this act." (Effective Oct. 1, 1983.)

Case Notes

Fee Simple Ownership of Fractional Mineral Interest — No Reversion: Through a series of transactions, Libby obtained 75% of the mineral interest in a property and Noranda obtained the remaining 25% of the mineral interest. Noranda filed a condemnation action against Libby seeking acquisition by condemnation of all interests other than those that it owned. The judge found for Noranda. After a subsequent transaction Noranda was vested with all surface and mineral rights except for a reservation of the timber. Subsequently, Libby filed a notice of reversionary interest concerning the property if Noranda abandoned the condemned interest or if the purpose for which the property was condemned terminated. After the passage of 6 years, Noranda announced that it was abandoning its plan to mine the property. Libby filed suit seeking the reversion of the condemned mineral interest. Noranda opposed the claim and counterclaimed to quiet title in the property. Noranda denied abandonment or that the issue of abandonment was material to the issue. The District Court concluded that Noranda owned 100% of the surface and mineral estate and therefore Libby had no reversionary interest regardless of whether Noranda abandoned the mining project. The Supreme Court concluded that a property owner has the right to carve out of his property as many estates or interests (perpendicular or horizontal, perpetual or limited) as it may be able to sustain. Montana courts have long recognized that title to mineral interests in land may be segregated in whole or in part from the rest of the fee simple title. A division of the mineral interest from the surface interest is a horizontal division. Mineral interests, like surface interests, may be divided vertically into fractional interests. The extent of the interest conveyed, reserved, or excepted by a grant, reservation, or exception of a fractional interest in minerals or mineral rights depends on the particular terms of the instrument. A fee simple title is presumed to be intended by every grant of real property from which it does not appear that a lesser estate was intended. The fact that Libby's interest was a fractional interest has no bearing on the quality of its estate. Contrary to Libby's argument that fee simple refers to a particular quantity (i.e., the whole) of real property, fee simple describes the infinite or perpetual duration of the ownership of the interest, whether it is an interest in the whole, the surface, a fraction of the surface, the minerals, or a fraction of the minerals. Because Noranda acquired all of Libby's fee simple right, title, and interest in the condemnation action, Libby did not retain a reversionary interest either under the terms of the condemnation decree or by operation of law. Libby Placer Mining Co. v. Noranda Minerals Corp., 2008 MT 367, 346 M 436, 197 P3d 924 (2008).

70-30-322. Option of original owner or successor in interest to purchase at sale price.

Compiler's Comments

2007 Amendment: Chapter 512 in (1) deleted former last sentence that read: "If more than one person claims an equal entitlement, the option may not be exercised"; and made minor changes in style. Amendment effective October 1, 2007.

2001 Amendment: Chapter 125 made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1985 Amendment: In (1) substituted "the owner or his successor in interest shall be notified by the seller by certified mail and shall have a 30-day option from the date of a sale provided for in 70-30-321" for "the successor in interest shall have the option" and "the sale" for "a sale provided for in 70-30-321".

1983 Amendment: At beginning of (1), inserted exception clause; and inserted (3) providing for reversion of property to the original owner or a successor in interest when an interest is abandoned or purpose is terminated.

Saving Clause: Section 3, Ch. 689, L. 1983, provided: "This act does not affect rights and duties that matured, property that was acquired, penalties that were incurred, or proceedings that were begun before the effective date of this act." (Effective Oct. 1, 1983.)

Case Notes

Fee Simple Ownership of Fractional Mineral Interest — No Reversion: Through a series of transactions, Libby obtained 75% of the mineral interest in a property and Noranda obtained the remaining 25% of the mineral interest. Noranda filed a condemnation action against Libby seeking acquisition by condemnation of all interests other than those that it owned. The judge found for

Noranda. After a subsequent transaction Noranda was vested with all surface and mineral rights except for a reservation of the timber. Subsequently, Libby filed a notice of reversionary interest concerning the property if Noranda abandoned the condemned interest or if the purpose for which the property was condemned terminated. After the passage of 6 years, Noranda announced that it was abandoning its plan to mine the property. Libby filed suit seeking the reversion of the condemned mineral interest. Noranda opposed the claim and counterclaimed to quiet title in the property. Noranda denied abandonment or that the issue of abandonment was material to the issue. The District Court concluded that Noranda owned 100% of the surface and mineral estate and therefore Libby had no reversionary interest regardless of whether Noranda abandoned the mining project. The Supreme Court concluded that a property owner has the right to carve out of his property as many estates or interests (perpendicular or horizontal, perpetual or limited) as it may be able to sustain. Montana courts have long recognized that title to mineral interests in land may be segregated in whole or in part from the rest of the fee simple title. A division of the mineral interest from the surface interest is a horizontal division. Mineral interests, like surface interests, may be divided vertically into fractional interests. The extent of the interest conveyed, reserved, or excepted by a grant, reservation, or exception of a fractional interest in minerals or mineral rights depends on the particular terms of the instrument. A fee simple title is presumed to be intended by every grant of real property from which it does not appear that a lesser estate was intended. The fact that Libby's interest was a fractional interest has no bearing on the quality of its estate. Contrary to Libby's argument that fee simple refers to a particular quantity (i.e., the whole) of real property, fee simple describes the infinite or perpetual duration of the ownership of the interest, whether it is an interest in the whole, the surface, a fraction of the surface, the minerals, or a fraction of the minerals. Because Noranda acquired all of Libby's fee simple right, title, and interest in the condemnation action, Libby did not retain a reversionary interest either under the terms of the condemnation decree or by operation of law. Libby Placer Mining Co. v. Noranda Minerals Corp., 2008 MT 367, 346 M 436, 197 P3d 924 (2008).

70-30-323. Liability limitation — several liability — defense costs.

Compiler's Comments

Effective Date: Section 4, Ch. 113, L. 2001, provided that this section is effective on passage and approval. Approved March 22, 2001.

CHAPTER 31
RELOCATION ASSISTANCE
FAIR TREATMENT OF CONDEMNEES

Part 1
General Provisions

70-31-101. Purpose.

Compiler's Comments

1989 Amendment: At end of (3) inserted "as amended". Amendment effective March 29, 1989.

70-31-102. Definitions.

Compiler's Comments

2001 Amendment: Chapter 125 in definition of agency at end substituted "as provided in Title 70, chapter 30" for "under state law"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1989 Amendment: In definition of agency, near beginning before "the state", inserted "any department, agency, or instrumentality of" and at end substituted "two or more states or two or more political subdivisions of the state or of two or more states, and any person who has the authority to acquire property by eminent domain under state law" for "the state of Montana or of a political subdivision of the state"; inserted definition of appraisal; in definition of business, in (d) after "purposes of", substituted "paying moving or related expenses" for "70-31-201(1)"; divided definition of displaced person into subsections; in (5)(a), after "any person who", deleted "on or after July 1, 1971"; in (5)(a)(i), at beginning, substituted "as a direct result of a written notice of intent to acquire or by the acquisition" for "as a result of the acquisition", after "in whole or in part" deleted "or as the result of the written order of an acquiring agency to vacate real property", and at end substituted "a displacing agency for which federal financial assistance will be available to pay all or any part of the cost" for "the agency"; in (5)(a)(ii), before "for which federal", inserted language relating to residential tenant and at end deleted "and solely for the"; in (5)(b) substituted language relating to person providing advisory services for "purposes of 70-31-201(1) and (2) and 70-31-204, as a result of"; in (5)(b)(i) substituted "a written notice of intent to acquire or as a direct result of the acquisition of other real property, in whole or in part" for "the acquisition of or as the result of the written order of the acquiring agency to vacate other real property" and at end inserted "undertaken by a displacing agency"; in (5)(b)(ii) inserted first sentence relating to rehabilitation, demolition, and other displacing activity and deleted second sentence that read: "The term "displaced person" also includes a person who moves or discontinues his business or moves other personal property or moves from his dwelling as the direct result of code enforcement activities or a program of rehabilitation of buildings conducted pursuant to a federal program"; inserted (5)(c) relating to persons who do not qualify as a "displaced person"; and made minor changes in phraseology. Amendment effective March 29, 1989.

70-31-104. New rights and powers not created.

Compiler's Comments

2001 Amendment: Chapter 125 in (1) inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

70-31-105. Duplication of eminent domain payments not intended.

Compiler's Comments

2001 Amendment: Chapter 125 inserted references to Title 60, chapter 4, and Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

70-31-111. Rulemaking authority.

Compiler's Comments

1989 Statement of Intent: The statement of intent attached to Ch. 374, L. 1989, provided: "A statement of intent is required for this bill because it grants rulemaking authority to agencies as defined in 2-3-102, to adopt rules to carry out the provisions of [this act].

The legislature intends that the agency have the discretion to adopt whatever rules are necessary to ensure compliance with the federal requirements in order to obtain the maximum federal benefits for displaced persons in Montana. It is intended that the agency adopt rules relating to eligibility for relocation payments and assistance, type and amounts of payments available to displaced persons, and relocation assistance advisory services."

Effective Date: Section 11, Ch. 374, L. 1989, provided that this section is effective March 29, 1989.

Part 3
Rights and Duties Relating to Condemnation

70-31-301. Appraisal, negotiation, and other condemnation policies mandated.

Compiler's Comments

2001 Amendment: Chapter 125 in (8) inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1989 Amendment: In (2) inserted last sentence relating to waiver of appraisal; in (9) substituted "uneconomic remnant" for "entire property"; and inserted (10) relating to donation of property. Amendment effective March 29, 1989.

Saving Clause: Section 9, Ch. 374, L. 1989, was a saving clause.

Severability: Section 10, Ch. 374, L. 1989, was a severability clause.

Case Notes

Reasonable Access Not Denied by Highway Reconstruction Project — Inverse Condemnation Claim Properly Denied: Plaintiffs sued the state for inverse condemnation and taking for constructing a highway improvement project that allegedly impaired access by large trucks to plaintiffs' business on a main street in Dillon. Plaintiffs presented evidence that it was difficult for large trucks to back into plaintiffs' receiving area without encroaching on the street and running off of curbs. The state presented evidence that a large truck could access the receiving area through curb cuts without falling off the curbs. The business manager testified that larger truck-trailer combinations could be unhooked to make them shorter and that a power unit could then push the trailers into the receiving area, that the plant was set up for pneumatic delivery and could receive almost all its products in this manner, precluding the necessity of maneuvering large trucks, and that it was possible to request delivery of the product in any size truck and trailer combination. The jury evaluated the conflicting evidence and concluded that plaintiffs' access was reasonable, and on appeal, the Supreme Court declined to disturb the verdict. Williams Feed, Inc. v. St., 2007 MT 79, 336 M 493, 155 P3d 1228 (2007).

70-31-302. Reimbursement of closing costs and taxes incurred by owner.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-31-303. Inverse condemnation — reimbursement of expenses of proceeding.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Costs of Litigation in Inverse Condemnation Cases: In providing for costs of litigation in condemnation cases, the Montana Constitution does not distinguish between condemnation litigation initiated by a government entity and condemnation cases initiated by the property owner, and Montana statutes do not distinguish between inverse condemnation and traditional condemnation cases. The only requirement for an award of litigation expenses is that the condemnee prevail by obtaining a judgment in excess of the condemnor's pretrial offer. In the present case, defendant asserted that under 70-31-303, plaintiff was not entitled to litigation expenses in an inverse condemnation case because federal money was not involved, but the Supreme Court affirmed that litigation expenses must be awarded in inverse condemnation cases when the condemnee prevails, as provided in 70-30-305. K&R Partnership v. Whitefish, 2008 MT 228, 344 M 336, 189 P3d 593 (2008). See also Wohl v. Missoula, 2013 MT 46, 369 Mont. 108, 300 P.3d 1119.

Denial of Application for Subdivision — Failure to State Claim for Inverse Condemnation: Madison River R.V. Ltd. (RV) applied to build a recreational vehicle park in Ennis, but the application was denied. RV's petition to the District Court included a claim that denial of the project amounted to an inverse condemnation of RV's property without just compensation. The District Court dismissed the claim on grounds that RV had not alleged facts from which the court could find that RV had suffered a taking, citing Kudloff v. Billings, 260 M 371, 860 P2d 140, 50 St. Rep. 1108 (1993). The Supreme Court affirmed. There was nothing in the record to suggest that the effect of the denial of the application denied RV all economically beneficial use of the property in question. Madison River R.V. Ltd. v. Ennis, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000).

Law Review Articles

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, VI. Eminent Domain, Inverse Condemnation, Williams, 46 Mont. L. Rev. 138 (1985).

70-31-304. Reimbursement of costs when condemnation proceedings dismissed or abandoned.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-31-305. Acquisition of buildings and improvements affected.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-31-311. Relocation payments and assistance.

Compiler's Comments

2001 Amendment: Chapter 125 substituted "Title 60, chapter 4, or Title 70, chapter 30" for "state law"; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Saving Clause: Section 9, Ch. 374, L. 1989, was a saving clause.

Severability: Section 10, Ch. 374, L. 1989, was a severability clause.

Effective Date: Section 11, Ch. 374, L. 1989, provided that this section is effective March 29, 1989.

CHAPTER 32
HOMESTEADS

Chapter Case Notes

Property Not Eligible for Homestead Protection When Derived From Fraudulent Transaction — Defendant Never Owned Property: The District Court correctly concluded that the defendant did not qualify for a homestead exemption. Although the homestead exemption may protect property from execution or forced sale under the Uniform Fraudulent Transfer Act, the property has to qualify as a homestead in the first place. The defendant's title to the property at issue derived from a fraudulent transaction. Because that transaction was declared void, the defendant never owned the property and could not claim the property as a homestead. 623 Partners, LLC v. Hunter, 2016 MT 336, 386 Mont. 24, 385 P.3d 963. See also In re Snyder, 2006 MT 308, 335 Mont. 11, 149 P.3d 26, and McCone County Fed. Credit Union v. Gribble, 2009 MT 290, 352 Mont. 254, 216 P.3d 206.

Homestead Property Not Asset Subject to Uniform Fraudulent Transfer Act: Gribble took out at least four loans with the credit union and defaulted on most if not all of them. The loans were secured with large equipment, not real property. The credit union filed a complaint seeking repayment and the right to foreclose on the collateral. Gribble transferred his residential real property to another party by quitclaim deed 11 days later. The credit union asked the District Court to set aside the transfer under the Uniform Fraudulent Transfer Act (UFTA), but instead the court granted summary judgment to defendant, and the credit union appealed. The Supreme Court held that because the real property was Gribble's residence, it qualified as a homestead that would generally be exempt under nonbankruptcy law and thus was not an asset for purposes of the UFTA. The District Court was affirmed. McCone County Fed. Credit Union v. Gribble, 2009 MT 290, 352 M 254, 216 P3d 206 (2009).

Retention of Creditor's Lien on Homestead Property Following Bankruptcy Discharge: Newmans borrowed money from a bank to buy a grocery store. To secure repayment, they granted the bank a security interest in the store assets and gave the bank a mortgage on their home. When the business failed, Newmans filed for Chapter 7 bankruptcy protection, scheduling the bank as secured creditor but disputing the bank's security interest in their home. The bank filed a proof of claim but identified only the business assets as security for the claim. The home was set aside to Newmans under the homestead law, and Newmans were granted their bankruptcy court discharge. When a deficiency resulted after sale of the business assets, the bank sought to enforce the mortgage lien against the home. The federal court held that the bank retained its lien on the home although it was not in possession of the property and was not required to file a secured claim in bankruptcy proceedings to retain its secured status. Under the Bankruptcy Act of 1898, applicable to this case, the bankruptcy discharge had no effect on the lien. Newman v. First Sec. Bank of Bozeman, 887 F2d 973 (9th Cir. 1989).

Homestead Declaration Filed After Judgment — Bankruptcy Proceedings: A homestead declaration, even though filed 5 months after judgment, avoids the state District Court judgment lien against real property in a bankruptcy action. AMFAC Mechanical Supply Co. v. Kelly, 39 St. Rep. 135 (U.S. Bankruptcy Ct., D.C. Mont. 1982) (apparently not reported in Federal Supplement).

Liberal Construction:

Homestead exemption laws were enacted for the benefit of the debtor and should be liberally construed in his favor. Oregon Mtg. Co., Ltd. v. Dunbar, 87 M 603, 289 P 559 (1930).

The purpose of the homestead statutes is to carry out the mandate of the Constitution, "that the legislative assembly shall enact liberal homestead and exemptions laws". Mitchell v. McCormick, 22 M 249, 56 P 216 (1899).

Lien on Homesteads: A money judgment cannot be impressed as a lien on a homestead without a showing that the money was borrowed for the purpose of buying the homestead, it not being sufficient that the money did buy the homestead. Mitchell v. McCormick, 22 M 249, 56 P 216 (1899).

Chapter Law Review Articles

Estates, Trusts and Wills—Homestead Allowance and Exempt Property, Jarratt, 43 Mont. L. Rev. 296 (1982).

Montana Homestead Laws; Their Relationship to Bankruptcy, Holter, 15 Mont. L. Rev. 100 (1954).

Part 1

Establishment of the Homestead

Part Case Notes

Defect in Property Description — No Invalidation of Homestead Exemption: Where a Writ of Execution was obtained against the plaintiff's home after she and her husband filed a homestead exemption for the property, the Supreme Court held that the District Court erred, in a declaratory judgment action brought by the plaintiff, in holding that a misdescription of homestead made the exemption invalid. The Supreme Court examined the purpose of including a real property description in a homestead declaration and followed the rationale of prior Montana Supreme Court opinions concerning the use and construction of the homestead declaration and held that a misdescription of "town or townsite" as "first addition" did not void the declaration, especially since the defendant knew where the homestead was located and knew it was the subject of a homestead declaration. Neel v. First Fed. S&L Ass'n, 207 M 376, 675 P2d 96, 41 St. Rep. 18 (1984).

Retroactive Filing of Exemption Held Not to Impair Obligations of Contract: Where the Supreme Court reversed a District Court decision and held that an amendment to the homestead exemption statutes allowing the filing of a homestead declaration after an auditor obtained a judgment applied retroactively to allow exemption of homesteads from judgments obtained prior to the effective date of the amendment, the Supreme Court also held that the retroactive application did not violate the provisions of the state and federal constitutions prohibiting interference with obligations of contracts. Under the rationale of Energy Reserves Group, Inc. v. Kans. Power & Light Co., 459 US 400, 74 L Ed 2d 52, 103 S Ct 697 (1983), the Supreme Court determined that the amendment did not substantially impair the obligations of the contract between the parties because: (1) the area of law of homestead exemptions had been heavily regulated by statute in the past; (2) when the defendant bank made its loan to the plaintiff, it was made subject to further state regulation of homestead exemptions; and (3) the bank should have been aware that the exemption had been increased over the last 50 years, knew that the plaintiff's home would be subject to a homestead exemption, and took its chances that the state might increase the exemption. Moreover, because the loan was not secured by a mortgage on the home, the bank could not have relied on the plaintiff's continued ownership of the home. For these reasons, the bank's reasonable contract expectations were not impaired by the state's amendment of the statute. Neel v. First Fed. S&L Ass'n, 207 M 376, 675 P2d 96, 41 St. Rep. 18 (1984).

70-32-101. Of what homestead consists.

Compiler's Comments

1981 Amendment: Inserted "or mobile home, and all appurtenances" after "dwelling house"; inserted "if any" after "and the land".

Case Notes

Property Selected as Homestead:

Where the owner of two contiguous tracts of agricultural land, upon each of which there was a dwelling house, worked the land as a unit through a tenant, the owner sometimes residing in the one house and sometimes in the other according to whether the one or the other was occupied by the tenant, the fact of such tenancy did not bar the owner of the right to select the lands as a homestead. Oregon Mtg. Co., Ltd. v. Dunbar, 87 M 603, 289 P 559 (1930).

A homestead may be claimed upon an undivided interest in land. Wall v. Duggan, 76 M 239, 245 P 953 (1926).

70-32-103. From whose property homestead may be selected — revocable trust disregarded.

Compiler's Comments

2021 Amendment: Chapter 33 inserted (2) providing that a homestead may be selected from property in a revocable trust; inserted (3) defining revocable and settlor; and made minor changes in style. Amendment effective February 26, 2021.

Applicability: Section 3, Ch. 33, L. 2021, provided: "[This act] applies to homesteads claimed on or after [the effective date of this act]." Effective February 26, 2021.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Deleted "but is head of a family within the meaning of 70-32-102" after "When the claimant is not married".

70-32-104. Limitation on value.

Compiler's Comments

2021 Amendment: Chapter 442 in (1) near beginning substituted "the value provided in subsection (3)" for "$250,000 in value"; and inserted (3) regarding the homestead value limit in 2021 and each calendar year after and requiring administrative rules. Amendment effective May 10, 2021.

2007 Amendment: Chapter 99 in (1) in first sentence increased limit on homestead value from $100,000 to $250,000. Amendment effective March 30, 2007.

2001 Amendment: Chapter 451 in (1) near beginning increased exemption to $100,000 from $60,000; and made minor changes in style. Amendment effective April 30, 2001.

Applicability: Section 2, Ch. 451, L. 2001, provided that [this act] applies to tax year beginning on or after January 1, 2001.

1997 Amendment: Chapter 30 in (1), near beginning, increased homestead exemption value from $40,000 to $60,000; and made minor changes in style.

Applicability: Section 2, Ch. 30, L. 1997, provided: "[Section 1] [70-32-104] applies to judgments obtained and bankruptcy proceedings begun after October 1, 1997."

1987 Amendment: Deleted former (1) that read: "(1) Homesteads may be selected and claimed consisting of:

(a) a quantity of land not exceeding 320 acres used for agricultural purposes and the dwelling house or mobile home thereon and its appurtenances and not included in any municipality;

(b) a quantity of land not in a municipality, not exceeding 1 acre and not used for agricultural or commercial purposes, and the dwelling house or mobile home thereon and its appurtenances; or

(c) a quantity of land within a municipality, not exceeding one-fourth of an acre, and the dwelling house or mobile home thereon and its appurtenances"; in (1) substituted first sentence relating to maximum value of homestead for "Such homestead, in either case, shall not exceed in value the sum of $40,000"; inserted (2) limiting a claimant who owns an undivided interest in real property to an exemption amount proportional to his undivided interest; and made minor change in phraseology.

Saving Clause: Section 13, Ch. 302, L. 1987, provided: "This act does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before the effective date of this act." Effective October 1, 1987.

1981 Amendment: In (1)(a), inserted "or mobile home" and substituted "municipality" for "town plot, city, or village"; inserted (1)(b) allowing selection of nonagricultural or noncommercial homestead land not in a municipality, with dwelling and appurtenances; in (1)(c), inserted "within a municipality" after "a quantity of land", deleted "being within a town plot, city, or village" after "one-fourth of an acre", and inserted "or mobile home" after "dwelling house"; in (2), increased the exemption from $20,000 to $40,000; and made minor changes in phraseology.

Case Notes

Sale of Homestead Property — Creditor Not Entitled to Portion of Proceeds — Creditor's Lien Not Within Enumerated Exemptions — Homestead Exemption Declared After Judgment. J & L Lands, LP v. Nezat, 2022 MT 111, 409 Mont. 45, 511 P.3d 303.

Increased Homestead Exemption Held Retroactive: Where the plaintiff filed a homestead declaration after a deficiency judgment had been obtained against her and then brought a declaratory judgment action to determine the retroactive application of an amendment to the homestead exemption statutes allowing the filing of a declaration after judgment, the Supreme Court held that the District Court erred in ruling that the amendment did not apply retroactively to the plaintiff. The Supreme Court held that the amendment would have a retroactive effect under the rationale of Harlem v. St. Highway Comm'n, 149 M 281, 425 P2d 718 (1967), because it impaired a right (the right of execution acquired under existing law). While there was no express declaration that the amendment apply retroactively to judgments obtained prior to the effective date of the amendment (October 1, 1981), the Supreme Court was guided by the maxim of law requiring a liberal application of the homestead exemption in favor of the homestead claimant and held that the amendment was intended to apply retroactively. Neel v. First Fed. S&L Ass'n, 207 M 376, 675 P2d 96, 41 St. Rep. 18 (1984).

Land Used for Agricultural Purposes: Lands used by a homestead claimant for grazing horses fall within the provision of this section, that homesteads may comprise land "used for agricultural purposes", the fact that the animals were not used for tilling the soil being immaterial. De Fontenay v. Childs, 93 M 480, 19 P2d 650 (1933).

Excessive Area:

The validity of a homestead declaration was not affected by the fact that declarant included 10 acres of farmland in the total of 160 acres selected, which 10 acres he did not own; not having exceeded the limitation prescribed by statute, the declaration was good as to the remaining 150 acres. Oregon Mtg. Co., Ltd. v. Dunbar, 87 M 603, 289 P 559 (1930).

Held, under the above rule, that a declaration of homestead covering "an undivided one-half interest and equity" in a 240-acre agricultural tract was void as an attempt to claim as exempt an area greater in quantity than 160 acres allowed by this section (prior to the 1931 amendment increasing the exemption to 320 acres). McCarthy v. Kelley, 63 M 233, 206 P 782 (1922).

While failure to accurately set forth in a homestead declaration the value of the premises does not invalidate it, failure to strictly comply with the requirement that the area claimed must not exceed the statutory limit renders the declaration void. McCarthy v. Kelley, 63 M 233, 206 P 782 (1922).

Where a declaration of homestead inadvertently included one-sixth more land than allowed, the whole claim was invalid. Yerrick v. Higgins, 22 M 502, 57 P 95 (1899).

Location of Parcels of Land in Homestead: Conceding, without deciding, that where an agricultural homestead consists of more than one parcel of land, the parcels selected must be contiguous (this section being silent on the subject), where two tracts cornered with each other and were used as one farm, they were contiguous, and a declaration of homestead was not open to the objection of noncontiguity. Oregon Mtg. Co., Ltd. v. Dunbar, 87 M 603, 289 P 559 (1930).

Conflicts: There is no conflict between the provisions of this section and 70-32-106. Mitchell v. McCormick, 22 M 249, 56 P 216 (1899).

Necessity for Actual Occupation: Actual occupancy of the land claimed as a homestead is necessary in order to exempt it from sale on execution. Power v. Burd, 18 M 22, 43 P 1094 (1896).

Homestead in Partnership Property:

A partner is entitled, as against the creditors of the firm, to claim and hold a homestead in the partnership estate. Ferguson v. Speith, 13 M 487, 34 P 1020 (1893).

When a creditor of a partnership has attached real estate belonging to such partnership, the members of the firm cannot, by mutual releases, destroy the nature of the property or of the tenancy so that either one of them can annul the lien of attachment by claiming a part of the land as a homestead. Lindley v. Davis, 6 M 453, 13 P 118 (1887), overruled in Lindley v. Davis, 7 M 206, 14 P 717 (1887). See Ferguson v. Speith, 13 M 487, 34 P 1020 (1893).

Homestead in Land Held in Cotenancy: A cotenant is entitled to a homestead in real estate held in cotenancy. Lindley v. Davis, 7 M 206, 14 P 717 (1887), overruling Lindley v. Davis, 6 M 453, 13 P 118 (1887); Ferguson v. Speith, 13 M 487, 34 P 1020 (1893).

70-32-105. Mode of selection — declaration required.

Compiler's Comments

1981 Amendment: Substituted "The person selecting a homestead must" for "In order to select a homestead, the head of a family must".

Case Notes

Selection by Wife: When the husband fails to select a homestead, the wife may select it. Mennell v. Wells, 51 M 141, 149 P 954 (1915).

Alienation Not Abandonment: The alienation of a probate homestead by the widow is not an abandonment. Kerlee v. Smith, 46 M 19, 124 P 777 (1912).

70-32-106. Contents of declaration.

Compiler's Comments

2009 Amendment: Chapter 2 at beginning inserted "Subject to 70-32-216"; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Deleted former (1) relating to head of the family; deleted former (4) relating to an estimate of cash value; combined the section to delete subsections; and made minor changes in phraseology.

Case Notes

Debtor Allowed to Trace Proceeds From Sale of Debtor's Home Even if Homestead Declaration Not Filed Prior to Sale: A homestead declaration is not invalidated simply because the declaration does not reflect the possibility that the debtor may no longer reside on a premises that may be claimed as a homestead. If the homestead is otherwise eligible for exemption under 70-32-216, a debtor may trace proceeds from the sale of the homestead even though a declaration was not filed prior to the sale. In re Snyder, 2006 MT 308, 335 M 11, 149 P3d 26 (2006).

Defect in Property Description — No Invalidation of Homestead Exemption: Where a Writ of Execution was obtained against the plaintiff's home after she and her husband filed a homestead exemption for the property, the Supreme Court held that the District Court erred, in a declaratory judgment action brought by the plaintiff, in holding that a misdescription of homestead made the exemption invalid. The Supreme Court examined the purpose of including a real property description in a homestead declaration and followed the rationale of prior Montana Supreme Court opinions concerning the use and construction of the homestead declaration and held that a misdescription of "town or townsite" as "first addition" did not void the declaration, especially since the defendant knew where the homestead was located and knew it was the subject of a homestead declaration. Neel v. First Fed. S&L Ass'n, 207 M 376, 675 P2d 96, 41 St. Rep. 18 (1984).

Sufficiency of Declaration:

A declaration of homestead stating that the declarant "is the head of a family" was sufficient as against the contention that under this section (prior to 1981 amendment) it was incumbent upon declarant to state the facts showing that she was such head as defined by 70-32-102 (repealed in 1981). Esterly v. Broadway Garage Co., 87 M 64, 285 P 172 (1930).

A declaration of homestead is valid and effective, though the estimated cash value (required by this section prior to the 1981 amendment) is far in excess of the limit fixed in the statute, provided it contains the other statements required; but, as to area, the premises described must fall within the statutory limit, otherwise the declaration is ineffective to exempt the property claimed. Yerrick v. Higgins, 22 M 502, 57 P 95 (1899), modifying Mitchell v. McCormick, 22 M 249, 56 P 216 (1899).

The requirements of the statute by which a homestead exemption right becomes fixed are mandatory and must be complied with. Yerrick v. Higgins, 22 M 502, 57 P 95 (1899).

The declaration of homestead must (prior to the 1981 amendment of this section) have contained the estimated value, not the statutory value. Mitchell v. McCormick, 22 M 249, 56 P 216 (1899).

Under an admission that property in controversy is a homestead and has been set apart as provided by law, it cannot be objected that the homesteader did not allege its statutory value in the declaration of homestead. Mitchell v. McCormick, 22 M 249, 56 P 216 (1899).

Value:

The homestead consists of the real property described in the declaration, although its value exceeds $2,500 (increased by later amendments). Vincent v. Vineyard, 24 M 207, 61 P 131 (1900).

Where a declaration of homestead was filed, the homestead attribute was impressed on all the property described in the declaration, although its value exceeded the sum of $2,500 (increased by later amendments). Vincent v. Vineyard, 24 M 207, 61 P 131 (1900).

Conflicts: There was no conflict between the provisions of this section and 70-32-104. Mitchell v. McCormick, 22 M 249, 56 P 216 (1899).

Part 2
Homestead Exemption — Execution

Part Case Notes

Sale of Homestead Property — Creditor Not Entitled to Portion of Proceeds — Creditor's Lien Not Within Enumerated Exemptions — Homestead Exemption Declared After Judgment. J & L Lands, LP v. Nezat, 2022 MT 111, 409 Mont. 45, 511 P.3d 303.

"Repealed" Homestead Exemption Acknowledgment of Notice Requirement Incorporated Into Trust Indenture Governs Present Action: Plaintiff borrowed money to refinance a loan and delivered to the mortgage company a trust indenture encumbering the property. The mortgage company failed prior to closing to secure the statutorily required acknowledgment of notice from the plaintiff that the property that was otherwise qualified for the homestead exemption was not exempt from execution or forced sale. After the mortgage company assigned the deed of trust, defendant Chase Bank attempted to foreclose through a trustee sale when the plaintiff defaulted on the note, claiming that repeal of the acknowledgment of notice statute resulted in the law no longer being part of the original contract entered into with the mortgage company. On appeal, the Supreme Court affirmed the District Court decision, ruling that the acknowledgment of notice provision was incorporated into the trust indenture and continued to govern the action despite its subsequent repeal. Statutory provisions in existence at the time that a contract is entered into become a part of the contract. Section 70-32-221 (now repealed) was not limited to those transactions between a lender and a borrower in which the homestead declarations were preexisting, but extended to transactions in which the borrower's property qualified for the exemption even if the borrower had not filed the declaration. Because the mortgage company failed to comply with the statute, the deed became void ab initio and unenforceable by Chase Bank, its subsequent holder. Earls v. Chase Bank of Tex., 2002 MT 249, 312 M 147, 59 P3d 364 (2002).

Judgment Lien Against Husband's Property Not Supportive of Execution Against Interests of Second Wife and Children — Property Subject to Prior Judgments Only: Following dissolution of his marriage, Ken Jones purchased real property in 1986. In May 1987, he executed a homestead declaration on the property pursuant to 70-32-105. In July 1987, he conveyed the property by quitclaim deed, with one-half interest to himself and one-half to his second wife and their two daughters in equal shares. In January 1988, his second wife also filed a declaration of homestead. Also in 1988, Ken declared bankruptcy. As a result of that filing, a dissolution decree property settlement provision that he pay certain sums to his first wife Rita was redesignated as a maintenance obligation. Ken appealed that order, and while the appeal was pending, Ken and his second wife conveyed the real property to Poindexter. Rita executed upon one-half of the sale proceeds, which Poindexter had withheld to satisfy Ken's past-due maintenance and support, but $2,113.53 remained due on the underlying judgment. Rita moved for an order of sale of the property so that she could recover the remaining maintenance plus her attorney fees. The District Court determined that Ken's homestead exemption was abandoned when he sold the property to Poindexter and that because Rita's judgment liens had never been removed or extinguished, the liens attached and encumbered the property at the time the homestead exemption was abandoned and thus the property was conveyed to Poindexter subject to the liens and the execution order. The Supreme Court disagreed and reversed because: (1) Rita had already executed on Ken's half of the sale proceeds and further execution would be against the interests of the second wife and daughters and was therefore unsupported; and (2) the maintenance payments became due and judgments were entered after Ken sold the property. Under 70-21-306, a purchaser takes property subject only to prior judgments; therefore, execution was inappropriate on the property for judgments entered after Poindexter's purchase. In re Marriage of Jones v. Poindexter, 253 M 408, 833 P2d 1044, 49 St. Rep. 501 (1992).

Judgment as Judicial Lien Against Homestead Property — Lien Not Discharged in Bankruptcy: In September 1980, respondent obtained and docketed a judgment against appellants. In May 1981, appellants filed a joint declaration of homestead covering their residence. In August 1981, appellants filed a joint Chapter 7 bankruptcy petition. In December 1981, appellants obtained a personal discharge in bankruptcy. In January 1982, respondent obtained a Writ of Execution and notice of sale and levy upon appellants' residence. Appellants then filed suit against respondent, alleging that respondent's judgment had been voided by the discharge in bankruptcy. The Supreme Court ruled that docketing of the judgment under 25-9-301 had created a judicial lien, that because the appellants had not sought avoidance of respondent's lien in the bankruptcy proceedings, the lien survived the discharge in bankruptcy, and that the lien can be enforced under 70-32-203. Reichert v. Koch, 202 M 167, 655 P2d 993, 40 St. Rep. 8 (1983).

70-32-201. Homestead exempt from execution generally.

Case Notes

Sale of Homestead Property — Creditor Not Entitled to Portion of Proceeds — Creditor's Lien Not Within Enumerated Exemptions — Homestead Exemption Declared After Judgment. J & L Lands, LP v. Nezat, 2022 MT 111, 409 Mont. 45, 511 P.3d 303.

Tax Deed Sales — Homestead Exemption Statutes Inapplicable: After the defendant recorded a declaration of homestead for her property, she failed to pay real property taxes on it, and the county sold a tax lien on the property to the plaintiff. After the plaintiff adhered to the statutory requirements for a tax deed, the District Court entered default judgment against the defendant and entered a decree of quiet title. The defendant moved to vacate the judgment, claiming her property was exempt from execution or forced sale under the homestead laws. On appeal, the Supreme Court held that the District Court did not err by granting summary judgment to the plaintiff because the homestead exemption statutes do not apply to property tax lien or property tax deed sales. RN & DB, LLC v. Stewart, 2015 MT 327, 381 Mont. 429, 362 P.3d 61.

Liberal Construction: Homestead exemption laws were enacted for the benefit of the debtor and should be liberally construed in his favor. Oregon Mtg. Co., Ltd. v. Dunbar, 87 M 603, 289 P 559 (1930).

Nonjoinder by Wife: Where a wife does not join in a homestead declaration on property owned by them as tenants in common, the exemption from attachment or execution does not attach to her interest. Isom v. Larson, 78 M 395, 255 P 1049 (1927).

Declaration After Attachment: The filing of a homestead declaration after a Writ of Attachment had been levied upon the land exempts the land from sale on execution obtained after the declaration was filed. Wall v. Duggan, 76 M 239, 245 P 953 (1926).

Attorney General's Opinions

Residential Homestead Property — Lien for Welfare Payments Not Allowed: A county may not execute on a lien for welfare payments against residential property owned by welfare recipients when there has been a homestead declaration recorded on the property. 42 A.G. Op. 112 (1988).

70-32-202. Execution allowed under certain judgments.

Compiler's Comments

1981 Amendment: Deleted former (1) that read "before the declaration of homestead was filed for record and which constitute liens upon the premises"; made minor changes in phraseology.

Case Notes

Sale of Homestead Property — Creditor Not Entitled to Portion of Proceeds — Creditor's Lien Not Within Enumerated Exemptions — Homestead Exemption Declared After Judgment. J & L Lands, LP v. Nezat, 2022 MT 111, 409 Mont. 45, 511 P.3d 303.

Tax Deed Sales — Homestead Exemption Statutes Inapplicable: After the defendant recorded a declaration of homestead for her property, she failed to pay real property taxes on it, and the county sold a tax lien on the property to the plaintiff. After the plaintiff adhered to the statutory requirements for a tax deed, the District Court entered default judgment against the defendant and entered a decree of quiet title. The defendant moved to vacate the judgment, claiming her property was exempt from execution or forced sale under the homestead laws. On appeal, the Supreme Court held that the District Court did not err by granting summary judgment to the plaintiff because the homestead exemption statutes do not apply to property tax lien or property tax deed sales. RN & DB, LLC v. Stewart, 2015 MT 327, 381 Mont. 429, 362 P.3d 61.

Waiving Right to Homestead Exemption: The defendant used his home as security for an appeal in a civil case in lieu of a supersedeas bond. In the court documents relating to the security for the appeal, the defendant specifically agreed to not file for a homestead exemption on the property. Subsequently, the defendant filed for a homestead exemption. The Supreme Court ruled that although no specific provision of the homestead laws would allow the plaintiff to have the homestead exemption invalidated, the defendant had specifically waived any right he had to the homestead exemption. Amundson v. Wortman, 244 M 103, 796 P2d 205, 47 St. Rep. 1427 (1990).

Homestead Subject to Execution — Debt Secured by Vendor's Lien: Plaintiff's property on which a homestead was filed was subject to execution based on a judgment for attorney fees as it was on a debt secured by a vendor's lien. The terms of the contract for deed that was in issue gave the defendants a vendor's lien. The contract provided for attorney fees to the prevailing party in any suit on the contract. The contract was considered as a unit, and therefore the vendor's lien applied to the attorney fees as well as the contract purchase price. Krone v. McCann, 219 M 353, 711 P2d 1367, 43 St. Rep. 5 (1986).

Foreclosure on Mortgage on Residence: In an action by a bank to foreclose a trust indenture secured by the mortgagor's residence and separate commercial property, the sale of the residence before the commercial property was upheld when the debtor did not exercise her right to determine the order of the sale. In a case of first impression, the Supreme Court ruled that it is a proper election for a debtor at the time of sale to demand a specific order in which separate parcels are to be sold. When the debtor acquiesced in the order of the sale, deferring to the discretionary authority of the trustee and allowing her residence to be sold first, the order of the sale will be upheld. First Nat'l Bank v. Powell, 212 M 468, 689 P2d 255, 41 St. Rep. 1870 (1984).

Homestead Declaration Filed After Judgment — Bankruptcy Proceedings: A homestead declaration, even though filed 5 months after judgment, avoids the state District Court judgment lien against real property in a bankruptcy action. AMFAC Mechanical Supply Co. v. Kelly, 39 St. Rep. 135 (U.S. Bankruptcy Ct., D.C. Mont. 1982) (apparently not reported in Federal Supplement).

Mortgage of Homestead:

Where a mortgage was "executed and recorded before the declaration of homestead was filed for record", as required by this section, but had lost its validity by lapse of time as a security and ceased to be a mortgage or lien under 71-1-210, held, that although the note which the mortgage was given to secure was still alive and a money judgment obtained on the note, the homestead was not subject to execution or forced sale to satisfy such judgment because the mortgage was outlawed and the debt therefore not "secured" by it when the judgment on the note was entered. Siuru v. Sell, 108 M 438, 91 P2d 411 (1939).

A homestead can be had in lands belonging to the United States. All the improvements upon the land, including fences, belong to the homestead and cannot be taken by a creditor. Where a mortgage was given upon the homestead property by the husband, who afterward abandoned his wife, and the latter had not joined in the execution of the instrument, she was entitled to be protected in the enjoyment of the mortgaged premises as against the mortgagee seeking to foreclose the mortgage. Watterson v. E. L. Bonner Co., 19 M 554, 48 P 1108 (1897).

A mortgage of a homestead was void and not subject to foreclosure, unless executed by the husband and wife, and the acknowledgment by the wife was an essential part of the execution. The abandonment of the homestead did not make valid a past mortgage which was void ab initio. Am. S&L v. Burghardt, 19 M 323, 48 P 391 (1897).

Loans for Purchase of Homestead: In an action to quiet title to land claimed by plaintiff as a homestead, defendant judgment creditor asserted that he had advanced the money for the purchase of the property and that under the doctrine of subrogation he had a vendor's lien upon the premises which entitled him to subject the land to sale on execution. However, in the absence of evidence that the money was loaned for the purpose of purchasing the homestead, the claim of vendor's lien may not be upheld, even though the money was actually used for that purpose. De Fontenay v. Childs, 93 M 480, 19 P2d 650 (1933).

Waiver of Exemptions: While advance general waivers of the exemption laws are void as contravening public policy, where a homestead claimant mortgages it with full knowledge of his rights and of the consequences of a relinquishment of his rights to withhold the specific property from forced sale, he waives his exemption if the statutory restrictions in this section and 70-32-301 are complied with. U.S. Bldg. & Loan Ass'n v. Stevens, 93 M 11, 17 P2d 62 (1932).

Filing of Declaration After Levy of Attachment:

The exemption statute which, by failing to include a homestead subject to attachment within the exceptions to the general rule that a homestead is exempt from execution, in effect declares that the lien of an attachment does not operate to defeat a homestead declaration, enters into and constitutes a part of a contract of sale of goods; therefore, to uphold a homestead declaration filed after the seller had caused an attachment to be levied on the land sought to be homesteaded by the buyer would not destroy a vested right secured to him by the lien. Wall v. Duggan, 76 M 239, 245 P 953 (1926).

The filing of a homestead declaration after a Writ of Attachment had been levied upon the land exempts the land from sale on execution obtained after the declaration was filed. Wall v. Duggan, 76 M 239, 245 P 953 (1926).

Liens Against Homesteads:

A judgment docketed in 1892 was not a lien on the homestead subject to execution under this section, and a mortgage of the homestead given in 1895 took precedence over such judgment. Vincent v. Vineyard, 24 M 207, 61 P 131 (1900).

A homestead is not exempt from foreclosure and sale to satisfy a lien for materials used by the owner in the improvement thereof, such lien being a "mechanics' lien" within the meaning of a statute providing that the exemption of homesteads from forced sale shall not affect any laborers' or mechanics' lien. (Mechanics' lien provisions repealed, 1987—see construction liens, Title 71, ch. 3, part 5.) Bonner v. Minnier, 13 M 269, 34 P 30 (1893).

A homestead is subject to the lien of a mechanic for material, as well as labor, where the material is the object of the labor for which he claims his lien. (Mechanics' lien provisions repealed, 1987—see construction liens, Title 71, ch. 3, part 5.) Merrigan v. English, 9 M 113, 22 P 454 (1889). See Bonner v. Minnier, 13 M 269, 34 P 30 (1893).

Attorney General's Opinions

Residential Homestead Property — Lien for Welfare Payments Not Allowed: A county may not execute on a lien for welfare payments against residential property owned by welfare recipients when there has been a homestead declaration recorded on the property. 42 A.G. Op. 112 (1988).

70-32-203. Execution under judgments not enumerated — application required.

Case Notes

Enforcement of Judicial Lien Against Homestead Property: In September 1980, respondent obtained and docketed a judgment against appellants. In May 1981, appellants filed a joint declaration of homestead covering their residence. In August 1981, appellants filed a joint Chapter 7 bankruptcy petition. In December 1981, appellants obtained a personal discharge in bankruptcy. In January 1982, respondent obtained a Writ of Execution and notice of sale and levy upon appellants' residence. Appellants then filed suit against respondent, alleging that respondent's judgment had been voided by the discharge in bankruptcy. The Supreme Court ruled that docketing of the judgment under 25-9-301 had created a judicial lien, that because the appellants had not sought avoidance of respondent's lien in the bankruptcy proceedings, the lien survived the discharge in bankruptcy, and that the lien can be enforced under 70-32-203. Reichert v. Koch, 202 M 167, 655 P2d 993, 40 St. Rep. 8 (1983).

Execution Against Excess Value: Judgments not constituting liens cannot be enforced under this section, but after notice to the claimant and a report of the appraisers that the value of the homestead exceeds $2,000 and that the property can be divided without material injury, execution can be enforced against such excess; if, however, the property cannot be divided, a sale will be ordered and the execution paid from the excess above that amount. Vincent v. Vineyard, 24 M 207, 61 P 131 (1900).

70-32-206. Appointment of appraisers — oath.

Law Review Articles

Freeholder Requirements in the Montana Code Annotated: Unconstitutional Restrictions on the Right of Political Participation, Hammond, 41 Mont. L. Rev. 97 (1980).

70-32-209. Order dividing land — execution against remainder over exemption.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-32-210. Sale when land cannot be divided.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

70-32-213. Sale proceeds equal to exemption protected.

Compiler's Comments

1987 Amendment: In middle of section increased time period from 6 months to 18 months.

Saving Clause: Section 13, Ch. 302, L. 1987, provided: "This act does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before the effective date of this act." Effective October 1, 1987.

70-32-214. Compensation of appraisers.

Compiler's Comments

1987 Amendment: After "fix" substituted "a reasonable amount as" for "the", after "appraisers" deleted "not to exceed $3 per day each for the time actually engaged", and made minor changes in phraseology.

Saving Clause: Section 13, Ch. 302, L. 1987, provided: "This act does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before the effective date of this act." Effective October 1, 1987.

70-32-216. Tracing homestead proceeds.

Compiler's Comments

2001 Amendment: Chapter 125 in (1) inserted references to Title 60, chapter 4, and Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

Saving Clause: Section 13, Ch. 302, L. 1987, provided: "This act does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before the effective date of this act." Effective October 1, 1987.

Case Notes

Sale of Homestead Property — Creditor Not Entitled to Portion of Proceeds — Creditor's Lien Not Within Enumerated Exemptions — Homestead Exemption Declared After Judgment. J & L Lands, LP v. Nezat, 2022 MT 111, 409 Mont. 45, 511 P.3d 303.

Property Not Eligible for Homestead Protection When Derived From Fraudulent Transaction — Defendant Never Owned Property: The District Court correctly concluded that the defendant did not qualify for a homestead exemption. Although the homestead exemption may protect property from execution or forced sale under the Uniform Fraudulent Transfer Act, the property has to qualify as a homestead in the first place. The defendant's title to the property at issue derived from a fraudulent transaction. Because that transaction was declared void, the defendant never owned the property and could not claim the property as a homestead. 623 Partners, LLC v. Hunter, 2016 MT 336, 386 Mont. 24, 385 P.3d 963. See also In re Snyder, 2006 MT 308, 335 Mont. 11, 149 P.3d 26, and McCone County Fed. Credit Union v. Gribble, 2009 MT 290, 352 Mont. 254, 216 P.3d 206.

Homestead Property Not Asset Subject to Uniform Fraudulent Transfer Act: Gribble took out at least four loans with the credit union and defaulted on most if not all of them. The loans were secured with large equipment, not real property. The credit union filed a complaint seeking repayment and the right to foreclose on the collateral. Gribble transferred his residential real property to another party by quitclaim deed 11 days later. The credit union asked the District Court to set aside the transfer under the Uniform Fraudulent Transfer Act (UFTA), but instead the court granted summary judgment to defendant, and the credit union appealed. The Supreme Court held that because the real property was Gribble's residence, it qualified as a homestead that would generally be exempt under nonbankruptcy law and thus was not an asset for purposes of the UFTA. The District Court was affirmed. McCone County Fed. Credit Union v. Gribble, 2009 MT 290, 352 M 254, 216 P3d 206 (2009).

Debtor Allowed to Trace Proceeds From Sale of Debtor's Home Even if Homestead Declaration Not Filed Prior to Sale: A homestead declaration is not invalidated simply because the declaration does not reflect the possibility that the debtor may no longer reside on a premises that may be claimed as a homestead. If the homestead is otherwise eligible for exemption under this section, a debtor may trace proceeds from the sale of the homestead even though a declaration was not filed prior to the sale. In re Snyder, 2006 MT 308, 335 M 11, 149 P3d 26 (2006).

Part 3
Conveyance, Encumbrance, and Abandonment of Homestead

70-32-301. How conveyed or encumbered — instrument.

Case Notes

Mortgage of Homestead: While courts have held that advance general waivers in executory contracts of the exemption laws are void as contravening public policy, where a homestead claimant, with full knowledge of his rights in the premises and of the consequences of a relinquishment of his rights to withhold the specific property from forced sale, mortgages it, he waives his exemption if the statutory restrictions found in 70-32-202 and this section are complied with. U.S. Bldg. & Loan Ass'n v. Stevens, 93 M 11, 17 P2d 62 (1932).

70-32-302. How abandoned — declaration.

Case Notes

Alienation of Homestead: In the absence of legislation to that effect, alienation of a homestead granted to a surviving wife does not constitute an abandonment of it. Kerlee v. Smith, 46 M 19, 124 P 777 (1912).

CHAPTER 33
MONTANA RESIDENTIAL MOBILE HOME LOT RENTAL ACT

Chapter Compiler's Comments

Effective Date: This chapter is effective October 1, 2007.

Chapter Case Notes

Fire Protection Services Not Required of Mobile Home Court Owners: Appellant claimed that the owners of a mobile home court violated The Montana Residential Landlord and Tenant Act of 1977 (similar to The Montana Residential Mobile Home Lot Rental Act) by failing to provide fire protection services. While 70-24-303 requires all common areas to be kept in a clean and safe condition and 70-24-105 extends the principles of law and equity relating to safety and fire prevention to the Act, absent the existence between the parties of any contractual obligation to provide fire protection services and absent proof of a statutory or common-law duty to provide those services, the complaint was properly dismissed. Rookhuizen v. Blain's Mobile Home Court, Inc., 236 M 7, 767 P2d 1331, 46 St. Rep. 139 (1989).

Part 1
General Provisions

70-33-102. Purpose — liberal construction.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 3, Ch. 572, L. 2023. Amendment effective May 18, 2023.

70-33-103. Definitions.

Compiler's Comments

2021 Amendment: Chapter 536 inserted definitions of abandon, actual and reasonable cost, and unauthorized person or trespasser; in definition of landlord in (a) after "owner" deleted "lessor, or sublessor", inserted (b) concerning a person who has written authorization from the owner to act as the owner's agent or assignee for purposes related to the premises or the rental agreement, and inserted (d) concerning a lessor who has written authorization from the owner of the premises to sublease the premises; in definition of rent at end substituted "including rent, late fees, or other charges as agreed on in the rental agreement, except money paid as a security deposit" for "under a rental agreement"; and made minor changes in style. Amendment effective May 14, 2021.

2015 Amendment: Chapter 454 in definition of court inserted "small claims court"; in definition of tenant inserted (b) expanding definition to include person with sublease agreement under certain circumstances; and made minor changes in style. Amendment effective October 1, 2015.

Saving Clause: Section 5, Ch. 454, L. 2015, was a saving clause.

70-33-108. Notice of no contact.

Compiler's Comments

Effective Date: This section is effective October 1, 2015.

70-33-109. Application of security deposit laws.

Compiler's Comments

Effective Date: This section is effective October 1, 2021.

70-33-110. Emotional support animals — documentation.

Compiler's Comments

Effective Date: This section is effective October 1, 2023.

Part 2
Rental Agreements

70-33-201. Rental agreements.

Compiler's Comments

2021 Amendment: Chapter 536 inserted (2)(f) concerning damages available if either party terminates the rental agreement without cause prior to the expiration date of the lease term; and made minor changes in style. Amendment effective May 14, 2021.

2017 Amendment: Chapter 155 in (2)(a) before "rental value" deleted "fair"; and in (2)(b) inserted "or using electronic funds transfer to an account designated for the payment of rent by the landlord". Amendment effective April 4, 2017.

Applicability: Section 5, Ch. 155, L. 2017, provided: "[This act] applies to rental agreements entered into, extended, or renewed on or after [the effective date of this act]." Effective April 4, 2017.

70-33-203. Effect of unsigned or undelivered rental agreement.

Compiler's Comments

2017 Amendment: Chapter 220 in (1) substituted "agreement that has already been signed by the tenant and delivered to the landlord" for "agreement signed and delivered to the landlord by the tenant" and at end inserted "to the tenant"; in (2) substituted "deliver to the landlord a written rental agreement that has already been signed by the landlord and delivered to the tenant" for "deliver a written rental agreement signed and delivered to the tenant by the landlord", after "without reservation" inserted "by the tenant", and at end inserted "to the landlord"; and made minor changes in style. Amendment effective April 20, 2017.

Applicability: Section 4, Ch. 220, L. 2017, provided: "[This act] applies to rental agreements entered into, extended, or renewed on or after [the effective date of this act]." Effective April 20, 2017.

Part 3
Rights and Duties of Parties

70-33-303. Landlord to maintain premises — agreement that tenant perform duties.

Compiler's Comments

2021 Amendment: Chapter 536 in (1)(a) near middle substituted "applicable building, housing, and health department codes" for "applicable building and housing codes" and at end inserted "at the time of original construction"; and in (1)(b) at end inserted "except when it is the tenant's responsibility to maintain the dwelling unit pursuant to 70-33-321". Amendment effective May 14, 2021.

70-33-312. Access to premises by landlord.

Compiler's Comments

2021 Amendment: Chapter 536 inserted (3)(b) concerning the effect of a landlord conspicuously posting the landlord's intent to enter on the main entry door of the dwelling unit for the purposes of notice; and made minor changes in style. Amendment effective May 14, 2021.

70-33-314. Resident associations — meetings.

Compiler's Comments

2009 Amendment: Chapter 211 in (1) inserted last sentence prohibiting a landlord's interference; inserted (2)(b) regarding future plans for a mobile home park; and made minor changes in style. Amendment effective April 15, 2009.

70-33-321. Tenant to maintain lot.

Compiler's Comments

2021 Amendment: Chapter 536 inserted (4)(d) concerning the unlawful possession of a firearm, explosive, or hazardous or toxic substance; inserted (4)(e) concerning any other unlawful activity; and made minor changes in style. Amendment effective May 14, 2021.

Part 4
Remedies

70-33-401. Administration of remedies — enforcement — agreement.

Compiler's Comments

2021 Amendment: Chapter 536 in (1) at end inserted "The aggrieved party may include a reasonable charge for the party's labor"; and in (2) at end inserted "Nothing in this chapter prohibits the assignment of a right or the claim of a right by either landlord or tenant. The landlord's or tenant's defenses and obligations may not be affected by an assignment". Amendment effective May 14, 2021.

Case Notes

Equitable Relief Against Continuing Trespasser: A daughter previously living on her mother's property rent-free and with express permission began interfering with her mother's use and enjoyment of the property. The mother filed a complaint for possession or trespass. In District Court, the jury found the daughter was trespassing but awarded no damages, and the judge entered an order of possession for the mother. The Supreme Court affirmed the District Court's action, explaining that on a jury's finding of trespass, it is within the discretion of the District Court to afford equitable relief to a party whose exclusive possession has been divested by a continuing trespasser, and that a grant of possession is available as an equitable remedy to afford complete relief on a common-law trespass claim when legal relief is inadequate. Renz v. Everett-Martin, 2019 MT 251, 397 Mont. 398, 450 P.3d 892.

70-33-403. Unconscionability — court discretion.

Compiler's Comments

2021 Amendment: Chapter 236 in (1) at beginning inserted exception clause; inserted (2) regarding exceptions to findings of unconscionability; and made minor changes in style. Amendment effective April 15, 2021.

Saving Clause: Section 7, Ch. 236, L. 2021, was a saving clause.

70-33-407. Fire or casualty damage — rights and obligations of tenant.

Case Notes

Fire Protection Services Not Required of Mobile Home Court Owners: Appellant claimed that the owners of a mobile home court violated The Montana Residential Landlord and Tenant Act of 1977 (similar to The Montana Residential Mobile Home Lot Rental Act) by failing to provide fire protection services. While 70-24-303 requires all common areas to be kept in a clean and safe condition and 70-24-105 extends the principles of law and equity relating to safety and fire prevention to the Act, absent the existence between the parties of any contractual obligation to provide fire protection services and absent proof of a statutory or common-law duty to provide those services, the complaint was properly dismissed. Rookhuizen v. Blain's Mobile Home Court, Inc., 236 M 7, 767 P2d 1331, 46 St. Rep. 139 (1989).

70-33-422. Noncompliance of tenant generally — landlord's right of termination — damages — injunction.

Compiler's Comments

2021 Amendment: Chapter 236 in (1) and (2) at end inserted last sentence requiring the tenant to vacate premises when the rental agreement is terminated. Amendment effective April 15, 2021.

Saving Clause: Section 7, Ch. 236, L. 2021, was a saving clause.

70-33-423. Waiver of landlord's right to termination.

Compiler's Comments

2021 Amendment: Chapter 236 in (3) at end inserted "including rent due". Amendment effective April 15, 2021.

Saving Clause: Section 7, Ch. 236, L. 2021, was a saving clause.

70-33-424. Refusal of access — landlord's remedies.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 4, Ch. 715, L. 2023. Amendment effective May 22, 2023.

70-33-427. Landlord's remedies after termination — action for possession.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 5, Ch. 715, L. 2023. Amendment effective May 22, 2023.

2015 Amendment: Chapter 454 in (4) inserted last sentence concerning writ of possession. Amendment effective October 1, 2015.

Saving Clause: Section 5, Ch. 454, L. 2015, was a saving clause.

70-33-429. Holdover remedies — consent to continued occupancy.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 6, Ch. 715, L. 2023. Amendment effective May 22, 2023.

70-33-430. Disposition of abandoned personal property.

Compiler's Comments

2021 Amendment: Chapter 536 inserted (1)(a) concerning disposal of personal property if a tenancy terminates by court order; in (1)(b) in first sentence after "in any manner" substituted "other than by" for "except by" and after "if at least" substituted "48 hours" for "5 days"; inserted (7) concerning requirements for a public or private sale authorized by this section; inserted (9) concerning the requirement for a landlord to ensure that the terms of this section are included in plain language as a notification when a lease or rental agreement is terminated; and made minor changes in style. Amendment effective May 14, 2021.

70-33-433. Grounds for termination of rental agreement.

Compiler's Comments

2021 Amendment: Chapter 536 in (1)(f) and (1)(g) substituted "6-month period" for "12-month period"; and in (1)(i) at end substituted "7 days" for "30 days". Amendment effective May 14, 2021.

70-33-424. Refusal of access — landlord's remedies.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 4, Ch. 715, L. 2023. Amendment effective May 22, 2023.

70-33-427. Landlord's remedies after termination — action for possession.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 5, Ch. 715, L. 2023. Amendment effective May 22, 2023.

2015 Amendment: Chapter 154 in (4) inserted last sentence concerning writ of possession. Amendment effective October 1, 2015.

Saving Clause: Section 5, Ch. 154, L. 2015, was a saving clause.

70-33-429. Holdover remedies — consent to continued occupancy.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 6, Ch. 715, L. 2023. Amendment effective May 22, 2023.

70-33-430. Disposition of abandoned personal property.

Compiler's Comments

2021 Amendment: Chapter 586 inserted (1)(a) concerning disposal of personal property if a tenancy terminates by court order; in (1)(b) in first sentence after "in any manner" substituted "other than by" for "except by" and after "if at least" substituted "48 hours" for "5 days"; inserted (7) concerning requirements for a public or private sale authorized by this section; inserted (9) concerning the requirement for a landlord to ensure that the terms of this section are included in plain language as a notification when a lease or rental agreement is terminated; and made minor changes in style. Amendment effective May 14, 2021.

70-33-433. Grounds for termination of rental agreement.

Compiler's Comments

2021 Amendment: Chapter 586 in (1)(f) and (1)(g) substituted "6-month period" for "12-month period"; and in (1)(i) at end substituted "7 days" for "30 days". Amendment effective May 14, 2021.

TITLE 71
MORTGAGES, PLEDGES, AND LIENS

CHAPTER 1
MORTGAGES

Chapter Case Notes

Fruitless Usurious Demand — Mortgage Agreement Not Usurious: A fruitless demand for unlawful usurious interest, made after default on a mortgage, does not make the mortgage agreement usurious when the mortgage agreement properly interpreted does not require a usurious result. Hanson v. Bonner, 202 M 505, 661 P2d 421, 40 St. Rep. 245 (1983).

Mortgage as Lien, Not Conveyance: Montana is a "lien" state, and a mortgage of itself does not convey any title in mortgaged property to the mortgagee. Hanson v. Bonner, 202 M 505, 661 P2d 421, 40 St. Rep. 245 (1983).

Chapter Law Review Articles

The Default Clause in the Installment Land Contract, Isham, 42 Mont. L. Rev. 110 (1981).

Part 1
General Provisions

Part Law Review Articles

The Default Clause in the Installment Land Contract, Isham, 42 Mont. L. Rev. 110 (1981).

71-1-101. Definition.

Case Notes

Contract for Deed Not Same Legal Concept as Mortgage: Although certain similarities exist between the two, a contract for deed is not the same legal concept as a mortgage under Montana law. Therefore, a contract for deed need not be treated as a mortgage for purposes of foreclosure. Aveco Properties, Inc. v. Nicholson, 229 M 417, 747 P2d 1358, 44 St. Rep. 2098 (1987). See also Burgess v. Shiplet, 230 M 387, 750 P2d 460, 45 St. Rep. 293 (1988).

Time of Mortgage Payments — Where Contract Silent as to Time of Day: According to the terms of the mortgage, monthly payments were to be made no later than 30 days after due date or mortgagor could be declared in default. Mortgagor deposited payment in escrow account after 3 p.m. on the 30th day, a Friday. Because of the time of the deposit, the escrow account was not credited until the 33rd day, the following Monday. The District Court ruled that the mortgage contract had not been breached since contract provided simply for deposit by 30th day and did not require that deposit be made by a particular time of day. The Supreme Court affirmed, ruling that for the District Court to have found in mortgagee's favor, it would have had to rewrite the contract, and this would have been improper. First Bank-Southside Missoula v. Sadler, 199 M 323, 649 P2d 454, 39 St. Rep. 1428 (1982).

Insufficient Description of Property Hypothecated: The description of personal property covered by a chattel mortgage, to be good as against subsequent purchasers or encumbrancers, must be sufficiently definite that a third person may, from the language of the mortgage and the information gained from the inquiry suggested by it, determine with certainty what property was intended to be included. A description by number of species or class, such as "873 head of sheep" in a certain county, owned by the mortgagor but not stating in whose possession the unmarked animals were, was insufficient, and title on foreclosure sale was a nullity as against a subsequent encumbrancer. Walker v. Johnson, 108 M 398, 91 P2d 406 (1939).

Lien Character of Mortgages:

In this state a mortgage does not pass title but creates a lien upon the property as security for the payment of a debt or the performance of an act. Thus, whenever a statute refers to a "lien" upon either real or personal property, that reference must be construed to include a mortgage, unless the contrary intention is expressed. Barth v. Ely, 85 M 310, 278 P 1002 (1929). See also Jones v. Hall, 90 M 69, 300 P 232 (1931).

Under the statutes of the territory and state, a mortgage has never possessed any of the characteristics of a sale; it has been considered a mere lien, fixed on property by contract of the parties, to secure the payment of a particular obligation or the performance of a particular act. Davidson v. Wampler, 29 M 61, 74 P 82 (1903).

Farm Lease Clause: A contract for the cultivation of farm land on shares by the terms of which the landowner reserves title in himself to the lessee's share as security for advances made by him to the lessee is in legal effect a chattel mortgage. As such, it is subject to the provisions of the chattel mortgage statute with reference to execution and filing. Crone v. Occident Elev. Co., 70 M 211, 224 P 659 (1924).

Retention of Title by Seller — No Lien for Attachment: Where property is sold under a contract providing that title shall remain in the seller until the purchase price is paid, the seller does not have a mortgage or lien upon the property within the attachment statute. State ex rel. Malin-Yates Co. v. Justice of Peace Court, 51 M 133, 149 P 709 (1915).

Assignment of Mortgage With Debt: A mortgage is a conveyance within the meaning of the recording laws of this state, though it is a conveyance of a chattel interest only. Title to it passes to an assignee by assignment of the debt or obligation secured by it, because the mortgage is but an incident, a security, and has no assignable quality independent of the debt. Further, assignment of a mortgage without the underlying obligation is a nullity. Cornish v. Woolverton, 32 M 456, 81 P 4 (1905).

Mortgage Not to Create Estate in Real Property: A mortgage itself does not create or alienate an estate in real property, but is a mere security for the payment of a debt or the discharge of an obligation. A mortgage is a conveyance of only a chattel interest. Cornish v. Woolverton, 32 M 456, 81 P 4 (1905); Mueller v. Renkes, 31 M 100, 77 P 512 (1904); Swain v. McMillan, 30 M 433, 76 P 943 (1904); Wilson v. Pickering, 28 M 435, 72 P 821 (1903); Hull v. Diehl, 21 M 71, 52 P 782 (1898); State ex rel. Cruse Sav. Bank v. Gilliam, 18 M 94, 44 P 394, 45 P 661 (1896); Holland v. Bd. of Comm'rs, 15 M 460, 39 P 575 (1895); Gallatin County v. Beattie, 3 M 173 (1878).

71-1-103. Mortgage a special lien — on what a lien.

Case Notes

Mortgagor Contracts That Property May Be Sold to Satisfy Debt: A mortgagor contracts, either expressly or by implication, that the mortgaged property may be sold to satisfy his debt. Thomas v. Thomas, 44 M 102, 119 P 283 (1911).

Applies to Both Real and Chattel Mortgages: This section applies to both real estate and chattel mortgages. Demers v. Graham, 36 M 402, 93 P 268 (1907). See also State ex rel. Cont. Supply Co. v. Tullock, 68 M 268, 217 P 348 (1923).

Increase: A chattel mortgage upon cows in which no mention was made of their increase did not cover their calves that were in gestation at the time of the execution of the mortgage but that were born prior to foreclosure. Demers v. Graham, 36 M 402, 93 P 268 (1907).

71-1-104. Mortgage not a personal obligation.

Case Notes

Deficiency Judgment: In this case the note was made a part of the mortgage, so the mortgagors expressly agreed to pay the mortgage debt. But in any event, this section must be read in connection with 71-1-222, which expressly authorizes a deficiency judgment in the event the proceeds from the sale of the mortgaged property are insufficient to pay the debts and costs. In other words, although the mortgagor does not assume a primary personal liability, he is held to a contingent liability, the contingency being the failure of the mortgaged property to sell for a sum sufficient to discharge the debt and costs. Kinyon Inv. Co. v. Belmont St. Bank, 69 M 282, 221 P 286 (1923).

71-1-105. Mortgagee not entitled to possession.

Case Notes

Action for Possession: A chattel mortgagee, who is entitled to the immediate possession of personal property under the terms of the mortgage when he considers it essential to the security of the payment of the debt secured, has a sufficient interest or right to maintain an action in conversion or for claim and delivery and will not be considered a trespasser, wrongdoer, or stranger as against the one in possession of the property. Walker v. Johnson, 108 M 398, 91 P2d 406 (1939).

Possession by Third Person: Under a clause in a chattel mortgage entitling the mortgagee to take immediate possession of the chattels mortgaged if such action is essential to the security of the payment of the debt secured, the fact that the mortgagee finds the property in the possession of a third person under a personal claim of right is alone sufficient to warrant taking immediate possession. Walker v. Johnson, 108 M 398, 91 P2d 406 (1939).

Contract for Possession Upon Condition:

A mortgagor of real property, by the terms of the mortgage, may grant to the mortgagee the right to possession upon the happening of a contingency, and after possession has been so obtained it may be held until the debt is paid. U.S. Bldg. & Loan Ass'n v. Stevens, 93 M 11, 17 P2d 62 (1932).

Under this section, the parties to a real estate mortgage may incorporate therein a stipulation for immediate possession by the mortgagee in case of default by the mortgagor, notwithstanding that 71-1-229 provides that the purchaser at a foreclosure sale is not entitled to possession during the period of redemption if the mortgagor personally occupies the premises as a home for himself and family. Kelly v. Roberts, 93 M 106, 17 P2d 65 (1932).

Under the rules for the interpretation of contracts, when the parties to a real estate mortgage had contracted that upon the mortgagor's default the mortgagee could at his option declare the entire indebtedness due and payable without notice, foreclose by judicial proceedings, or sell the premises according to law, and should be entitled to immediate possession and the receipt of the rents, issues, and profits thereof, the mortgagee was entitled to possession upon condition broken without foreclosure and sale. Union Cent. Life Ins. Co. v. Jensen, 74 M 70, 237 P 518 (1925).

Possession in Absence of Agreement:

In the absence of an express stipulation in a farm mortgage entitling the mortgagee to the possession of the mortgaged property, either before or after the mortgagor's default, the mortgagee was not entitled to possession until sale to him on foreclosure proceedings. Neither was the mortgagee entitled to rents prior to the foreclosure since a notice to the mortgagor's tenant that the mortgagee claimed the rent was ineffectual as a means of acquiring an interest in the crop. Long v. W. P. Devereux Co., 87 M 198, 286 P 402 (1930).

In the absence of an express agreement between the parties to a mortgage that upon default on the part of the mortgagor the mortgagee shall have the right to enter and take possession, such right does not exist. Sharp Bros., Inc. v. Bartlett, 76 M 415, 248 P 199 (1926).

Intervention in Ejectment: In an action for ejectment, the mortgagee may intervene if he can show either an interest in the subject matter of the action or an interest in the success of either of the parties. Stack v. Coyle, 59 M 444, 197 P 747 (1921).

71-1-106. Waste prohibited.

Case Notes

Mortgagee's Right to Assert, on Mortgagee's Behalf, Mortgagor's Contract and Tort Claims for Damage to Property: The mortgagee alleged that the engineering firm hired by the mortgagor knowingly laid improper pipe in the land, resulting in the state's disapproval of the pipe. The mortgagee could not sue the engineering firm for breach of contract and for breach of professional duty owed to the mortgagor under the theory that the mortgagee was a direct creditor of the mortgagor and was entitled to execute on any asset of the mortgagor and that the contract and breach of professional duty claims were assets. The mortgagee would have to be a judgment creditor of the mortgagor with a claim against the mortgagor that had been reduced to judgment before the mortgagee could sue the engineering firm for breach of the firm's contract with and professional duty to the mortgagor. Turner v. Kerin & Associates, 283 M 117, 938 P2d 1368, 54 St. Rep. 522 (1997).

Mortgagee's Right to Sue Mortgagor and Third Party for Impairment of Security Interest — Suit by Mortgagee Acquiring Security Interest After Damage by Third Party: A mortgagee can sue a mortgagor for actions or inactions that impair the mortgagee's security interest. The mortgagee can also sue a third party for damage to the property that impairs the security interest. In this case, a mortgagee who acquired mortgages from a prior mortgagee could sue a third party in tort for impairment of the security interest caused by damage to the property that occurred while the prior mortgagee held the mortgages. Allowable damages are the extent of the outstanding debt. The third party was an engineering firm alleged to have knowingly laid improper pipe in a subdivision. The state refused to approve the pipe. Turner v. Kerin & Associates, 283 M 117, 938 P2d 1368, 54 St. Rep. 522 (1997).

Lien Follows Removed Property: When a real estate mortgage is given, it constitutes a pledge of all that then is part of the realty. Thus, while the mortgagor has the right to use the premises, he has no right to remove a building therefrom or do any other act which impairs the mortgagee's security. If the mortgagor removes a building from the property without the knowledge or consent of the mortgagee, the mortgage lien on that building is not extinguished. Mills v. Pope, 90 M 569, 4 P2d 485 (1931).

71-1-107. Transfers of interest.

Case Notes

Transaction Neither Sale nor Mortgage — No Security Interest Created: Plaintiff purchased a ranch on behalf of defendant with defendant's money but put title to the ranch in plaintiff's name and operated the ranch for defendant. The parties subsequently executed documents to settle the dispute between them concerning the ranch property, including plaintiff's quitclaim deed of the property to defendant. Since the transaction did not involve either a sale or mortgage of the property, plaintiff did not hold a security interest in the ranch. O'Connor v. Lewis, 238 M 270, 776 P2d 1228, 46 St. Rep. 1260 (1989).

Mortgage Terminated by Quitclaim Deed — Foreclosure Procedure Not Required: Plaintiff, d/b/a Starhaven Ranch, Ltd., purchased a ranch on a contract for deed from Crofts. Crofts had purchased the land on a contract basis from Clarnos. Crofts assigned their purchasers' interest in the contract to defendant. Crofts defaulted on a contract provision requiring them to obtain grazing permits and on their contract with Clarnos. Starhaven fell in default on its final downpayment. Crofts fell in default on the loan with defendant. The bank recorded the quitclaim deed from Crofts. The bank asserted it succeeded to the rights of the Croft-Starhaven contract and took action against Starhaven. Crofts disappeared. Starhaven made payment on the Clarno-Croft contract to prevent Clarnos from declaring a forfeiture. The bank asserted absolute ownership rights against Starhaven. The bank obtained the quitclaim deed Starhaven had executed to Crofts and recorded it. The bank then sent Starhaven a notice to vacate, triggering the proceedings. The trial court held the bank had succeeded to all Crofts' interest in the property when it obtained and recorded the assignment. The court then concluded the bank could assert the default provisions of the Croft-Starhaven contract and was entitled to forfeiture. On appeal, the Supreme Court held that the assignment as collateral for a loan created a security interest only—in this case a mortgage—and mortgage foreclosure proceedings were the proper method for the bank to pursue its remedies. On rehearing, the court upheld the trial court, finding that the mortgagors waived their right to foreclosure proceedings by filing a quitclaim deed to defendant bank. Waiver of the right to foreclosure includes consent to the possession of the mortgagee and the waiver of the equity of redemption. The bank was entitled under the Croft-Starhaven contract to require Starhaven's forfeiture upon defaulting on the contract payments, and Starhaven was not entitled to foreclosure proceedings. Erickson v. First Nat'l Bank, 215 M 350, 697 P2d 1332, 42 St. Rep. 423 (1985).

Mortgage Created by Promissory Note, Assignment of Contract for Deed, and Quitclaim Deed: When a debt is shown to exist between the parties, a deed absolute on its face, delivered in connection with the indebtedness, will be construed as a mortgage when it is shown that the instrument was intended to secure the indebtedness. A mortgage was created when borrowers executed and delivered to lenders a promissory note, an assignment of a contract for deed as collateral, and a quitclaim deed to the real property that was the subject of the contract for deed. Hanson v. Bonner, 202 M 505, 661 P2d 421, 40 St. Rep. 245 (1983).

Resulting Trust as Equitable Mortgage: When a conveyance is executed from the vendor direct to the lender to secure a loan of the purchase money made by him to the purchaser, the legal title is held not only for the lender as security but also in trust for the borrower for the purpose of finally having title go to him. Therefore, the transaction between the parties constitutes a resulting trust in the form of an equitable mortgage. Bermes v. Sylling, 179 M 448, 587 P2d 377 (1978), followed in O'Connor v. Lewis, 238 M 270, 776 P2d 1228, 46 St. Rep. 1260 (1989).

Deed Given as Security: A deed, absolute on its face but given as security for a debt, is in fact a mortgage. Isom v. Larson, 78 M 395, 255 P 1049 (1927).

71-1-108. Subsequently acquired title.

Case Notes

Estoppel Basis of Rule: The rule declared by this section that title acquired by the mortgagor after execution of the mortgage inures to the benefit of the mortgagee is based on the doctrine of estoppel. Midland Realty Co. v. Halverson, 101 M 49, 52 P2d 159 (1935); Grasswick v. Miller, 82 M 364, 267 P 299 (1928).

Estoppel to Assert Adverse Claim: A grantor who transfers his interest in land by deed absolute or in trust to secure a debt and thereafter agrees to the execution of a mortgage thereon by the grantee is estopped from later claiming an interest in the property adverse to the mortgagee. Further, any title the grantor may thereafter acquire inures to the benefit of the mortgagee. First St. Bank v. Mussigbrod, 83 M 68, 271 P 695 (1928).

Enlarged Homestead Entry: An entryman of desert land conveyed it, before patent, to grantee, who mortgaged it. After the mortgage, the entry was canceled for fraud. Later, the entryman filed upon the same land under the Enlarged Homestead Act (43 U.S.C. 218) and was issued a patent to the land. Subsequently, the mortgagee claimed that the entryman's Homestead Act title inured to him under the provisions of 70-20-302, 70-20-303, and this section. The Supreme Court ruled these statutes inapplicable and denied mortgagee's claim, reasoning that to hold otherwise would nullify the federal law prohibiting alienation of public land prior to patent. Phoenix Mut. Life Ins. Co. v. Brainard, 82 M 39, 265 P 10 (1928).

Homestead Entry:

The defendant in a foreclosure action had executed a promissory note secured by a mortgage upon a desert land entry which, after final certificate had been issued to him, was canceled. Later, he entered the land as a homestead and was issued a patent. The Supreme Court held that the lien of the mortgage on the desert entry attached to the homestead entry and defendant was estopped under this section from claiming the benefit of 43 U.S.C. § 175, which provided that lands acquired under the homestead laws may not become liable to the satisfaction of debts contracted prior to issuance of patent. Stockmen's Nat'l Bank v. Sutherland, 71 M 457, 230 P 369 (1924).

The rule declared by this section, that title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt, applies to land, title to which at the time the mortgage was given was in the federal government and was subsequently acquired therefrom under the homestead laws. Lohman St. Bank v. Grim, 69 M 444, 222 P 1052 (1924).

Desert Land Entry: A mortgage upon a desert land entry given by the entryman as security for an antecedent debt before final proof is made or a patent is issued is enforceable against the mortgagor after patent issues to him. The title thus subsequently acquired by the mortgagor inures to the benefit of the mortgagee under this section, and the mortgagor is estopped from denying the validity of the mortgage. Selway v. Daut, 67 M 262, 215 P 646 (1923).

71-1-110. Passage of mortgage by assignment of debt.

Case Notes

Assignee's Right to Assert Tolling of Statute of Limitations: The assignee of the mortgagee brought suit to foreclose the mortgage. The mortgagor, who had acknowledged the debt, pleaded the Statute of Limitations. The assignee has the same right to assert that the acknowledgment took the case out of the Statute of Limitations as the original mortgagee would have if the suit had been brought by him. Breese v. O'Brien, 102 M 547, 59 P2d 65 (1936).

Endorsement of Note as Assignment: The assignment of a debt secured by mortgage carries with it the security; hence, acquisition of a note by endorsement has the effect of transferring the mortgage securing it. Ingebrightsen v. Hatcher, 87 M 482, 288 P 1023 (1930).

Assignment of Mortgage Alone: Assignment of a note secured by mortgage carries the mortgage with it. A mortgage is only a security and independent of the debt has no assignable quality. Therefore, an assignment of the mortgage alone is a nullity and confers no right whatever upon the assignee. First Nat'l Bank of Saco v. Vagg, 65 M 34, 212 P 509 (1922).

Mortgage as Incident to Debt: A mortgage given to secure the payment of a note is but an incident and passes to the assignee of the note. NW. Improvement Co. v. Rhoades, 52 M 428, 158 P 832 (1916); Cornish v. Woolverton, 32 M 456, 81 P 4 (1905).

Mortgage as Evidence of Debt: When there is no written evidence of the debt or obligation, the mortgage is evidence both of the debt and the security for its payment. Further, the debt is the principal thing, and the title to the mortgage follows an assignment of it. Cornish v. Woolverton, 32 M 456, 81 P 4 (1905).

71-1-111. Power of sale.

Case Notes

Execution of Power of Sale: A mortgagee may execute a power of sale contained in a chattel mortgage, and it is not necessary for him to call upon the Sheriff to make the sale, or to proceed by an action to foreclose. Kinsman v. Stanhope, 50 M 41, 144 P 1083 (1914).

Implied Power of Sale: A mortgagor contracts, either expressly or by implication, that the mortgaged property may be sold to satisfy his debt. Thomas v. Thomas, 44 M 102, 119 P 283 (1911).

Trust Deed Under Power of Attorney: An attorney in fact, under a general power of attorney to sell, convey, and mortgage the grantor's property, may secure the payment of his grantor's debt by executing a trust deed conveying the grantor's property and authorizing the trustee or his successor in trust to sell the same in case of nonpayment of the indebtedness. Muth v. Goddard, 28 M 237, 72 P 621 (1903).

71-1-112. Applicable laws.

Case Notes

Failure to File Affidavit of Good Faith: A mortgage given by a corporation covering both real and personal property, under this section before amendment by Ch. 11, L. 1931, which required a corporate mortgage to be accompanied by an affidavit of good faith made by the mortgagor, was good as to the real estate but invalid as to the personal property under the rule that a mortgage may be valid in part and invalid in part. Standard Oil Co. v. Idaho Community Oil Co., 95 M 412, 27 P2d 173 (1933).

Real and Personal Property: The former provisions of this section, requiring that mortgages "of both real and personal property" executed by a corporation be accompanied by an affidavit of good faith, applied only to mortgages covering both real and personal property, and therefore had no application to one covering real estate only. Godfrey L. Cabot, Inc. v. Gas Prod. Co., 93 M 497, 19 P2d 878 (1933).

71-1-113. Limit on the amount of funds on reserve.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Funds Deposited in General Ledger Account Rather Than Applied Toward Note — Foreclosure Proper: American Federal Savings and Loan (American) held trust indentures securing July and August notes on Buckland's rental property. Buckland requested that rents be "applied to the loans", and American responded that it would first apply rents toward the August note until paid off and then to the July note, adding that as long as rents continued to come in on a regular basis, foreclosure would be held off. Because of rent collection problems, American accepted management of the property, eventually paying off the August note. From then on, rents were placed in a noninterest-bearing general ledger account rather than applied to the July note. American could have applied the funds toward the costs of managing the property, but did not. American commenced foreclosure proceedings when rents received did not satisfy the July note. Although the Supreme Court disagreed with the handling of the funds, foreclosure was still proper because the funds, if applied to the July note, would still have been insufficient to bring the note current. Am. Fed. S&L Ass'n v. Buckland, 238 M 364, 777 P2d 1289, 46 St. Rep. 1339 (1989).

Mechanics' Lien Improperly Carried Forward — Amount of Note Reduced Upon Foreclosure: Electricians filed a mechanics' lien on Buckland's property for wiring an apartment. Buckland later sought to exchange the property for some land, but the lien had to be settled first. Because American Federal Savings and Loan (American) held a security interest in the property, American's approval was necessary to settle the lien and complete the exchange. American paid the settlement and took assignment of the lien. As part of the exchange, Buckland gave American a note for the amount of the lien, secured by a trust indenture on the land. Buckland subsequently traded the land for a duplex, and as part of the exchange, American carried forward the mechanics' lien. American later commenced foreclosure proceedings on the trust indenture. Buckland successfully argued that it was improper to carry forward the lien, which, according to the closing statement on sale of the first property, was paid from the proceeds of that sale. Thus, it was necessary to reduce the note by the amount of the lien, lest American recover twice. Am. Fed. S&L Ass'n v. Buckland, 238 M 364, 777 P2d 1289, 46 St. Rep. 1339 (1989).

Part 2
Mortgages of Real Property

Part Compiler's Comments

Section Not Codified — Satisfaction of Drought Relief Mortgage: Section 52-213, R.C.M. 1947 (sec. 1, Ch. 221, L. 1921), was not codified in the MCA. The section has not been repealed and is still valid law. The section provided: "Execution of satisfaction of mortgage under special act. Whenever under the provisions of sections 4680 to 4711 of these codes any mortgage or other security has been executed to a county or to any officers thereof, the county treasurer of such county is hereby authorized upon the payment of the debt for which the security was given, to execute an acknowledgment of satisfaction of said mortgage or other security. In case of the creation of a new county embracing the lands covered by any such mortgage, subsequent to the execution thereof, the county treasurer of such new county may execute said satisfaction in like manner and with the same effect as though executed by the treasurer of the county to which such security was originally given." Sections 4680 to 4711, referred to above, were included in the 1921 codification and relate to county drought relief. The sections were repealed by Ch. 22, L. 1935.

Part Case Notes

Assignment of Mortgage — No Effect on Lien Priority Position — Subordination Agreement Effective: The plaintiff sold real property to a couple who received a loan from a mortgage company and from the plaintiff himself to purchase the property. Both the plaintiff and the couple who purchased the property signed subordination agreements in favor of the mortgage company. The couple later defaulted on the loan, the mortgage company assigned its rights to the defendant, and two trustee sales were held for the property. The plaintiff filed a quiet title action to the property and the District Court issued summary judgment in the plaintiff's favor. The defendant appealed, and the Supreme Court reversed. The District Court erred in determining that the couple's debt to the mortgage company was no longer in the first priority position because the debt had been assigned to the defendant. The assignment of the mortgage did not affect its priority, and either party could freely assign their rights since assignment was not prohibited in the mortgage documents. Watts v. HSBC Bank US Trustee, 2013 MT 233, 371 Mont. 295, 308 P.3d 57.

Bankruptcy — Power to Sell Right of Redemption Prior to Foreclosure Sale Affirmed — Abandonment and Lifting of Stay Distinguished: After Smith filed his bankruptcy petition, the bankruptcy trustee allowed the foreclosure of the property by Morelands. The trustee then allowed the sale of Smith's redemption right, which was purchased at a Sheriff's sale by Eastep. Montana Ranch Properties, Inc., then purchased the real estate at the foreclosure sale. Eastep then tendered the necessary amount to exercise his redemption rights, which was allowed by the District Court. Citing Segal v. Rochelle, 382 US 375 (1966), and 11 U.S.C. 363(b), the Supreme Court held that a trustee has the power to sell contingent interests in property as part of the bankruptcy estate and that the District Court did not err in concluding that Eastep held the redemptive rights to the property. The Supreme Court also held that the trustee did not abandon the property by lifting the automatic stay and allow Moreland's foreclosure. Mont. Ranch Properties, Inc. v. Eastep, 257 M 43, 847 P2d 304, 50 St. Rep. 152 (1993).

Contract for Deed — Forfeiture — Notice to Persons With Interest: A contract for deed was executed between Morin, the seller, and Roberts, the buyer. Later, Roberts entered into a second contract selling the property to Iverson. The second contract provided that Iverson would assume Roberts' obligation to Morin, and upon completion of Iverson's obligation to Roberts, Roberts would assign his interest in the Morin contract to Iverson. Iverson defaulted on the Morin contract, and Morin sent a notice of default to Iverson but not to Roberts. When Roberts learned of the default, he offered to cure. Morin refused the offer, seeking instead to enforce the forfeiture provision of the contract, thereby regaining the property, which had greatly increased in value. The court found that this situation is similar to the purchaser in an executory real estate contract who mortgages his interest. In that case the mortgagee is entitled to notice of forfeiture if the seller knows of the mortgage and the mortgagee has the right to tender payment to the seller necessary to protect his security. Roberts v. Morin, 198 M 233, 645 P2d 423, 39 St. Rep. 892 (1982).

Part Law Review Articles

The Montana Judicial and Non-Judicial Foreclosure Sale: Analysis and Suggestions for Reform, Dietrich, 49 Mont. L. Rev. 285 (1988).

First State Bank v. Chunkapura: New Limitations on Trust Indentures, Magone, 49 Mont. L. Rev. 181 (1988).

The Default Clause in the Installment Land Contract, Isham, 42 Mont. L. Rev. 110 (1981).

71-1-201. What real property may be mortgaged — debts secured.

Case Notes

Contract for Deed Not Same Legal Concept as Mortgage: Although certain similarities exist between the two, a contract for deed is not the same legal concept as a mortgage under Montana law. Therefore, a contract for deed need not be treated as a mortgage for purposes of foreclosure. Aveco Properties, Inc. v. Nicholson, 229 M 417, 747 P2d 1358, 44 St. Rep. 2098 (1987). See also Burgess v. Shiplet, 230 M 387, 750 P2d 460, 45 St. Rep. 293 (1988).

Desert Land Entry Capable of Transfer: A desert land entry is a distinct interest in real estate, a property right capable of transfer, and there is no prohibition against transfer. Selway v. Daut, 67 M 262, 215 P 646 (1923).

71-1-202. Mortgage not considered conveyance — recovery of possession.

Case Notes

Foreclosure Sale Order Not Violative of Conveyance Restriction or Redemption Right: Defendant contended the wording of an order of sale in a foreclosure proceeding, stating that defendants "have no lien, right, title, estate, claim, or interest on or to the mortgaged property, whether real, personal, or mixed hereinafter described", incorrectly severed his interest in the land prior to foreclosure sale and severely hindered his attempts to sell the land and satisfy the promissory note. However, the language did not violate this section because it did not enable the mortgage owner to recover possession without a foreclosure and sale. Further, the statement did not affect the defendant's 1-year statutory right of redemption. Aetna Life Ins. Co. v. Slack, 232 M 250, 756 P2d 1140, 45 St. Rep. 1028 (1988).

Mortgage Terminated by Quitclaim Deed — Foreclosure Procedure Not Required: Plaintiff, d/b/a Starhaven Ranch, Ltd., purchased a ranch on a contract for deed from Crofts. Crofts had purchased the land on a contract basis from Clarnos. Crofts assigned their purchasers' interest in the contract to defendant. Crofts defaulted on a contract provision requiring them to obtain grazing permits and on their contract with Clarnos. Starhaven fell in default on its final downpayment. Crofts fell in default on the loan with defendant. The bank recorded the quitclaim deed from Crofts. The bank asserted it succeeded to the rights of the Croft-Starhaven contract and took action against Starhaven. Crofts disappeared. Starhaven made payment on the Clarno-Croft contract to prevent Clarnos from declaring a forfeiture. The bank asserted absolute ownership rights against Starhaven. The bank obtained the quitclaim deed Starhaven had executed to Crofts and recorded it. The bank then sent Starhaven a notice to vacate, triggering the proceedings. The trial court held the bank had succeeded to all Crofts' interest in the property when it obtained and recorded the assignment. The court then concluded the bank could assert the default provisions of the Croft-Starhaven contract and was entitled to forfeiture. On appeal, the Supreme Court held that the assignment as collateral for a loan created a security interest only—in this case a mortgage—and mortgage foreclosure proceedings were the proper method for the bank to pursue its remedies. On rehearing, the court upheld the trial court, finding that the mortgagors waived their right to foreclosure proceedings by filing a quitclaim deed to defendant bank. Waiver of the right to foreclosure includes consent to the possession of the mortgagee and the waiver of the equity of redemption. The bank was entitled under the Croft-Starhaven contract to require Starhaven's forfeiture upon defaulting on the contract payments, and Starhaven was not entitled to foreclosure proceedings. Erickson v. First Nat'l Bank, 215 M 350, 697 P2d 1332, 42 St. Rep. 423 (1985).

Mortgage as Lien, Not Conveyance: Montana is a "lien" state, and a mortgage of itself does not convey any title in mortgaged property to the mortgagee. Hanson v. Bonner, 202 M 505, 661 P2d 421, 40 St. Rep. 245 (1983).

Mortgagor's Right to Dispose of Property: A mortgagor, whenever he chooses, may dispose of his estate in the mortgaged property regardless of the knowledge or consent of the mortgagee whose rights are secured and may be enforced by foreclosure. Bermes v. Sylling, 179 M 448, 587 P2d 377 (1978).

Possessory Right on Condition Broken:

This section does not apply to mortgages in which the parties have contracted that the mortgagee has the right of possession upon condition broken. Union Cent. Life Ins. Co. v. Jensen, 74 M 70, 237 P 518 (1925), distinguished in Sharp Bros., Inc. v. Bartlett, 76 M 415, 248 P 199 (1926), and First Nat'l Corp. v. Perrine, 99 M 454, 43 P2d 1073 (1935).

A deed with a defeasance clause, given to secure a debt, was a mortgage and was subject to this section. However, upon default, the mortgagee, with the consent of the mortgagor, took possession of the property. Therefore, since mortgagor's consent was given subsequent to the mortgage, it was not a part of the mortgage and this section was not applicable. Fee v. Swingly, 6 M 596, 13 P 375 (1887), distinguished in First Nat'l Bank of Butte v. Bell Silver & Copper Min. Co., 8 M 32, 19 P 403 (1888).

Taxation: In view of this section, a mortgage is security for a debt and accompanies the debt, but is not taxable in a county when owned by nonresidents, even though the land is within the county. Holland v. Bd. of Comm'rs, 15 M 460, 39 P 575 (1895).

Power of Sale in Mortgage: This section does not prevent the inclusion of a power of sale in a mortgage or trust deed, and the purchaser at a sale made pursuant to such a power may take possession without foreclosure. First Nat'l Bank of Butte v. Bell Silver & Copper Min. Co., 8 M 32, 19 P 403 (1888), affirmed in 156 US 470, 39 L Ed 497, 15 S Ct 440 (1895).

71-1-203. Writing required.

Case Notes

Transaction Neither Sale nor Mortgage — No Security Interest Created: Plaintiff purchased a ranch on behalf of defendant with defendant's money but put title to the ranch in plaintiff's name and operated the ranch for defendant. The parties subsequently executed documents to settle the dispute between them concerning the ranch property, including plaintiff's quitclaim deed of the property to defendant. Since the transaction did not involve either a sale or mortgage of the property, plaintiff did not hold a security interest in the ranch. O'Connor v. Lewis, 238 M 270, 776 P2d 1228, 46 St. Rep. 1260 (1989).

Quitclaim Purchaser as Bona Fide Purchaser: Smith purchased mortgaged property by quitclaim deed with actual knowledge of the mortgage. Smith did not have knowledge of two extension agreements which were not recorded. In a foreclosure suit, Smith was found to be a bona fide purchaser without notice and entitled to priority over both the unrecorded extension agreements and extension agreements recorded after Smith recorded his deed. Aitken v. Lane, 108 M 368, 92 P2d 628 (1939).

Unrecorded Extension Valid Between Parties: An agreement extending the life of a mortgage made either under this section or 71-1-210 is binding between the parties though not recorded. Aitken v. Lane, 108 M 368, 92 P2d 628 (1939).

Foreclosure for Breach of Condition to Pay Taxes and Insurance: The parties to a mortgage made an agreement giving mortgagors additional time for payment and providing for a reduction in the principal and the interest rate in the event that mortgagors could refinance the mortgage. It was left optional with the mortgagees whether a new note and mortgage would be executed or the old one incorporating the new terms extended. The agreement did not prevent mortgagee from foreclosing for breach of the mortgage condition requiring payment of taxes and insurance. Further, the court ruled that the agreement was enforceable even though it had not been executed because the mortgagees had chosen to extend the old mortgage but the mortgagors had refused to sign the extension. McIntosh v. Weaver, 108 M 328, 90 P2d 169 (1939).

Failure of Administrator to Plead Limitation as Constructive Fraud: The administrator of the insolvent estate of a mortgagor was duty bound to plead the Statute of Limitations in a suit to foreclose a mortgage when the mortgagee failed to file a renewal affidavit under 71-1-210 and no extension agreement had been made under this section. If the administration permits a default to be entered without defending, his conduct is constructively fraudulent as against a general creditor. Further, failure of the creditor to demand that the administrator plead the Statute is immaterial when demand would have been useless. Missoula Trust & Sav. Bank v. Boos, 106 M 294, 77 P2d 385 (1938).

Affidavit of Good Faith Not Required: This section does not require an affidavit by the mortgagee that the extension was not made with the intent to hinder or defraud creditors, and therefore its absence did not render the agreement invalid. Register Life Ins. Co. v. Kenniston, 99 M 191, 43 P2d 251 (1935).

Period for Which Extended: The mortgagor and mortgagee made an agreement for the extension of a real estate mortgage under this section. The effect of the agreement was to extend its life for more than 16 years after its original maturity date. This did not render the agreement invalid as against a creditor of the mortgagor holding a judgment lien acquired before the date of the agreement. The court rejected the claim that because this section and 71-1-210 are in pari materia, the provision of 71-1-210 that the life of a mortgage cannot be extended for more than 16 years should be applied to this section. The court stated that even though the provision of 71-1-210 limiting the time period during which a mortgage may be extended by renewal affidavit has in effect been incorporated within this section by construction, the time to which extension may run is unlimited in the absence of legislative declaration on the subject. Register Life Ins. Co. v. Kenniston, 99 M 191, 43 P2d 251 (1935).

Agreement to Extend to Be Recorded — Effect of Recording on Priorities:

A real estate mortgage extension agreement executed under this section before maturity of the last of a series of mortgage notes was not recorded until after the period of extension had expired. Two years prior thereto the property had been conveyed to another, subject to the mortgage. The deed, however, was not recorded until some 6 weeks after recordation of the agreement. Because the extension agreement, was recorded first, under 70-21-304 it took priority over the deed, even though the vendee was a subsequent purchaser in good faith and for a valuable consideration. Hastings v. Wise, 91 M 430, 8 P2d 636 (1932).

When the parties to a real estate mortgage, before maturity of the debt which it secured and before rights of the third parties had intervened, extended for several years the payment of the debt and the mortgage and when they recorded the extension agreement, a mortgage given on the property after filing of the extension agreement was inferior to it. O. M. Corwin Co. v. Brainard, 80 M 318, 260 P 706 (1927). See also dissenting opinion in Reed v. Richardson, 94 M 34, 20 P2d 1054 (1933).

This section, providing for the extension of a mortgage, contemplates the making of a contract assented to by both parties. In order that notice of the extension may be given to subsequent purchasers and mortgagees, the extension agreement must be filed with the County Clerk for record. O. M. Corwin Co. v. Brainard, 80 M 318, 260 P 706 (1927).

Mortgage Extension as Conveyance: A real estate mortgage extension agreement executed as provided by this section is a "conveyance" within the meaning of 70-21-301. Hastings v. Wise, 91 M 430, 8 P2d 636 (1932).

Renewal of Mortgage Where There Is No Injury to Third Persons:

Where third persons are not affected thereby, a mortgagor of lands may, under this section, in effect procure a renewal of the mortgage by an extension of the time of payment of the debt secured by it, irrespective of the provisions of 71-1-210 concerning filing of a renewal affidavit. Hastings v. Wise, 89 M 325, 297 P 482 (1931).

The parties to a real estate mortgage may, under this section, renew or extend it within the 8-year period following the maturity of the debt secured, even though the rights of subsequent mortgagees have attached in the meantime, if by such renewal or extension the latter are not injured. Vitt v. Rogers, 81 M 120, 262 P 164 (1927).

Status of Purchaser of Mortgaged Lands Prior to Expiration of 8-Year Period After Maturity of Debt: One who by deed becomes the owner of all the right, title, and interest in lands of the mortgagor, at any time before the expiration of the 8-year period following the maturity of the entire mortgage indebtedness, does not become the owner of the property free and clear of the mortgage lien upon expiration of that period, where no extension agreement under this section or affidavit of renewal under 71-1-210 has been filed or recorded. Turner v. Powell, 85 M 241, 278 P 512 (1929), followed in Hillsdale College v. Thompson, 99 M 400, 44 P2d 753 (1935).

Payment on Debt Insufficient Extension: Since the renewal or extension of a mortgage requires a writing as formal as one granting real property, no extension of the lien is effected by a mere payment on account of the debt secured, after the barring of the latter by the Statute of Limitations. Berkin v. Healy, 52 M 398, 158 P 1020 (1916). See also Morrow v. Bank of America, N.A., 2014 MT 117, 375 Mont. 38, 324 P.3d 1167.

Retrospective Application: This section has no application to a mortgage on real estate renewed by extension of the note which it secured in 1890. Wilson v. Pickering, 28 M 435, 72 P 821 (1903).

71-1-204. Form of mortgage.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Subordination Agreements: A subordination agreement dictates the priorities between existing parties but does not mortgage an interest in the property. Travelers Ins. Co. v. Holiday Village Shopping Center Ltd. Partnership, 280 M 217, 931 P2d 1292, 53 St. Rep. 1372 (1996).

U.C.C. Financing Statement: A financing statement filed to perfect a security interest in fixtures arising under the U.C.C. does not meet the definitional requirements of this section and so cannot be considered a mortgage. First Sec. Bank of Bozeman v. Tholkes, 169 M 422, 547 P2d 1328 (1976).

71-1-206. Future advances.

Compiler's Comments

1985 Amendment: In (1) at beginning of first sentence, substituted "The amount of future advances or total indebtedness that may be outstanding at any given time and subject" for "The total amount of all future advances contemplated and to be subject", in second sentence, made minor changes in phraseology, and inserted last sentence allowing the use of a mortgage to secure a line of credit with varying balances so long as the total principal amount of the obligations does not exceed the mortgage amount plus interest; in (2) after "advances", inserted "or total indebtedness", after "shall" inserted "notwithstanding the fact that from time to time during the term of the mortgage no indebtedness is due from the mortgagor to the mortgagee", and inserted last sentence providing that the lien extends to interest as provided in the instrument secured by the mortgage; and in (3) inserted last sentence providing that the mortgagor retains the right to demand satisfaction of the mortgage when the balance is zero.

Case Notes

Failure to Notify Second Mortgagor of Sales and Future Advances Not Breach of Fiduciary Duty: Absent findings of clear error, a District Court decision that a first mortgagor breached no fiduciary duty to second mortgagor by failing to notify of property sales and future advances was affirmed. The court properly found it was the second mortgagor's obligation to discover the existence and extent of the future advance clause by requesting a copy of the deed of trust and to investigate more closely the actual terms of the instrument prior to entering the second mortgage. Serv. Funding, Inc. v. Craft, 234 M 431, 763 P2d 1131, 45 St. Rep. 2030 (1988).

Priority of Deed of Trust — Advances Diminishing Value of Second Mortgage: Second mortgagor argued that advances made by first mortgagor after the maturity dates on the original notes significantly diminished the value of the second mortgage without second mortgagor's knowledge. The argument failed because the first mortgagor had priority of the deed of trust not only as to the previous sale proceeds but to remaining collateral as well. Serv. Funding, Inc. v. Craft, 234 M 431, 763 P2d 1131, 45 St. Rep. 2030 (1988).

71-1-207. Recording of mortgages and assignments.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Scrivener's Error — Lien Perfected — Bankruptcy: The plaintiffs paid off one of two loans with deeds of trust, but due to a scrivener's error the wrong lien payoff was recorded. Subsequently recorded instruments corrected the mistake, but the plaintiffs argued that when they entered bankruptcy the scrivener's error invalidated the underlying trust indenture and corresponding lien. Because a lien stays with the property until the debt is paid in full or until foreclosure proceedings are complete, the scrivener's error did not invalidate or discharge the underlying lien, and it survived the plaintiffs' bankruptcy proceedings. Reeves v. U.S. Bank Nat'l Ass'n, 2017 MT 70, 387 Mont. 138, 391 P.3d 742, following Dewsnup v. Timm, 502 U.S. 410 (1992).

Assignment of Mortgage — No Effect on Lien Priority Position — Subordination Agreement Effective: The plaintiff sold real property to a couple who received a loan from a mortgage company and from the plaintiff himself to purchase the property. Both the plaintiff and the couple who purchased the property signed subordination agreements in favor of the mortgage company. The couple later defaulted on the loan, the mortgage company assigned its rights to the defendant, and two trustee sales were held for the property. The plaintiff filed a quiet title action to the property and the District Court issued summary judgment in the plaintiff's favor. The defendant appealed, and the Supreme Court reversed. The District Court erred in determining that the couple's debt to the mortgage company was no longer in the first priority position because the debt had been assigned to the defendant. The assignment of the mortgage did not affect its priority, and either party could freely assign their rights since assignment was not prohibited in the mortgage documents. Watts v. HSBC Bank US Trustee, 2013 MT 233, 371 Mont. 295, 308 P.3d 57.

Record of Assignment as Notice to Purchaser: The record of the assignment of a mortgage is notice to a purchaser from the mortgagor, so that payments by him to the assignor are at his own risk, especially in the absence of any showing that when the payments were made the assignor was in possession of the note which the mortgage secured. Cornish v. Woolverton, 32 M 456, 81 P 4 (1905).

71-1-208. Recording of subordination or waiver agreements.

Case Notes

Assignment of Mortgage — No Effect on Lien Priority Position — Subordination Agreement Effective: The plaintiff sold real property to a couple who received a loan from a mortgage company and from the plaintiff himself to purchase the property. Both the plaintiff and the couple who purchased the property signed subordination agreements in favor of the mortgage company. The couple later defaulted on the loan, the mortgage company assigned its rights to the defendant, and two trustee sales were held for the property. The plaintiff filed a quiet title action to the property and the District Court issued summary judgment in the plaintiff's favor. The defendant appealed, and the Supreme Court reversed. The District Court erred in determining that the couple's debt to the mortgage company was no longer in the first priority position because the debt had been assigned to the defendant. The assignment of the mortgage did not affect its priority, and either party could freely assign their rights since assignment was not prohibited in the mortgage documents. Watts v. HSBC Bank US Trustee, 2013 MT 233, 371 Mont. 295, 308 P.3d 57.

71-1-209. Recording defeasance necessary to affect grant.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Estoppel of Mortgagor by Failure to Record Defeasance: A deed absolute to real property was given to a mortgagee by a mortgagor who was in default on the contract. No instrument of defeasance was recorded in connection with the transaction. Thus, under this section, regardless of the nature of any agreement between the mortgagor and mortgagee, the mortgagor is estopped from questioning the title of an innocent third party who purchased the property from the mortgagee. Halko v. Anderson, 108 M 588, 93 P2d 956 (1939); Harrington v. Butte & Superior Copper Co., 52 M 263, 157 P 181 (1916).

71-1-210. Period of mortgage — renewal.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Mortgage Good Between Parties Until Debt Barred: As between the original parties, the mortgage remains valid without filing an affidavit of renewal so long as the debt secured by the mortgage is not barred by the Statute of Limitations. Mont. Valley Land Co. v. Bestul, 126 M 426, 253 P2d 325 (1953); Turner v. Powell, 85 M 241, 278 P 512 (1929). See also Reed v. Richardson, 94 M 34, 20 P2d 1054 (1933).

Declaration of Mortgage After Expiration Date: When property was sold to save it from foreclosure, under contract which would have permitted seller to repurchase it within 1 year for the same amount, suit brought to have deed and contract declared a mortgage 9½ years after date of deed and contract was properly dismissed. Clarke v. Chamberlain, 124 M 405, 225 P2d 477 (1950).

Application of 1933 Amendment Not Retroactive: The 1933 amendment to this section cannot constitutionally be held to apply to a mortgage executed during the effective period of the prior statute. Hogevoll v. Hogevoll, 117 M 528, 162 P2d 218 (1945).

Recital in Deed as Tolling Statute of Limitations: A recital in a deed that the premises are subject to a prior mortgage constitutes an acknowledgment of the mortgage by both parties and a recognition of the debt, does not impair the rights of the owner of the mortgage, and constitutes an admission which tolls the statute and removes its bar. W. Holding Co. v. NW. Land & Loan Co., 113 M 24, 120 P2d 557 (1942).

Quitclaim Purchaser as Bona Fide Purchaser: Smith purchased mortgaged property by quitclaim deed with actual knowledge of the mortgage. Smith did not have knowledge of two extension agreements which were not recorded. In a foreclosure suit, Smith was found to be a bona fide purchaser without notice and thus entitled to priority over the unrecorded extension agreements or extension agreements recorded after Smith recorded his deed. Aitken v. Lane, 108 M 368, 92 P2d 628 (1939).

Unrecorded Extension Binding on Parties: An agreement extending the life of a mortgage made either under this section or 71-1-203 is binding between the parties whether or not it has been recorded. Aitken v. Lane, 108 M 368, 92 P2d 628 (1939).

Homestead Protected After Mortgage Outlawed: A mortgage was executed and recorded "before the declaration of homestead was filed for record" as provided in 70-32-202, but had lost its validity by lapse of time as a security and ceased to be a mortgage or lien under this section. The note which the mortgage was given to secure was still alive and a money judgment was obtained on the note. The Supreme Court ruled that the homestead was not subject to execution or forced sale to satisfy the judgment because the mortgage was no longer valid and the debt therefore not "secured" by it when the judgment on the note was entered as required by 70-32-202. Siuru v. Sell, 108 M 438, 91 P2d 411 (1939).

Failure of Administrator to Plead Limitation as Constructive Fraud: The administrator of the insolvent estate of a mortgagor is duty bound to plead the Statute of Limitations in a suit to foreclose a mortgage when the mortgagee failed to file a renewal affidavit under this section, and no extension agreement had been made under 71-1-203. If the administration permits a default to be entered without defending, his conduct is constructively fraudulent as against a general creditor. Further, failure of the creditor to demand that the administrator plead the Statute is immaterial when demand would have been useless. Missoula Trust & Sav. Bank v. Boos, 106 M 294, 77 P2d 385 (1938).

Mortgage Not to Exist Beyond Life of Debt: A mortgage cannot exist beyond the life of the debt or obligation it was given to secure. Rieckhoff v. Woodhull, 106 M 22, 75 P2d 56 (1938).

Statute of Limitations Not a Bar When Debt Kept Alive: A real estate mortgage governed by this section prior to amendment was not barred by the Statute of Limitations so long as the debt secured thereby was kept alive. Sommer v. Wigen, 103 M 327, 62 P2d 333 (1936).

Effect Between Parties of Keeping Debt Alive: As between the mortgagor of real property and the mortgagee, if the debt for which the mortgage is given is kept alive, the mortgage is good even after the expiration of 8 years from the maturity of the note or obligation. Breese v. O'Brien, 102 M 547, 59 P2d 65 (1936); Leffek v. Luedeman, 95 M 457, 27 P2d 511 (1933).

Purchaser Before Expiration of Mortgage:

One acquiring mortgaged realty within the 8-year period following the maturity of the mortgage indebtedness may not assert the invalidity of the mortgage under this section if the mortgage debt is not barred under 27-2-202, the general Statute of Limitations; he is not a "subsequent purchaser" within the meaning of this section. Humbird v. Arnet, 99 M 499, 44 P2d 756 (1935).

One who by deed becomes the owner of all the right, title, and interest in lands of the mortgagor at any time before the expiration of the 8-year period following the maturity of the entire mortgage indebtedness does not become the owner of the property free and clear of the mortgage lien upon expiration of that period, even though no extension agreement under 71-1-203 or affidavit of renewal under this section has been filed or recorded. Turner v. Powell, 85 M 241, 278 P 512 (1929), followed in Hillsdale College v. Thompson, 99 M 400, 44 P2d 753 (1935).

Extension by Agreement:

The method prescribed by this section for extending the life of a real estate mortgage by the filing of an affidavit by the mortgagee is not exclusive. Under 71-1-203 an extension may be effected by written agreement between the parties to the mortgage. Register Life Ins. Co. v. Kenniston, 99 M 191, 43 P2d 251 (1935); O. M. Corwin Co. v. Brainard, 80 M 318, 260 P 706 (1927).

A written agreement between mortgagor and mortgagee for the extension of a real estate mortgage under 71-1-203, the effect of which was to extend its life for more than 16 years after its original maturity date, did not render it invalid as against a creditor of the mortgagor holding a judgment lien acquired before the date of the agreement. Register Life Ins. Co. v. Kenniston, 99 M 191, 43 P2d 251 (1935). See also Frisbee v. Coburn, 101 M 58, 52 P2d 882 (1935).

Where third persons are not affected thereby, a mortgagor of lands may, under 71-1-203, by agreement with the mortgagee executed as provided therein, in effect renew the mortgage by extending the time of payment of the debt secured by it, irrespective of the provisions of this section concerning the filing of a renewal affidavit. Hastings v. Wise, 89 M 325, 297 P 482 (1931).

During the life of a properly recorded real estate mortgage, mortgagors executed second and third mortgages on the same property. Later, before the expiration of the first mortgage its life was extended for 2 years by a written agreement between the parties to the mortgage. The extension agreement was recorded. After the extension, the second and third mortgagees were in no worse position than they had been when they took their mortgage. Therefore they were not injured by the extension and their claim that plaintiff's lien had become inferior to theirs by his failure to file a renewal affidavit was without merit. Vitt v. Rogers, 81 M 120, 262 P 164 (1927).

Action for Debt After Mortgage Invalid: A mortgagee whose mortgage was rendered invalid for failure to file a renewal affidavit but whose debt has not become barred by the general Statute of Limitations may proceed against the mortgagor's administrator on the debt. The mortgagee is entitled to a judgment adjudicating the debt as a valid claim against the estate payable in due course of administration. Leffek v. Luedeman, 95 M 457, 27 P2d 511 (1933).

Insolvent Administrator Attacking Mortgage: An administrator of an insolvent estate may, on behalf of creditors who cannot under the law secure a specific lien upon the estate property after the debtor's death, attack the validity of a real estate mortgage on the ground of the holder's failure to file the renewal affidavit required by this section. Leffek v. Luedeman, 95 M 457, 27 P2d 511 (1933).

Failure to Plead Statute of Limitations: Defendant, in an action to foreclose a first mortgage on real property held by him under a quitclaim deed from the purchaser on foreclosure of the second mortgage, in his answer relied on the failure of plaintiff to file an affidavit of renewal of the mortgage as a bar to the action. He did not plead the general Statute of Limitations. Judgment for plaintiff was proper in the absence of a pleading that the debt was barred. Reed v. Richardson, 94 M 34, 20 P2d 1054 (1933).

Debt Not Extended: This section, limiting the validity of a mortgage, unless renewed, to 8 years after maturity of the debt which it was given to secure, affects merely the lien of the mortgage and does not extend the life of the debt. Enactment of 71-3-122 did not change the rule of law that a mortgage cannot exist beyond the life of the debt or obligation it is given to secure. Jones v. Hall, 90 M 69, 300 P 232 (1931).

Actual Notice Where Affidavit Not Recorded:

Two months before the maturity date of a debt secured by a mortgage, an agreement was entered into extending the debt for 10 years. The agreement was not recorded until after the 10-year extension had elapsed. In an action to foreclose the mortgage, the owner of the land asserted that the mortgage was barred by 71-1-210 because an affidavit of renewal had not been filed within 60 days of the original maturity date. The Supreme Court held that since a mortgage can be renewed by written agreement and because the owner had actual knowledge of the extension agreement, the filing of an affidavit was not necessary. Hastings v. Wise, 89 M 325, 297 P 482 (1931).

This section, when read in connection with the prior law concerning recording mortgages and harmonized therewith, merely limits the duration of record notice of the lien of recorded mortgages. Even though "subsequent purchasers" is not qualified by "in good faith", the failure of a mortgagee to file the required affidavit did not affect the lien as against a subsequent purchaser, who purchased with actual notice of the mortgage and during the time that the record of the mortgage was constructive notice. Cullen v. Reed, 220 F 356 (D.C. Mont. 1915).

Failure to File Affidavit: When a mortgagee fails to file a renewal affidavit within 60 days after the expiration of 8 years from the date of maturity of the obligation secured thereby, the land is no longer subject to the mortgage. Pereira v. Wulf, 83 M 343, 272 P 532 (1928).

Provision for Benefit of Mortgagee: The protection afforded by this section is intended for the benefit of the mortgagee, not the mortgagor, and the latter may not be heard to object to the sufficiency of the renewal affidavit provided for therein when it appears affirmatively that the debt for which the mortgage was given was not barred by the Statute of Limitations. Skillen v. Harris, 85 M 73, 277 P 803 (1929).

Time of Foreclosure After Renewal:

The purpose of the Legislature in enacting this section was definitely to limit the life of a mortgage, unless extended, to 8 years from the maturity of the debt (except as between the parties themselves). The remedy therein provided may be invoked by the mortgagee or his successors only and, if invoked, the mortgagee may foreclose at any time during the second 8-year period, and any implication to the contrary in Morrison v. Farmers & Traders' St. Bank, 70 M 146, 225 P 123 (1924), must be overruled. Vitt v. Rogers, 81 M 120, 262 P 164 (1927).

This section contemplates action by the mortgagee alone. The mortgagor cannot prevent the filing of the affidavit of renewal, nor can he bring it about. As between the mortgagee and the mortgagor, if the debt is kept alive, the mortgage is good even after the expiration of 8 years from the maturity of the debt. O.M. Corwin Co. v. Brainard, 80 M 318, 260 P 706 (1927).

Presumption That Decree Is Supported by Evidence: The record on appeal in a foreclosure suit was silent as to when the indebtedness secured by the mortgage became due, or whether a debt secured by the mortgage and a subsequent instrument of which the mortgage had been made a part by reference had been paid. Therefore, the trial court's finding that plaintiff mortgagee was entitled to a decree will be presumed supported by the evidence, rendering untenable the contentions of appellant that the mortgage had expired under this section and that the amount due on the latter instrument had been paid. The Supreme Court noted that the litigation concerned rights of the original parties to the transaction only and that no rights of third parties were involved. First Nat'l Bank of Missoula v. Marlowe, 71 M 461, 230 P 374 (1924).

Constitutionality:

This section, construed as a Statute of Limitations, is not open to attack on constitutional grounds. Morrison v. Farmers & Traders' St. Bank, 70 M 146, 225 P 123 (1924).

This section is valid when applied prospectively from the date of enactment. However, to the extent that retroactive application of the section would enable a mortgagee whose mortgage had been extinguished by lapse of time to revitalize the security and impose a lien upon property without the owner's consent, it would deprive the owner of his property without due process of law and would be invalid. Berkin v. Healy, 52 M 398, 158 P 1020 (1916).

Section as Statute of Limitations and Not Recording Statute: This section is not a recording statute, affecting notice, but is a Statute of Limitations, affecting the remedy. Thus a mortgage, in the absence of the filing of a renewal affidavit, ceases to be of binding force as against third parties and becomes unenforceable 8 years from the maturity of the debt or obligation secured. Morrison v. Farmers & Traders' St. Bank, 70 M 146, 225 P 123 (1924), overruled in part, Vitt v. Rogers, 81 M 120, 262 P 164 (1927).

71-1-211. Satisfaction of mortgage — record thereof.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Deleted former subsection (1) relating to recording the satisfaction of a mortgage on the mortgage record margin; made grammar change in first line of (1) to reflect deletion of former subsection (1); inserted "and page" after "book" in (2); substituted "mortgagor and mortgagee indexes as to the discharge of such mortgage" for "minutes of the discharge of such mortgage made by the county clerk upon the margin of the record thereof" at the end of (2).

Case Notes

Covenant of Good Faith and Fair Dealing Not Breached When Mortgage Allowed Partial Release: Because the bank did not owe a duty to the mortgagors to maintain the mortgage contract until full payment of the debt, the mortgagors were not deprived of a contractual benefit when the bank partially released the mortgage. Therefore, the mortgagors could not successfully claim breach by the bank of the implied covenant of good faith and fair dealing. The claim did not relate to the contract but rather to peripheral aspects of the mortgagors' relationship with the bank. Weldon v. Mont. Bank, 268 M 88, 885 P2d 511, 51 St. Rep. 1178 (1994).

Meaning of Mortgage Provision Requiring Release on Full Payment of Debt: A mortgage stated that "A release of this mortgage is to be made at the expense of the Mortgagors, on full payment of indebtedness secured thereby." Neither this provision nor 71-1-212 and this section, numerating the statutory duties of a bank regarding the release of a mortgage, required the bank to maintain the mortgage in full effect until final payment or to notify mortgagors of the bank's partial release prior to full payment. The bank could cancel or release the mortgage at any time with or without consideration from or the consent of the mortgagors, and the quoted provision only obligated the bank to release the mortgage at the mortgagors' expense upon full payment. Weldon v. Mont. Bank, 268 M 88, 885 P2d 511, 51 St. Rep. 1178 (1994).

"Deed of Release": The phrase "deed of release", as used in former (1) of this section (deleted, sec. 1, Ch. 127, L. 1981), means a writing, duly subscribed and acknowledged by the mortgagee, whereby he absolves the mortgaged property from the lien of the mortgage. Swain v. McMillan, 30 M 433, 76 P 943 (1904).

Attorney General's Opinions

Blanket Document Listing Multiple Reconveyances of Trust Indentures Allowed: Generally, a County Clerk and Recorder must record reconveyances of trust indentures, which operate the same as a release or satisfaction of a mortgage. In order to effectuate release of a mortgage, the mortgagee or its agent must acknowledge and certify that a release has taken place by presenting a certificate to the County Clerk and Recorder. There is no requirement that each certificate be on a separate piece of paper. As long as each reconveyance meets the statutory requirements for release of a mortgage, the County Clerk and Recorder is obligated to accept for filing a multiple page or "blanket" document listing more than one reconveyance on each page. 48 A.G. Op. 23 (2000).

71-1-212. Penalties for failure to give certificate of discharge or release after full performance.

Compiler's Comments

2009 Amendment: Chapter 2 near end after "assigns" inserted "in". Amendment effective October 1, 2009.

2001 Amendment: Chapter 30 near middle after "who" deleted "shall for the space of 30 days after being requested", after "discharge or release" substituted "of the mortgage within 90 days after a request for one" for "thereof shall be", and near end after "sum of" substituted "$500" for "$100"; and made minor changes in style. Amendment effective October 1, 2001.

Case Notes

Covenant of Good Faith and Fair Dealing Not Breached When Mortgage Allowed Partial Release: Because the bank did not owe a duty to the mortgagors to maintain the mortgage contract until full payment of the debt, the mortgagors were not deprived of a contractual benefit when the bank partially released the mortgage. Therefore, the mortgagors could not successfully claim breach by the bank of the implied covenant of good faith and fair dealing. The claim did not relate to the contract but rather to peripheral aspects of the mortgagors' relationship with the bank. Weldon v. Mont. Bank, 268 M 88, 885 P2d 511, 51 St. Rep. 1178 (1994).

Meaning of Mortgage Provision Requiring Release on Full Payment of Debt: A mortgage stated that "A release of this mortgage is to be made at the expense of the Mortgagors, on full payment of indebtedness secured thereby." Neither this provision nor 71-1-211 and this section, numerating the statutory duties of a bank regarding the release of a mortgage, required the bank to maintain the mortgage in full effect until final payment or to notify mortgagors of the bank's partial release prior to full payment. The bank could cancel or release the mortgage at any time with or without consideration from or the consent of the mortgagors, and the quoted provision only obligated the bank to release the mortgage at the mortgagors' expense upon full payment. Weldon v. Mont. Bank, 268 M 88, 885 P2d 511, 51 St. Rep. 1178 (1994).

71-1-213. Discharge or release by other than mortgagee.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

71-1-222. Proceedings in foreclosure suits.

Compiler's Comments

1999 Amendment: Chapter 349 inserted (4) excepting certain acts or proceedings from the one-action limitation; and made minor changes in style. Amendment effective October 1, 1999.

1993 Amendment: Chapter 80 in (1)(b), after "sale", inserted "including the payment of property taxes due at the time of foreclosure"; and made minor changes in style. Amendment effective February 25, 1993.

Effective Date — Applicability: Section 4, Ch. 80, L. 1993, provided: "[This act] is effective on passage and approval and applies to any foreclosures occurring after [the effective date of this act]." Effective February 25, 1993.

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GENERAL

Propriety of Fair Market Value Hearing — Deficiency Standard: After the defendants defaulted on a mortgage, the buyer of the property at a sheriff's sale (and the holder of the property's mortgage note) sought a deficiency judgment against the defendants for over $700,000. Although the defendants did not introduce any evidence that the successful bid was not a fair price for the property, the District Court ordered a hearing on the property's fair market value. The buyer argued that a hearing was not required under the statute nor was a judicial determination of fair market value required before entry of a deficiency judgment. However, although a hearing to determine fair market value is not a debtor's legal right before entry of a deficiency judgment, the District Court did not err by using its discretion to act in equity and conducting a hearing because the record showed that the parties had longstanding differences of opinion concerning the property's value. Further, fair market value is the standard for valuing real property for the purposes of determining if a deficiency remains, and it is determined by the intrinsic value of the property without consideration of the impact of the foreclosure proceedings on the fair market value. Whitefish Credit Union v. Prindiville, 2015 MT 328, 381 Mont. 443, 362 P.3d 53, following Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 250 Mont. 175, 819 P.2d 158 (1991).

Failure to Consider "One-Action Rule" — Grounds for Reversal and Remand: A private school had two loans with the plaintiff bank, one secured by real property and another unsecured. After both loans became delinquent, the bank filed a complaint against the school for default on the loans and for a judicial foreclosure. The District Court granted the bank summary judgment without ordering the sale of the real property. On appeal, the school argued that the court failed to consider the "one-action rule" in foreclosure proceedings that requires the real property securing a defaulted loan to be sold before a judgment is entered for the difference between the amount owed and the sale proceeds. On appeal, the Supreme Court agreed and remanded the matter to the District Court for it to consider application of the one-action rule. Mountain West Bank, N.A. v. Helena Christian School, Inc., 2012 MT 194, 366 Mont. 165, 285 P.3d 588.

No Error in Ordering Foreclosure of Personal Real Property for Failure to Repay Business Loans — Deficiency Judgment Proper: Defendants, husband and wife, failed to make scheduled payments on two bank loans, and the bank filed for foreclosure of two deeds of trust. Defendants were in the process of obtaining a divorce. The husband failed to respond to the complaint, and a default judgment was entered against him. The District Court then granted summary judgment against the wife, ordered foreclosure and sale of the collateral real property, and entered a deficiency judgment holding the wife responsible for any deficiency following sale of the real property. The wife appealed on grounds that the District Court erroneously granted summary judgment by: (1) determining that any oral representations made by bank agents were merged into written documents; (2) holding that the bank was entitled to a deficiency judgment; and (3) finding that the bank had no fiduciary duty to the wife. The Supreme Court considered each argument in turn and affirmed. First, the written loan agreements expressed the entire agreement between the parties, and any alleged oral understandings that were not reduced to writing were invalid. Second, although a deficiency judgment may not issue if the secured property is a single-family residence, in this case, the security agreements provided that the collateral property be used for business purposes, so even though the property was defendants' primary residence, the trust indenture was not strictly residential, and the District Court did not err in ordering a deficiency judgment. Third, as stated in Coles Dept. Store v. First Bank, 240 M 226, 783 P2d 932 (1989), to establish a fiduciary relationship, in addition to a long history of bank dealings, a bank must act in some capacity other than that common in the usual arm's-length debtor-creditor relationship. Here, no prior banking relationship existed between the parties, and given the wife's extensive legal and marketing background, she would not have needed to rely on the bank to interpret the loan documents for her or to act as her adviser, so no fiduciary relationship or duty existed. First Sec. Bank v. Abel, 2008 MT 161, 343 M 313, 184 P3d 318 (2008), following First St. Bank of Forsyth v. Chunkapura, 226 M 54, 734 P2d 1203 (1987), and Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 239 M 250, 780 P2d 608 (1989).

Elements of Prima Facie Case for Foreclosure: To make a prima facie case for foreclosure, proof of these three elements by the complaining party is required: (1) debt of the obligor; (2) nonpayment of the debt; and (3) present ownership of the debt by the complaining party. When no genuine issues of material fact regarding the right to foreclose are demonstrated, summary judgment is proper. Farm Credit Bank of Spokane v. Hill, 266 M 258, 879 P2d 1158, 50 St. Rep. 726 (1993).

Right to Apply Member Stock to Indebtedness: As a condition for a loan from the Federal Land Bank of Spokane (FLB), the Hills were required to purchase $9,800 worth of stock in the Federal Land Bank Association (FLBA). The FLBA purchased a like amount of stock in FLB, and the Hills pledged their stock to FLB in the event of default. When the Hills defaulted, the Farm Credit Bank of Spokane (FCB), which had become the successor by merger to FLB, retired the Hills' stock and applied the par value of the stock to the Hills' indebtedness. The Hills contended error in the stock seizure absent any allegation by FCB that it was entitled to the stock and without a showing that the bank should receive it. The Supreme Court cited provisions of the federal Farm Credit Act of 1971 that provide statutory authority for farm credit banks to retire and apply stock when a loan is in default and relied on case law from other jurisdictions that have recognized this right. Failure by the Hills to show that retirement of the stock was improper led the court to conclude that forfeiture and application of the stock were not in error. Farm Credit Bank of Spokane v. Hill, 266 M 258, 879 P2d 1158, 50 St. Rep. 726 (1993).

Prima Facie Case for Foreclosure — Default Judgment Proper: In order to make a prima facie case for foreclosure, a lender is required to show three elements: (1) the debt of the borrowers; (2) nonpayment of the debt; and (3) present ownership of the debt by the lender. Evidence of the presence of these elements, coupled with a sufficient showing of attorney fees, was adequate for a default judgment to be entered against debtors. NW. Farm Credit Serv., ACA v. Lund, 255 M 114, 841 P2d 490, 49 St. Rep. 910 (1992). See also First Nat'l Bank of Albuquerque v. Quinta Land & Cattle Co., 238 M 335, 779 P2d 48 (1989).

Award of Attorney Fees for Work Performed After Purchase at Foreclosure Sale: Defendant contended that 71-1-234 precluded an award of attorney fees for postforeclosure legal work because the award would require a second determination of fees in violation of the "one-action" rule of this section. However, 71-1-234 merely requires the District Court to act upon the mortgagee's petition for attorney fees before the notice of sale issues and neither expressly prohibits postjudgment attorney fees nor expressly provides that an award of fees earned prior to the foreclosure decree is final and conclusive. Farm Credit Bank of Spokane v. Newton, 252 M 336, 829 P2d 931, 49 St. Rep. 267 (1992).

One-Action Rule Not Violated by Separate Foreclosure Suits:

The District Court order granting summary judgment in Flathead County on a promissory note after the bank had already obtained judgment in Gallatin County on the same promissory note was not an additional judgment but an integrated proceeding allowing foreclosure of the Flathead property. Jones v. First Sec. Bank of Bozeman, 249 M 221, 814 P2d 988, 48 St. Rep. 653 (1991).

The bank brought two separate actions in two different counties to foreclose on separate parcels of property, both of which secured the defendant's promissory note which was in default. The Supreme Court ruled that the bank was not violating the one-action rule because the two actions were filed simultaneously, incorporating each other by reference, and therefore were not an attempt to circumvent the one-action rule. (See 1999 amendment itemizing exceptions to one-action rule.) First Sec. Bank v. Jones, 243 M 301, 794 P2d 679, 47 St. Rep. 1238 (1990).

Sales Price Not Properly Challenged and Not Inequitable: The defendants argued that the sales price obtained during foreclosure on their property was not for fair market value and therefore was inadequate and that no deficiency judgment should have been entered against them. The Supreme Court held that the defendants had not raised the issue of the adequacy of the sales price during trial and could not raise the issue on appeal. The court also held that no evidence was presented that showed the sales price to be inequitable and said the facts before it were distinguishable from those before the court in Trustees of Wash.-Idaho-Mont. Carpenters Employers Retirement Trust Fund v. Galleria Partnership, 239 M 250, 780 P2d 608, 46 St. Rep. 1661 (1989). Fed. S&L Ins. Corp. v. Hamilton, 241 M 367, 786 P2d 1190, 47 St. Rep. 357 (1990), followed in First W. Fed. Sav. Bank v. Lence, 255 M 7, 839 P2d 1277, 49 St. Rep. 857 (1992).

Determination of "Fair Market" Value in Mortgage Foreclosure: The Supreme Court, exercising its equity jurisdiction, examined the size of a deficiency judgment in relation to the original note to determine whether after foreclosure a judgment debtor was also liable for the deficiency judgment. The case was remanded to the District Court to determine the fair market value of the property at the time of the Sheriff's sale. "Fair market" is the intrinsic value of the real property with its improvements at the time of sale under judicial foreclosure, without consideration of the impact of foreclosure proceedings on the fair market value. Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 239 M 250, 780 P2d 608, 46 St. Rep. 1661 (1989). The District Court judgment valuing the foreclosed property at $1.1 million and awarding no interest on the loan was affirmed in Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 250 M 175, 819 P2d 158, 48 St. Rep. 724 (1991), followed in Bank of Baker v. Mikelson Land Co., 1999 MT 76, 294 M 64, 979 P2d 180, 56 St. Rep. 315 (1999).

Foreign Judgment — Summary Judgment Proper: A New Mexico bank successfully sued New Mexico defendants in New Mexico on defaulted loans secured by mortgages on Montana property. The bank then sought foreclosure in Montana. The law of the state where a judgment is rendered controls the interpretation of the effect of the foreign judgment in any subsequent actions between the parties or those with whom there is privity. Under a collateral estoppel analysis, the bank was entitled to summary judgment in Montana. The bank is entitled to attorney fees and costs, including attorney fees on appeal. First Nat'l Bank of Albuquerque v. Quinta Land & Cattle Co., 238 M 335, 779 P2d 48, 46 St. Rep. 1313 (1989).

Judgment on Note as Extinguishing Right to Foreclose: When a note is secured by mortgage, an action on the note alone waives the mortgage security if plaintiff obtains a judgment which becomes final, and he may not thereafter go into a court of equity and secure relief by way of foreclosure. Coburn v. Coburn, 89 M 386, 298 P 349 (1931).

Jury Trial: An action to foreclose a mortgage is one in equity, which is not changed into one at law by pleadings that raise issues of law on questions incidental to the principal relief sought by plaintiff. Therefore defendant is not entitled to a jury trial. Rochester v. Bennett, 74 M 293, 240 P 384 (1925).

Manner of Sale Directed — Separate or in One Body: In an action to foreclose a mortgage on land, the District Court may in its discretion direct whether the land is to be sold in separate parcels or en masse. Elston v. Hix, 67 M 294, 215 P 657 (1923), followed in Aetna Life Ins. Co. v. Slack, 232 M 250, 756 P2d 1140, 45 St. Rep. 1028 (1988).

Collateral Security:

Plaintiff by commencing an action to foreclose his mortgage upon land did not waive his claim upon wheat grown thereon, possession of which had been turned over to him by the mortgagors, but which was not covered by mortgage. The restriction found in this section does not include personal or collateral security not falling fairly within the meaning of the term "mortgage". Craig v. Burns, 65 M 550, 212 P 856 (1923).

This section is a limitation upon the rights which usually pertain to property, but its restriction will not be construed to include personal or collateral security, or any other form of security not falling within the meaning of the term "mortgage". St. Sav. Bank v. Albertson, 39 M 414, 102 P 692 (1909), distinguished in Vande Veegaete v. Vande Veegaete, 75 M 52, 243 P 1082 (1925).

Consent Decree: If a consent decree is entered in a suit to foreclose a mortgage, authorizing the receiver appointed therein to make a sale of the mortgaged property, a fully executed contract under such authority would constitute a "judicial sale", not requiring confirmation to pass title. Interior Sec. Co. v. Campbell, 55 M 459, 178 P 582 (1919).

Judicial Sale: A sale made pursuant to a decree of court in an action to foreclose a mortgage, instituted under this section, is a "judicial sale". Interior Sec. Co. v. Campbell, 55 M 459, 178 P 582 (1919).

Assignment of Mortgage: Where a note and a mortgage securing it were transferred by assignment, the payee endorsing the note without recourse, the transferee took it with full knowledge that it was a mortgage note, collectible under this section—a nonnegotiable instrument subject to all the equities existing in favor of the maker. Buhler v. Loftus, 53 M 546, 165 P 601 (1917).

Order of Sale Not Required:

A decree of foreclosure operates directly upon the mortgaged property, and is itself sufficient authority for the officer to proceed; it is unnecessary that any order aside from the decree should issue. Thomas v. Thomas, 44 M 102, 119 P 283 (1911).

An officer's authority to sell land on foreclosure arises from the decree of sale, and not from any so-called "order of sale". If an "order of sale", containing a copy of the decree, is issued to the Sheriff, any errors in such order, either as to the style of process or otherwise, are immaterial, and should be disregarded. Thomas v. Thomas, 44 M 102, 119 P 283 (1911).

Writ of Execution Not Required: A court of equity has inherent power to order a sale of mortgaged property without issuing a formal Writ of Execution. Thomas v. Thomas, 44 M 102, 119 P 283 (1911).

REMEDIES

Fair Market Value of Property Subject to Sheriff's Sale Determinable Notwithstanding Pendency of Litigation: First Western Federal Savings Bank foreclosed on a deed of trust securing Lence's condominium for nonpayment of mortgage and obtained a judgment from the District Court declaring that a deficiency judgment was available to First Western. Lence claimed that the District Court erred in refusing to delay the Sheriff's sale until the completion of certain federal court litigation over owners' access to resort facilities. The Supreme Court held that there was no reason to delay the sale, inasmuch as determination of the value of the property was the job of the appraiser. The Supreme Court also said that there was no reason in law or equity to further delay the mortgagee's right of foreclosure and sale, inasmuch as Lence had been in default since 1989. First W. Fed. Sav. Bank v. Lence, 255 M 7, 839 P2d 1277, 49 St. Rep. 857 (1992).

Exhaustion of Collateral Prior to Setoff — "One-Action Rule" Inapplicable to Contracts for Deed: In deciding whether a bank must first exhaust its collateral before it can exercise its right to setoff to recover a matured debt secured by the collateral, the Supreme Court cited Glacier Campground v. Wild Rivers, Inc., 182 M 389, 597 P2d 689 (1978), in holding that the "one-action rule" applying to notes secured by mortgages on real property does not apply to contracts for deed. Once payment was overdue, nothing in the law required the bank to wait until the contract for deed was canceled before it had a right of setoff. Rather, the bank could pursue any legal means, including setoff, even though other remedies lay open under the contract for deed. Victor Werlhof Aviation Ins. v. Farmers St. Bank, 237 M 51, 771 P2d 962, 46 St. Rep. 613 (1989). See also FDIC v. Shoop, 2 F3d 948 (9th Cir. 1993).

Deficiency Judgment:

A lender, electing to foreclose on its security under a trust deed by judicial procedure, is not entitled to remedies inconsistent with the Small Tract Financing Act of Montana. Specifically, the lender may not recover a deficiency judgment against the borrower, and the borrower has no right of redemption as is accorded in a judicial foreclosure of a conventional mortgage. First St. Bank of Forsyth v. Chunkapura, 226 M 54, 734 P2d 1203, 44 St. Rep. 451 (1987).

The purpose of this section is to require the mortgagee to bring one foreclosure action to enforce "any right" protected by the mortgage. If the price bid in at foreclosure is insufficient to reimburse the mortgagee, a deficiency judgment may be entered against the mortgagor for the balance due and may be enforced by a lien upon the real property of the mortgagor only. Stallings v. Erwin, 148 M 227, 419 P2d 480 (1966).

Where an equally liable defendant was a nonresident and personal service was impossible, rendering a deficiency judgment impossible, the judgment in the foreclosure suit did not extinguish the debt. Therefore, an action against the nonresident on one of the unpaid notes was properly maintainable and did not constitute a splitting of the creditor's cause of action. Lepper v. Jackson, 102 M 259, 57 P2d 768 (1936).

When, by election, a judgment creditor takes a deficiency judgment against one of two joint defendants both subject to the personal jurisdiction of the court, without in any way preserving his right as against the other defendant against whom he takes only a foreclosure, the judgment creditor waives his rights with respect to the second defendant. Subsequent action against the second defendant is barred by the deficiency judgment. Lepper v. Jackson, 102 M 259, 57 P2d 768 (1936).

A mortgage on real property was foreclosed and the property sold. The price received at the foreclosure sale was not sufficient to satisfy the debt, and a deficiency judgment could not be entered because the mortgagor was served by publication. Therefore the debt afforded grounds for a separate action. Craig v. Burns, 65 M 550, 212 P 856 (1923).

A deficiency judgment may be properly entered against the grantor in a deed of trust given to secure the payment of a promissory note, whether or not the deed itself specifically provides for entry of a deficiency judgment. First Nat'l Bank of Butte v. Pardee, 16 M 390, 41 P 77 (1895), followed in Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 239 M 250, 780 P2d 608, 46 St. Rep. 1661 (1989).

Writ of Assistance — No Dependence on Confirmation of Foreclosure: The issuance of a Writ of Assistance is not dependent on judicial confirmation of a foreclosure sale. Fed. Land Bank of Spokane v. Heidema, 224 M 64, 727 P2d 1336, 43 St. Rep. 2020 (1986), followed in Kansas City Life Ins. Co. v. Bratsky Farms, 238 M 398, 778 P2d 859, 46 St. Rep. 1366 (1989).

Foreclosure on Trust Indenture — Order of Sale Upheld When Debtor Failed to Demand Specific Order: In an action by a bank to foreclose a trust indenture secured by the mortgagor's residence and separate commercial property, sale of the residential property first was upheld when the debtor did not exercise her right to determine the order of the sale. It is a proper election for a debtor at the time of the sale to demand a specific order in which separate parcels are to be sold. However, when the debtor acquiesced in the order of the sale and deferred to the discretionary authority of the trustee, the order of sale will be upheld. First Nat'l Bank v. Powell, 212 M 468, 689 P2d 255, 41 St. Rep. 1870 (1984).

Foreclosure of Mortgage Securing Note — Payment to Holder Required: The Dahls executed a note to Sythe and also executed a real estate mortgage in Sythe's favor. The note was placed in an escrow account in the Culbertson State Bank, and the bank was designated as the place where payment was to be made. Sythe assigned the note to the bank as security for a note obtained by him. Sythe later gave the bank a written assignment of the mortgage. Defendant Dahl was given written notice of this assignment. The bank did not receive any payments from Sythe on his notes or from Dahl on the note assigned to the bank. The bank brought an action for the foreclosure of the mortgage against Dahl. Dahl contended that the note was discharged because paid in full, with payments being made to Sythe. The bank was never able to make service of process on Sythe. The bank was a "holder" of the note since it was in possession of the note endorsed by Sythe. As a holder and having produced the note, the bank was entitled to recover unless the defendant established a defense. Defendant's sole defense was that he had paid the note to Sythe. The defense of payment only discharges the maker's liability on the instrument if payment is made to the holder. Defendant never attempted to prove payment to the holder. Since the bank was the holder of the note and a valid assignee of the mortgage securing the note, it was entitled to a decree of foreclosure. Culbertson St. Bank v. Dahl, 190 M 33, 617 P2d 1295, 37 St. Rep. 1752 (1980).

Writ of Assistance: The Writ of Assistance, employed in mortgage foreclosure actions, issues as an aid in carrying out the decree of sale and is not governed in its issuance by the law on executions, as is the Writ of Possession. Dodd v. Simon, 113 M 536, 129 P2d 224 (1942).

Contract for Sale Not a Mortgage:

This section applies only to actions for the recovery of debts or the enforcement of rights secured by a mortgage, or what amounts to a mortgage in law, and has no application to an action for the cancellation of a land contract brought by the vendor. White v. Jewett, 106 M 416, 78 P2d 85 (1938).

A contract of sale which, among other things, provided that time should be of the essence, that the vendors could, at their option, terminate the contract for failure on the part of the vendee to comply strictly with its terms, that, upon such termination, the property involved and all payments made by the vendee would be the property of the vendors, and that the vendee would not have a right of recovery, was not a mortgage. Arnold v. Fraser, 43 M 540, 117 P 1064 (1911). See also Cook-Reynolds Co. v. Chipman, 47 M 289, 133 P 694 (1913).

Failure of Security:

This section does not prohibit a personal action when the security given the creditor has become valueless without any fault on his part. Nor is it necessary for him to foreclose his mortgage in order to prove that his security has become valueless. He may prove the value of the security in any way possible. Further, in an action on the debt, the creditor may secure an attachment under the provisions of 27-18-201. Bailey v. Hansen, 105 M 552, 74 P2d 438 (1937), followed in FDIC v. Shoop, 2 F3d 948 (9th Cir. 1993).

The purpose of this section is to require mortgagees to exhaust their security before having recourse to the general assets of the debtor. However, where the mortgagee has lost his security in any manner, other than deliberately parting with it for the purpose of evading the provisions of the section, he may proceed against the mortgagor on the debt. Bailey v. Hansen, 105 M 552, 74 P2d 438 (1937); Lepper v. Jackson, 102 M 259, 57 P2d 768 (1936); Leffek v. Luedeman, 95 M 457, 27 P2d 511, 91 ALR 286 (1933).

A mortgagee whose mortgage was rendered invalid for failure to file a renewal affidavit but whose debt has not become barred by the general Statute of Limitations may proceed against the mortgagor's administrator on the debt. The mortgagee is entitled to a judgment adjudicating the debt as a valid claim against the estate payable in due course of administration. Leffek v. Luedeman, 95 M 457, 27 P2d 511, 91 ALR 286 (1933).

Plaintiff sued defendant on a promissory note, alleging that the note had been secured by a chattel mortgage but that defendant had sold the secured property without plaintiff's knowledge or consent. It was proper to permit plaintiff to introduce testimony that the mortgage had become valueless without any fault on his part. Vande Veegaete v. Vande Veegaete, 75 M 52, 243 P 1082 (1925).

When a note was secured by a second mortgage, which has become worthless because of foreclosure of the first mortgage and expiration of the time of redemption, the complaint in an action on such note need not refer to such mortgage or loss of security. Brophy v. Downey, 26 M 252, 67 P 312 (1902).

Exhaustion of Security Required Before Taking Other Recourse:

When there has been an improper sale of mortgaged property, the mortgagee still has security for the indebtedness and must resort to it in satisfaction of his claim. Advance-Rumely Thresher Co. v. Kruger, 93 M 66, 16 P2d 1102, 85 ALR 1053 (1932).

The word "secured" does not mean that the security must be adequate to satisfy the debt. As long as the security has value, the mortgagee must proceed according to this section. The fact that the mortgagor caused the security to become encumbered does not estop him from asserting that the mortgagee is barred by this section from maintaining a personal action against him. Barth v. Ely, 85 M 310, 278 P 1002 (1929).

In a suit on a promissory note, the defendant's answer that the plaintiff has taken "security" for the payment of the note does not bar the action when it does not appear from the answer that the security is in the form of a mortgage or the equivalent of a mortgage. The fact that the obligation sued upon is secured by a mortgage or its equivalent is a matter of defense, and the burden rests upon the defendant to make that appear by his pleading. St. Sav. Bank v. Albertson, 39 M 414, 102 P 692 (1909).

The obvious purpose of this section is to compel one who has taken a special lien to secure his debt to exhaust his security before having recourse to the general assets of the debtor. St. Sav. Bank v. Albertson, 39 M 414, 102 P 692 (1909).

A surety on a promissory note whose liability has been secured by a chattel mortgage cannot, upon being obliged to pay the note, waive the mortgage security and proceed by attachment against his principals to recover the debt but must foreclose the mortgage as required by this section. The decision in this case does not affect the question of enforcing the debt by exercising a power of sale contained in the mortgage. Largey v. Chapman, 18 M 563, 46 P 808 (1896), explained in Bailey v. Hansen, 105 M 552, 74 P2d 438 (1937).

Alternative Remedies:

When the pleadings in an action on a promissory note do not disclose that plaintiff has security for the debt, a personal action may be maintained; in such a case the provision that foreclosure is the only action for the recovery of a debt secured by mortgage does not apply. Richardson v. Lloyd, 90 M 127, 300 P 254 (1931).

This section prohibits any action other than that provided by statute for the foreclosure of the mortgage. The creditor cannot waive the mortgage and sue on the debt. Section 71-3-110, providing that the existence of a lien as security for the performance of an obligation does not affect the right of the creditor to enforce the obligation without regard to the lien, has reference to liens other than mortgage liens. Barth v. Ely, 85 M 310, 278 P 1002 (1929).

While 71-3-110 appeared in the Civil Code, and this section in the Code of Civil Procedure, R.C.M. 1921, both referring to the right of creditors to enforce obligations secured by lien, they must be considered to have been passed at the same time, and it must be presumed that it was intended that both should be operative, and each should govern as to the title in which it is found, and courts must construe them together and reconcile them, if possible. Barth v. Ely, 85 M 310, 278 P 1002 (1929).

When, in an action to foreclose a first mortgage, the mortgagee in a second mortgage is made a defendant and defaults, such action does not defeat the right of his assignee of the note to recover thereon after the time to redeem the premises from the foreclosure sale has expired. Brophy v. Downey, 26 M 252, 67 P 312 (1902).

The holder of a note secured by a second mortgage is not required to foreclose during the period of redemption after the first mortgage has been foreclosed and the property sold thereunder, but he may wait until such period has expired and his lien is determined, and then sue on the note. Brophy v. Downey, 26 M 252, 67 P 312 (1902), explained in Barth v. Ely, 85 M 310, 278 P 1002 (1929).

PARTIES TO FORECLOSURE

Tax Lien: When, subsequent to purchase of tax certificates, mortgagee foreclosed the mortgage, the foreclosure sale cut off any lien asserted by mortgagee for taxes paid even though the mortgage permitted mortgagee to pay taxes and collect the same upon foreclosure. A mortgagee who pays taxes on the mortgaged property prior to foreclosure does not acquire a distinct and separate lien on the property which survives the foreclosure sale. Stallings v. Erwin, 148 M 227, 419 P2d 480 (1966).

Unrecorded Conveyances: Under this section a grantee holding an unrecorded conveyance from or under the mortgagor at the commencement of a foreclosure suit need not be made a party to that suit, and the proceedings and the judgment rendered therein are as conclusive against such grantee as if he had been made a party. West v. Capital Trust & Sav. Bank, 113 M 130, 124 P2d 572 (1942).

Void Mortgage: When a mortgage is held void as to all the parties against whom it was attempted to be foreclosed, the foreclosure sale is equally void as to all the parties. Gaer v. Bank of Baker, 113 M 116, 122 P2d 828 (1942).

Creditor Attacking Mortgage: When a general creditor of a probate estate seeks to set aside a mortgage foreclosure decree on the basis of fraud, before he can be granted any relief, he must secure a lien by some process upon the property involved. A general creditor cannot assert the invalidity of a mortgage unless he has fastened a lien on the mortgaged property. Missoula Trust & Sav. Bank v. Boos, 106 M 294, 77 P2d 385 (1938).

Lessee Bound by Decree: A farm tenant holding under an unrecorded oral lease was bound, under this section, by the decree of foreclosure even though he was not a party to the action. The Writ of Assistance lay to oust him from possession unless he acquired a new and independent right after rendition of the decree. State ex rel. Goodhue County Nat'l Bank v. District Court, 96 M 600, 31 P2d 837 (1934).

Second Mortgagees Unnecessary Parties to Action: Where a second mortgage of church property did not purport to be the deed of the corporation but was executed by the president and secretary of the trustees individually and duly recorded, it was not necessary to make the second mortgagees parties to an action to foreclose a prior mortgage on the church property, in order to bar their equitable right to redeem. Shackleton v. Allen Chapel African Methodist Episcopal Church, 25 M 421, 65 P 428 (1901).

Law Review Articles

The Montana Judicial and Non-Judicial Foreclosure Sale: Analysis and Suggestions for Reform, Dietrich, 49 Mont. L. Rev. 285 (1988).

71-1-223. Power of sale.

Case Notes

Scrivener's Error — Lien Perfected — Bankruptcy: The plaintiffs paid off one of two loans with deeds of trust, but due to a scrivener's error the wrong lien payoff was recorded. Subsequently recorded instruments corrected the mistake, but the plaintiffs argued that when they entered bankruptcy the scrivener's error invalidated the underlying trust indenture and corresponding lien. Because a lien stays with the property until the debt is paid in full or until foreclosure proceedings are complete, the scrivener's error did not invalidate or discharge the underlying lien, and it survived the plaintiffs' bankruptcy proceedings. Reeves v. U.S. Bank Nat'l Ass'n, 2017 MT 70, 387 Mont. 138, 391 P.3d 742, following Dewsnup v. Timm, 502 U.S. 410 (1992).

Acceleration and Immediate Possession Clauses:

When a chattel mortgage contains a clause giving to the mortgagee the right to declare the debt due and payable before the due date under certain circumstances and the power to take possession of the property and sell it, concluding that the power thus conferred shall be in addition to and not in substitution of the right of foreclosure, it is evidence of the intention of the parties that the mortgagee has the right of election granted by this section to proceed either by foreclosure or under the above provision of the mortgage. Bice v. Daffern, 88 M 479, 293 P 433 (1930).

When the parties to a real estate mortgage had contracted that upon the mortgagor's default the mortgagee could at his option declare the entire indebtedness due and payable without notice, foreclose by judicial proceedings, or sell the premises according to law, and should be entitled to immediate possession and receive the rents, issues, and profits thereof, he was entitled to possession upon condition broken without foreclosure and sale. Union Cent. Life Ins. Co. v. Jensen, 74 M 70, 237 P 518 (1925), distinguished in Sharp Bros., Inc. v. Bartlett, 76 M 415, 248 P 199 (1926), Morton v. Union Cent. Life Ins. Co., 80 M 593, 261 P 278 (1927), and First Nat'l Corp. v. Perrine, 99 M 454, 43 P2d 1073 (1935).

Breach of Obligation — Note Incorporating Mortgage: In determining whether there has been a breach of an obligation for which a mortgage was given as security, within the meaning of this section, prescribing how a power of sale conferred by the mortgage may be executed, the note and mortgage must be read together and the stipulation in the mortgage must be construed as entering into and becoming a part of the note. Bice v. Daffern, 88 M 479, 293 P 433 (1930).

Mortgagee as Purchaser: A mortgagee cannot become a purchaser at a summary sale of property conducted by himself under a power of sale contained in the mortgage. Union Cent. Life Ins. Co. v. Jensen, 74 M 70, 237 P 518 (1925).

Trust Deed Executed by Attorney in Fact: An attorney in fact, under a general power of attorney to sell, convey, and mortgage the grantor's property, may secure the payment of his grantor's debt by executing a trust deed conveying the grantor's property and authorizing the trustee or his successor in trust to sell the same in case of nonpayment of the indebtedness. Muth v. Goddard, 28 M 237, 72 P 621 (1903).

71-1-224. Sale — notice.

Case Notes

No Error in Ordering Foreclosure of Personal Real Property for Failure to Repay Business Loans — Deficiency Judgment Proper: Defendants, husband and wife, failed to make scheduled payments on two bank loans, and the bank filed for foreclosure of two deeds of trust. Defendants were in the process of obtaining a divorce. The husband failed to respond to the complaint, and a default judgment was entered against him. The District Court then granted summary judgment against the wife, ordered foreclosure and sale of the collateral real property, and entered a deficiency judgment holding the wife responsible for any deficiency following sale of the real property. The wife appealed on grounds that the District Court erroneously granted summary judgment by: (1) determining that any oral representations made by bank agents were merged into written documents; (2) holding that the bank was entitled to a deficiency judgment; and (3) finding that the bank had no fiduciary duty to the wife. The Supreme Court considered each argument in turn and affirmed. First, the written loan agreements expressed the entire agreement between the parties, and any alleged oral understandings that were not reduced to writing were invalid. Second, although a deficiency judgment may not issue if the secured property is a single-family residence, in this case, the security agreements provided that the collateral property be used for business purposes, so even though the property was defendants' primary residence, the trust indenture was not strictly residential, and the District Court did not err in ordering a deficiency judgment. Third, as stated in Coles Dept. Store v. First Bank, 240 M 226, 783 P2d 932 (1989), to establish a fiduciary relationship, in addition to a long history of bank dealings, a bank must act in some capacity other than that common in the usual arm's-length debtor-creditor relationship. Here, no prior banking relationship existed between the parties, and given the wife's extensive legal and marketing background, she would not have needed to rely on the bank to interpret the loan documents for her or to act as her adviser, so no fiduciary relationship or duty existed. First Sec. Bank v. Abel, 2008 MT 161, 343 M 313, 184 P3d 318 (2008), following First St. Bank of Forsyth v. Chunkapura, 226 M 54, 734 P2d 1203 (1987), and Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 239 M 250, 780 P2d 608 (1989).

Deficiency Judgment Available in Foreclosure on Recreational Home Condominium: First Western Federal Savings Bank foreclosed on a deed of trust securing Lence's condominium for nonpayment of mortgage and obtained a judgment from the District Court declaring that a deficiency judgment was available to First Western. The Supreme Court affirmed, based on its prior opinions in First St. Bank of Forsyth v. Chunkapura, 226 M 54, 734 P2d 1203 (1987), and First Fed. Sav. & Loan v. Anderson, 238 M 296, 777 P2d 1281 (1989). The rulings that the Small Tract Financing Act of Montana was not intended to apply the remedy of deficiency judgment trust deeds securing owner-occupied, single-family residences did not apply to Lence's condominium. The condominium was not Lence's primary residence because it was occupied by him only in the summers, and the Act was not intended by the Legislature to apply to this type of property. First W. Fed. Sav. Bank v. Lence, 255 M 7, 839 P2d 1277, 49 St. Rep. 857 (1992).

Fair Market Value of Property Subject to Sheriff's Sale Determinable Notwithstanding Pendency of Litigation: First Western Federal Savings Bank foreclosed on a deed of trust securing Lence's condominium for nonpayment of mortgage and obtained a judgment from the District Court declaring that a deficiency judgment was available to First Western. Lence claimed that the District Court erred in refusing to delay the Sheriff's sale until the completion of certain federal court litigation over owners' access to resort facilities. The Supreme Court held that there was no reason to delay the sale, inasmuch as determination of the value of the property was the job of the appraiser. The Supreme Court also said that there was no reason in law or equity to further delay the mortgagee's right of foreclosure and sale, inasmuch as Lence had been in default since 1989. First W. Fed. Sav. Bank v. Lence, 255 M 7, 839 P2d 1277, 49 St. Rep. 857 (1992).

Determination of "Fair Market" Value in Mortgage Foreclosure: The Supreme Court, exercising its equity jurisdiction, examined the size of a deficiency judgment in relation to the original note to determine whether after foreclosure a judgment debtor was also liable for the deficiency judgment. The case was remanded to the District Court to determine the fair market value of the property at the time of the Sheriff's sale. "Fair market" is the intrinsic value of the real property with its improvements at the time of sale under judicial foreclosure, without consideration of the impact of foreclosure proceedings on the fair market value. Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 239 M 250, 780 P2d 608, 46 St. Rep. 1661 (1989). The District Court judgment valuing the foreclosed property at $1.1 million and awarding no interest on the loan was affirmed in Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 250 M 175, 819 P2d 158, 48 St. Rep. 724 (1991), followed in Bank of Baker v. Mikelson Land Co., 1999 MT 76, 294 M 64, 979 P2d 180, 56 St. Rep. 315 (1999).

Combining Properties for Sale — Validity of Notice: When the parties to two mortgages executed at the same time were the same, the fact that the property covered by both was included in one sale did not affect the validity of the notice of sale or the sale. First Nat'l Corp. v. Perrine, 99 M 454, 43 P2d 1073 (1935).

Erroneous Description in Notice: Erroneous inclusion of a tract of land owned by one other than the mortgagor in a notice of sale under a power contained in the mortgage did not vitiate the sale as to the mortgagor, whose property covered by the mortgage was properly described in the notice. First Nat'l Corp. v. Perrine, 99 M 454, 43 P2d 1073 (1935).

Jurisdictional Defect When Notice Improper: The notice of sale of mortgaged realty under a power of sale in the mortgage on default of the mortgagor is jurisdictional; unless the requirements of this section were met, a sale made is void. When notice is given by publication, posting of the notice is not required by this section. First Nat'l Corp. v. Perrine, 99 M 454, 43 P2d 1073 (1935).

Time of Sale Relative to Publication: A notice of the type required by this section was published in a local weekly newspaper for 4 consecutive weeks, beginning with March 11 and ending on April 1; the sale was had on April 15. Although only 15 days had elapsed between the last publication and the sale, the first publication was as much notice as the last, and therefore the sale had been advertised at least 30 days before the sale, rendering the notice sufficient. First Nat'l Corp. v. Perrine, 99 M 454, 43 P2d 1073 (1935).

71-1-225. Surplus money from sale.

Case Notes

Surplus Sale Proceeds: When the foreclosing party's debt was paid in full, the defaulting purchaser under the contract for deed was entitled to the surplus proceeds from the foreclosure sale. Davidson v. D.H. Hansen Ranch, Inc., 235 M 204, 766 P2d 258, 45 St. Rep. 2320 (1988).

71-1-228. Rights of redemption applicable.

Case Notes

Person Not in Residence on Mortgaged Property Not Entitled to Possession During Statutory Redemption Period: Halseth defaulted on several promissory notes, so Independence Bank filed a foreclosure action on Halseth's property in Blaine County. At trial, Halseth contended that because he was currently residing on the property, he was entitled to possession of the property during the 1-year redemption period following the foreclosure sale. Although Halseth maintained a residence in Harlem, he testified that he had moved a camper trailer to the Blaine County property for the sole purpose of establishing his right to retain the property during the redemption period. The District Court applied the definition of residence in 1-1-215, and determined that Halseth resided in Harlem, not on the Blaine County property, and that he was therefore not entitled to retain possession during the redemption period. Halseth appealed. The Supreme Court agreed with the District Court's findings. Even though he moved the camper trailer to Blaine County, Halseth retained ties to the Harlem residence and did not intend to relinquish it. Absent a demonstration of the union of act and intent necessary to change permanent residence from Harlem to Blaine County, Halseth could not be said to reside at the Blaine County property and was not entitled to retain possession of the property during the redemption period. Independence Bank v. Halseth, 2002 MT 100, 309 M 398, 46 P3d 657 (2002).

Foreclosure Sale Order Not Violative of Conveyance Restriction or Redemption Right: Defendant contended the wording of an order of sale in a foreclosure proceeding, stating that defendants "have no lien, right, title, estate, claim, or interest on or to the mortgaged property, whether real, personal, or mixed hereinafter described", incorrectly severed his interest in the land prior to foreclosure sale and severely hindered his attempts to sell the land and satisfy the promissory note. However, the language did not violate 71-1-202 because it did not enable the mortgage owner to recover possession without a foreclosure and sale. Further, the statement did not affect the defendant's 1-year statutory right of redemption. Aetna Life Ins. Co. v. Slack, 232 M 250, 756 P2d 1140, 45 St. Rep. 1028 (1988).

Express Waiver of Redemption Rights in Federal Loan Contract: Although the mortgagors' Small Business Administration (SBA) loan contained an express waiver of redemption rights, the mortgagors were entitled to redeem property purchased by the SBA at a mortgage foreclosure sale pursuant to 71-3-109. That statute provides that all contracts in restraint of the right of redemption from a lien are void. The balance between federal and state law must be struck in favor of Montana's interest in protecting its debtors. U.S. v. Pastos, 781 F2d 747 (9th Cir. 1986).

Mortgage Terminated by Quitclaim Deed — Foreclosure Procedure Not Required: Plaintiff, d/b/a Starhaven Ranch, Ltd., purchased a ranch on a contract for deed from Crofts. Crofts had purchased the land on a contract basis from Clarnos. Crofts assigned their purchasers' interest in the contract to defendant. Crofts defaulted on a contract provision requiring them to obtain grazing permits and on their contract with Clarnos. Starhaven fell in default on its final downpayment. Crofts fell in default on the loan with defendant. The bank recorded the quitclaim deed from Crofts. The bank asserted it succeeded to the rights of the Croft-Starhaven contract and took action against Starhaven. Crofts disappeared. Starhaven made payment on the Clarno-Croft contract to prevent Clarnos from declaring a forfeiture. The bank asserted absolute ownership rights against Starhaven. The bank obtained the quitclaim deed Starhaven had executed to Crofts and recorded it. The bank then sent Starhaven a notice to vacate, triggering the proceedings. The trial court held the bank had succeeded to all Crofts' interest in the property when it obtained and recorded the assignment. The court then concluded the bank could assert the default provisions of the Croft-Starhaven contract and was entitled to forfeiture. On appeal, the Supreme Court held that the assignment as collateral for a loan created a security interest only—in this case a mortgage—and mortgage foreclosure proceedings were the proper method for the bank to pursue its remedies. On rehearing, the court upheld the trial court, finding that the mortgagors waived their right to foreclosure proceedings by filing a quitclaim deed to defendant bank. Waiver of the right to foreclosure includes consent to the possession of the mortgagee and the waiver of the equity of redemption. The bank was entitled under the Croft-Starhaven contract to require Starhaven's forfeiture upon defaulting on the contract payments, and Starhaven was not entitled to foreclosure proceedings. Erickson v. First Nat'l Bank, 215 M 350, 697 P2d 1332, 42 St. Rep. 423 (1985).

71-1-229. Possession of land prior to foreclosure upon default and during period of redemption.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Person Not in Residence on Mortgaged Property Not Entitled to Possession During Statutory Redemption Period: Halseth defaulted on several promissory notes, so Independence Bank filed a foreclosure action on Halseth's property in Blaine County. At trial, Halseth contended that because he was currently residing on the property, he was entitled to possession of the property during the 1-year redemption period following the foreclosure sale. Although Halseth maintained a residence in Harlem, he testified that he had moved a camper trailer to the Blaine County property for the sole purpose of establishing his right to retain the property during the redemption period. The District Court applied the definition of residence in 1-1-215, and determined that Halseth resided in Harlem, not on the Blaine County property, and that he was therefore not entitled to retain possession during the redemption period. Halseth appealed. The Supreme Court agreed with the District Court's findings. Even though he moved the camper trailer to Blaine County, Halseth retained ties to the Harlem residence and did not intend to relinquish it. Absent a demonstration of the union of act and intent necessary to change permanent residence from Harlem to Blaine County, Halseth could not be said to reside at the Blaine County property and was not entitled to retain possession of the property during the redemption period. Independence Bank v. Halseth, 2002 MT 100, 309 M 398, 46 P3d 657 (2002).

Residence by Relative Not Substitute for Personal Residence: DeSaye appealed the trial court's ruling that he was not entitled to possession of his foreclosed farm during the statutory redemption period. The Supreme Court affirmed, holding that DeSaye had to personally reside on the farm to be entitled to possession and could not use his son's residence on the farm to meet the residency requirement. Interstate Prod. Credit Ass'n v. DeSaye, 250 M 320, 820 P2d 1285, 48 St. Rep. 986 (1991), followed in Farm Credit Bank of Spokane v. Hill, 266 M 258, 879 P2d 1158, 50 St. Rep. 726 (1993).

Occupation of Foreclosed Land as Home — Payment of Rents and Profits Not Required: Defendants occupied the land that was foreclosed on as their home. To require that they pay rent or profits from the land diminished their unqualified right to possession under 25-13-821 and this section in a way that was not provided for by the Legislature. Fed. Land Bank of Spokane v. Snider, 247 M 508, 808 P2d 475, 48 St. Rep. 285 (1991), distinguishing Citizens' Nat'l Bank v. W. Loan & Bldg. Co., 64 M 40, 208 P 893 (1922), followed in Aetna Life Ins. Co. v. Jordan, 254 M 208, 835 P2d 770, 49 St. Rep. 703 (1992), and distinguished in Farm Credit Bank of Spokane v. Hill, 266 M 258, 879 P2d 1158, 50 St. Rep. 726 (1993).

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Vendee of Mortgagor: Purchasers who took premises subject to preexisting mortgage, and who had not assumed payment of mortgage, even though occupying premises as their home at time of foreclosure, were not "execution debtors" within the meaning of the statute and were not entitled to possession of premises during 1-year period of redemption. First Nat'l Bank of Circle v. Hastetter, 149 M 142, 423 P2d 306 (1967).

Premises Not Occupied as Home:

The mortgagor's right of possession during the period of redemption does not apply unless the debtor occupies the premises as a home for himself and family, and does not apply to a business establishment. Rock Island Plow Co. v. Cut Bank Implement Co., 101 M 117, 53 P2d 116 (1935).

The purchaser at a sale of realty under foreclosure, as against the judgment debtor, is entitled to possession during the period of redemption if the premises are not occupied by the debtor as a home for himself and his family. Lepper v. Home Ranch Co., 90 M 558, 4 P2d 722 (1931); Kester v. Amon, 81 M 1, 261 P 288 (1927); State ex rel. Flowerree v. District Court, 71 M 89, 227 P 579 (1924); Dyer v. Schmidt, 67 M 6, 213 P 1117 (1923); Citizens' Nat'l Bank of Laurel v. W. Loan & Bldg. Co., 64 M 40, 208 P 893 (1922).

Change of Possession: The right granted by this section to remain in possession during the period of redemption is exempt from forced sale; the right, however, is lost if there is a change of possession. U.S. Bldg. & Loan Ass'n v. Stevens, 93 M 11, 17 P2d 62 (1932).

71-1-230. Action to redeem mortgage.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

71-1-231. Redemption by multiple mortgagors.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

71-1-232. Deficiency judgment not allowed on foreclosure of purchase price mortgage.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Refusal of District Court to Invoke Equitable Power to Require Payment of Past-Due Monthly Payments in Light of Nonjudicial Foreclosure Proceedings — Affirmed: Plaintiff was delinquent in making monthly payments on a trailer park. Defendant estate initiated a nonjudicial foreclosure against plaintiff. The trust indenture under which plaintiff secured financing allowed the estate to issue a notice of trustee sale if plaintiff defaulted. After the notice of trustee sale was recorded, foreclosure proceedings were stayed through an injunction. The injunction was lifted following trial, and the estate then requested that the District Court use its equitable and contempt powers to compel plaintiff to pay the past-due payments or go to jail if plaintiff refused. The District Court declined, explaining that the estate was entitled to the amount plaintiff provided as security when the injunction was issued and that the estate could resume the nonjudicial foreclosure proceedings or initiate judicial foreclosure proceedings for further remedy. By using this approach, the District Court attempted to return the parties to the positions held when the injunction was issued rather than putting the estate in a better position. The Supreme Court affirmed. Because the estate as the seller financed the sale of the property to plaintiff, the estate was acting as a purchase money mortgagee and thus was not entitled to a deficiency judgment upon foreclosure of the property. Therefore, the District Court did not err in releasing the bond and returning the parties to the trustee sale position. The estate's request for further equitable relief was declined. Deschamps v. Treasure St. Trailer Ct., Ltd., 2010 MT 74, 356 Mont. 1, 230 P.3d 800.

Deficiency Judgment Not Allowed on Vendor Foreclosure of Purchase Money Mortgage: This section applies only to vendors of real property who take back a mortgage for part of the purchase price of real property and does not authorize a vendor to receive a deficiency judgment on the foreclosure of a purchase money mortgage. Farm Credit Bank of Spokane v. Hill, 266 M 258, 879 P2d 1158, 50 St. Rep. 726 (1993).

Statute Inapplicable When Foreclosure Unavailable to Junior Mortgagee: McGregors sold 255 acres of irrigated farmland to Madsens for $510,000 on a contract for deed, which included a $235,000 balloon payment 3 years after the sale. When Madsens borrowed $200,000 from Equitable Life Assurance Society (Equitable) for the balloon payment, McGregors agreed to subordinate their interest to Equitable, accepting a second mortgage. The balance remaining pursuant to the contract for deed was converted into a promissory note and mortgage in favor of McGregors. Following default by Madsens on payments to both Equitable and McGregors, Equitable foreclosed. McGregors also initiated a foreclosure action, but after Equitable's foreclosure, they sought instead to sue Madsens on the promissory note. Madsens argued that McGregors' mortgage was a purchase money mortgage to secure the balance of the purchase price and that this section prevented McGregors from suing on the note. However, the foreclosure action and sale by Equitable, through no fault of McGregors, extinguished McGregors' security interest in the land. Inasmuch as foreclosure of the mortgage was unavailable to McGregors, they did not come under the prohibition of this section and the District Court properly awarded McGregors a money judgment on the note. McGregor v. Madsen, 253 M 210, 832 P2d 779, 49 St. Rep. 483 (1992).

Foreclosure of First Lien — Second Lienholder's Direct Action on Note — Summary Judgment: A second lienholder whose lien is extinguished by the foreclosure of a first lien may maintain a direct action on the note. The bank, which held a promissory note secured by a junior trust indenture, was entitled to sue directly on the note after foreclosure by the holder of the senior trust indenture. The statutory prohibitions against deficiency judgments after foreclosure upon a note secured by a trust indenture apply only to the foreclosing creditor. They do not apply to a creditor holding a note that is no longer secured because of a foreclosure action taken by another creditor possessing a first trust deed. Summary judgment for the bank was proper when there was no genuine issue of any material fact and when the bank was entitled to judgment as a matter of law. First Interstate Bank of Kalispell v. Wann, 235 M 111, 765 P2d 749, 45 St. Rep. 2232 (1988).

What Constitutes Purchase Money Mortgage: Respondent purchased a tract of land. After a complicated series of conveyances, respondent, as security for a loan, granted a mortgage that covered only a portion of the original tract purchased. The mortgage was granted by respondent 8 months after the tract had been conveyed to the respondent and was granted to parties who were not the sellers of the tract. The court found the evidence indicated the mortgage was given to secure payment of the purchase price of the original tract, was not given to secure any new indebtedness, and was therefore a purchase money mortgage. A purchase money mortgage under this section is not required to be issued simultaneously with the conveyance of the property on which it is given. (Section 71-3-114 was determined to be inapplicable to this case.) Swenson v. Ramage, 234 M 188, 762 P2d 851, 45 St. Rep. 1832 (1988).

Mortgage Foreclosure Executed to Secure Loan — Deficiency Judgment Not Prohibited: Defendant relied on this section in arguing that a deficiency judgment was not proper because the mortgage was a purchase money mortgage. However, the section did not apply because the plaintiff insurance company was not the vendor of the property and foreclosure was not executed to satisfy the balance of the purchase price. Rather, the company assumed the status of mortgagee to secure its loan, and the mortgage foreclosure was executed to satisfy the amount owing on the promissory note. A deficiency judgment was not prohibited under these circumstances. Aetna Life Ins. Co. v. Slack, 232 M 250, 756 P2d 1140, 45 St. Rep. 1028 (1988), followed in Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 239 M 250, 780 P2d 608, 46 St. Rep. 1661 (1989), and in First Fed. S&L Ass'n of Missoula v. Anderson, 238 M 296, 777 P2d 1281, 46 St. Rep. 1280 (1989).

Contract for Deed Not a Purchase Money Mortgage: A contract for deed and a purchase money mortgage are not one and the same thing with two different names. They are based upon two distinct legal theories. Glacier Campground v. Wild Rivers, Inc., 182 M 389, 597 P2d 689 (1978), followed in Aveco Properties, Inc. v. Nicholson, 229 M 417, 747 P2d 1358, 44 St. Rep. 2098 (1987).

71-1-233. Attorney's fee on foreclosure.

Case Notes

Attorney Fees Payable When Possession Resolved by Stipulation: After property was purchased at a foreclosure sale, purchaser moved for a writ of assistance because debtor did not immediately vacate the property. The motion included a request for attorney fees. The possession dispute was later settled by stipulation, which allowed continued possession of the property for a short time. Debtor asserted that because she retained the property until it could be redeemed and sold to a third party, she was the prevailing party and could not be liable for attorney fees. The Supreme Court followed the rationale in Nett v. Stockgrowers Fin. Corp., 84 M 116, 274 P 497 (1929), that the prevailing creditor is entitled to recoup the costs of collection even if the matter never goes to court. The Supreme Court held that it was not error to award attorney fees to the creditor for work performed in connection with the postforeclosure dispute regarding possession when possession was resolved by stipulation, even though the stipulation itself did not provide for the award of fees. Farm Credit Bank of Spokane v. Newton, 252 M 336, 829 P2d 931, 49 St. Rep. 267 (1992).

Reasonableness of Fees — Fees on Appeal: Based on the record of considerable time and energy spent by a New Mexico bank to foreclose mortgages on Montana land and the complexity and involved nature of the litigation, the award of $50,000 for attorney fees was not unreasonable. The bank is also entitled to its attorney fees on appeal. First Nat'l Bank of Albuquerque v. Quinta Land & Cattle Co., 238 M 335, 779 P2d 48, 46 St. Rep. 1313 (1989).

Determination of Fee — Considerations: In mortgage foreclosure actions, the District Court must allow a reasonable attorney fee. The statute is reciprocal so that a party successfully defending against a foreclosure action is awarded attorney fees. The amount of property involved and the complexity of the case may be considered as important elements in determining the fee. Bermes v. Sylling, 179 M 448, 587 P2d 377 (1978).

Intervenor: Where a party intervened in an action to foreclose mortgage in an effort to have title quieted in his behalf as against both mortgagee and mortgagor, it was error to award intervenor judgment for attorney's fees under this section, since intervenor qualified as neither mortgagee bringing foreclosure action nor as possible successful mortgagor defending such action. Nikles v. Barnes, 153 M 113, 454 P2d 608 (1969).

Priority of Claim:

On foreclosure of mortgage, federal tax lien took priority over attorney's fees allowed under this section, since attorney's lien failed to meet "choate" test at the time the amount of federal taxes owed on the property was fixed. First Nat'l Bank of Lewistown v. Tilzey, 238 F. Supp. 750 (D.C. Mont. 1965).

The cost of extending abstract and attorney fees borne by mortgagee seeking foreclosure took priority over federal tax liens, which attached after the mortgage was in default. Streeter Bros. v. Overfelt, 202 F. Supp. 143 (D.C. Mont. 1962).

Deficiency After Foreclosure: The provision for allowance of attorney's fees does not apply to an action in personam on the note after exhaustion of the security. Goggins v. Bookout, 141 M 449, 378 P2d 212 (1963).

Defense Attorney's Fees: This section, making it incumbent upon the District Court in a mortgage foreclosure action to allow a reasonable attorney's fee, applies as well to the fees of defense counsel when the action has been dismissed. Graham v. Superior Mines, 100 M 427, 49 P2d 443 (1935), distinguished in Valeo v. Tabish, 1999 MT 146, 295 M 34, 983 P2d 334, 56 St. Rep. 579 (1999).

Power of Sale in Mortgage Providing for Attorney's Fee: Where a chattel mortgage provides that in case of default in payment of the note secured the mortgagee may have the property sold and out of the proceeds retain a reasonable attorney's fee, the only method of recovering it is by sale. Therefore the mortgagor may not assert that the fee intended was one to be fixed by the court in its discretion on institution of foreclosure proceedings. Nett v. Stockgrowers' Fin. Corp., 84 M 116, 274 P 497 (1929).

Evidence as to Fees: In fixing an attorney's fee in a foreclosure proceeding the District Court may consider the practice of the court and its own knowledge of the usual compensation for such services, and while it also may call to its aid attorneys as expert witnesses, it is not required to make its decision in accordance with their testimony. Bohan v. Harris, 71 M 495, 230 P 586 (1924).

71-1-234. Attorney fee — petition and notice.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Award of Attorney Fees for Work Performed After Purchase at Foreclosure Sale: Defendant contended that this section precluded an award of attorney fees for postforeclosure legal work because the award would require a second determination of fees in violation of the "one-action" rule of 71-1-222. However, this section merely requires the District Court to act upon the mortgagee's petition for attorney fees before the notice of sale issues and neither expressly prohibits postjudgment attorney fees nor expressly provides that an award of fees earned prior to the foreclosure decree is final and conclusive. Farm Credit Bank of Spokane v. Newton, 252 M 336, 829 P2d 931, 49 St. Rep. 267 (1992).

Part 3
Small Tract Financing

Part Case Notes

Notice Requirements Not Met — Second Trustee's Sale Appropriate Recourse: When the defendant trustee failed to provide proper notice as required by 71-1-315, the first trustee's sale of the property was null and void as to the plaintiff junior easement holder who had not received notice of the sale. The appropriate recourse was a second trustee's sale where each interest holder who did not previously receive notice was notified and had an opportunity to purchase the subject property. The second trustee's sale effectively foreclosed on the property and extinguished the plaintiff's easement. Terry L. Bell Generations Trust v. Flathead Bank of Bigfork, 2013 MT 152, 370 Mont. 342, 302 P.3d 390, followed in JAS, Inc. v. Eisele, 2016 MT 33, 382 Mont. 200, 367 P.3d 330, in which the Supreme Court noted that the Small Tract Financing Act of Montana contains strict notice requirements and does not provide for an actual or constructive notice exception.

Deficiency Judgment Available in Foreclosure on Recreational Home Condominium: First Western Federal Savings Bank foreclosed on a deed of trust securing Lence's condominium for nonpayment of mortgage and obtained a judgment from the District Court declaring that a deficiency judgment was available to First Western. The Supreme Court affirmed, based on its prior opinions in First St. Bank of Forsyth v. Chunkapura, 226 M 54, 734 P2d 1203 (1987), and First Fed. Sav. & Loan v. Anderson, 238 M 296, 777 P2d 1281 (1989). The rulings that the Small Tract Financing Act of Montana was not intended to apply the remedy of deficiency judgment trust deeds securing owner-occupied, single-family residences did not apply to Lence's condominium. The condominium was not Lence's primary residence because it was occupied by him only in the summers, and the Act was not intended by the Legislature to apply to this type of property. First W. Fed. Sav. Bank v. Lence, 255 M 7, 839 P2d 1277, 49 St. Rep. 857 (1992).

Default on Trust Indenture — Motion for Possession Proper: Ryans contended the District Court erred in granting the motion of the beneficiary of a trust indenture and underlying promissory note for possession of real property following Ryans' default. The Supreme Court affirmed, noting the trust indenture was properly filed, interest was properly transferred, and procedures governing notice, posting, and publication of sale were correctly followed. Citizens St. Bank v. Ryan, 243 M 23, 792 P2d 1116, 47 St. Rep. 1179 (1990).

Constitutionality: The Small Tract Financing Act of Montana, Title 71, ch. 1, part 3, is not unconstitutional on grounds that it is special legislation favoring rural landowners, that its withdrawal of redemption rights and its notice provisions violate due process, or that it provides for statutory power of sale to be read into all agreements using trust indentures even where agreement between parties does not so provide. Great Falls Nat'l Bank v. McCormick, 152 M 319, 448 P2d 991 (1968).

Part Law Review Articles

The Montana Judicial and Non-Judicial Foreclosure Sale: Analysis and Suggestions for Reform, Dietrich, 49 Mont. L. Rev. 285 (1988).

First State Bank v. Chunkapura: New Limitations on Trust Indentures, Magone, 49 Mont. L. Rev. 181 (1988).

The Default Clause in the Installment Land Contract, Isham, 42 Mont. L. Rev. 110 (1981).

Toward Abolishing Installment Land Sale Contracts, Lohn, 36 Mont. L. Rev. 110 (1975).

71-1-302. Policy.

Compiler's Comments

2001 Amendment: Chapter 30 in two place increased applicable area of real estate from 30 acres to 40 acres; and made minor changes in style. Amendment effective October 1, 2001.

1989 Amendment: In two places changed 15 acres to 30 acres; and made minor changes in phraseology.

Case Notes

Trust Indenture Exceeding Statutory Acreage Defective — Equitable Mortgage — Notice: A trust indenture involving 7.61 acres violated the public policy of this state because it exceeded the permitted 3 acres and therefore was not a statutory trust indenture. The defective trust indenture became an equitable mortgage and was binding on subsequent encumbrancers with actual knowledge of the existence of the indenture. Recording a trust indenture executed in violation of statute does not constitute constructive, imputed, or presumed notice. A defective trust indenture will be enforced between the parties as an equitable lien. However, the lien is subordinate to the claims of subsequent encumbrancers and of judgment creditors who extended credit subsequent to the date of the instrument, without actual knowledge of the existence of the instrument. (The 3-acre limit was increased to 15 acres by a 1974 amendment, to 30 acres by a 1989 amendment, and to 40 acres by a 2001 amendment.) Amsterdam Lumber, Inc. v. Dyksterhouse, 179 M 133, 586 P2d 705 (1978).

Constitutionality: The Small Tract Financing Act of Montana, Title 71, ch. 1, part 3, is not unconstitutional on grounds that it is special legislation favoring rural landowners, that its withdrawal of redemption rights and its notice provisions violate due process, or that it provides for statutory power of sale to be read into all agreements using trust indentures even when agreement between parties does not so provide. Great Falls Nat'l Bank v. McCormick, 152 M 319, 448 P2d 991 (1968).

71-1-303. Definitions.

Compiler's Comments

2005 Amendment: Chapter 413 inserted definitions of servicer, title insurance producer, and title insurer; and made minor changes in style. Amendment effective October 1, 2005.

2001 Amendment: Chapter 30 deleted former definition of thirty acres that read: ""Thirty acres" means 30 acres of land"; and made minor changes in style. Amendment effective October 1, 2001.

1989 Amendment: In (2) changed 15 acres to 30 acres.

Case Notes

Electronic Mortgage Tracking Entity Not Beneficiary Under Small Tract Financing Act: The plaintiff homeowners brought suit against several lenders, including Mortgage Electronic Registration Systems (MERS), alleging the lenders lacked the authority to foreclose the plaintiffs' property. The plaintiffs alleged that MERS, which is an electronic mortgage tracking entity, had no authority to assign the plaintiffs' deed of trust to another lender and did not qualify as a beneficiary under the Small Tract Financing Act. The Supreme Court agreed and held that MERS did not constitute a beneficiary under 71-1-303 since MERS held only legal title to the property and received no benefit or secured obligation from the deed of trust. The lenders' argument that MERS constituted a special agent under 28-10-102 was not raised before the District Court and therefore did not qualify for consideration by the Supreme Court on appeal. The Supreme Court remanded the case for consideration of the agency relationship between MERS and the lenders. Pilgeram v. GreenPoint Mortgage Funding, Inc., 2013 MT 354, 373 Mont. 1, 313 P.3d 839.

Trust Indenture Exceeding Statutory Acreage Defective — Equitable Mortgage — Notice: A trust indenture involving 7.61 acres violated the public policy of this state because it exceeded the permitted 3 acres and therefore was not a statutory trust indenture. The defective trust indenture became an equitable mortgage and was binding on subsequent encumbrancers with actual knowledge of the existence of the indenture. Recording a trust indenture executed in violation of statute does not constitute constructive, imputed, or presumed notice. A defective trust indenture will be enforced between the parties as an equitable lien. However, the lien is subordinate to the claims of subsequent encumbrancers and of judgment creditors who extended credit subsequent to the date of the instrument, without actual knowledge of the existence of the instrument. (The 3-acre limit was increased to 15 acres by a 1974 amendment, to 30 acres by a 1989 amendment, and to 40 acres by a 2001 amendment.) Amsterdam Lumber, Inc. v. Dyksterhouse, 179 M 133, 586 P2d 705 (1978).

71-1-304. Trust indentures authorized — power of sale for breach in trustee.

Compiler's Comments

2001 Amendment: Chapter 30 in (1) in first sentence and near middle of (4) increased applicable area of real property from 30 acres to 40 acres; and made minor changes in style. Amendment effective October 1, 2001.

1989 Amendment: In (1) and (4) changed 15 acres to 30 acres; and made minor changes in phraseology.

Case Notes

No Error in Ordering Foreclosure of Personal Real Property for Failure to Repay Business Loans — Deficiency Judgment Proper: Defendants, husband and wife, failed to make scheduled payments on two bank loans, and the bank filed for foreclosure of two deeds of trust. Defendants were in the process of obtaining a divorce. The husband failed to respond to the complaint, and a default judgment was entered against him. The District Court then granted summary judgment against the wife, ordered foreclosure and sale of the collateral real property, and entered a deficiency judgment holding the wife responsible for any deficiency following sale of the real property. The wife appealed on grounds that the District Court erroneously granted summary judgment by: (1) determining that any oral representations made by bank agents were merged into written documents; (2) holding that the bank was entitled to a deficiency judgment; and (3) finding that the bank had no fiduciary duty to the wife. The Supreme Court considered each argument in turn and affirmed. First, the written loan agreements expressed the entire agreement between the parties, and any alleged oral understandings that were not reduced to writing were invalid. Second, although a deficiency judgment may not issue if the secured property is a single-family residence, in this case, the security agreements provided that the collateral property be used for business purposes, so even though the property was defendants' primary residence, the trust indenture was not strictly residential, and the District Court did not err in ordering a deficiency judgment. Third, as stated in Coles Dept. Store v. First Bank, 240 M 226, 783 P2d 932 (1989), to establish a fiduciary relationship, in addition to a long history of bank dealings, a bank must act in some capacity other than that common in the usual arm's-length debtor-creditor relationship. Here, no prior banking relationship existed between the parties, and given the wife's extensive legal and marketing background, she would not have needed to rely on the bank to interpret the loan documents for her or to act as her adviser, so no fiduciary relationship or duty existed. First Sec. Bank v. Abel, 2008 MT 161, 343 M 313, 184 P3d 318 (2008), following First St. Bank of Forsyth v. Chunkapura, 226 M 54, 734 P2d 1203 (1987), and Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 239 M 250, 780 P2d 608 (1989).

Preclusion of Deficiency Judgment Not Applicable to Commercial Loan: In deciding whether a partnership qualified for the preclusion of a deficiency judgment on deeds of trust used as security instruments in a commercial loan transaction, the Supreme Court relied on First St. Bank of Forsyth v. Chunkapura, 226 M 54, 734 P2d 1203, 44 St. Rep. 451 (1987), in finding that when a lender holding a trust indenture as security chooses to foreclose under the mortgage laws, a deficiency judgment can be obtained, except for occupied single-family residential property. Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 239 M 250, 780 P2d 608, 46 St. Rep. 1661 (1989).

No Deficiency Judgment Upon Foreclosure of Trust Deed: A lender, electing to foreclose on its security under a trust deed by judicial procedure, is not entitled to remedies inconsistent with the Small Tract Financing Act of Montana. Specifically, the lender may not recover a deficiency judgment against the borrower, and the borrower has no right of redemption as is accorded in a judicial foreclosure of a conventional mortgage. First St. Bank of Forsyth v. Chunkapura, 226 M 54, 734 P2d 1203, 44 St. Rep. 451 (1987), distinguished for rental property in Midfirst Bank v. Ranieri, 257 M 312, 848 P2d 1046, 50 St. Rep. 284 (1993). See also Cavanaugh v. CitiMortgage, Inc., 2013 MT 349, 372 Mont. 541, 313 P.3d 212.

Statement That Property Does Not Exceed Statutory Acreage: A trust indenture which states that the real property involved does not exceed 3 acres when in fact it involved 7.61 acres is a defective trust indenture notwithstanding 71-1-304. (The 3-acre limit was increased to 15 acres by a 1974 amendment, to 30 acres by a 1989 amendment, and to 40 acres by a 2001 amendment.) Amsterdam Lumber, Inc. v. Dyksterhouse, 179 M 133, 586 P2d 705 (1978).

Trust Indenture Exceeding Statutory Acreage Defective — Equitable Mortgage — Notice: A trust indenture involving 7.61 acres violated the public policy of this state because it exceeded the permitted 3 acres and was therefore not a statutory trust indenture. The defective trust indenture became an equitable mortgage and was binding on subsequent encumbrancers with actual knowledge of the existence of the indenture. Recording a trust indenture executed in violation of statute does not constitute constructive, imputed, or presumed notice. A defective trust indenture will be enforced between the parties as an equitable lien. However, the lien is subordinate to the claims of subsequent encumbrancers and of judgment creditors who extended credit subsequent to the date of the instrument, without actual knowledge of the existence of the instrument. (The 3-acre limit was increased to 15 acres by a 1974 amendment, to 30 acres by a 1989 amendment, and to 40 acres by a 2001 amendment.) Amsterdam Lumber, Inc. v. Dyksterhouse, 179 M 133, 586 P2d 705 (1978).

Law Review Articles

The Montana Judicial and Non-Judicial Foreclosure Sale: Analysis and Suggestions for Reform, Dietrich, 49 Mont. L. Rev. 285 (1988).

First State Bank v. Chunkapura: New Limitations on Trust Indentures, Magone, 49 Mont. L. Rev. 181 (1988).

71-1-305. Trust indenture considered to be mortgage on real property.

Case Notes

No Error in Ordering Foreclosure of Personal Real Property for Failure to Repay Business Loans — Deficiency Judgment Proper: Defendants, husband and wife, failed to make scheduled payments on two bank loans, and the bank filed for foreclosure of two deeds of trust. Defendants were in the process of obtaining a divorce. The husband failed to respond to the complaint, and a default judgment was entered against him. The District Court then granted summary judgment against the wife, ordered foreclosure and sale of the collateral real property, and entered a deficiency judgment holding the wife responsible for any deficiency following sale of the real property. The wife appealed on grounds that the District Court erroneously granted summary judgment by: (1) determining that any oral representations made by bank agents were merged into written documents; (2) holding that the bank was entitled to a deficiency judgment; and (3) finding that the bank had no fiduciary duty to the wife. The Supreme Court considered each argument in turn and affirmed. First, the written loan agreements expressed the entire agreement between the parties, and any alleged oral understandings that were not reduced to writing were invalid. Second, although a deficiency judgment may not issue if the secured property is a single-family residence, in this case, the security agreements provided that the collateral property be used for business purposes, so even though the property was defendants' primary residence, the trust indenture was not strictly residential, and the District Court did not err in ordering a deficiency judgment. Third, as stated in Coles Dept. Store v. First Bank, 240 M 226, 783 P2d 932 (1989), to establish a fiduciary relationship, in addition to a long history of bank dealings, a bank must act in some capacity other than that common in the usual arm's-length debtor-creditor relationship. Here, no prior banking relationship existed between the parties, and given the wife's extensive legal and marketing background, she would not have needed to rely on the bank to interpret the loan documents for her or to act as her adviser, so no fiduciary relationship or duty existed. First Sec. Bank v. Abel, 2008 MT 161, 343 M 313, 184 P3d 318 (2008), following First St. Bank of Forsyth v. Chunkapura, 226 M 54, 734 P2d 1203 (1987), and Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 239 M 250, 780 P2d 608 (1989).

Preclusion of Deficiency Judgment Not Applicable to Commercial Loan: In deciding whether a partnership qualified for the preclusion of a deficiency judgment on deeds of trust used as security instruments in a commercial loan transaction, the Supreme Court relied on First St. Bank of Forsyth v. Chunkapura, 226 M 54, 734 P2d 1203, 44 St. Rep. 451 (1987), in finding that when a lender holding a trust indenture as security chooses to foreclose under the mortgage laws, a deficiency judgment can be obtained, except for occupied single-family residential property. Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 239 M 250, 780 P2d 608, 46 St. Rep. 1661 (1989).

No Deficiency Judgment Upon Foreclosure of Trust Deed: A lender, electing to foreclose on its security under a trust deed by judicial procedure, is not entitled to remedies inconsistent with the Small Tract Financing Act of Montana. Specifically, the lender may not recover a deficiency judgment against the borrower, and the borrower has no right of redemption as is accorded in a judicial foreclosure of a conventional mortgage. First St. Bank of Forsyth v. Chunkapura, 226 M 54, 734 P2d 1203, 44 St. Rep. 451 (1987). See also Midfirst Bank v. Ranieri, 257 M 312, 848 P2d 1046, 50 St. Rep. 284 (1993), and Cavanaugh v. CitiMortgage, Inc., 2013 MT 349, 372 Mont. 541, 313 P.3d 212.

Lien — Priority Over Trust Indenture: This case involves the question of priority between a trust indenture and subsequent mechanics' lien (now construction lien). The holder of the mechanics' lien brought the action to recover amounts owing on a contract for home improvements. The home owners, prior to contracting for the improvements to their home, had obtained a loan from a mortgage company, which prepared a trust indenture. The District Court held that the trust indenture took priority over the lien. However, the Supreme Court reversed as to the priority issue, stating that the party having the greatest ability to protect its interests, in this case the holder of the trust indenture, had the burden of exercising due care to prevent overreaching by an interested party. The holder of the trust indenture, which is a mortgage on the real property subject to the laws relating to mortgages, was in the best position to protect against nonpayment by the landowner by either withholding funds to the extent of the contemplated improvements or by requiring the home owner to obtain lien waivers from the mechanics. The mechanics' lien (now construction lien) took priority over the mortgagee's trust indenture. Home Interiors, Inc. v. Hendrickson, 214 M 194, 692 P2d 1229, 41 St. Rep. 2408 (1984).

Foreclosure on Trust Indenture — Order of Sale Upheld When Debtor Failed to Demand Specific Order: In an action by a bank to foreclose a trust indenture secured by the mortgagor's residence and separate commercial property, sale of the residential property first was upheld when the debtor did not exercise her right to determine the order of the sale. It is a proper election for a debtor at the time of the sale to demand a specific order in which separate parcels are to be sold. However, when the debtor acquiesced in the order of the sale and deferred to the discretionary authority of the trustee, the order of sale will be upheld. First Nat'l Bank v. Powell, 212 M 468, 689 P2d 255, 41 St. Rep. 1870 (1984).

Defective Trust Indenture: The trust indenture in this case is a defective trust indenture which will be enforced between the parties as an equitable lien. However, the lien of such defective trust indenture is subordinate to the claims of subsequent encumbrancers and of judgment creditors who extended credit subsequent to the date of the instrument, without actual knowledge of the existence of the indenture. Amsterdam Lumber, Inc. v. Dyksterhouse, 179 M 133, 586 P2d 705 (1978).

Attorney General's Opinions

Recordation of Trust Indenture — Amount and Maturity Date Not Required: A County Clerk and Recorder may not refuse to accept for filing a trust indenture that does not include an amount secured and a maturity date because there are no specific requirements that such matters be set forth in the instrument. 41 A.G. Op. 11 (1985).

71-1-306. Qualifications of trustee — successor trustee.

Compiler's Comments

1999 Amendment: Chapter 51 in (1)(c) substituted "insurance producer" for "insurance agent"; and made minor changes in style. Amendment effective March 15, 1999.

1987 Amendment: In (1)(c) substituted "title insurer or title insurance agent or agency" for "title insurance or abstract company".

71-1-307. Reconveyance upon performance — liability for failure to reconvey.

Compiler's Comments

2005 Amendment: Chapter 413 in (1) in first sentence after "beneficiary" inserted "or servicer" and in second sentence near beginning after "beneficiary" inserted "or servicer", near middle after "property" inserted "within 90 days of the request", after "beneficiary" inserted "servicer", and at end after "trustee" substituted "who refuses is liable to the grantor for the sum of $500 and all actual damages resulting from the refusal to reconvey" for "so refusing shall be liable as provided by law in the case of refusal to execute a discharge or satisfaction of a mortgage on real property"; inserted (2) concerning liability for lack of timely request to reconvey; inserted (3) concerning award of attorney fees and costs; and made minor changes in style. Amendment effective October 1, 2005.

Applicability: Section 7, Ch. 413, L. 2005, provided: "[Section 5] [71-1-307] applies to all trust indentures executed on or after [the effective date of this act]." Effective October 1, 2005.

71-1-308. Reconveyance of trust indenture — forms — objections to reconveyance.

Compiler's Comments

Effective Date: This section is effective October 1, 2005.

71-1-309. Objection to reconveyance.

Compiler's Comments

Effective Date: This section is effective October 1, 2005.

71-1-310. Liability of title insurer or title insurance producer.

Compiler's Comments

Effective Date: This section is effective October 1, 2005.

71-1-312. Discontinuance of foreclosure proceedings when entire amount of default paid.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

71-1-313. Conditions for foreclosure by advertisement and sale.

Compiler's Comments

2021 Amendment: Chapter 447 in (3)(g) at end substituted "mountain daylight time" for "mountain standard time"; and made minor changes in style. Amendment effective on occurrence of contingency.

71-1-314. Requests for copies of notice of sale.

Case Notes

Duties of Indenture Trustee Limited to Provisions of Small Tract Financing Act: Under the Small Tract Financing Act of Montana, an indenture trustee's duties are those related to properly conducting a foreclosure sale, including providing proper notice to affected parties, conducting the sale, and disposing of sale proceeds. In this case, plaintiff contended that broader duties of trustees, as set out in 72-34-113 (now repealed), also applied to indenture trustees. The Supreme Court disagreed. There is no indication that broader duties than those outlined in the Act were contemplated for indenture trustees, and the duties of indenture trustees are therefore limited to the statutory duties in the Act. Knucklehead Land Co., Inc. v. Accutitle, Inc., 2007 MT 301, 340 M 62, 172 P3d 116 (2007).

71-1-315. Notice — sale — payment.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: In (3) inserted fifth through eighth sentences regarding procedure for postponement due to automatic or court-ordered stay.

1983 Amendment: In (2), substituted "recorded" for "filed for record".

Case Notes

No Indication in Statute Preventing Delegation of Duties — Delegation of Trustee's Duties Not Barred — Summary Judgment Upheld. Pennell v. Nationstar Mtg., LLC, 2022 MT 235, 410 Mont. 526, 520 P.3d 796.

Judicial Foreclosure Action by Junior Lien Holder — Counterclaim for Judicial Foreclosure by Senior Lien Holder Not Compulsory: A lien holder commenced a judicial foreclosure action on real property and named several possible senior lien holders as defendants. Only one defendant, a bank, claimed to hold a senior lien interest. The plaintiff acknowledged that the recording date of the bank's predecessor in interest preceded its own. After the bank filed its witness and exhibit list 10 days late, the District Court granted the plaintiff's motion to strike the list. It also granted the plaintiff's motion for summary judgment, holding that the bank could not prove the elements necessary for judicial foreclosure. The bank appealed. The Supreme Court reversed, concluding that the District Court had failed to recognize principles of judicial foreclosure. The Supreme Court reiterated that a foreclosure does not terminate the interest of a senior lien holder and that a senior lien holder is not required to counterclaim for a judicial foreclosure brought by a junior lien holder. Ruby Valley Nat'l Bank v. Wells Fargo Delaware Trust Co., N.A., 2014 MT 16, 373 Mont. 374, 317 P.3d 174.

Notice Requirements Not Met — Second Trustee's Sale Appropriate Recourse: When the defendant trustee failed to provide proper notice as required by 71-1-315, the first trustee's sale of the property was null and void as to the plaintiff junior easement holder who had not received notice of the sale. The appropriate recourse was a second trustee's sale where each interest holder who did not previously receive notice was notified and had an opportunity to purchase the subject property. The second trustee's sale effectively foreclosed on the property and extinguished the plaintiff's easement. Terry L. Bell Generations Trust v. Flathead Bank of Bigfork, 2013 MT 152, 370 Mont. 342, 302 P.3d 390, followed in JAS, Inc. v. Eisele, 2016 MT 33, 382 Mont. 200, 367 P.3d 330, in which the Supreme Court noted that the Small Tract Financing Act of Montana contains strict notice requirements and does not provide for an actual or constructive notice exception.

Absence of Evidence of Violation of Standards of Commercial Reasonableness — Implied Covenant of Good Faith and Fair Dealing Not Breached: Plaintiff contended that defendant title companies breached the implied covenant of good faith and fair dealing during a foreclosure sale. Plaintiff presented an expert who opined that defendants did not conduct the sale in the same manner as the expert, but offered no conclusion that defendants' administration of the sale demonstrated a violation of accepted and reasonable commercial standards. Absent evidence of defendants' failure to act in accordance with industry practices, the District Court did not err in holding that defendants did not breach the implied covenant of good faith and fair dealing. Knucklehead Land Co., Inc. v. Accutitle, Inc., 2007 MT 301, 340 M 62, 172 P3d 116 (2007).

Duties of Indenture Trustee Limited to Provisions of Small Tract Financing Act: Under the Small Tract Financing Act of Montana, an indenture trustee's duties are those related to properly conducting a foreclosure sale, including providing proper notice to affected parties, conducting the sale, and disposing of sale proceeds. In this case, plaintiff contended that broader duties of trustees, as set out in 72-34-113 (now repealed), also applied to indenture trustees. The Supreme Court disagreed. There is no indication that broader duties than those outlined in the Act were contemplated for indenture trustees, and the duties of indenture trustees are therefore limited to the statutory duties in the Act. Knucklehead Land Co., Inc. v. Accutitle, Inc., 2007 MT 301, 340 M 62, 172 P3d 116 (2007).

Negligent Misrepresentation Claim Erroneously Characterized — No Error: Defendants conducted a foreclosure sale of real property in which plaintiff was the successful bidder, but the sale was subsequently voided, and plaintiff sued for negligent misrepresentation. Plaintiff contended that the District Court erroneously characterized the claim as a misrepresentation that the property would be sold on a particular day to the highest bidder when, in fact, the issue was the false representation that adequate notice had been given to the Internal Revenue Service. However, the District Court concluded that the notice was adequate as a matter of law, so even if the court mischaracterized the issue underlying the negligent misrepresentation claim, plaintiff could not demonstrate error on appeal by relying on a notice issue that was decided to the contrary and not challenged. The District Court was affirmed. Knucklehead Land Co., Inc. v. Accutitle, Inc., 2007 MT 301, 340 M 62, 172 P3d 116 (2007).

No Recovery When No Damages Incurred in Failure to Convey Property: Defendants conducted a foreclosure sale of real property in which plaintiff was the successful bidder, but the sale was subsequently voided, and plaintiff sued for breach of contract. The District Court concluded that under 27-1-314, defendant was not entitled to damages. On appeal, the Supreme Court affirmed. Because no purchase price was paid that could be recovered in this case, 27-1-314 limited recoverable damages to expenses incurred in examining title and preparing the necessary sale papers. Only when there is a showing of bad faith does the statute authorize the nonbreaching party to recover the difference between the agreed price and the property value at the time of the breach, when the agreed price is lower than the value. However, plaintiff failed to produce facts showing defendants' bad faith, so plaintiff's damages were limited to actual damages, of which there were none. Knucklehead Land Co., Inc. v. Accutitle, Inc., 2007 MT 301, 340 M 62, 172 P3d 116 (2007).

"Credit Bid" Satisfies Requirement of Payment in Cash: A bank foreclosed on a trust indenture and, at the foreclosure sale, made a "credit bid" under which it applied the amount bid against the outstanding debt owed by the defendant. The defendant contested the sale on the grounds that the sale was not properly conducted because the bank did not pay the trustee in cash. The Supreme Court held that paying the price bid in money or its equivalent immediately or promptly after the foreclosure sale satisfies the requirements of this section. Rocky Mtn. Bank v. Stuart, 280 M 74, 928 P2d 243, 53 St. Rep. 1305 (1996).

Postponing Sale by Public Proclamation — General Emergency: Where potential purchasers, subsequent lienholders, and the public in general are practically and legally prevented from traveling to and attending a sale at the time and place noticed for the sale, the giving of notice of a postponed sale only by "public proclamation at the time and place fixed in the notice of sale" is a futile act, of no practical or legal significance. The provisions of 71-1-315(3) apply to normal situations where there is no state of general emergency (Mt. St. Helens' eruption) preventing potential purchasers, subsequent lienholders, and the public in general from attending at the time and place fixed in the notice of sale. Consol. Dairies of Lake County, Inc. v. Amer. Abstract & Title Co., 193 M 1, 629 P2d 770, 38 St. Rep. 933 (1981).

71-1-316. Disposition of proceeds of sale — notice — surplus funds — attorney fees.

Compiler's Comments

2015 Amendment: Chapter 213 in (1)(a)(ii) at end inserted "that is subject to this sale"; in (1)(b) substituted current text relating to depositing surplus funds and mailing notice for "the surplus, if any, to the person or persons legally entitled to the surplus, or the trustee, in the trustee's discretion, may deposit the surplus with the clerk and recorder of the county in which the sale took place"; in (2) in three places after "surplus" inserted "funds" and deleted former last sentence that read: "The county treasurer shall pay the surplus funds as provided in a written order from the district court"; inserted (3) relating to petitions for disbursement of surplus funds; inserted (4) relating to costs and attorney fees; and made minor changes in style. Amendment effective October 1, 2015.

2007 Amendment: Chapter 158 in (2) at beginning of third sentence inserted "The county treasurer shall pay the surplus funds as provided in a written" and at end deleted "of such county"; and made minor changes in style. Amendment effective October 1, 2007.

71-1-317. Deficiency judgment not allowed.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

No Error in Ordering Foreclosure of Personal Real Property for Failure to Repay Business Loans — Deficiency Judgment Proper: Defendants, husband and wife, failed to make scheduled payments on two bank loans, and the bank filed for foreclosure of two deeds of trust. Defendants were in the process of obtaining a divorce. The husband failed to respond to the complaint, and a default judgment was entered against him. The District Court then granted summary judgment against the wife, ordered foreclosure and sale of the collateral real property, and entered a deficiency judgment holding the wife responsible for any deficiency following sale of the real property. The wife appealed on grounds that the District Court erroneously granted summary judgment by: (1) determining that any oral representations made by bank agents were merged into written documents; (2) holding that the bank was entitled to a deficiency judgment; and (3) finding that the bank had no fiduciary duty to the wife. The Supreme Court considered each argument in turn and affirmed. First, the written loan agreements expressed the entire agreement between the parties, and any alleged oral understandings that were not reduced to writing were invalid. Second, although a deficiency judgment may not issue if the secured property is a single-family residence, in this case, the security agreements provided that the collateral property be used for business purposes, so even though the property was defendants' primary residence, the trust indenture was not strictly residential, and the District Court did not err in ordering a deficiency judgment. Third, as stated in Coles Dept. Store v. First Bank, 240 M 226, 783 P2d 932 (1989), to establish a fiduciary relationship, in addition to a long history of bank dealings, a bank must act in some capacity other than that common in the usual arm's-length debtor-creditor relationship. Here, no prior banking relationship existed between the parties, and given the wife's extensive legal and marketing background, she would not have needed to rely on the bank to interpret the loan documents for her or to act as her adviser, so no fiduciary relationship or duty existed. First Sec. Bank v. Abel, 2008 MT 161, 343 M 313, 184 P3d 318 (2008), following First St. Bank of Forsyth v. Chunkapura, 226 M 54, 734 P2d 1203 (1987), and Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 239 M 250, 780 P2d 608 (1989).

Preclusion of Deficiency Judgment Not Applicable to Commercial Loan: In deciding whether a partnership qualified for the preclusion of a deficiency judgment on deeds of trust used as security instruments in a commercial loan transaction, the Supreme Court relied on First St. Bank of Forsyth v. Chunkapura, 226 M 54, 734 P2d 1203, 44 St. Rep. 451 (1987), in finding that when a lender holding a trust indenture as security chooses to foreclose under the mortgage laws, a deficiency judgment can be obtained, except for occupied single-family residential property. Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 239 M 250, 780 P2d 608, 46 St. Rep. 1661 (1989).

No Deficiency Although Debtors Rented Premises: Although the defendant debtors no longer occupied the residential property themselves and had rented it, the beneficiary of a trust indenture on the property was not entitled to a deficiency judgment. At the time the bank accepted the trust indenture for the mortgaged property, the trust deed related to an occupied, single-family residential property, sometimes occupied by renters. The property therefore fit the Chunkapura exception, and the bank could not obtain a deficiency judgment against the debtors after the sale of the mortgaged property. First Fed. S&L Ass'n of Missoula v. Anderson, 238 M 296, 777 P2d 1281, 46 St. Rep. 1280 (1989). See also Cavanaugh v. CitiMortgage, Inc., 2013 MT 349, 372 Mont. 541, 313 P.3d 212.

Foreclosure of First Lien — Second Lienholder's Direct Action on Note — Summary Judgment: A second lienholder whose lien is extinguished by the foreclosure of a first lien may maintain a direct action on the note. The bank, which held a promissory note secured by a junior trust indenture, was entitled to sue directly on the note after foreclosure by the holder of the senior trust indenture. The statutory prohibitions against deficiency judgments after foreclosure upon a note secured by a trust indenture apply only to the foreclosing creditor. They do not apply to a creditor holding a note that is no longer secured because of a foreclosure action taken by another creditor possessing a first trust deed. Summary judgment for the bank was proper when there was no genuine issue of any material fact and when the bank was entitled to judgment as a matter of law. First Interstate Bank of Kalispell v. Wann, 235 M 111, 765 P2d 749, 45 St. Rep. 2232 (1988).

No Deficiency Judgment Upon Foreclosure of Trust Deed: A lender, electing to foreclose on its security under a trust deed by judicial procedure, is not entitled to remedies inconsistent with the Small Tract Financing Act of Montana. Specifically, the lender may not recover a deficiency judgment against the borrower, and the borrower has no right of redemption as is accorded in a judicial foreclosure of a conventional mortgage. First St. Bank of Forsyth v. Chunkapura, 226 M 54, 734 P2d 1203, 44 St. Rep. 451 (1987). See also Cavanaugh v. CitiMortgage, Inc., 2013 MT 349, 372 Mont. 541, 313 P.3d 212.

Satisfaction of Judgment by Purchaser of Indentured Property — Further Action Not Foreclosed: The plaintiff received a secondary trust indenture from the defendant as collateral for a loan, and after obtaining a default judgment against the defendant on the underlying debt, purchased the indentured property from the trustee under the provisions of Title 71, thereafter selling the property at a loss. In an appeal from a declaratory judgment, the Supreme Court held that this section did not prohibit the plaintiff from proceeding against other real property held by the defendant, as the plaintiff seeks only to satisfy its default judgment, which has no relationship to the foreclosure on the indentured property by the holder of the first trust indenture. AVCO Financial Serv. of Billings One, Inc. v. Christiaens, 201 M 117, 652 P2d 220, 39 St. Rep. 1993 (1982).

71-1-318. Trustee's deed.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Priority of Lien Over Trust Indenture: Considering the rights affected, competing policies, and potential consequences, the Supreme Court held that a mechanics' lien (now construction lien) for improvements constructed after the grant of a trust indenture has priority over the interest of a purchaser at trustee's foreclosure sale. Beck v. Hanson, 180 M 82, 589 P2d 141 (1979).

71-1-319. Possession.

Case Notes

Unlawful Detainer Following Foreclosure Sale to Bank — Summary Judgment and Writ of Assistance Proper: As a part of refinancing a marital home, the defendant quitclaimed her interest, right, and title to the home to her husband, who died the following year. Ultimately, the loan went into default and the plaintiff bank served the defendant notice to leave the home, which she refused. The plaintiff then filed a complaint for unlawful detainer. The District Court granted the plaintiff summary judgment and issued it a writ of assistance. On appeal, the defendant challenged whether a foreclosure sale had actually occurred based on an affidavit of a witness who alleged that she had been at the steps of the courthouse on the day of the sale and had not witnessed a foreclosure sale occur. The Supreme Court affirmed, ruling that the District Court had not erred when it determined that the affidavit did not offer any credible evidence in support of the defendant's arguments. Bank of America, N.A. v. Alexander, 2017 MT 31, 386 Mont. 305, 389 P.3d 1020.

Grantor Named in Trust Indenture Not Entitled to Notice to Vacate After Nonjudicial Foreclosure Proceedings: A bank foreclosed on a trust indenture and filed a complaint for possession. The defendant argued that the bank's complaint for possession was premature because 70-27-104 entitled the defendant to a postsale notice to vacate, which the bank did not give. The Supreme Court held that by executing the trust indenture and agreeing by one of its paragraphs to vacate the trust property on the 10th day following the foreclosure sale, the defendant had waived any right to notice to vacate under 70-27-104. Rocky Mtn. Bank v. Stuart, 280 M 74, 928 P2d 243, 53 St. Rep. 1305 (1996).

71-1-320. Trustees' fees and attorneys' fees.

Compiler's Comments

1983 Amendment: At end of next to last sentence, after "shall not exceed" substituted the rest of sentence referring to fees for "$150".

Case Notes

Debtors Entitled to Attorney Fees on Reciprocity — Bank Entitled to Fees on Foreclosure: In the trial court and on appeal, the debtors in an action to foreclose on a deed of trust on residential real property were entitled to attorney fees on the basis of reciprocity under 28-3-704; on foreclosure, the bank was entitled to attorney and trustee fees granted by this section. First Fed. S&L Ass'n of Missoula v. Anderson, 238 M 296, 777 P2d 1281, 46 St. Rep. 1280 (1989), distinguished in Valeo v. Tabish, 1999 MT 146, 295 M 34, 983 P2d 334, 56 St. Rep. 579 (1999).

71-1-321. Deeds of trust and trust deeds not invalidated.

Case Notes

Priority Determined by Intention of Parties: A purchaser simultaneously executed a mortgage in favor of the seller and a deed of trust in favor of the bank. The deed of trust was filed the day before the mortgage was filed. The mortgage bore the notation "no exceptions", following the form language reading "free from all encumbrances excepting". Upon the buyer's default, the sellers filed an action for a declaratory ruling that their purchase money mortgage was prior in time and right to the bank's deed of trust. The trial court reformed the sellers' mortgage to delete the term "no exceptions" and held that the bank's deed of trust was prior in time and right to the mortgage. The Supreme Court affirmed and held that the deed of trust, executed to secure the purchase loan, was a purchase money mortgage and prior in time and right because the evidence indicated that the parties intended the sellers' mortgage to be a second mortgage and the words "no exceptions" were due to a typing error. Pulse v. N. Am. Land Title Co. of Mont., 218 M 275, 707 P2d 1105, 42 St. Rep. 1578 (1985).

CHAPTER 2
PLEDGES

Part 1
Pledges in General

71-2-101. Definitions.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Case Notes

Depository as Pledge Holder: When bank accepts special deposit as a pledge to secure return of borrowed personal property by pledgor to a third person, it becomes a pledge holder within this section. Maser v. Farmers' & Merchants' Bank of Winnett, 90 M 33, 300 P 207 (1931).

Deposit as Guaranty of Use Held a Pledge: Where tenant of an estate was required to deposit sum of money as a guaranty that premises would not be used for unlawful purposes, the deposit amounted to a pledge, and he was entitled to its return upon distribution of the estate and passing of title to the premises in question to one of the heirs. Ryan v. Stagg, 89 M 390, 298 P 353 (1931).

Sale With Title in Seller Until Full Payment Not a Pledge: When property is sold under contract providing that title shall remain in seller until purchase price is paid, the seller does not have a mortgage, pledge, or lien upon property within the attachment statute. State ex rel. Malin-Yates Co. v. Justice of Peace Court, 51 M 133, 149 P 709 (1915).

What May Be Pledged:

Transaction by which collateral security is delivered by debtor and accepted by creditor constitutes a pledge. Averill Mach. Co. v. Bain, 50 M 512, 148 P 334 (1915).

Real estate lease or mortgage may be pledged. There seems to be no difference in principle between pledge of a lease and pledge of a contract to purchase land. Ringling v. Smith River Dev. Co., 48 M 467, 138 P 1098 (1914).

Bank Deposit as Pledge — Interest Belongs to Pledgor: A deposit in a bank to indemnify sureties on bond against possible loss is a pledge within this section. Title to it, as between principal and sureties, is in the principal, and any interest accruing belongs to him and not to sureties. Leggat v. Palmer, 39 M 302, 102 P 327 (1909).

Law Review Articles

Montana Law and the Uniform Commercial Code, 21 Mont. L. Rev. 1 (1959).

71-2-103. Delivery required.

Case Notes

Pledgor Deemed Trustee of Securities Under Certain Circumstances: Pledgee may entrust pledged notes to pledgor for a special purpose in which case pledgor holds them as trustee; receiver of bank who obtained notes for purpose of endorsing payments thereon fell under this rule. Ainsworth v. Kruger, 80 M 468, 260 P 1055 (1927).

Delivery of Property Essential:

Lien of pledge is dependent on possession, and pledge therefore is not valid until property pledged is delivered to pledgee or pledge holder. Goriez v. Rock Creek Ditch Co., 67 M 566, 216 P 778 (1923).

Elements essential to contract of pledge are delivery of personal property by owner to pledgee and an agreement of the parties, express or implied, that the pledgee shall hold it as security for the payment of a debt or the performance of some obligation. Brunswick-Balke-Collender Co. v. Higgins, 54 M 11, 165 P 1109 (1917), distinguished in Ainsworth v. Kruger, 80 M 468, 260 P 1055 (1927).

Constructive Delivery: Constructive delivery of accounts by debtor to creditor for purpose of collection is sufficient to satisfy rule that pledge is dependent on possession of thing pledged. Savage Tire Sales Co. v. Stuart, 61 M 524, 203 P 364 (1921).

71-2-106. Obligations of pledge holder.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

71-2-107. Property pledged to extent of lien.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

71-2-108. When pledge may not be withdrawn.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

71-2-109. When real owner cannot defeat pledge.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Assumption of Apparent Ownership: This section has no application when the apparent ownership is permitted to be assumed for any purpose other than that of transfer or sale, and applies then only if pledgee received property in good faith and for value. Vinson v. Pelletier, 78 M 254, 255 P 1067 (1927).

Return of Corporate Stock: When owner of corporate stock had delivered it for purpose of its being turned over to persons entitled thereto upon happening of certain event, rather than for the purpose "of making any transfer of it" within meaning of this section, and when the bailee pledged it instead to person who brought action to foreclose the pledge, who was fully conversant with the facts and respective rights of parties, and who was therefore not a holder in good faith, the court properly decreed return of the stock to its owner. Vinson v. Pelletier, 78 M 254, 255 P 1067 (1927).

71-2-110. Debtor's misrepresentation of value of pledge.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

CHAPTER 3
LIENS

Chapter Compiler's Comments

Joint Resolution on Interim Study of Lien Laws: Senate Joint Resolution No. 31 of the 49th Legislature requesting an interim study of Montana's lien laws read: "WHEREAS, Montana adopted its basic lien laws from the "Field Code" shortly after becoming a state; and

WHEREAS, the Legislature has added to and amended the basic lien laws of Montana, including the adoption of the Uniform Commercial Code in 1963, without comprehensive analysis of the various statutes that provide for liens; and

WHEREAS, there have been introduced in the 49th Legislative Session numerous and conflicting bills dealing with delayed recording, lien priorities, place of filing, centralized filing, purchase free of lien, and other subjects which indicate that Montana's lien laws are confusing and that relative lien priorities are possibly unfair; and

WHEREAS, it is essential to the economic growth of the State of Montana that the lien laws not hinder or obstruct the free flow of credit, especially in the agricultural area; and

WHEREAS, there is insufficient time during a regular legislative session to resolve the conflicting legislation or to provide a comprehensive, careful study of the existing lien laws, after considering all relevant factors, and there is insufficient time to receive information from the public, those concerned with the lien laws, and those obtaining and providing credit.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That an appropriate interim committee be assigned to:

(1) examine Montana laws relating to liens, including Montana's basic lien laws and the Uniform Commercial Code;

(2) study the problems of delayed recording, lien priorities, conflicting lien priorities, and other related subjects;

(3) study the problems with place of filing and the possibility of centralized lien filing;

(4) obtain testimony and information relevant to Montana's lien laws as they may affect those who obtain or grant credit, including:

(a) testimony and information addressing the conflicting positions of persons asking for preferential lien priority;

(b) the apparent conflict or lack of uniformity of present laws covering lien priorities; and

(c) any other matters pertinent to the effects of lien laws on such persons;

(5) study the laws of other states relating to liens and lien priorities, recordation, and other relevant matters;

(6) draft legislation to implement its recommendations, if necessary; and

(7) report its findings and recommendations to the 50th Legislature."

Chapter Law Review Articles

Agricultural Liens Under Revised Article 9, Burnham, 63 Mont. L. Rev. 91 (2002).

Part 1
General Provisions

Part Case Notes

Damages to Be Ascertained Before Granting Lien: The District Court granted plaintiff a lien on timber cut by defendant on plaintiff's land under a contract. The lien was granted because defendant had failed to clean up slash on the land pursuant to the contract. The issue of the amount of damages was never raised at the trial. It was improper to grant a lien where there was no ascertained debt or claim. Madison Fork Ranch v. L & B Lodge Pole Timber Prod., 189 M 292, 615 P2d 900, 37 St. Rep. 1468 (1980).

Personal Property Taxes Due as Liens: When taxes were due on personal property (cattle), the tax was a lien on that property and also a lien on the real property of the owner. However, "because the cattle have long since gone to that great roundup in the sky, the lien on the cattle per se has evaporated. It has not evaporated as against the real property of the owners of the cattle, however". Stensvad v. Musselshell County, 180 M 489, 591 P2d 225 (1979).

71-3-101. Definitions.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Contract Remedy Providing Transfer of Twenty-Acre Parcel of Land as Security for Contractual Obligations Violative of Subdivision Laws: As part of a sale of real property, Canton pledged a 20-acre parcel to Riverview Homes II, Ltd. (Riverview), as security in the event that Canton breached his contractual obligation to complete a proposed subdivision and construct an artificial lake. Canton breached the contract, and Riverview sought to quiet title to the 20-acre parcel. The District Court agreed that Canton breached the contract, but held that the contract remedy violated subdivision laws. Riverview appealed, contending that the parcel was exempted from subdivision review as a division of land created to provide security for a lien under 76-3-201, and that the security provision was an enforceable construction lien because of Canton's contractual obligation to construct the lake. The Supreme Court noted that Riverview neither furnished services or materials to Canton for the lake construction nor satisfied any other requirement applicable to construction liens in Title 71, ch. 3, part 5, so the construction lien theory failed. If it was not a construction lien, it had to be considered a general lien under this section, which, pursuant to Reiter v. Reiter, 237 M 220, 772 P2d 314 (1989), can be claimed only as arising from dealings in particular trades or businesses in which the existence of a general lien has been recognized by judicial decisions or if a custom to that effect can be established by evidence. General liens are looked upon with disfavor, and the court refused to recognize a general lien for breach of a contract to provide equity in land in this case. The District Court's conclusion that the 20-acre parcel was not transferable under 76-3-302, and failed to qualify for an exemption under 76-3-201, was affirmed. Riverview Homes II, Ltd. v. Canton, 2001 MT 309, 307 M 517, 38 P3d 848 (2001).

No General Lien for Breach of Contract to Provide Equity in Land: Son filed a lien against the family farm held by his mother, asserting it was a general lien under this section. The Supreme Court held that in the absence of an express agreement to give a lien, a general lien can be claimed only as arising from dealings in particular trades or businesses in which the existence of a general lien has been recognized by judicial decisions or if a custom to that effect can be established by evidence. General liens are looked upon with disfavor. The court refuses to recognize a general lien for breach of a contract to provide equity in land or to convey land upon the owner's death. Reiter v. Reiter, 237 M 220, 772 P2d 314, 46 St. Rep. 751 (1989), followed in Riverview Homes II, Ltd. v. Canton, 2001 MT 309, 307 M 517, 38 P3d 848 (2001). A later appeal by the son was dismissed as frivolous in Reiter v. Reiter, 240 M 450, 784 P2d 917, 47 St. Rep. 20 (1990).

Conditional Sale: A conditional sale, not an absolute sale with retention of lien, is not in effect a mortgage, and therefore is not void as to innocent third parties, though never acknowledged and recorded with an affidavit. Bennett Bros. Co. v. Fitchett, 24 M 457, 62 P 780 (1900).

71-3-102. How liens created.

Attorney General's Opinions

No Duty for County Clerk and Recorder to Accept Common-Law Liens for Filing: Although a County Clerk and Recorder has a statutory duty to accept for filing any instrument, paper, or notice authorized by law to be recorded, there is no apparent authority in Montana law for allowing the filing of a common-law lien. It is unclear whether Montana even recognizes common-law liens. Because a common-law lien is not authorized by law to be received, County Clerk and Recorders may refuse to accept for filing written instruments purporting to be liens when the writing does not qualify as a statutory lien or lien created by contract. 38 A.G. Op. 114 (1980).

71-3-105. Lien on future interest.

Case Notes

Deliverable Property: Subsequently acquired personal property may be mortgaged, provided it is capable of delivery, and may be taken possession of by the mortgagee upon its acquisition by the mortgagor. Sec. St. Bank of Havre v. Mariette, 69 M 536, 223 P 114 (1924).

Description of Property: While a mortgagor of personal property may include in the mortgage property thereafter to be acquired by him, such after-acquired property must be described so accurately that third persons consulting the record may be put upon notice as to what is intended to be mortgaged. If the after-acquired property is not so described as to enable the Sheriff to identify it, the mortgage is void as against such third persons. Hackney v. Birely, 67 M 155, 215 P 642 (1923).

Crop Mortgage:

While, independently of statute, one cannot sell or mortgage personal property not in existence or in which he has no present interest, property which has a potential existence may be mortgaged or hypothecated. Isbell v. Slette, 52 M 156, 155 P 503 (1916).

Annual crops have a potential existence even before they are planted, and the owner or one rightfully in possession of land has a mortgageable interest in the crops thereafter to be planted thereon, the lien of such mortgage not attaching until they are planted, and being limited to the interest which the mortgagor has. Isbell v. Slette, 52 M 156, 155 P 503 (1916).

A mortgage on crops yet to be planted is, in effect, nothing more than an executory contract that may become executed when the crops are planted and the lien attaches, but which may be defeated if, for any reason, the mortgagor violates good faith and fails or refuses to plant the crops. Isbell v. Slette, 52 M 156, 155 P 503 (1916).

71-3-107. Prior liens.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

71-3-108. Lien or contract for lien transfers no title.

Case Notes

Termination of Lien: A mortgage does not transfer any title to the property mortgaged; it is merely a lien fixed upon the property to secure the performance of an act or obligation, and therefore when it ceases to be a lien it ceases to be a mortgage. Morrison v. Farmers & Traders' St. Bank, 70 M 146, 225 P 123 (1924).

Chattel Mortgage: A chattel mortgage creates a lien only and therefore does not pass title from the mortgagor to the mortgagee. Demers v. Graham, 36 M 402, 93 P 268 (1907); Mueller v. Renkes, 31 M 100, 77 P 512 (1904); Bennett Bros. Co. v. Fitchett, 24 M 457, 62 P 780 (1900).

Increase in Property: A chattel mortgage upon cows in which no mention was made of their increase did not cover their calves that were in gestation at the time of the execution of the mortgage but that were born prior to foreclosure. Demers v. Graham, 36 M 402, 93 P 268 (1907).

71-3-109. Certain contracts void.

Case Notes

Express Waiver of Redemption Rights in Federal Loan Contract: Although the mortgagors' Small Business Administration loan contained an express waiver of state redemption rights, the mortgagors were entitled to redeem property purchased at a foreclosure sale pursuant to this section, which provides that all contracts in restraint of the right of redemption from a lien are void. The balance between state and federal law must be struck in favor of Montana's interest in protecting its debtors. U.S. v. Pastos, 781 F2d 747 (9th Cir. 1986).

Sale of Mortgagor's Rights: The rule stated in this section does not apply to transactions after the execution of the mortgage. A mortgagor may sell and convey all his right and interest in the mortgaged premises to the mortgagee, when the transaction is fair, honest, and without fraud and when no unconscionable advantage has been taken of his position by the mortgagee. Donohoe v. Landoe, 126 M 351, 251 P2d 560 (1952).

Possessory Rights After Foreclosure: A clause in a real estate mortgage by which the mortgagor on foreclosure waives any claim of homestead and all right of possession of the mortgaged premises during the period of redemption is not invalid under this section. U.S. Bldg. & Loan Ass'n v. Stevens, 93 M 11, 17 P2d 62 (1932).

Equity of Redemption: Although the term "right of redemption" is used in this section, the subject treated is the "equity of redemption". Banking Corp. of Mont. v. Hein, 52 M 238, 156 P 1085 (1916).

Conditional Sales: When, under a contract of sale of property, both real and personal, cancellation with forfeiture of an advance payment was sought because of breach by the vendee in failing to make a deferred payment, the legal title remained in the vendor even though possession had been delivered to the vendee. Cook-Reynolds Co. v. Chipman, 47 M 289, 133 P 694 (1913).

71-3-110. Enforcement of obligation by creditor.

Case Notes

Mortgage Foreclosure: Section 71-1-222, declaring that there is but one action for the recovery of a debt or the enforcement of any right secured by mortgage, prohibits any action other than that provided by statute for the foreclosure of the mortgage, and the creditor cannot waive the mortgage and sue on the debt; this section has reference to liens other than mortgage liens. Barth v. Ely, 85 M 310, 278 P 1002 (1929).

Reconciliation With Other Statutes: While this section appeared in the Civil Code, and 71-1-222 appeared in the Code of Civil Procedure, R.C.M. 1921, both referring to the right of creditors to enforce obligations secured by lien, they must be considered to have been passed at the same time, and it must be presumed that it was intended that both should be operative, and each should govern as to the title in which it is found, and courts must construe them together and reconcile them, if possible. Barth v. Ely, 85 M 310, 278 P 1002 (1929).

71-3-111. Creation of lien not a personal obligation.

Case Notes

Purchaser From Mortgagor: The purchaser of mortgaged real estate does not thereby become personally liable for the payment of the indebtedness described in the mortgage. Mueller v. Renkes, 31 M 100, 77 P 512 (1904).

71-3-112. Holder of lien not entitled to compensation.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Authority for Additional Expenditures for Preservation and Protection of Property — Priority of Payment: Section 70-7-110 and this section provide sufficient statutory authority to allow lien claimants to add expenditures for the preservation and protection of encumbered property on to their liens after the liens are filed. Such preservation expenses should be accorded a first priority of payment. Tri-County Plumbing & Heating, Inc. v. Levee Restorations, Inc., 221 M 403, 720 P2d 247, 43 St. Rep. 928 (1986).

71-3-113. Priority of liens.

Case Notes

Attorney Lien Priority Over Chiropractor Lien: Under this section, other things being equal, different liens on the same property have priority according to the time of their creation. Relying on this section, the District Court concluded that, having been filed first, a chiropractor's lien had priority over an attorney's lien. However, 71-3-1114 specifically provides that an attorney's lien has priority over a chiropractor's lien, regardless of the time of the liens' creation, so the District Court's declaration of lien priority was reversible error. Wyant v. Kenda, 2004 MT 348, 324 M 342, 102 P3d 1260 (2004).

Secured Mortgage Lien Superior to Subsequent Delinquent Special Improvement District Lien: Great Falls sold industrial development revenue bonds (IDR bonds), secured by a mortgage lien held by the First Trust Company, to develop an industrial park. Later, the city issued special improvement district bonds (SID bonds) to defray the costs of street and utility construction at the industrial park. When the city defaulted on both the IDR and SID bond payments, the District Court ruled that the First Trust Company mortgage lien securing IDR bonds had a higher priority than the city's lien securing the SID bonds. On appeal, the Supreme Court upheld the lower court's decision, holding that when a governmental body creates an SID and issues

SID bonds that are a lien on the property that is also subject to a prior IDR lien created by a governmental body, the IDR lien has priority under this section because it was created prior to the SID lien. First Trust Co. of Mont. v. Great Falls, 256 M 390, 845 P2d 1227, 50 St. Rep. 45 (1993).

Executors Advancing Funds: When executors advanced money from their personal funds to the legatee of a cash bequest before distribution of the estate, their claim against the indebtedness of the estate was prior in time and therefore superior to the claim of a judgment debtor of the legatee. Hustad v. Reed, 133 M 211, 321 P2d 1083 (1958).

Attachment of Interest in Revested Property: A grantee of property under a deed absolute on its face but in fact a mortgage reconveyed the property by deed to the grantors (husband and wife) upon payment of the debt secured thereby and presented it for record 5 minutes before a second grantee of the same grantors presented his, also given as security for a loan. A creditor of the wife previously had attached her interest in the premises and secured judgment which had been duly docketed. Under these circumstances, immediately upon the filing for record of the first deed, the grantors were reinvested with the legal title, and the judgment lien of the creditor at once attached to the interest of the wife and was therefore prior and superior to the claim of the second grantee under decree of foreclosure of his mortgage deed. Isom v. Larson, 78 M 395, 255 P 1049 (1927).

71-3-114. Priority of purchase money mortgage.

Case Notes

Construction Lien Attaches From Date Work Commenced - Priority Over Purchase Money Mortgage: Gaston began water monitoring and percolation tests on property to be purchased by Yellowstone Bank, even though ownership of the property had not yet passed to the Bank. When payments to Gaston for its work stopped, Gaston sued to foreclose its construction lien and to establish priority of the lien. The Supreme Court held that the lien was valid against the Bank and its financing company, that the lien attached the day Gaston began work, and that Gaston's construction lien had priority over the purchase money mortgage used to finance the purchase of the property by Yellowstone Bank. Gaston Eng'r & Surveying v. Oakwood Properties, LLC, 2011 MT 44, 359 Mont. 341, 249 P.3d 75.

What Constitutes Purchase Money Mortgage: Respondent purchased a tract of land. After a complicated series of conveyances, respondent, as security for a loan, granted a mortgage that covered only a portion of the original tract purchased. The mortgage was granted by respondent 8 months after the tract had been conveyed to the respondent and was granted to parties who were not the sellers of the tract. The court found the evidence indicated the mortgage was given to secure payment of the purchase price of the original tract, was not given to secure any new indebtedness, and was therefore a purchase money mortgage. A purchase money mortgage under 71-1-232 is not required to be issued simultaneously with the conveyance of the property on which it is given. (This section was determined to be inapplicable to this case.) Swenson v. Ramage, 234 M 188, 762 P2d 851, 45 St. Rep. 1832 (1988).

Priority Determined by Intention of Parties: A purchaser simultaneously executed a mortgage in favor of the seller and a deed of trust in favor of the bank. The deed of trust was filed the day before the mortgage was filed. The mortgage bore the notation "no exceptions", following the form language reading "free from all encumbrances excepting". Upon the buyer's default, the sellers filed an action for a declaratory ruling that their purchase money mortgage was prior in time and right to the bank's deed of trust. The trial court reformed the sellers' mortgage to delete the term "no exceptions" and held that the bank's deed of trust was prior in time and right to the mortgage. The Supreme Court affirmed and held that the deed of trust, executed to secure the purchase loan, was a purchase money mortgage and prior in time and right because the evidence indicated that the parties intended the sellers' mortgage to be a second mortgage and the words "no exceptions" were due to a typing error. Pulse v. N. Am. Land Title Co. of Mont., 218 M 275, 707 P2d 1105, 42 St. Rep. 1578 (1985).

Construction Money Advanced Before Purchase Money: One who advances money for the purchase price of property acquires an interest therein superior to the lien claims for the price of the construction of buildings thereon, even though work on the buildings was commenced prior to such advancement. Soliri v. Fasso, 56 M 400, 185 P 322 (1919).

71-3-115. Order of resort to different funds.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Settlement of Personal Injury Claim: When injured party received payment in settlement of his personal injury claim in the form of three different drafts, the settlement was nevertheless one fund against which hospital lien could be asserted according to its priority, rather than three different funds to which marshaling principles would be applied in discharging attorney's lien, even though one of the drafts was in the amount of the hospital bill and included the hospital as payee. Sisters of Charity of Providence of Mont. v. Nichols, 157 M 106, 483 P2d 279 (1971).

71-3-117. Right to redeem.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Equity of Redemption in Assignee: A third mortgagee failed to exercise his statutory right to redeem the property from a foreclosure sale on the first mortgage within the statutory time period. After the expiration of the statutory time period, he assigned the mortgage. Although he had lost his statutory right of redemption, he retained his equity of redemption and passed it to his assignee. However, this right could only be exercised to protect the assignee from loss. Parcells v. Nelson, 103 M 412, 62 P2d 131 (1936).

Deed Absolute in Form:

In an action to have a deed absolute on its fact declared a mortgage, the defense of laches may be interposed. Riley v. Blacker, 51 M 364, 152 P 758 (1915).

This section does not apply to a case when an absolute deed is claimed to be a mortgage long after the delivery of the deed, the death of the grantee, and the settlement and distribution of his estate. Riley v. Blacker, 51 M 364, 152 P 758 (1915).

Laches in Failure to Redeem: When no proceedings were ever instituted for foreclosure of a mortgage, the mortgagor, in bringing an action to redeem 4 years after the mortgagee went into possession, was not guilty of such laches as to deprive him of the right to relief. Grogan v. Valley Trading Co., 30 M 229, 76 P 211 (1904).

71-3-118. Rights of inferior lienor.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Equity of Redemption in Assignee: A third mortgagee failed to exercise his statutory right to redeem the property from a foreclosure sale on the first mortgage within the statutory time period. After the expiration of the statutory time period, he assigned the mortgage. Although he had lost his statutory right of redemption, he retained his equity of redemption and passed it to his assignee. However, this right could only be exercised to protect the assignee from loss. Parcells v. Nelson, 103 M 412, 63 P2d 131 (1936).

71-3-121. Extinction by sale or wrongful conversion.

Case Notes

Evidence Sufficient to Indicate No Wrongful Conversion: The jury correctly found that defendant production credit association did not wrongfully convert farm equipment when a security agreement and financial statement indicated that: (1) the money owed on the equipment was a liability for use in calculating the debtor's ability to repay the loan; (2) the association considered the equipment as collateral; and (3) a sale of the equipment to the debtor had taken place. Zimmerman v. Bozeman Prod. Credit Ass'n, 233 M 156, 759 P2d 166, 45 St. Rep. 1387 (1988).

Full Extinction: Pursuant to the judgment in a foreclosure action, the mortgaged property was sold at public sale. The purchase of the property satisfied and extinguished the judgment, and the rendering court lacked jurisdiction to alter its judgment after the sale. Further, the purchase of the property extinguished the mortgage lien as fully as it would have been extinguished by payment of the indebtedness by the mortgagor. Oreg. Mtg. Co., Ltd. v. Kunneke, 76 M 117, 245 P 539 (1926).

Form of Conveyance:

Although the case was not decided on this issue, in analyzing this section, the Supreme Court stated that the meaning of the section appears to be that in order to be effective to extinguish the lien of the mortgage, a sale by the mortgagor to the mortgagee must be for that purpose and that the evidence of the sale (the conveyance) must disclose the fact. The sale must be "in satisfaction of the claim secured" by the lien. Dubbels v. Thompson, 49 M 550, 143 P 986 (1914).

Although the case was not decided on this issue, in analyzing this section, the Supreme Court stated that the legislative intent of the section appeared to be to leave open to inquiry the status of the mortgage lien in every case in which the evidence of the sale does not refer to the mortgage. Upon this assumption, a deed from the mortgagor to the mortgagee that does not refer to the mortgage leaves the record equivocal in meaning, and persons taking the title from the mortgagee are bound at their peril to ascertain by inquiry whether the conveyance was intended as a final adjustment of the rights of the parties. Dubbels v. Thompson, 49 M 550, 143 P 986 (1914).

71-3-122. Lien extinguished by statute of limitations.

Case Notes

Lien Extinguished When Debt Barred: When the debt is barred the lien to secure it is extinguished. Mont. Valley Land Co. v. Bestul, 126 M 426, 253 P2d 325 (1953).

Implied Amendment: Section 71-1-210, limiting the validity of a mortgage, unless renewed, to 8 years after maturity of the debt which it was given to secure, affects merely the lien of the mortgage and does not extend the life of the debt and to that extent amends this section; hence, when the debt dies, the mortgage dies with it. Humbird v. Arnet, 99 M 499, 44 P2d 756 (1935); Jones v. Hall, 90 M 69, 300 P 232 (1931).

Lien of Mortgage:

This section was made directly applicable to mortgages by section 45-106, R.C.M. 1947 (since repealed). Berkin v. Healy, 52 M 398, 158 P 1020 (1916).

In the absence of legislation declaring a different rule, the lien of a mortgage on real property was not extinguished by the lapse of the period fixed by the statute within which an action to enforce payment of the debt could be brought and prosecuted to a successful termination. However, such lien was extinguished by the provisions of this section. Berkin v. Healy, 52 M 398, 158 P 1020 (1916).

71-3-124. Filing costs and attorney fees to be recovered on foreclosure of liens — offer of judgment.

Compiler's Comments

2009 Amendment: Chapter 367 in (1) near beginning of first sentence and in (2) near beginning of first sentence in list of part references inserted reference to part 16; and made minor changes in style. Amendment effective October 1, 2009.

Saving Clause: Section 13, Ch. 367, L. 2009, was a saving clause.

1999 Amendment: Chapter 240 in (1) after "money paid" inserted "and attorney fees incurred"; inserted (2) requiring lienholder to pay attorney fees if lienholder rejects defendant's offer of judgment; and made minor changes in style. Amendment effective October 1, 1999.

Case Notes

Breach of Contract and Disputed Construction Lien — Claims Not Intertwined for Purposes of Awarding Attorney Fees —Fee Award Reversed and Remanded: A construction company filed a construction lien after it was locked out of the nearly completed home it had constructed. The plaintiff filed a variety of claims and the jury found in its favor and the District Court awarded it attorney fees related to the construction lien. The plaintiff's expert opined that the claim related to the construction lien could not be separated from the fees related to the other claims and therefore the defendant should pay all of its fees. The defendant did not call a witness to refute the opinion, and the District Court awarded the plaintiff all of its fees. On appeal, the Supreme Court reversed and remanded the matter, holding that, regardless of the expert's opinion, the District Court had the discretion to award only those fees related to the construction lien. TCH Builders and Remodeling v. Elements of Constrs., Inc., 2019 MT 71, 395 Mont. 187, 437 P.3d 1035.

District Court Conclusion That Claims Were Inseparable for Calculation of Attorney Fee Award in Error — Remanded to Assess Reasonable Fees: The plaintiff sued the defendant he had hired to build a home after the defendant had filed a lien against the home because the plaintiff refused to pay the final invoice. The plaintiff claimed that the lien was invalid because the parties' agreement was void as it was not reduced to writing in violation of 28-2-2201. The District Court agreed that the contract was void but still ordered the plaintiff to pay the invoice under the theory of quantum meruit. The District Court also awarded the defendant attorney fees. The District Court concluded that the claims in contract and in equity against the defendant were inseparable and therefore awarded the defendant nearly all of his attorney fees. On appeal, the Supreme Court reversed the award of attorney fees, holding that the claims were not inseparable, and remanded the matter for the District Court to order a reasonable amount of fees. Mandell v. Ward, 2016 MT 205, 384 Mont. 377, 377 P.3d 1228.

Substitution of Surety Bond for Lien — Lienee Not Entitled to Attorney Fees: Although the District Court discharged a construction lien after the property owner substituted a surety bond pursuant to 71-3-551, the substitution did not mean that the subcontractor failed to establish the lien and that the property owner was entitled to attorney fees. The Legislature did not intend for the lien substitute statute to allow lienees to recover their attorney fees by securing a surety bond despite their underlying liability. AAA Constr. of Missoula, LLC v. Choice Land Corp., 2011 MT 262, 362 Mont. 264, 264 P.3d 709.

Proper Award of Attorney Fees to Party Establishing Construction Lien: As prevailing party in a construction lien case, plaintiff was entitled to attorney fees, and statutory fee shifting provisions for the prevailing party created the presumption that plaintiff's lodestar fee was reasonable. Defendant failed to produce sufficient evidence to overcome the presumption of reasonableness or to demonstrate how the award of attorney fees was arbitrary, unreasonable, or substantially unjust. The award of attorney fees was affirmed. JTL Group, Inc. v. New Outlook, LLP, 2010 MT 1, 355 Mont. 1, 223 P.3d 912. See also Blue Ridge Homes v. Thein, 2008 MT 264, 345 Mont. 125, 191 P.3d 374.

Proper Award of Attorney Fees for Enforcement of Construction Lien: The District Court did not err in awarding plaintiff attorney fees related to plaintiff's construction lien arbitration award, successful enforcement of the arbitration award, efforts to foreclose on the lien, and efforts to win dismissal of a federal court action brought by defendant on the issue. Eisenhart v. Puffer, 2008 MT 58, 341 M 508, 178 P3d 139 (2008).

Posttrial Motions to Amend Judgment, to Limit Punitive Damages, and for Attorney Fees Properly Denied: In a construction contract case, defendants filed numerous posttrial motions, including motions to amend the judgment, to limit the punitive damages award, and for attorney fees and costs. The motions were denied, and defendants appealed, but the Supreme Court affirmed. The motion to amend the judgment was unsupported by any authority. The motion to limit punitive damages was based on the statutory limit of 3% of net worth enacted by the 2003 Legislature, effective October 1, 2003, but the cause of action accrued prior to October 1, 2003, and the statutory limit did not apply retroactively. For the motion for attorney fees and costs to be granted, defendants would have to have been the prevailing party in the action, but defendants failed to provide any argument explaining how they were the prevailing party. Accordingly, the District Court did not err in denying the posttrial motions. Murphy Homes, Inc. v. Muller, 2007 MT 140, 337 M 411, 162 P3d 106 (2007).

Judgment for Lesser Amount Than Claimed in Lien — No Proportional Reduction Required: The District Court found that $14,201.58 was due on a construction lien rather than $16,568 claimed in the lien. Defendant asserted that because this section allows attorney fees only for a claimant whose lien is established, plaintiff should have received only 86% of its attorney fees in proportion to the ratio of plaintiff's success to the amount claimed in the lien. The Supreme Court disagreed. This section does not require a proportional reduction in attorney fees when judgment is for a lesser amount than was claimed in the lien. LHC, Inc. v. Alvarez, 2007 MT 123, 337 M 294, 160 P3d 502 (2007).

Attorney Fees and Costs of Appeal Owing to Successful Lien Claimant: Under this section, a successful lien claimant is entitled to recover attorney fees and costs incurred at trial and on appeal. The Supreme Court remanded for a determination of attorney fees and costs of appeal to be awarded to the successful plaintiff in this case. Johnston v. Palmer, 2007 MT 99, 337 M 101, 158 P3d 998 (2007).

Improper Premise for Award of Plaintiff's Attorney Fees Based on Defendant's Affidavit — Abuse of Discretion Warranting Reversal: Plaintiff sought attorney fees on a Construction lien foreclosure. The District Court agreed that reasonable attorney fees were owed, but the court premised the amount on an affidavit submitted by defendant 19 months after the hearing without allowing plaintiff the opportunity to hear testimony and cross-examine. The Supreme Court held that the affidavit was not competent evidence. Because the District Court abused its discretion in awarding attorney fees in this manner, the Supreme Court reversed and remanded for a hearing in which both parties would have equal opportunity to present and hear relevant testimony and undertake necessary cross-examination. The court also affirmed that plaintiff was entitled to postjudgment interest on its legal fees from the date of the original judgment in which the District Court determined that plaintiff was entitled to its then-undetermined fees and costs.

James Talcott Constr., Inc. v. P&D Land Enterprises, 2006 MT 188, 333 M 107, 141 P3d 1200 (2006), following Glaspey v. Workman, 234 M 374, 763 P2d 666 (1988).

Award of Attorney Fees When Construction Lien Established: Although the timeliness of a construction lien was initially contested on appeal, once it was determined that a contractor had properly established a lien, the contractor was entitled to attorney fees for the costs of the appeal pursuant to this section. Rossi v. Pawiroredjo, 2004 MT 39, 320 M 63, 85 P3d 776 (2004).

Denial of Attorney Fees Previously Awarded Improper: An amendment of a summary judgment award, denying fees previously and properly awarded pursuant to this section, was inappropriate. (See 1999 amendment.) Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 86 (1996).

Fee Nearly as Much as Claim:

Appellant cited the holding in Carkeek, supra, that an attorney fee was unreasonable in relation to the size of the lien. However, the Supreme Court noted the finding in Glaspey v. Workman, 234 M 374, 763 P2d 666 (1988), that an attorney fee that exceeds the amount in controversy is not per se excessive and that each case depends on its own unique set of facts. Therefore, a disproportionate award of attorney fees may not necessarily constitute an abuse of discretion in some fact situations. DeVoe v. Gust. Lagerquist & Sons, Inc., 244 M 141, 796 P2d 579, 47 St. Rep. 1527 (1990).

The District Court reduced the award of attorney's fees in a successful defense against a mechanics' lien (now construction lien) foreclosure from $5,773.20 to $3,000. A reasonable attorney fee in a given case does not necessarily result from simple multiplication of the hours spent times a fixed hourly rate. To award an attorney's fee of $5,773.20 in defending against a $6,200 claim would appear most unreasonable regardless of the time spent, the skill involved in the work, the experience of the attorney, and similar considerations. There was no abuse of discretion by the District Court in awarding the fee, so it was not overturned on appeal. Carkeek v. Ayer, 188 M 345, 613 P2d 1013, 37 St. Rep. 1274 (1980).

Expert Witness Fees and Deposition Costs Not Included: Plaintiff that prevails in its action is entitled to recover attorney fees and costs. This does not include expert witness fees and costs. Tri-County Atlas, Inc. v. Brummer, 238 M 331, 779 P2d 46, 46 St. Rep. 1309 (1989).

Error in Failure to Award Attorney Fees: Under this section, it was error for the District Court to award judgment to a plaintiff who foreclosed on a construction lien and to then order each party to pay its own attorney fees. (See 1999 amendment.) Hanzel v. Marler, 237 M 521, 774 P2d 426, 46 St. Rep. 1020 (1989).

Total Amount of Claim Not Obtained — Award of Attorney Fees: Once a lien is established, this section mandates an award of attorney fees. The fact that a claimant does not receive the entire amount of his claim does not alter this mandate. Donnes v. Orlando, 221 M 356, 720 P2d 233, 43 St. Rep. 890 (1986).

Defense Counsel Fees:

This statute distinguishes between attorney fees and costs. Even if he is entitled to costs under former Rule 68, M.R.Civ.P. (now superseded), a defendant in a lien foreclosure action is entitled to attorney fees only if the lien is not established. (See 1999 amendment.) Schillinger v. Brewer, 215 M 333, 697 P2d 919, 42 St. Rep. 408 (1985).

When the evidence indicated that there was no lien to be foreclosed, as a matter of law, the defendant was allowed attorney's fee. Thompson v. Cure, 133 M 273, 322 P2d 323 (1958), distinguished in Valeo v. Tabish, 1999 MT 146, 295 M 34, 983 P2d 334, 56 St. Rep. 579 (1999). See also Mtn. W. Bank, N.A. v. Cherrad, LLC, 2013 MT 99, 369 Mont. 492, 301 P.3d 796.

A houseowner entered into a contract to erect a house in reliance on a lumber company's manager's representations that it was backing the contractor. When the houseowner paid the contractor, the lumber company was estopped from asserting a lien for materials, and the houseowner was entitled to a judgment including attorney's fees. Monarch Lumber Co. v. Wallace, 132 M 163, 314 P2d 884 (1957).

Priority of Lien — Attorney Fees: The holders of a mechanics' lien (now construction lien) established the validity and priority of their lien and therefore are entitled to recover costs and attorney fees pursuant to this section. Home Interiors, Inc. v. Hendrickson, 214 M 194, 692 P2d 1229, 41 St. Rep. 2408 (1984).

Award of Attorney Fees — Contingent Contract — Proper: Plaintiff agreed to remodel a prefab home for defendant. He also built a foundation, added a bedroom and deck, and built a double garage. Plaintiff completed the basement and sent a bill to defendant. The bill was paid. The remainder of the work was completed, but defendant refused to pay, contending the oral agreement between the parties contained a "cap" of $30,000. Plaintiff contended the agreement was on a cost-plus basis, the unpaid portion of which was $63,310. The District Court found for plaintiff and awarded the amount due with interest at 6% from the completion date. The court also awarded plaintiff attorney fees. Defendant contended attorney fees were not properly awarded. The Supreme Court adopted the rationale of Wight v. Hughes Livestock Co., Inc., 204 M 98, 664 P2d 303, 40 St. Rep. 696 (1983), a workers' compensation case. The court held that plaintiff is merely made whole by the award. To require him to pay attorney fees out of the award would be advantageous to defendant because defendant would pay only what was already owed and plaintiff would end up with less than the contract price. Plaintiff was unable to hire counsel on any basis other than a contingent fee due to financial limitations. Because of the substantial legal questions in the case, counsel was risking that his work would be uncompensated. The market value of counsel's service was affected by the need for a contingent fee. The award was proper. Frank L. Pirtz Constr., Inc. v. Hardin Town Pump, Inc., 214 M 131, 692 P2d 460, 41 St. Rep. 2366 (1984).

District Court Reduction of Attorney Fees Not Abuse of Discretion — Reasonable Attorney Fees Allowable for Defending Appeal: Lumber company filed a materialmen's lien (now construction lien) for unpaid amounts for materials supplied for construction of an addition to real property. The Supreme Court upheld the District Court's order of foreclosure of the lien even though there was a minor defect in filing. The Supreme Court found that the District Court did not abuse its discretion by reducing the plaintiff's claimed attorney fees from $2,648.75 to $800 when amount in controversy totaled only $888. On appeal, plaintiff requested additional attorney fees of $1,285. The Supreme Court stated that although it was reluctant to award additional attorney fees under the circumstances, the language of this section is mandatory, and remanded to the District Court for further proceedings to establish the plaintiff's reasonable attorney fees for defending the appeal. Simkins-Hallin Lumber Co. v. Simonson, 214 M 36, 692 P2d 424, 41 St. Rep. 2305 (1984).

Validity of Lien — Attorney's Fees: The tenant is entitled to attorney's fees for the cost incurred in establishing the validity of his mechanics' lien (now construction lien). Kosena v. Eck, 195 M 12, 635 P2d 1287, 38 St. Rep. 1736 (1981).

Order of Trial: Attorney's fees are recoverable by the prevailing party in a lien foreclosure action. The fact that evidence of attorney's fees was allowed to be presented upon reopening of plaintiff's case in chief is within the discretion of the trial court, and defendant made no showing that he was injured by the manner in which the evidence was presented. Maxwell v. Anderson, 181 M 215, 593 P2d 29 (1979).

Attorney's Fees — Error in Amending Judgment: The District Court struck an award of attorney's fees to a defendant in an action to foreclose a mechanics' lien (now construction lien). This was error because this section provides that attorney's fees must be allowed to a defendant against whose property the lien is claimed if the lien is not established. M. & R. Constr. Co. v. Shea, 180 M 77, 589 P2d 138 (1979).

Attorney's Fees — Lien Appeal: A claimant in a mechanics' lien (now construction lien) foreclosure action is entitled to attorney's fees for defending an appeal if counsel's affidavit details the time expended on the appeal. Beck v. Hanson, 180 M 82, 589 P2d 141 (1979).

Award of Fees Not Discretionary: District Court's denial of recovery of attorney's fees in prosecution of mechanics' lien (now construction lien) foreclosure was reversed because the award of attorney's fees under this section is not discretionary. Matzinger v. Remco, Inc., 171 M 383, 558 P2d 650 (1976), followed in Price Bldg. Serv., Inc. v. Holms, 214 M 456, 693 P2d 553, 42 St. Rep. 84 (1985).

Invalid Lien — Premature Action: Liens which were filed prematurely before the contracted work was completed or substantial performance had been made were invalid, and the property owners who defended against such invalid liens by contractors were entitled to attorney's fees. W. Plumbing of Bozeman v. Garrison, 171 M 85, 556 P2d 520 (1976).

Attorney's Claim for Services: This statute does not create authority for granting attorney fees in a proceeding for a Writ of Supervisory Control in a dispute over the proper amount of attorney's fees to be awarded to a court-appointed attorney. State ex rel. Stephens v. District Court, 170 M 22, 550 P2d 385 (1976).

Wage Claims Generally: There is no statutory provision for the allowance of an attorney's fee in the ordinary action for wages or salary. This section has reference only to claims of employees against an employer who makes an assignment for the benefit of creditors. McBride v. School District, 88 M 110, 290 P 252 (1940).

Preliminary Costs: It was error in a suit to foreclose a mechanics' lien (now construction lien) to allow as costs items charged for the preparation and verification of the lien and for an abstract of title to the property. Neuman v. Grant, 36 M 77, 92 P 43 (1907).

71-3-125. Filing of agricultural lien statements.

Compiler's Comments

2005 Amendment: Chapter 575 in (1) substituted "30-1-201(2)(j)" for "30-1-201(9)"; in (4)(a) substituted "30-9A-501" for "30-9A-502"; and made minor changes in style. Amendment effective October 1, 2005.

Saving Clause: Section 92, Ch. 575, L. 2005, was a saving clause.

Applicability: Section 93, Ch. 575, L. 2005, provided: "[This act] applies to a document of title that is issued or a bailment that arises on or after [the effective date of this act]. [This act] does not apply to a document of title that is issued or a bailment that arises before [the effective date of this act] even if the document of title or bailment would be subject to [this act] if the document of title had been issued or bailment had arisen after [the effective date of this act]. [This act] does not apply to a right of action that has accrued before [the effective date of this act]." Effective October 1, 2005.

1999 Amendment: Chapter 305 at end of (4)(a) substituted "30-9-522" (renumbered 30-9A-502) for "30-9-403"; and at end of (4)(b) substituted "30-9-545" (renumbered 30-9A-525) for "30-9-403". Amendment effective July 1, 2001.

1993 Amendment: Chapter 335 in (2)(a), at end, deleted "and the county of residence of the debtor".

1989 Amendment: Throughout section changed references to notice of an agricultural lien to references to statement of an agricultural lien; at end of (2)(a) inserted "and the county of residence of the debtor"; in (2)(d) substituted "secretary of state" for "county clerk and recorder" and at end inserted "and filing number"; inserted (2)(f) through (2)(m) expanding information requirements for agricultural lien statements; inserted (6) providing for lapse of certain agricultural lien statements unless filed with the Secretary of State; and made minor changes in phraseology.

Applicability: Section 10, Ch. 529, L. 1989, provided: "[This act] applies to agricultural liens filed after September 30, 1989."

Administrative Rules

ARM 44.6.105 Uniform Commercial Code fees.

ARM 44.6.110 Definitions and format requirements for filing of Title 71 lien.

Case Notes

Interaction of Agricultural Lien Law and Uniform Commercial Code on Secured Transactions — Filing of Agricultural Lien Adequate to Fulfill Financing Statement Requirements of Uniform Commercial Code: Agricultural liens are not security interests, and only the parts of Article 9 of the Uniform Commercial Code (U.C.C.) that expressly refer to agricultural liens, rather than those that refer only to security interests, apply to agricultural liens. Merely because collateral consists of farm products does not automatically turn an agricultural lien into a security interest. The attachment rules of Article 9 do not apply to agricultural liens; rather, agricultural liens attach according to the rules in the statutes that created agricultural liens. Similarly, 71-3-902 clearly delineates the procedure for perfecting an agricultural lien. This case presented a potential conflict regarding lien priority in that 71-3-904 grants agricultural liens a superpriority status that is not dependent on being the first to file, while 30-9A-322 states that an agricultural lien has priority over a conflicting security interest on the same collateral if the lien is perfected pursuant to 30-9A-310 of the U.C.C. Thus, agricultural lienors must satisfy the perfection requirements of 30-9A-310 in addition to the perfection requirements of 71-3-902, and by doing so, the lienors will be insulated from the U.C.C. first-in-time rule and retain the superpriority status pursuant to 71-3-904. However, because agricultural liens require the same and more information as a U.C.C. filing and both filings are documented in the same database, the filing of an agricultural lien with the Secretary of State also satisfied the financing statement requirements of the U.C.C., and a duplicate filing of a U.C.C. financing statement is not required. Stockman Bank of Mont. v. Mon-Kota, Inc., 2008 MT 74, 342 M 115, 180 P3d 1125 (2008).

71-3-131. Acknowledgment of lien satisfaction — penalty.

Compiler's Comments

1999 Amendment: Chapter 240 at beginning of (1) inserted reference to subsection (2); inserted (2) requiring property owner to pay costs and attorney fees before lien is released; and made minor changes in style. Amendment effective October 1, 1999.

Part 2
Federal Tax Liens

Part Compiler's Comments

States Enacting Uniform Federal Lien Registration Act: In 1983, Montana adopted with minor changes the Uniform Federal Lien Registration Act, (Ch. 396, L. 1983), the successor to the Revised Federal Tax Lien Registration Act. This act has been adopted in the following states: California, Idaho, Maryland, Michigan, Minnesota, Nevada, North Dakota, Oregon, and Wisconsin. The Uniform Law Commissioners' prefatory note states that the new act does not make any changes to the previous act "except as required to prescribe the method of perfecting the employer liability lien, provided by the Pension Reform Act and any other similar liens."

Uniform Federal Lien Registration Act — Prefatory Note: The Uniform Law Commissioners' prefatory note to the Uniform Federal Lien Registration Act states: "This Act is a successor to the Revised Federal Tax Lien Registration Act as revised by the Conference in 1966 and does not make any drafting changes to the previous Act except as required to prescribe the method of perfecting the employer liability lien, provided by the Pension Reform Act, and any other similar liens.

Since most of the policy decisions made in drafting this Act were derived from the Revised Uniform Federal Tax Lien Registration Act as it was revised in 1966, it would appear helpful to include here the Prefatory Note which was included with the earlier Act in 1966.

"Section 6323 of the United States Internal Revenue Code of 1954, as amended by P.L. 89-719, Federal Tax Lien Act of 1966 provides that liens for an unpaid federal tax shall not be valid as against mortgagees, pledgees, judgment creditors, purchasers and holders of other security interest until notice of the tax lien has been filed in an office designated by the law of the state in which the property subject to the lien is situated, or, in the absence of a valid state designation, in the federal district court for the place where the property is situated. Under federal law, personal property is deemed situated at the residence of the taxpayer regardless of its physical location.

"Thus the new federal act would invalidate any provision of a state law which required filing of liens for property other than real estate at more than one office or at any state office other than that associated with the residence of the taxpayer. State law requiring filing at the physical location of personal property or at both physical location and residence of the taxpayer is not permissible and if a state law includes such a provision the Internal Revenue Service would, for that state, file liens in the federal district court rather than in a state office.

"The new federal legislation provides for filing of certain types of certificates and notices affecting previously filed liens which some of the existing state legislation does not provide for. The effectiveness of these additional notices as a communication to interested persons depends on their being filed in the same office where the notice of lien is filed. It is necessary, therefore, that state law be broadened to permit filing and indexing of these additional notices.

"In addition to the above reasons for new state legislation, there is another reason for revising existing state laws concerned with federal tax liens. Many of the existing laws are no longer appropriate in the states (all but three in December, 1966) which have enacted the Uniform Commercial Code. It is highly desirable that the place for filing and searching for federal tax liens be the same place as that designated by the state law under the Uniform Commercial Code for filing and searching for a security interest in the same property. Unfortunately, complete coordination of federal tax lien filing with the rules for filing under the Uniform Commercial Code cannot be fully achieved by state legislation. The United States Supreme Court has held that the Congressional permission to a state to designate the office for filing of federal tax liens cannot be taken advantage of by the states in such a way as to require the federal tax collector to specify the particular property to which the lien applies. United States v. Union Central Life Insurance Company, 363 U.S. 291 (1961). The Internal Revenue Service has interpreted this decision to preclude a state requirement for filing federal tax liens in conformity with the Uniform Commercial Code because of the Code's differing requirements for various types of property and its requirement for filing in two offices in some cases. Rev.Rul. 64-170, 1964-1 Cum.Bull. 499. P.L. 89-719 continues this interpretation.

"Nevertheless, it is possible to go a long way toward bringing federal tax lien filing into conformity with the Uniform Commercial Code and it is highly desirable to do so in order to accommodate to commercial convenience so far as possible within the limitations of federal law. States which departed from the uniformity of the Commercial Code by amendment as to the place of filing may now wish to conform their Commercial Code to the original uniform version at the same time they change the federal tax lien requirements. The Act presented here calls for filing on taxpayers who are corporations or partnerships in the office of the Secretary of State and in all other cases in an office in the place where the taxpayer resides. No provision is possible calling for filing of the tax lien at the place where particular kinds of property are physically located. Any attempt to deviate from the proposed place of filing in this Code risks non-compliance with Federal Law. The federal act does permit filing of notices as to real property in an office at the place where the real property is situated. It has no such permission for other kinds of property. Section 1 of the Act contained herein complies with the federal requirement.

"The present Act was prepared in light of Public Law 89-719 of 1966 amending Section 6323 of the Internal Revenue Code of 1954. The Internal Revenue Service has reviewed the Act and believes it meets the requirement of federal law. The Conference recommends that it be adopted and that existing legislation concerning federal tax liens be repealed.""

71-3-201. Short title.

Compiler's Comments

1983 Amendment: Changed name from "Revised Uniform Federal Tax Lien Registration Act" to "Uniform Federal Lien Registration Act".

71-3-203. Execution of notices and certificates.

Official Comments

Uniform Law Commissioners' Comment: The official comment to this section prepared by the Uniform Law Commissioners states: "This section addresses only the validity of the filing and not the validity of the lien."

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1983 Amendment: Near middle of section, after "delegate" inserted "or by any official or entity of the United States responsible for filing or certifying of notice of any lien"; changed "tax liens" to "federal liens".

Source: This section is based on section 3 of the Federal Lien Registration Act.

71-3-204. Federal liens — place of filing.

Official Comments

Uniform Law Commissioners' Comment: The official comment to this section prepared by the Uniform Law Commissioners states: "1. In order to accommodate to commercial convenience so far as possible within the limitations of Section 6323 of the Internal Revenue Code, filing with the Secretary of State is provided for the lien on tangible and intangible personal property of partnerships and corporations (as those terms are defined in Section 7701 of the Internal Revenue Code of 1954 and the implementing regulations) thus including within "partnerships" such entities as joint ventures and within "corporations" such entities as joint stock corporations and business trusts.

Because most purchases and secured transactions involving personal property of natural persons relate to consumer goods or farm personal property, searches for liens against those persons are more likely to be made at the local level. Thus, with few exceptions a search for corporation federal tax liens with the Secretary of State and for natural persons with an officer in the county of residence will normally be in the same office as searches for security interests under the Uniform Commercial Code.

Section 6323 of the Internal Revenue Code "locates" all tangible and intangible personal property at the residence of the taxpayer even though it is physically located elsewhere in the same or in another state. State law cannot vary this requirement. State law does affect the result, however, in that state law determines the "residence" of a taxpayer. See IRC § 6323(f)(2). Filing at the physical location of personal property of a taxpayer who is not a resident of the state of location of the property cannot be required.

2. The coverage of this Act now extends beyond federal tax liens as described in the Comment to Section 1. [Montana omits this section.]

3. In some jurisdictions, a question may be raised concerning the propriety of incorporating federal law by reference. In others, the place of filing described in this Act may not correspond to the place of filing under the Uniform Commercial Code. Alteration of this Act in these respects may create the peril that the notices will be filed in the federal district court, thus eliminating the benefits of this Act."

Compiler's Comments

1983 Amendment: Near beginning of (1), after "property for" substituted "obligations" for "taxes"; near end of (1), after "subject to" substituted "the liens" for "a federal tax lien"; in (2), substituted "obligations" for "taxes"; in (2)(a), before "lien" deleted "tax"; inserted (2)(b) and (2)(c) providing that place of filing is with the Secretary of State if the lien is against a trust or decedent's estate.

Source: This section is based on section 2 of the Federal Lien Registration Act.

71-3-205. Duties of filing officer.

Official Comments

Uniform Law Commissioners' Comment: The official comment to this section prepared by the Uniform Law Commissioners states: "1. It is the practice of the Internal Revenue Service to regard a "certificate of discharge" as primarily referable to specific pieces of property, so a certificate of discharge corresponds to a release under Section 9-406 of the Uniform Commercial Code. A "certificate of release" in tax practice is equivalent to a "termination statement" in Section 9-404 of the Uniform Commercial Code in the sense that it is a general statement applicable to all property or types of property referred to in the termination statement.

2. It is expected that the Pension Benefit Guaranty Corporation will adopt the same practices as the Internal Revenue Service or other practices as the circumstances may require."

Compiler's Comments

1999 Amendment: Chapter 305 in (1)(a) substituted "30-9-539" (renumbered 30-9A-519) for "30-9-403(4)"; and made minor changes in style. Amendment effective July 1, 2001.

1987 Amendment: Deleted former (5) that read: "(5) The fee for a certificate is $2. Upon request, the filing officer shall furnish a copy of any notice of federal lien or notice or certificate affecting a federal lien for a fee of $1 per page."

1983 Amendment: Near beginning of (1), changed "tax lien" to "federal lien"; near end of (1)(b), after "receipt, the" substituted "title and address of the official or entity certifying the lien" for "serial number of the district director"; after "the total" substituted "amount" for "unpaid balance of the assessment"; in (3), after "alphabetical" deleted "federal tax"; and in (4), after "notice of" deleted "federal tax".

Source: This section is based on section 4 of the Federal Lien Registration Act.

71-3-206. Fees.

Official Comments

Uniform Law Commissioners' Comment: The official comment to this section prepared by the Uniform Law Commissioners states: "1. It is understood that the Treasury accepts the obligation to pay nondiscriminatory filing fees for filing notice of tax liens but desires those payments to be on a monthly billing basis. For notice of tax lien on real property, the filing fee for a real estate mortgage may serve as a standard; for a filing fee on notice of tax lien on personal property the filing fee for filing a financing statement may serve as a standard. There is now no established practice concerning fees for other notices. The certificate of discharge is comparable to a satisfaction of a real estate mortgage and to release of collateral under Section 9-406 of the Uniform Commercial Code. Those instruments are usually filed by persons other than the Treasury, and a filing fee for filing them should be prescribed.

A different problem is presented by certificates of release or non-attachment. Sometimes those certificates serve the purpose of permitting the public filing official to clear his records, and for that purpose the filing fee perhaps should be low in order to induce filing. Sometimes those notices are filed for purposes of the taxpayer. Given the volume of notices of tax liens which are filed daily in large filing offices, it may serve the public interest to have filed certificates of release. From the standpoint of the Treasury, those certificates serve no important purpose, and the Treasury may not file them if the fee is large. In adoption of this Act, consideration should be given by the states to provide a substantially smaller fee for filing a certificate of release, so that when a tax case is closed the Treasury will file those releases in a routine manner in order to reduce the storage and administrative problem of the local and state filing officers.

2. It is understood that the Pension Benefit Guaranty Corporation will accept the same obligations as those imposed on the Treasury for federal tax liens."

Compiler's Comments

1999 Amendment: Chapter 305 in (1) after "established" deleted "and deposited" and at end substituted "30-9-539" (renumbered 30-9A-519) for "30-9-403". Amendment effective July 1, 2001.

1993 Amendment: Chapter 420 in (1), at end, deleted reference to subsection (13) of 30-9-403. Amendment effective April 20, 1993.

1989 Amendment: At end of (1) changed "30-9-403(12)" to "30-9-403(13)".

1987 Amendment: Substituted (1) providing that fees must be established and deposited pursuant to 30-9-403 for "(1) The fee for filing and indexing each notice of lien or certificate or notice affecting the tax lien is:

(a) for a lien on real estate, $2;
(b) for a lien on tangible and intangible personal property, $2;
(c) for a certificate of discharge or subordination, $1;
(d) for all other notices, including a certificate of release or nonattachment, $2."

1983 Amendment: In (2), after "revenue" inserted "or other appropriate federal officials".

Source: This section is based on section 5 of the Federal Lien Registration Act.

Administrative Rules

ARM 44.6.104 Federal tax lien fees.

Part 3
Liens for Salaries and Wages

71-3-301. Priority when assignment of property made.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Wage Earner's Assignee as Claimant: After a wage earner has once established his right to preference payment for wages earned within the period of 60 days immediately preceding a levy upon the property of his employer, by giving the notice provided for by the "Wageworkers' Law", he may assign his claim. The assignment carries with it the lien as an incident, and the assignee is therefore entitled to assert the preference. Thompson v. Twodot Fertilizer Co., 71 M 486, 230 P 588 (1924).

Affirmation of Judgment: When there is no evidence in the record and the findings of the court bring the plaintiff within the operation of the statute known as the "Wageworkers' Law", a judgment for plaintiff against an assignee for the benefit of creditors will be affirmed on the authority of Flanders v. Murphy, 10 M 398, 25 P 1052 (1891) and Marshall v. Livingston Nat'l Bank, 11 M 351, 28 P 312 (1891). Knatz v. Wise, 16 M 555, 41 P 710 (1895).

Assignment to Creditor Directly for His Benefit: It is no objection to a complaint in an action by a laborer to enforce his claim that it alleges an assignment to a creditor directly for his sole benefit, and not as a trustee or for the benefit of creditors. Marshall v. Livingston Nat'l Bank, 11 M 351, 28 P 312 (1891); Flanders v. Murphy, 10 M 398, 25 P 1052 (1891).

Transaction in Form of Chattel Mortgage: When the effect of an instrument conveying personal property is a transfer of a debtor's property to a creditor, with power to make an immediate sale of the same and render the excess to the debtor after satisfying the debt therein described, which debt is made to be due at once, the transaction, will be regarded as an assignment even though it is in the form of a chattel mortgage. Marshall v. Livingston Nat'l Bank, 11 M 351, 28 P 312 (1891).

71-3-302. Priority in case of death of employer.

Compiler's Comments

1997 Amendment: Chapter 482 substituted "72-3-807(1)(e)" for "72-3-807(1)(d)". Amendment effective May 2, 1997.

1987 Amendment: Near end of section changed "72-3-807(1)(e)" to "72-3-807(1)(d)".

71-3-303. Priority in cases of execution or attachment.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Entire Claim to Be Established: Claimant should establish the whole of his claim, though he can be declared entitled to a lien for only so much of it as accrued within 60 days next preceding the levy of the writ, not exceeding $200. Shea v. Regan, 29 M 308, 74 P 737 (1903).

Jurisdiction of Justice of Peace: An action by a claimant to establish his claim for services, insofar as it seeks to establish and foreclose a lien on the debtor's attached property, is a proceeding equitable in nature and therefore not within the jurisdiction of a Justice of the Peace. Shea v. Regan, 29 M 308, 74 P 737 (1903).

71-3-304. Service of notice.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

71-3-305. Proceeding if claim disputed.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Parties to Action: When the claimant commences an action to establish a disputed claim, neither the Sheriff holding the attached property nor the attaching creditor is a necessary or proper party to such action, though the latter may intervene, if he considers it advisable. Shea v. Regan, 29 M 308, 74 P 737 (1903).

Waiver by Failure to Bring Action: When a claimant fails to commence an action against his debtor within 10 days after the date of the notice that his claim was disputed, he waives his right to a lien. Shea v. Regan, 29 M 308, 74 P 737 (1903).

Part 4
Farm Laborers' Liens

Part Law Review Articles

Agricultural Liens Under Revised Article 9, Burnham, 63 Mont. L. Rev. 91 (2002).

71-3-401. Who may have lien — priority.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Encumbrance Interpreted as Farm Laborer's Lien — No General Lien for Breach of Contract to Provide Equity in Land: Son filed a lien against the family farm held by his mother, asserting it was a general lien under 71-3-101. The Supreme Court held that in the absence of an express agreement to give a lien, a general lien can be claimed only as arising from dealings in particular trades or businesses in which the existence of a general lien has been recognized by judicial decisions or if a custom to that effect can be established by evidence. General liens are looked upon with disfavor. The court refuses to recognize a general lien for breach of a contract to provide equity in land or to convey land upon the owner's death. Interpreted as a farm laborer's lien, this rather unusual lien was invalid and unenforceable because the son did not take action upon it within 90 days as required by 71-3-405. Reiter v. Reiter, 237 M 220, 772 P2d 314, 46 St. Rep. 751 (1989). A later appeal by the son was dismissed as frivolous in Reiter v. Reiter, 240 M 450, 784 P2d 917, 47 St. Rep. 20 (1990).

71-3-402. How lien obtained.

Compiler's Comments

1989 Amendment: Near beginning, after "office of the", deleted "clerk and recorder in the county in which any of the real estate is situated on which any crop is grown, upon which a lien is claimed, a statement verified by affidavit of the person claiming such lien, his duly authorized agent, or attorney having knowledge of the facts, setting forth the terms of employment, the name of the employer, the time when the services were commenced and when ended, the wages agreed upon, if any, and if not agreed upon then the reasonable value of the same, the terms of payment, if any, and a description of the real estate on which any crop is grown or has been grown or harvested on which a lien is claimed, the amount paid him, if any, and the amount remaining unpaid and that said laborer claims a lien for the same"; substituted "secretary of state a statement of agricultural lien, as provided in 71-3-125" for former (2) that read: "(2) Notice of the lien also must be filed in the office of the secretary of state as required by 71-3-125"; and made minor change in phraseology.

Applicability: Section 10, Ch. 529, L. 1989, provided: "[This act] applies to agricultural liens filed after September 30, 1989."

1987 Amendment: Inserted (2) requiring filing of the lien notice with the Secretary of State.

71-3-404. Notice to other lienholders.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: In first sentence of (1), before "secretary of state", deleted "county clerk and recorder or"; near beginning of (2), before "certified", deleted "registered or"; and made minor changes in phraseology and punctuation.

Applicability: Section 10, Ch. 529, L. 1989, provided: "[This act] applies to agricultural liens filed after September 30, 1989."

1987 Amendment: In (1), near middle of first sentence after "county clerk and recorder", inserted "or secretary of state".

71-3-405. Limitations of actions to foreclose liens.

Case Notes

Encumbrance Interpreted as Farm Laborer's Lien — No General Lien for Breach of Contract to Provide Equity in Land: Son filed a lien against the family farm held by his mother, asserting it was a general lien under 71-3-101. The Supreme Court held that in the absence of an express agreement to give a lien, a general lien can be claimed only as arising from dealings in particular trades or businesses in which the existence of a general lien has been recognized by judicial decisions or if a custom to that effect can be established by evidence. General liens are looked upon with disfavor. The court refuses to recognize a general lien for breach of a contract to provide equity in land or to convey land upon the owner's death. Interpreted as a farm laborer's lien, this rather unusual lien was invalid and unenforceable because the son did not take action upon it within 90 days as required by this section. Reiter v. Reiter, 237 M 220, 772 P2d 314, 46 St. Rep. 751 (1989). A later appeal by the son was dismissed as frivolous in Reiter v. Reiter, 240 M 450, 784 P2d 917, 47 St. Rep. 20 (1990).

71-3-408. Acknowledgment of satisfaction of lien — penalty.

Compiler's Comments

1999 Amendment: Chapter 305 in (2) substituted "30-9-533" (renumbered 30-9A-513) for "30-9-404"; and made minor changes in style. Amendment effective July 1, 2001.

1987 Amendment: Inserted (2) requiring filing of a termination statement with the Secretary of State.

Part 5
Construction Liens

Part Compiler's Comments

Applicability: Section 21, Ch. 202, L. 1987, provided that the chapter applies to real estate improvement contracts made after September 30, 1987.

Interim Study Committee Bill: Chapter 202, L. 1987, enacted by Senate Bill No. 20, was introduced by request of the Joint Interim Subcommittee on Lien Laws. See "Creditor's Rights vs. Debtor's Shields", A Report to the 50th Legislature, Mont. Leg. Council, Nov. 1986. Certain provisions of the new law are based on the Uniform Simplification of Land Transfers Act (USLTA), Article 5, Construction Liens, and therefore the comments to that uniform law are instructive in interpreting the provisions of Ch. 202.

Saving Clause: Section 19, Ch. 202, L. 1987, was a saving clause.

Severability: Section 20, Ch. 202, L. 1987, was a severability section.

Part Case Notes

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DECISIONS AFTER 1987 GENERAL REVISION OF MECHANICS' LIEN LAWS

Breach of Contract — Construction Lien for Work Not Completed: Under a construction contract for Spanish Peaks Lodge, LLC, for a resort, a contractor was entitled to the actual costs of construction plus 5% of the project's total cost and certain other fees. Spanish Peaks declared bankruptcy, and construction was terminated prior to the conclusion of the project. Subsequently, the contractor's successor in interest filed a construction lien for the unpaid portion of the contract price. On appeal, the Supreme Court reversed, finding that the District Court erred by holding that the construction lien had priority over a mortgage holder because a construction lien is limited to unpaid amounts for services rendered or materials furnished and the construction lien was based on work not yet performed. DCK Worldwide Holdings, Inc. v. CH SP Acquisition, LLC, 2015 MT 225, 380 Mont. 215, 355 P.3d 724.

Construction Lien Litigation Not Moot — Property Remained in Property Owner's Possession: A District Court found for a property owner in a suit involving a construction lien, and it instructed the clerk and recorder to remove the lien from the property's public record. The property owners recorded the judgment, but on appeal, the Supreme Court reversed the judgment and remanded the case. The company holding the construction lien subsequently recorded a lis pendens on the real property, but the property owners closed on a refinancing loan after a deputy clerk erroneously filed a letter of release. On remand, the property owners argued that the lien was unenforceable because the District Court's judgment effectively discharged and released the lien. The Supreme Court found that even though the owners refinanced a loan on the property subject to the lien, it was never sold and remained in the property owner's possession, so the case was not rendered moot. The Supreme Court found that the initial judgment of the District Court removing the lien had been reversed, so the lien still existed on the property and the construction company could still litigate its validity. Sudan Drilling, Inc. v. Anacker, 2014 MT 72, 374 Mont. 272, 320 P.3d 977.

No Authority of Arbitration Panel to Foreclose Construction Lien Against Party Not Involved in Arbitration: An arbitration panel liquidated damages related to breach of contract actions filed by both parties and also made findings of fact regarding the issue of a construction lien placed by plaintiff on improvements to defendant's property. The District Court subsequently relied on the findings in granting summary judgment in plaintiff's favor on the construction lien. Defendant third party that was not a party to arbitration contended that the panel overlooked disputed issues of fact in entering judgment in the lien foreclosure action, and the Supreme Court agreed. The panel had authority to liquidate the parties' breach of contract damages, but no authority to foreclose the construction lien or make findings of fact regarding foreclosure because the third party was not involved in the arbitration. The case was remanded for further proceedings on the lien and its foreclosure. Dick Anderson Constr., Inc. v. Monroe Constr. Co., LLC, 2009 MT 416, 353 M 534, 221 P3d 675 (2009).

Doctrine of Foreseeability Not Sufficiently Raised in Context of Construction Contract: Defendants in a construction contract dispute attempted to raise the issue of foreseeability as a defense, asserting that if plaintiff suffered damages, the damages were the result of plaintiff's own negligence. The District Court determined that foreseeability had no place in the lawsuit because foreseeability had not been pleaded, in that foreseeability to determine the size of a particular construction contract was not the same as foreseeability from the standpoint of causal relationship in a negligence claim. The Supreme Court concluded that defendants did not sufficiently raise the foreseeability issue either in pleadings or in the pretrial order, even assuming that it had a place in the case, so the District Court did not err in barring the foreseeability defense. Murphy Homes, Inc. v. Muller, 2007 MT 140, 337 M 411, 162 P3d 106 (2007).

Contractor Entitled to Stop Work Pursuant to Developer's Breach of Contract — Contractor Improperly Required to Reimburse Postbreach Expenses: Plaintiff contractor submitted a claim for construction costs to defendant developer's architect, who approved payment, but the developer refused to pay the costs, so the contractor stopped work. The developer hired another contractor to finish the work, and the District Court penalized the contractor by requiring reimbursement of the developer's costs for finishing the work. The Supreme Court reversed the award. The contractor was entitled to stop work because of the developer's material breach of contract, and the developer was not entitled to benefit from its own wrong, so it was error to penalize the contractor for amounts expended by the developer to finish the work. James Talcott Constr., Inc. v. P&D Land Enterprises, 2006 MT 188, 333 M 107, 141 P3d 1200 (2006).

Insufficient Evidence to Warrant Award of Home Office Overhead: Plaintiff contractor sought to enforce a contractor's lien and was awarded damages, but the contractor sought additional damages to cover extended costs for home office overhead occasioned by delays caused by defendant, claiming that under the contract, delay costs were to be borne by the responsible party. A special master found that plaintiff had failed to establish entitlement to additional home office overhead costs and that the evidence submitted in support of the claim was not credible. The District Court adopted the special master's findings, and on appeal, the Supreme Court affirmed. Without addressing the credibility of the evidence, the Supreme Court held that the evidence submitted by the contractor was insufficient to establish entitlement to additional home office overhead costs. James Talcott Constr., Inc. v. P&D Land Enterprises, 2006 MT 188, 333 M 107, 141 P3d 1200 (2006).

Prejudgment Interest Allowable on Amount Recoverable Under Construction Lien: Although a construction contract provided for payment of prejudgment interest, the District Court refused to approve it on the amount that plaintiff was entitled to collect under a Construction lien. On appeal, the Supreme Court approved payment of prejudgment interest, notwithstanding defendant's challenge to the amount of the claim. Plaintiff's damages were certain or capable of being ascertained, and a dispute on the amount owed on the claim did not transform the claim into one that did not bear prejudgment interest, nor did a difference between claimed damages and the amount actually awarded preclude the award of prejudgment interest. James Talcott Constr., Inc. v. P&D Land Enterprises, 2006 MT 188, 333 M 107, 141 P3d 1200 (2006), following Price Bldg. Serv., Inc. v. Helms, 214 M 456, 693 P2d 553 (1985), and followed in LHC, Inc. v. Alvarez, 2007 MT 123, 337 M 294, 160 P3d 502 (2007), and Total Indus. Plant Serv., Inc. v. Turner Indus. Group, LLC, 2013 MT 5, 368 Mont. 189, 294 P.3d 363.

Failure of Trial Court to Consider Damages From Defective Construction Not Erroneous: In a construction lien case, the District Court adopted the contractor's proposed findings and conclusions almost verbatim. Plaintiffs alleged error because the court failed to consider damages from defective workmanship, but the Supreme Court affirmed. Although the verbatim adoption of findings and conclusions is discouraged, in this case, the trial court considered substantial but conflicting evidence from both parties regarding the quality of the work and resolved the conflict in favor of the contractor. Given the substantial evidence upon which the decision was made, the Supreme Court declined to disturb the findings. Rossi v. Pawiroredjo, 2004 MT 39, 320 M 63, 85 P3d 776 (2004).

Final Work Performed to Enhance Value of Project, Not to Extend Time for Lien Filing — Lien Timely Filed: Defendant initially ceased work on plaintiffs' residence on April 6 but returned on June 11 to try to clean some tile that was stained upon installation; however, the cleaning attempt was unsuccessful. On September 7, 88 days later, defendant filed a construction lien for the balance due, plus interest. The District Court held that the filing was timely because defendant had worked on the project within the previous 90 days and that the work was performed to enhance the value of the property, not to extend the time for filing a lien. Plaintiffs contended that the lien filing was untimely because the unsuccessful work on June 11 did not render a tangible improvement to the property and that the last actual work occurred on April 6, more than 90 days prior to filing. The Supreme Court affirmed. The fact that the June 11 work was unsuccessful or insignificant in relation to the overall work performed was not conclusive with regard to extending the time for lien filing. So long as the final work was done to enhance the property value, it was sufficient to extend the time for filing a construction lien. Rossi v. Pawiroredjo, 2004 MT 39, 320 M 63, 85 P3d 776 (2004).

Purpose of Procedural Lien Requirements to Provide Notice to and Protect Interests of Property Owners — Construction Lien Statutes Construed: The purpose of the procedural requirements in construction lien law is to impart notice to the owner of real property that a lien has been filed against the property and to protect all parties dealing with the property, including subsequent owners. The requirements will be strictly construed, but once the procedure is fulfilled, the statutes will be liberally construed so as to give effect to their remedial purpose. Failure to state on the lien statement the owner or person whose interest in property is sought to be charged is fatal to the lien. In the case at bar, Swain listed Battershell as the contracting owner, but Battershell held no interest in the property at the time that the lien was filed and was not listed as owner of record in the County Clerk's office; thus, the listing of Battershell as the contracting owner on the lien statement was fatal to the lien. Swain v. Battershell, 1999 MT 101, 294 M 282, 983 P2d 873, 56 St. Rep. 424 (1999), distinguishing Mtn. St. Resources, Inc. v. Ehlert, 195 M 496, 636 P2d 868, 38 St. Rep. 2061 (1981).

Right to Retain Lien — Substantive Property Right: Talcott Construction brought an action to foreclose on its construction lien on certain condominiums. Mountain Bank filed an irrevocable letter of credit with the District Court on behalf of the defendant, P&D Land Enterprises, and the court entered an order dissolving Talcott's lien. The defendant argued that Talcott could not appeal the dissolving of the lien because former Rule 1, M.R.App.P. (now superseded), referred only to writs of attachment. The Supreme Court held that an appeal was proper because the rule referred to "attachments" and the construction lien was an attachment and a property right, the release of which was the deprivation of a substantive right. James Talcott Constr., Inc. v. P&D Land Enterprises, 261 M 260, 862 P2d 395, 50 St. Rep. 1313 (1993).

Priority of Recorded Trust Deed Over Mechanics' Lien for Improvements: Schenk borrowed $80,000 from American Federal Savings and Loan Association (American) to purchase a bar, executing a promissory note secured by a deed of trust in favor of American. None of the loan proceeds were used as payment for improvements. Subsequent to completion of remodeling and electrical work on the bar, an electric company perfected a mechanics' lien. American later filed a complaint seeking foreclosure of the deed of trust, and the electric company asserted as an affirmative defense the priority of the mechanics' lien. The District Court granted summary judgment to the company, citing the lien priority. The Supreme Court reversed, based on the facts that: (1) the parties entered into the loan agreement almost 1 year prior to the commencement of improvements; (2) American lacked any resource to determine that improvements would be commenced at a date far removed from the loan date; (3) American could not withhold funds intended for construction because the loan was used for purchase rather than improvements; and (4) Schenk was under no obligation to notify American of the remodeling, and even if notified, American had no legal means to further secure its lien position. Am. Fed. S&L Ass'n v. Schenk, 241 M 177, 785 P2d 1024, 47 St. Rep. 177 (1990), distinguishing Beck v. Hanson, 180 M 82, 589 P2d 141 (1979), Home Interiors, Inc. v. Henderson, 214 M 194, 692 P2d 1229 (1984), and Tri-County Plumbing & Heating, Inc. v. Levee Restorations, Inc., 221 M 403, 720 P2d 247 (1986).

DECISIONS PRIOR TO 1987 GENERAL REVISION OF MECHANICS' LIEN LAWS

PARTIES WHO MAY HAVE LIEN

General

Property Value Not Enhanced — Quantum Meruit Inapplicable: Plaintiff contractors argued that they be allowed to recover expenditures for work they performed on commercial property, under the theory of quantum meruit. However, recovery was disallowed upon finding that the work had not enhanced the value of the property but instead had rendered the property unusable commercially and noncommercially. Durand v. Dowdall, 232 M 347, 757 P2d 1302, 45 St. Rep. 1104 (1988).

Materialman Not Bound by Owners' Agreement to Share Costs: In an action to foreclose a mechanics' lien (now construction lien), an agreement between the lessors and lessees of the liened property on sharing improvement costs is a matter to be settled only between the lessors and lessees. The contractor was not a party to that contract and is not bound by its terms. Price Bldg. Serv., Inc. v. Holms, 214 M 456, 693 P2d 553, 42 St. Rep. 84 (1985).

Work to Enhance Property — Extension of Filing Time: Plaintiff agreed to remodel a prefab home for defendant. He also built a foundation, added a bedroom and deck, and built a double garage. Plaintiff completed the basement and sent a bill to defendant. The bill was paid. The remainder of the work was completed, but defendant refused to pay, contending the oral agreement between the parties contained a "cap" of $30,000. Plaintiff contended the agreement was on a cost-plus basis, the unpaid portion of which was $63,310. The District Court found for plaintiff and awarded the amount due with interest at 6% from the completion date. The plaintiff had filed a mechanics' lien (now construction lien) on the property. Defendant contended the lien was invalid because it was not timely filed. The lien was filed on July 9, 1981. The last working day for plaintiff was in December 1980, but carpet was relaid on April 20, 1981. While performing additional insubstantial work will not extend the 90-day time limit for filing a lien, if the work was done to enhance the property and not merely to extend the time limit, the lien is timely. The District Court found the work was done to enhance the property, and its finding was supported by substantial credible evidence. Frank L. Pirtz Constr., Inc. v. Hardin Town Pump, Inc., 214 M 131, 692 P2d 460, 41 St. Rep. 2366 (1984).

Architect's Services — Enhancement of Structure or Other Thing on Property Required: As agreed with landowner, architect prepared plans and specifications for buildings. Before any construction was begun, the project was abandoned. The landowner refused to pay the architect, and the architect filed a lien against the land under 71-3-501 (now repealed). The lien was invalid because the architect's services did not enhance the value of a structure or other thing built on the property. Kenneth D. Collins Agency v. Hagerott, 211 M 303, 684 P2d 487, 41 St. Rep. 1375 (1984).

Contract Ceiling Price — Precludes Quantum Meruit: Plaintiff agreed to build a house for defendants. The contract entered into contained cost-plus language as well as ceiling price language. Costs were more than had been anticipated. Defendants ordered plaintiff to stop working on the house. Defendants paid the ceiling price referred to in the contract. Plaintiff filed a mechanics' lien (now construction lien) on the property. A trial was held, with the judge finding for defendants. Plaintiff maintained that regardless of the terms of the contract he was entitled to a reasonable quantum meruit for supplying materials and services from which defendants received the benefit. Cases where this was previously allowed did not involve a ceiling price provision, however. There was no implied agreement to waive the ceiling price, nor was there a preponderance of evidence indicating a sum owed to plaintiff in equity. Matos v. Rohrer, 203 M 162, 661 P2d 443, 40 St. Rep. 366 (1983), distinguished in Lewistown Miller Constr. Co., Inc. v. Martin, 2011 MT 325, 363 Mont. 208, 271 P.3d 48.

Repair by Tenant as Basis for Lien: The leased premises were partially destroyed by fire. The landlord had a contractual obligation to repair the building but failed to repair. The tenant completed the repairs himself with the knowledge and consent of the landlord. After the repairs were completed, the landlord attempted, contrary to the terms of the lease, to drastically increase the rent. A dispute arose over the rent increase, and the tenant filed a mechanics' lien (now construction lien) to cover the cost of the repairs. The court held that there was an implied contract between the parties, and an implied contract is sufficient to support a valid mechanics' lien (now construction lien). In addition, the landlord's totally unjustified demand for drastically increased rental payment after the completion of the repairs presents an even stronger equitable basis to uphold the lien. The tenant is entitled to a mechanics' lien (now construction lien) in the full amount of the value of any permanent repairs that were the duty of the landlord to provide. Kosena v. Eck, 195 M 12, 635 P2d 1287, 38 St. Rep. 1736 (1981).

Counterclaim for Defective Performance — Finding Necessary Before Denial: When the trial court did not enter a judgment or make a general finding on defendant's counterclaim alleging defective performance, it cannot be implied that the claim was without merit. The cause was remanded for entry of findings and judgment disposing of the counterclaim. Bauer v. Cook, 182 M 221, 596 P2d 200 (1979).

Breach of Contract — Abandonment of Jobsite: Defendant's refusal to authorize payment to a contractor upon completion of a portion of construction when the evidence indicated that time was of the essence and the defendant had delayed construction constituted a total breach of contract justifying abandonment of the jobsite and giving the contractor the right to file and enforce a mechanics' lien (now construction lien). Bauer v. Cook, 182 M 221, 596 P2d 200 (1979).

Award Based on Reasonable Cost Notwithstanding Contract: Under proper circumstances an award can be made on the reasonable cost of labor and materials furnished by the lienholder, in disregard of the original contract between the parties. Maxwell v. Anderson, 181 M 215, 593 P2d 29 (1979).

Waiver of Lien: Plaintiff retained lien rights for money owing to him despite his execution of a series of lien releases written in general terms when each release was executed upon the payment of an amount of money and uncontradicted parol testimony indicated that the parties regarded the lien waivers to be releases only as to amounts paid and not general releases of lien rights. Fillbach v. Inland Constr. Corp., 178 M 374, 584 P2d 1274 (1978).

Construction Superintendent: Lien of general construction superintendent on housing projects was invalid and void when there was no proof in the record of the amount of money due and owing to him under terms of contract with investment company and party doing actual construction work. Harsh Mont. Corp. v. Locke, 134 M 150, 328 P2d 926 (1958).

Failure of Contractor to Pay Laborers and Materialmen: The fact that a plaintiff building contractor did not pay claims of certain materialmen furnishing labor and materials in the remodeling of a residence could not result in relieving the owner of liability under the contract. Because the contractor made no claim for the items furnished in his lien foreclosure action, the owner was liable directly to the materialmen and no prejudice resulted to the owner from the contractor's failure to pay the claims. If the plaintiff had paid them, then he would simply have added the amounts of such payments to his own claim and lien plus 10% for plaintiff's services and supervision. Smith v. Gunniss, 115 M 362, 144 P2d 186 (1943).

Assignment to Trustee for Collection: Various laborers filed lien claims for wages due them from a mining company, and the money to pay their claims was furnished by certain persons, whereupon the laborers assigned their claims and liens to one of such persons as trustee. Such trustee had the right to enforce the lien held by him for the benefit of those who paid off the laborers' claims. Caird Eng'r Works v. Seven-Up Gold Min. Co., Inc., 111 M 471, 111 P2d 267 (1941).

Enhancement of Mining Claim Unnecessary for Lien: When a mechanics' lien (now construction lien) is for labor performed on a mining claim, as distinguished from that performed on a building or structure, there need be no enhancement of the property in order to entitle claimant to a lien. Caird Eng'r Works v. Seven-Up Gold Min. Co., Inc., 111 M 471, 111 P2d 267 (1941).

Prior Understanding Not Required to File Lien: In order for a lien to attach there need not have been an understanding between a materialman and the purchaser of materials that they were being furnished upon the credit of the particular building. Caird Eng'r Works v. Seven-Up Gold Min. Co., Inc., 111 M 471, 111 P2d 267 (1941).

Materialman Not Bound by Contractor's Agreement or to Deal Directly With Owner: The right to a materialmen's lien (now construction lien) may not be taken away by implication. A materialman's knowledge that the contractor had agreed in writing to turn the building over free from encumbrances did not affect his right to a lien. The materialman did not assent to be bound by such contract. Further he did not deal directly with the owner, but dealt with her sons as lessees, and the owner gave her consent and ratified what was done by making a substantial payment. Morin Lumber Co. v. Person, 110 M 114, 99 P2d 206 (1940).

Necessary Parties to Action: In a proceeding to foreclose a mechanics' lien (now construction lien) instituted by an oil well driller under 71-3-501 (now repealed) and 71-3-1002, asserted against a leasehold interest, neither the lessor nor, in the case of an assigned lease, the assignor is a necessary party. Sunburst Oil & Ref. Co. v. Callender, 84 M 178, 274 P 834 (1929).

Burden of Proof: The burden is on a lien claimant to establish his lien, and to support this burden he must show not only that he furnished the materials, but also that they were used for the enhancement of the property to which he claims a right to resort as security for the debt thus created. In the absence of this showing, his equity does not arise. Rogers-Templeton Lumber Co. v. Welch, 56 M 321, 184 P 838 (1919); Missoula Mercantile Co. v. O'Donnell, 24 M 65, 60 P 594 (1900).

Who May Assert Lien — What Property Is Lienable

Property Covered by Lien: When defendant owned seven unpatented mining claims and leased such claims under agreement requiring lessee to do shaft and engineering work, and such work was subsequently done by plaintiff with knowledge of lessor, mechanics' lien (now construction lien) held by plaintiff attached to all mining claims held by defendant, notwithstanding that plaintiff performed work on only one such claim in group of seven claims. Fausett v. Blanchard, 154 M 301, 463 P2d 319 (1969).

Materialmen of Subcontractor: The materialmen of the subcontractor were not entitled to a lien under the facts of this case. Any implied contractual relationship between the owner and the materialmen through the contractor and the subcontractor was disaffirmed by agreement of the parties. Glacier St. Elec. Supply Co. v. Hoyt, 152 M 415, 451 P2d 90 (1969).

Abandoned Improvements — Delay in Completion:

When contract specifically said that contractor's ability to continue work would be dependent upon prompt payment by owner as agreed and owner did not pay as agreed, contractor was allowed foreclosure of lien even though he was unable to complete the work. Gramm v. Ins. Unlimited, 141 M 456, 378 P2d 662 (1963), distinguished in Intermtn. Elec., Inc. v. Berndt, 164 M 67, 518 P2d 1168 (1974).

The abandonment of an improvement before its completion without fault of the contractor does not abrogate his right or that of laborers and materialmen to liens for the value of the work done and the materials furnished. In such case the improvement is considered completed, so far as the rights of the lienors are concerned. When the owner frequently makes changes in the plans, causing delay and necessitating additional work, materials, and expense and permits the contractor to continue after expiration of the time fixed for completion, the owner waives the original date as if the extended time had been originally fixed in the contract. Smith v. Gunniss, 115 M 362, 144 P2d 186 (1943).

"Structures":

A platform without foundation, walls, or roof, except for a wall on one side to serve as an instrument panel and so constructed so that it could be moved if the location did not prove satisfactory, was not a structure within the meaning of 71-3-501 (now repealed). Cascade Elec. Co. v. Assoc. Creditors, Inc., 124 M 370, 224 P2d 146 (1950).

Under the rule of "noscitur a sociis", i.e., the meaning of a word may be known from the accompanying words, a threshing machine is not a "structure" within the meaning of 71-3-501 (now repealed). A structure to be lienable must be attached to the land at the time labor is performed upon or materials are used in connection with its creation, improvement, or repair upon it. Barnes v. Mont. Lumber Co., 67 M 481, 216 P 335 (1923).

"Fixtures": Machines, motors, and other electrical equipment placed upon a movable platform were not fixtures so as to make them lienable. Cascade Elec. Co. v. Assoc. Creditors, Inc., 124 M 370, 224 P2d 146 (1950).

Inclusion of Articles Not Used in Building: In the absence of a fraudulent intent, the fact that a notice or claim of lien may include some items which are lienable and others which are not or the fact that the claim was made for a larger amount than the claimant shows himself entitled to will not vitiate or destroy the lien for the amount actually due the claimant. The inclusion in a contractor's lien claim of materials not used in the dwelling remodeled did not prejudice the owner when the judgment of the court provided for a proper reduction for such items. Smith v. Gunniss, 115 M 362, 144 P2d 186 (1943).

Architectural Services — Sampling Ore, Etc.: "Architectural services", rendered by a foreign engineering company, consisting of technical work in the sampling of ore, metallurgical tests, preparation of mining plant specifications, making blueprints, etc., used in the construction of a quartz mill as well as supervising its construction, and an item for placing orders for machinery to enable the mining company to obtain wholesale prices thereon, was lienable. Caird Eng'r Works v. Seven-Up Gold Min. Co., Inc., 111 M 471, 111 P2d 267 (1941).

Corporation as Person: A corporation is a "person" within the meaning of the mechanics' and materialmen's lien (now construction lien) law, and as such may claim a lien under 71-3-501 (now repealed). Caird Eng'r Works v. Seven-Up Gold Min. Co., Inc., 111 M 471, 111 P2d 267 (1941).

Independent Contractor's Right to Claim Lien: An independent contractor may claim, under 71-3-501 (now repealed), a mechanics' lien (now construction lien) whether he hires servants to do the actual work or not. Caird Eng'r Works v. Seven-Up Gold Min. Co., Inc., 111 M 471, 111 P2d 267 (1941).

Lien for Tools and Machinery or Labor as Extending to Entire Unit: By virtue of 70-15-104, mining tools and machinery are deemed affixed to the mine; hence in effect they constitute "machinery or fixtures for" mining claims under 71-3-501 (now repealed), entitling one who furnishes the same or performs labor thereon to a lien, which extends to all improvements and structures operated as a unit in the common enterprise. Caird Eng'r Works v. Seven-Up Gold Min. Co., Inc., 111 M 471, 111 P2d 267 (1941).

Trucker Entitled to Lien: A trucker who hauled lumber and other materials for use in the erection of a building on a mining claim is entitled to a lien for the costs of delivery thereof, but not for hauling groceries and other supplies which are consumed in mining operations, or for the hauling of concentrates to a smelter. Caird Eng'r Works v. Seven-Up Gold Min. Co., Inc., 111 M 471, 111 P2d 267 (1941).

Extent of Lien as to Land: The lien given by 71-3-501 (now repealed) attaches primarily to the structure in the erection of which the labor or materials were used, and extends only incidentally to the land upon which it is situated. Stritzel-Spaberg Lumber Co. v. Edwards, 50 M 49, 144 P 772 (1914).

Lien Not to Be Denied Because It Would Necessitate Removal of Building: The lien on a building cannot be denied because of the fact that some injury may result to the realty from the removal of the building. Section 71-3-501 (now repealed) contemplates removal, whether injury does or does not result. Stritzel-Spaberg Lumber Co. v. Edwards, 50 M 49, 144 P 722 (1914).

Nonlienable Articles: Illuminating oil, mica grease, lubricating oil, and gasoline for fuel used in a mining plant did not enhance the value or become a part of the machinery, and hence were not lienable within 71-3-501 (now repealed). A. M. Holter Hardware Co. v. Ontario Min. Co., 24 M 198, 61 P 8 (1900).

Material Entering Into the Construction: A cover for a stovepipe flue, opening into the chimney from the interior of a building and removable when such flue was to be used, was not material entering into the construction of the building, or a fixture, and such building was not subject to a lien therefor. Missoula Mercantile Co. v. O'Donnell, 24 M 65, 60 P 594 (1900).

Statutory Construction

Quantum Meruit Action on Modified Written Contract — Completion of Contract Prevented by Defendant: Where, following oral modification by the parties of a written contract for the construction of a foundation under the defendant's house, the defendant procured a third party to finish the work, the District Court did not err in refusing to grant the defendant's motion for a directed verdict. It makes no difference to the resolution of the case that the contract was partially written and partially oral, as the mechanics' lien (now construction lien) statute is remedial and should be given a liberal construction in order to achieve its purposes. Because the defendant prevented the plaintiff from carrying out the remainder of the modified contract, the plaintiff is entitled to recover for the work it did do, under its quantum meruit claim. William Bros. Constr. v. Vaughn, 193 M 224, 631 P2d 688, 38 St. Rep. 1070 (1981).

Counterclaim by Home Owners Allowed: The rule denying a lien claimant a personal judgment against a property owner in a lien foreclosure action when privity of contract is absent cannot be conversely applied to deny a property owner a personal judgment against a lien claimant for damages attributable to the lien claimant and arising out of a contract between the property owner and the prime contractor. Miller v. Melaney, 172 M 74, 560 P2d 902 (1977).

Claim Arising Upon Contract: A mechanics' lien (now construction lien) under 71-3-501 (now repealed) is not a claim arising upon a contract under section 91-2704, R.C.M. 1947 (since repealed), and the lien is not lost because creditor's claim is not filed. Hammer v. Chapin, 256 F. Supp. 818 (D.C. Mont. 1966).

Requirements of Chapter Exclusive: Compliance with the provisions of Title 71, ch. 3, part 5, is sufficient to perfect the lien, and 28-10-609 does not apply to mechanics' liens (now construction liens). Monarch Lumber Co. v. Haggard, 139 M 105, 360 P2d 794 (1961).

Form of Contract Immaterial: The right of a mechanic or materialman to a lien on property upon which he has supplied work, labor, or materials is not dependent upon whether the construction contract with the owner is written, oral, express, or implied; it is not the contract which creates the lien under 71-3-501 (now repealed), but the use of the materials furnished and the work and labor expended that give rise to the lien. Smith v. Gunniss, 115 M 362, 144 P2d 186 (1943).

Claimant Not Barred by Right to Agisters' Lien: The fact that an engineering company furnishing tools, machinery, and labor for their repair could have asserted an agisters' lien under 71-3-1201 did not deprive it of the right to assert a mechanics' lien (now construction lien). Nor does the fact that hauling building materials gives a trucker a carrier's lien under 69-11-410 (now repealed) and an agister's lien under 71-3-1201 bar him from asserting a lien under the mechanics' lien (now construction lien) law. Caird Eng'r Works v. Seven-Up Gold Min. Co., Inc., 111 M 471, 111 P2d 267 (1941).

Nature of Act:

Insofar as the granting of a materialmen's or mechanics' lien (now construction lien) is concerned, the statute is remedial in character and must be liberally construed. Rogers-Templeton Lumber Co. v. Welch, 56 M 321, 184 P 838 (1919).

The manner of perfecting a mechanics' lien (now construction lien) consists of various steps which are purely statutory, and, while the statute is in some respects remedial in its nature and thus far should be construed liberally, it creates a new right, and the statutory proceedings by which this new right is perfected and enforced must be strictly followed. Crane & Ordway Co. v. Baatz, 53 M 438, 164 P 533 (1917); McGlauflin v. Wormser, 28 M 177, 72 P 428 (1903).

The fountainhead of all mechanics' liens (now construction liens) in this state is 71-3-501 (now repealed); by it mining claims and railroads are, as possible subjects for such liens, in pari materia. Dean v. Stewart, 49 M 506, 143 P 966 (1914).

Though the mechanics' lien (now construction lien) law is remedial in character, its requirements must be complied with. Cook v. Gallatin R.R. Co., 28 M 340, 73 P 131 (1903); Missoula Mercantile Co. v. O'Donnell, 24 M 65, 60 P 594 (1900); Richards v. Lewisohn Bros., 19 M 128, 47 P 645 (1897); Black v. Appolonio, 1 M 342 (1871).

Operation of Statute in General:

One who does work or labor upon or furnishes material for a mining claim is entitled to a mechanics' lien (now construction lien) therefor on the claim. McIntyre v. MacGinniss, 41 M 87, 108 P 353 (1910).

The mechanics' lien (now construction lien) statute is materially different from that concerning loggers' liens, and cases upon the former are inapplicable to the latter. Lane v. Lane Potter Lumber Co., 40 M 541, 107 P 898 (1910).

The history of the mechanics' lien (now construction lien) law is given in detail in Merrigan v. English, 9 M 113, 22 P 454 (1898). Lane v. Lane Potter Lumber Co., 40 M 541, 107 P 898 (1910).

A subcontractor has a direct lien for the reasonable value of his labor and materials. Merrigan v. English, 9 M 113, 22 P 454 (1898). See also Eccleston v. Hetting, 17 M 88, 42 P 105 (1895); Duignan v. Mont. Club, 16 M 189, 40 P 294 (1895); Wortman v. Kleinschmidt, 12 M 316, 30 P 280 (1892).

Requirement of Contract — Substantial Performance

Work to Be Completed: A lien can arise only upon completion of the contracted work. A contractor cannot successfully assert a mechanics' lien (now construction lien) upon the property where there has been only part performance or a lack of substantial performance of the work for which the part claims the lien. Durand v. Dowdall, 232 M 347, 757 P2d 1302, 45 St. Rep. 1104 (1988); Olson v. Westfork Properties, Inc., 171 M 154, 557 P2d 821 (1976); W. Plumbing of Bozeman v. Garrison, 171 M 85, 556 P2d 520 (1976).

Sufficiency of Evidence — Lack of Contract: There was substantial evidence to support the judgment of the District Court that a mechanics' lien (now construction lien) filed by the plaintiff against the defendant's property was invalid for lack of a contract, express or implied, between the defendant and the plaintiff. The lien had been filed against the defendant's property for work performed for a third party who was under contract to purchase the property from the defendant. M. & R. Constr. Co. v. Shea, 180 M 77, 589 P2d 138 (1979).

Substantial Performance: Electrical subcontractor was not entitled to lien under 71-3-501 (now repealed) when, after completing 40% of the agreed work and upon learning of the contractor's insolvency, he voluntarily abandoned the work without requesting a promise for payment from the home owner. Intermtn. Elec., Inc. v. Berndt, 164 M 67, 518 P2d 1168 (1974), followed in Durand v. Dowdall, 232 M 347, 757 P2d 1302, 45 St. Rep. 1104 (1988).

Requirement of Contract: Subcontractor who verbally agreed with contractor to install electrical circuitry in residence was not entitled to lien against the home owner when the contract between the home owner and the general contractor specifically provided that the contractor was not entitled to subcontract work without the home owner's written permission and the home owner had not expressly or impliedly assented to the subcontractor's performance of the work. In order for a valid lien to be created under 71-3-501 (now repealed) there must be a contract, express or implied, between the owner of the property and the subcontractor. Intermtn. Elec., Inc. v. Berndt, 164 M 67, 518 P2d 1168 (1974).

Contractual Debt Required: To render the owner of realty liable to a materialmen's lien (now construction lien), the lien must rest upon a contract debt incurred either directly or indirectly, unless the owner has ratified what was done or in some manner is estopped from questioning the lien. The mere fact that the material furnished enhances the value of the property is insufficient to establish liability. Dewey Lumber Co. v. McQuirk, 96 M 294, 30 P2d 475 (1934).

PRIORITIES

Lien as Superior to Mortgage: A mechanics' lien (now construction lien) is superior to a prior recorded mortgage. Tri-County Plumbing & Heating, Inc. v. Levee Restorations, Inc., 221 M 403, 720 P2d 247, 43 St. Rep. 928 (1986), following Home Interiors, Inc. v. Hendrickson, 214 M 194, 692 P2d 1229, 41 St. Rep. 2408 (1984).

Priority of Lien Over Trust Indenture: Considering the rights affected, competing policies, and potential consequences, the Supreme Court held that a mechanics' lien (now construction lien) for improvements constructed after the grant of a trust indenture has priority over the interest of a purchaser at trustee's foreclosure sale. Beck v. Hanson, 180 M 82, 589 P2d 141 (1979), followed in Home Interiors, Inc. v. Hendrickson, 214 M 194, 692 P2d 1229, 41 St. Rep. 2408 (1984).

Precedence of Lien Over Subsequent Mortgage — Relation Back of Lien:

A mechanics' lien (now construction lien) for work performed and material furnished on a building erected on land of decedent prior to his death, which was perfected August 23, 1963, after decedent's death, had priority over a mortgage executed by the successor to the estate of the deceased on January 21, 1965, to the Small Business Administration. Hammer v. Chapin, 256 F. Supp. 818 (D.C. Mont. 1966).

Under 71-3-502 (now repealed), the lien relates back to the date on which work was commenced, whether commenced by the lien claimant or another, and temporary cessation of work on the building will not prevent the operation of the statute when there has been no change of design or evidence of an intention to abandon prosecution of the work. Fed. Land Bank of Spokane v. Green, 108 M 56, 90 P2d 489 (1939).

When a mortgage was executed subsequent to the furnishing of materials and labor, for which a lien was claimed on the mortgaged property, the mortgagee, by purchase of the property on foreclosure of the mortgage, did not become a bona fide purchaser but was substituted only to the rights of the mortgagor and took the property subject to the mechanics' lien (now construction lien). W. Iron Works v. Mont. Pulp & Paper Co., 30 M 550, 77 P 413 (1904).

Right to Remove Buildings:

Where land is mortgaged at the time of the erection of a building or other improvement thereon, a mechanics' or materialmen's lien (now construction lien) attaches only to the building or improvement, and on lien foreclosure sale the purchaser has the right to remove the structure from the land. Interstate Lumber Co. v. Rider, 93 M 489, 19 P2d 644 (1933).

Where the judgment in a materialmen's foreclosure proceeding establishes the lien on the building alone, separate from the land, and orders it sold, the purchaser thereof has a right to remove it within the time allowed by 71-3-502 (now repealed). Wyman v. Hall, 84 M 571, 276 P 944 (1929).

Waiver or Forfeiture of Right: While failure of the purchaser of a building at a lien foreclosure sale to remove it from the land within a reasonable time will operate as a waiver or forfeiture of the right, the question of waiver or forfeiture cannot be considered unless pleaded. Midland Coal & Lumber Co. v. Ferguson, 61 M 402, 202 P 389 (1921).

Lien Preferred to Prior Mortgage on Land:

The lien of a mechanic as to the improvement is superior to a prior mortgage on the land, but as to the land itself the prior mortgage maintains precedence, and where a lien claimant has not erected a building or placed such an improvement upon a mining claim as is susceptible of severance or removal, his lien must yield to a prior mortgage upon the premises. Johnson v. Puritan Min. Co., 19 M 30, 47 P 337 (1896); Opera House Co. v. Maguire, 14 M 558, 37 P 607 (1893).

A purchaser who is in possession of premises under a sale upon the foreclosure of his lien is entitled, as against the holder of a mortgage having priority to his lien as to the land, to remain in possession of the premises until the foreclosure of the mortgage without losing his right to remove the buildings. Opera House Co. v. Maguire, 14 M 558, 37 P 607 (1893).

WHO IS CONSIDERED AN OWNER

Existence of Agency — "Contracting Owner" Established: The defendant property owner, acting through its agent construction company, was a "contracting owner" under 71-3-522 when the construction company was created to act and did act as the agent of the defendant for the purpose of contracting for improvements. Dick Anderson Constr., Inc. v. Monroe Property Co., LLC, 2011 MT 138, 361 Mont. 30, 255 P.3d 1257.

Contract for Deed — Purchasers and Sellers Owners: A mechanics' lien (now construction lien) that referred to both the sellers and purchasers under a contract for deed of the property at issue as the "owners" of the property was valid. Further, failure to name as owners persons who, after the lien was filed, exercised a lease option to purchase the property was proper. Price Bldg. Serv., Inc. v. Holms, 214 M 456, 693 P2d 553, 42 St. Rep. 84 (1985).

Pleading Ownership: In a suit to foreclose a mechanics' lien (now construction lien), the alleged insufficiency of the complaint for indefiniteness concerning the ownership of the property on which the work was done was cured by attaching and incorporating within the complaint a copy of the lien setting forth the name of the record owner. Doney v. Ellison, 103 M 591, 64 P2d 348 (1937).

Improvements at Request of Owner's Agent: When the owner of a building permitted a brother of her attorney-in-fact to rent it to the occupant, to make arrangements with contractor relative to certain improvements thereon, to collect the rent and endorse checks given in payment of rent, etc., he was at least the ostensible agent of the owner in causing contractor to perform the work on the building for which he filed the lien. Doney v. Ellison, 103 M 591, 64 P2d 348 (1937).

Contract for Deed — Purchaser Not Owner: Whitesel entered into a contract for deed to sell a house to McQuirk. After taking possession of the property under the contract, McQuirk remodeled the house. McQuirk purchased materials for the remodeling from the plaintiff. McQuirk failed to pay the plaintiff and defaulted on the contract for deed. The plaintiff filed a mechanics' lien (now construction lien) on the house. In an action to foreclose the lien the Supreme Court held that no lien affecting the interests of the seller can arise out of doing work or furnishing materials under a contract with the purchaser. A mere executory contract of purchase between others does not furnish a sufficient basis for imposition of a mechanics' lien (now construction lien) against the owner of land. Dewey Lumber Co. v. McQuirk, 96 M 294, 30 P2d 475 (1934).

Owner to Benefit From Improvement: Under the statutes of this state, the name of the "owner" required to be mentioned in the lien claim is the name of the owner of the interest to be affected by or charged with the lien, and the mention of the record owner is not sufficient when he is not the person for whose use or benefit the property, building, or improvement is constructed, repaired, or altered. Missoula Mercantile Co. v. O'Donnell, 24 M 65, 60 P 594 (1900).

Tenant Procuring Materials — Mining: The interests of the owners of a mine were not subject to a lien for labor and materials procured by a tenant in his operations on the mine. Block v. Murray, 12 M 545, 31 P 550 (1892). See Mont. Lumber & Mfg. Co. v. Obelisk Min. Concentrating Co., 15 M 20, 37 P 897 (1894); Pelton v. Minah Consol. Min. Co., 11 M 281, 28 P 310 (1891).

PERFECTION OF LIEN

General

Good Faith Error in Amount of Lien — Added to Filed Lien: A lien claimant precisely followed the statutory procedure in perfecting and securing a mechanics' lien (now construction lien); however, it made a good faith mathematical error in the amount. The District Court awarded claimant the mathematical error and added it to the amount of the filed lien. The Supreme Court affirmed, noting the liberal construction of Montana's mechanics' lien (now construction lien) laws as stated in Crane & Ordway Co. v. Baatz, 53 M 438, 164 P 533 (1917), and Gen. Elec. Supply Co. v. Bennett, 192 M 110, 626 P2d 844, 38 St. Rep. 553 (1981), holding that since claimant made every effort to comply with the steps necessary to acquire its lien, equity demanded that it receive the entire value of labor and materials put into the project. Tri-County Plumbing & Heating, Inc. v. Levee Restorations, Inc., 221 M 403, 720 P2d 247, 43 St. Rep. 928 (1986).

Service on Owner — When Effective: Service of a copy of a mechanics' lien (now construction lien) statement upon the owner of the affected property is effective when the notice is properly addressed and mailed by registered or certified mail, return receipt requested, to the owner's last-known address. Sheridan Ready Mix, Inc. v. First Congregational Church of Plentywood, 215 M 53, 695 P2d 456, 42 St. Rep. 175 (1985).

Lien — Compliance With Statutes: A materialmen's lien (now construction lien) becomes perfected only after full compliance with the lien statutes. Varco-Pruden v. Nelson, 181 M 252, 593 P2d 48 (1979).

Counterclaim by Home Owners Allowed: The rule denying a lien claimant a personal judgment against a property owner in a lien foreclosure action, when privity of contract is absent, cannot be conversely applied to deny a property owner a personal judgment against a lien claimant for damages attributable to the lien claimant and arising out of a contract between the property owner and the prime contractor. Miller v. Melaney, 172 M 74, 560 P2d 902 (1977).

Validity of Lien — Completion of Work Required: A lien is invalid and unenforceable if a contractor fails to substantially complete performance. The general rule is that a lien arises only upon completion of contracted work. Olson v. Westfork Properties, 171 M 154, 557 P2d 821 (1976).

When Lien Arises — Substantial Performance of Contract: A lien arises only upon completion of the contracted work, and although substantial performance of the contracted work meets this requirement, it is a condition precedent to liability of the home owners when there was a contract to perform work on their home. W. Plumbing of Bozeman v. Garrison, 171 M 85, 556 P2d 520 (1976).

Notice to Property Owner: In order to perfect a lien for material furnished to a contractor, the materialman need not give notice to the property owner prior to the property owner's payment to the contractor. Monarch Lumber Co. v. Haggard, 139 M 105, 360 P2d 794 (1961).

Purpose to Notify Subsequent Purchasers and Encumbrancers:

The requirements of 71-3-511 (now repealed) are merely to impart notice to the owner and to subsequent purchasers or lienholders that the lien attaches to a certain described piece of property. Cole v. Hunt, 123 M 256, 211 P2d 417 (1949).

The purpose of the statutory requirement relating to a description of the property covered by a lien is to notify all parties dealing therewith, i.e., subsequent purchasers or encumbrancers, that a lien is claimed upon it; hence when there were no subsequent purchasers or encumbrancers who could have been misled by an alleged defective description, that fact may be taken into consideration in determining its sufficiency. Caird Eng'r Works v. Seven-Up Gold Min. Co., Inc., 111 M 471, 111 P2d 267 (1941).

Complaint — Itemized Statement: In suit on mechanics' lien (now construction lien) in which a copy of the verified claim of lien was made part of the complaint, it was not necessary that the claim contain an itemized statement of the materials or labor furnished, and if defendant desired such a statement, he could request it under 25-4-302. Cole v. Hunt, 123 M 256, 211 P2d 417 (1949).

Destruction of Part of Property: When a part of the lien of a lumber company was based upon the furnishing of materials, a part of which were used in construction of a building which was later destroyed by fire, and it could not be ascertained from the account how much of the materials were used in the buildings destroyed, but all of the buildings constituted in legal effect only one structure operated as a unit in a mining enterprise, the lien on the remaining structures was unaffected by the destruction of the one. Caird Eng'r Works v. Seven-Up Gold Min. Co., Inc., 111 M 471, 111 P2d 267 (1941).

One Contract for Erection of Buildings Operated as One Unit: When materials were furnished and labor performed under one contract for the erection of several buildings, one lien may attach to all buildings where the entire property was operated as a unit and for a common purpose, regardless of the fact that none of the materials or labor may have gone into some of the structures, and it is not necessary that the lands on which the buildings were erected be contiguous. Caird Eng'r Works v. Seven-Up Gold Min. Co., Inc., 111 M 471, 111 P2d 267 (1941).

Separation of Items Not Lienable Where Possible: That a part of items claimed under a mechanics' or materialmen's lien (now construction lien) may not be lienable is no reason for condemning the lien as a whole, where it is possible to make a separation of what is and what is not lienable. Caird Eng'r Works v. Seven-Up Gold Min. Co., Inc., 111 M 471, 111 P2d 267 (1941).

Reservoir Company Property Not Subject to Lien: When ownership of 804 out of 1000 shares of stock of reservoir corporation was in irrigation district so that government of corporation was virtually transferred to irrigation district organized under Montana laws, and corporation furnished all water used by landowners of district, service performed by corporation through the district to landholders was a "public service" and amounted to "dedication" of necessary facilities used to supply such service as a public use, and facilities were not liable to lien of construction company employed by corporation to enlarge the reservoir, so that property of reservoir company was not subject to execution. Ackroyd v. Winston Bros. Co., 113 F2d 657 (9th Cir. 1940), reversing Ackroyd v. Brandy Irrigation Co., 27 F. Supp. 503 (D.C. Mont. 1939).

Real Party in Interest Rule — Surviving Partner: A materialman, Herman, by cross-complaint in a mortgage foreclosure suit, asked for foreclosure of a lien on a dwelling included in the mortgage. Evidence showed the materials were furnished by a copartnership. Before the trial, Herman died and the administrator of his estate was substituted as party defendant. On appeal, plaintiff claimed that the action should have been brought by Herman's surviving partner under Title 72, ch. 12, part 7 (now repealed). The Supreme Court ruled that the real party in interest rule was not applicable because its rationale is to protect the adversary from another suit on the same issues by a different party, and in this case, no one but the lienor could claim under the lien. Fed. Land Bank of Spokane v. Green, 108 M 56, 90 P2d 489 (1939).

Claimant Entitled to Interest: A materialman, who secured judgment for the enforcement of his lien, was entitled to interest under 27-1-211 on the entire amount, notwithstanding that he had overstated the amount, since the correct amount was readily ascertainable by consulting the owner, and there had been no offer of payment so as to stop the running of interest under 28-1-1202 and 28-1-1225. Fed. Land Bank of Spokane v. Green, 108 M 56, 90 P2d 489 (1939).

Foreclosure Requirements:

In an action to foreclose a materialmen's lien (now construction lien), the plaintiff must prove not only that the materials were furnished but also that they were used in the construction of the building sought to be charged. Pittsburgh Plate Glass Co. v. Culbertson Hotel Co., 62 M 605, 205 P 957 (1922).

Under the rule that it is sufficient if the statute giving the right to a mechanics' lien (now construction lien) is substantially complied with by the lien claimant, a notice of lien which stated that a certain sum was due the lienor "after allowing just credits and offsets", instead of using the words of 71-3-511 (now repealed), "after allowing all credits", is sufficient. Wertz v. Lamb, 43 M 477, 117 P 89 (1911).

In an action to enforce a mechanics' lien (now construction lien), allegations showing compliance with sections similar in substance to the above are jurisdictional, and when denied must be proved as alleged in order to authorize decree of foreclosure. McGlauflin v. Wormser, 28 M 177, 72 P 428 (1903).

Timeliness of Lien Filing

Work to Enhance Property — Extension of Filing Time: Plaintiff agreed to remodel a prefab home for defendant. He also built a foundation, added a bedroom and deck, and built a double garage. Plaintiff completed the basement and sent a bill to defendant. The bill was paid. The remainder of the work was completed, but defendant refused to pay, contending the oral agreement between the parties contained a "cap" of $30,000. Plaintiff contended the agreement was on a cost-plus basis, the unpaid portion of which was $63,310. The District Court found for plaintiff and awarded the amount due with interest at 6% from the completion date. The plaintiff had filed a mechanics' lien (now construction lien) on the property. Defendant contended the lien was invalid because it was not timely filed. The lien was filed on July 9, 1981. The last working day for plaintiff was in December 1980, but carpet was relaid on April 20, 1981. While performing additional insubstantial work will not extend the 90-day time limit for filing a lien, if the work was done to enhance the property and not merely to extend the time limit, the lien is timely. The District Court found the work was done to enhance the property, and its finding was supported by substantial credible evidence. Frank L. Pirtz Constr., Inc. v. Hardin Town Pump, Inc., 214 M 131, 692 P2d 460, 41 St. Rep. 2366 (1984).

Evidence to Support Timeliness: Plaintiff filed a mechanics' lien (now construction lien) against defendant on October 19, 1977. On the lien application he stated his final day of performance on the project as July 21, 1977. Section 71-3-511 (now repealed) requires liens to be filed within 90 days of completion of the project. At trial, plaintiff claimed his last full time on the job was the middle of August. Defendant claimed the last work was performed on July 15, 1977. The District Court found the filing of the lien was timely and that work was completed August 19, 1977. The Supreme Court found substantial credible evidence to support the timeliness of the lien filing but nothing to support the specific date and therefore remanded the case for a determination of the specific date of completion of the project. Anderson v. Hobbs, 196 M 31, 637 P2d 817, 38 St. Rep. 2098 (1981).

Father and Son — "Tacking": Fact that father and son worked together on one of two projects and that they often worked together did not justify "tacking" the two projects together for purpose of determining timeliness of mechanics' lien (now construction lien) filed by person furnishing them concrete when there were two distinct contracts and two distinct accounts; the fact that lien was not timely as to one project did not render entire lien void, and it remained valid as to second project. Tindall v. Negaard, 161 M 476, 507 P2d 845 (1973).

Open Account Purchases:

Entries made in open account crediting owner for materials returned did not operate to keep 90-day period allowed under 71-3-511 (now repealed) for filing mechanics' lien (now construction lien) from lapsing, since entry of credit for payment or for goods returned does not fall within ambit of "last item in such account"; the Legislature by that language meant the last item furnished, not the last entry in open account. Am. Homes, Inc. v. Broadmoor Corp., 153 M 184, 455 P2d 334 (1969).

A small item furnished within 90 days before filing of the lien was sufficient to keep alive a lien based on purchases on open account, at least as against mortgages recorded after some materials had been furnished, even though the item was not required by the original construction plans, when the original contract with the materialman was for such materials as might be required and not for specific materials, and when the last item was purchased on the initiative of the owner to make the property more salable and not on the initiative of the materialman to preserve the lien. Walsh Anderson Co. v. Keller, 139 M 210, 362 P2d 533 (1961).

The intent of the Legislature in enacting 71-3-511 (now repealed) was to provide for the filing of a lien, wherever there is an open account, within 90 days after the date of the last item furnished, and under it the question whether there was a continuous open account is one of fact for the court to determine, and its finding, if supported by the evidence, must stand. Caird Eng'r Works v. Seven-Up Gold Min. Co., Inc., 111 M 471, 111 P2d 267 (1941).

Effect of Failure to File Lien Within 90 Days After Material Is Furnished — Subsequent Contract:

When no privity of contract existed between subcontractor and the owners of the improved building, and subcontractor did not comply with the 90-day limitation for filing lien, such subcontractor lost all right to sue owner who had paid prime contractor for work done, and subcontractor was also barred from adding on time period of a subsequent contract with owners for purposes of filing its mechanics' lien (now construction lien). Trunk & Son, Inc. v. DeHaan, 143 M 442, 391 P2d 353 (1964).

In an action to foreclose a materialmen's lien (now construction lien) on a grain elevator for machinery furnished for its equipment, evidence showed that the sale of the equipment had been completed more than 90 days prior to the day on which the claim of lien was filed, and the contention of plaintiff that it was the intention of the parties that title should not pass until it had been shown that the machinery operated successfully after a 30 days' trial could not be sustained. Richardson Grain Separator Co. v. Valier Elev. Co., 67 M 227, 215 P 237 (1923).

Effect of Overstatement of Amount:

When there were indications that contractor had "padded the bill" for nearly $4,000, but no proof that he had done so with intent to defraud, he did not lose his right to a mechanics' lien (now construction lien) but the trial court should require an accounting. Hammond v. Knievel, 141 M 433, 378 P2d 388 (1963).

In the absence of fraud alleged and proved, the bare overstatement of the amount due lienor in the lien filed did not, in view of the facts, invalidate the lien. Eskestrand v. Wunder, 94 M 57, 20 P2d 622 (1933).

Question of Continuous Open Account One of Fact: The question of whether a continuous open account existed some 15 months after completion of the contracted construction work was one of fact and the finding by the trial court would not be disturbed on appeal when supported by evidence. Hammond v. Knievel, 141 M 433, 378 P2d 388 (1963).

Time of Furnishing:

When an order for machinery to be shipped f.o.b., the place of shipment is accepted by the seller and it is so shipped "net 30 days 2%-10", the bill of lading or invoice being sent to the buyer, the sale is complete as of the day of shipment, and the machinery is "furnished" within the meaning of 71-3-511 (now repealed). Richardson Grain Separator Co. v. Valier Elev. Co., 67 M 227, 215 P 237 (1923).

When machinery was shipped from New York on June 6 and reached its destination in this state on June 18, and a claim therefor was filed September 14, the Supreme Court held that the material had been "furnished" on or before June 6 and that therefore, the claim for a lien was not filed in time to comply with the law. McEwen v. Union Bank & Trust Co., 35 M 470, 90 P 359 (1907).

Notice of Lien — Contents — Verification

Amount of Lien Based on Actual Job Cost Figures Rather Than Estimates: Appellant contended that testimony showed that applications for payment submitted by a lien claimant were based only on estimates of work completed rather than from an actual tally of hours spent on the job or from materials invoiced and installed, and that because the estimated applications were the basis for the amounts of the liens, the liens themselves were only estimates and should be disregarded. However, in affirming judgment, the Supreme Court found substantial testimony indicating that the liens were based on actual job cost figures and noted the the District Court had before it summaries of labor and materials supplied by the claimants which supported the lien amounts and which showed the amounts were not overstated. Tri-County Plumbing & Heating, Inc. v. Levee Restorations, Inc., 221 M 403, 720 P2d 247, 43 St. Rep. 928 (1986).

Description Through Accounts and Financial Statements: The accounts and financial statements attached to and filed with a mechanics' lien (now construction lien) were a part of the lien statement and could be used, in addition to the property description, to identify the property sought to be charged with the lien. Sheridan Ready Mix, Inc. v. First Congregational Church of Plentywood, 215 M 53, 695 P2d 456, 42 St. Rep. 175 (1985).

Sufficiency of Description of Property:

Mechanics' lien (now construction lien) statement adequately described the property where it stated that the property was the Congregational Church and that "the real property which is subject to this lien is situated in the County of Sheridan, State of Montana, and is particularly described as follows: to-wit: Lots one (1) and two (2) of Block Three (3) Original Townsite, Plentywood, Montana". Sheridan Ready Mix, Inc. v. First Congregational Church of Plentywood, 215 M 53, 695 P2d 456, 42 St. Rep. 175 (1985).

A mechanics' lien (now construction lien), in describing the property, in addition to the legal description referred to ". . . that certain building and improvements erected upon" the described property. Along with the lien, the contractor filed a statement of account for "Sound West", the name of the business operating from the remodeled building. The lien was challenged on the grounds that it failed to describe the building and instead merely described the land. The Supreme Court upheld the lien's validity, since one familiar with the locality could determine what property was described in the lien and referred to in the statement of account. Price Bldg. Serv., Inc. v. Holms, 214 M 456, 693 P2d 553, 42 St. Rep. 84 (1985).

In this case involving the validity of an electrical equipment supplier's mechanics' lien (now construction lien) on a building, the issue on appeal was whether the description of the property in the notice of the lien filed with the County Clerk and Recorder was legally sufficient to identify the property for purposes of enforcing the lien. The Supreme Court ruled in favor of the electrical supplier. The court held that once the procedural requirements of 71-3-511 (now repealed) have been satisfied, the mechanics' lien (now construction lien) statutes are to be construed liberally so as to give effect to their remedial character. Although the land on which the building was located was covered by the lien on the building, 71-3-514 (now repealed) does not require that the land be described. When, as here, the land is described, the erroneous part of the description should be deleted. If the description remains sufficient to identify the particular property sought to be charged, the lien will be upheld. Other documents filed with the notice of lien may be used to identify the property. Gen. Elec. Supply Co. v. Bennett, 192 M 110, 626 P2d 844, 38 St. Rep. 553 (1981).

The description in a lien is a correct description within the meaning of 71-3-511 (now repealed) if the charged property can be identified by the description. The purpose of the statutory requirement of a "correct description" is to give notice of the existence of the lien to interested third parties. The statutory requirement is met if the lien document taken as a whole adequately describes the property to which the lien attaches. Insignificant inaccuracies will not be fatal to the lien. Morrison-Maierle, Inc. v. Selsco, 186 M 180, 606 P2d 1085 (1980).

When only construction on land was a platform without walls or roof except for a wall on one side to serve as an instrument panel, notice of lien which stated that it was for work in electrical wiring of "certain Fish Meal Plant building" was defective since there was no building on the land. Cascade Elec. Co. v. Assoc. Creditors, Inc., 124 M 370, 224 P2d 146 (1950).

When a mechanics' lien (now construction lien) was claimed on only one quartz mill on a certain claim and on a three-room house on another claim and there were two other mills and two other three-room houses in the mining district, a description of the particular mill and house was held sufficient when persons familiar with the locality could point out the particular structures as corresponding with the description, there was testimony of the age and dilapidated condition of the other buildings, and the items that went into the mill in question were traced into the proper mill. Caird Eng'r Works v. Seven-Up Gold Min. Co., Inc., 111 M 471, 111 P2d 267 (1941).

When a lien recited that materialman furnished lumber and building material "for that certain frame building erected upon the certain lot, piece or parcel of land hereinafter described", then gave the legal subdivisions, made the list of materials a part of the lien, the list containing items not usable in a dwelling, but also a kitchen cabinet, oak flooring, varnish, etc., suitable only for the dwelling, the validity of the lien was not affected by the fact that there were other frame buildings on the land, because one familiar with the land could point out the building. Fed. Land Bank of Spokane v. Green, 108 M 56, 90 P2d 489 (1939).

The contention was of no merit that the complaint in an action to foreclose an oil well materialmen's lien (now construction lien) and the notice of lien were insufficient as to description of the property and of the owner of it. Section 71-3-511 (now repealed) requires no more than a description by which the property may be identified and makes no provision for a description of the owner. Cont. Supply Co. v. White, 92 M 254, 12 P2d 569 (1932).

Courts are reluctant to set aside mechanics' liens (now construction liens) merely because of a loose description of the property, and the general rule is that if there is substantial compliance with the statutory provisions and there appears enough in the description to enable one familiar with the locality to identify the property upon which the lien is claimed, it is sufficient. Under that rule, a lien filed by an oil well driller pursuant to 71-3-511 (now repealed) and 71-3-1002 was sufficient. Callender v. Crossfield Oil Synd., 84 M 263, 275 P 273 (1929).

When title to the land on which a building was constructed with material furnished by plaintiff is not in the lienee, the lien extends to the building only, and in such a case any error or mistake in the description of the land in the notice of the lien does not affect the validity of the lien if the "property", i.e., the building, can be identified. Midland Coal & Lumber Co. v. Ferguson, 61 M 402, 202 P 389 (1921).

The validity of a mechanics' lien (now construction lien) must be tested by the description contained in it, and it is only in case of ambiguity that it may be explained and the property identified by oral evidence. Interstate Lumber Co. v. Magill-Nevin Plumbing & Heating Co., 57 M 334, 188 P 144 (1920).

The purpose of requiring the lien to be filed and an abstract thereof made of record is to impart notice to the owner and to subsequent purchasers or lienholders. In order that the purpose may be served, it is necessary that the description in the lien be sufficient to apprise interested parties just what property is sought to be charged. An error in the description of the property will not render the lien invalid if the property can be identified by the description given. Johnson v. Erickson, 56 M 550, 185 P 1116 (1919).

The notice of lien for material and labor furnished in the construction of a railway roadbed is sufficient, notwithstanding errors of description therein, if the property can be identified by the description given. Dean v. Stewart, 49 M 506, 143 P 966 (1914).

A notice of lien for clearing land must contain such a description of the land sought to be charged that it can be identified; if it is impossible to identify the land from such notice, the lien is invalid. Ivanhoff v. Teale, 47 M 115, 130 P 972 (1913).

The "property" to be identified is the building or improvement on which the lien is given, and hence a specific description of the "land" is not required. W. Iron Works v. Mont. Pulp & Paper Co., 30 M 550, 77 P 413 (1904). See also Stritzel-Spaberg Lumber Co. v. Edwards, 50 M 49, 144 P 722 (1914).

A notice of lien which describes the property as lot 14 in a certain block and city plat cannot sustain a lien for materials used in the erection of a building on lot 13, as such description, being neither uncertain, defective, or ambiguous, cannot be aided or explained by oral evidence. Goodrich Lumber Co. v. Davie, 13 M 76, 32 P 282 (1892).

Otherwise Valid Claim Not Defeated by Minor Technical Defect: Lumber company filed a materialmen's lien (now construction lien) for unpaid amounts for materials supplied for construction of an addition to real property. The District Court ordered foreclosure of the lien even though there was a discrepancy in the certificate of notice that was attached to the lien when filed. The certificate indicated that notice had been mailed 1 day later than the lien and certificate of notice were actually filed with the County Clerk and Recorder. The Supreme Court affirmed the District Court ruling and held that an otherwise valid mechanics' lien (now construction lien) should not be defeated when the lienor substantially complied with the statutory procedural requirement, notice was actually given, and no prejudice to the property holder had arisen because of the lienor's technical error. Simkins-Hallin Lumber Co. v. Simonson, 214 M 36, 692 P2d 424, 41 St. Rep. 2305 (1984).

Filing Requirements — Adequacy of Statements: The provision of 71-3-511 (now repealed) that one filing a mechanics' lien (now construction lien) must include a "just and true account of the amount due him, after allowing all credits, containing a correct description of the property to be charged with such lien, verified by affidavit" was complied with where the lien contained a statement of the amount owing, a real property description, and an affidavit that the facts in the lien were true and within the knowledge of the affiant. The language of the statute did not have to be used. It was implicit that a just and true net amount due was stated. The case law test that the affidavit must be a sufficient basis for a perjury charge if the statement is false was also satisfied. Little Horn St. Bank v. Schessler-Miller Ready Mix, 210 M 412, 682 P2d 187, 41 St. Rep. 1128 (1984).

Description to Include Improvement Not Land: The property to be described in a materialmen's lien (now construction lien) is the building, structure, or other improvement upon which the lien is to attach, and not the land upon which the property is located. Varco-Pruden v. Nelson, 181 M 252, 593 P2d 48 (1979).

Affidavit Essential: An affidavit is an essential part of a mechanics' lien (now construction lien), and verification by a corporate officer "to the best of his own knowledge", without any assertion of the validity of the underlying claim, is insufficient to perfect a mechanics' lien (now construction lien). Saunders Cash-Way Lumber & Hardware Co. v. Herrick, 179 M 233, 587 P2d 947 (1978), followed in Climate Control Co., Inc. v. Bergsieker Refrigeration Inc., 196 M 405, 640 P2d 442, 39 St. Rep. 214 (1982), and A.A. Quality Constr. v. Thomas, 224 M 108, 728 P2d 416, 43 St. Rep. 2055 (1986).

Name of Debtor: Notice of lien which named as the debtor the "Montana Fish Meal Company" when the debtor was actually the "Montana Fish Meal and Oil Corporation" was defective. Cascade Elec. Co. v. Assoc. Creditors, Inc., 124 M 370, 224 P2d 146 (1950).

Sufficiency of Statement as to Work Done and Amount:

It is not necessary that the particular items of the account be set out in the paper constituting the lien. Cole v. Hunt, 123 M 256, 211 P2d 417 (1949).

A mechanics' lien (now construction lien) was not void merely because the paper was in form an affidavit, with an itemized statement attached, instead of a statement of the account and a description of the property followed by an affidavit. The method pursued was in substantial compliance with the requirements of 71-3-511 (now repealed), and therefore sufficient. Wertz v. Lamb, 43 M 477, 117 P 89 (1911).

Though a claimant's notice of lien fails to state under oath that it contains "a just and true account of the amount due him after allowing all credits", it is sufficient when it sets forth the contract between the parties, the amount of work done, and the materials furnished in considerable detail; when it gives the total amount of credits or money paid thereon and states the balance claimed to be due; when it states "that items are correct"; when it is signed by the claimant, and when it bears a jurat reciting that it was subscribed and sworn to before a designated notary public. Mills v. Olsen, 43 M 129, 115 P 33 (1911).

One desiring to file a mechanics' lien (now construction lien) need not classify the character of work done or set out the items of it in the account filed with the notice; all that is required is an honest statement from which it may be understood what amount is claimed. McIntyre v. MacGinniss, 41 M 87, 108 P 353 (1910); Smith v. Sherman Min. Co., 12 M 524, 31 P 72 (1892); Black v. Appolonio, 1 M 342 (1871).

A verified account attached to a mechanics' lien (now construction lien) statement, reciting certain items of charges, including labor and material for excavating a cistern, constituted a substantial compliance with 71-3-511 (now repealed). Neuman v. Grant, 36 M 77, 92 P 43 (1907).

A mechanics' lien (now construction lien) statement which shows the dates when the work was commenced and completed, the total number of days' work performed, and the amount due therefor is a sufficient account. It is not necessary to state the items of which the account consists or the nature of the work. Smith v. Sherman Min. Co., 12 M 524, 31 P 72 (1892).

Inclusion of Articles Not Used in Building: The fact that a notice or claim of lien may include some items which are lienable and others which are not, or the fact that the claim was made for a larger amount than the claimant shows himself entitled to, will not vitiate or destroy the lien for the amount actually due the claimant, in the absence of a fraudulent intent; inclusion of materials in a contractor's lien claim not used in the dwelling remodeled did not prejudice the owner when the judgment of the court provided for a proper reduction for such items. Smith v. Gunniss, 115 M 362, 144 P2d 186 (1943).

Verification:

Where the sufficiency of the affidavit attached to a mechanics' lien (now construction lien) is questioned, one of the tests is whether perjury is assignable upon it; if so, it is sufficient. Gregg v. Sigurdson, 67 M 272, 215 P 662 (1923).

A verification to a mechanics' lien (now construction lien) to the effect that affiant, after deposing directly and positively that he had read the claim for lien and knew its contents, that the matters and things therein stated were true "as he verily believes", was a sufficient compliance with the provisions of 71-3-511 (now repealed), and not void as having been made on information and belief. Gregg v. Sigurdson, 67 M 272, 215 P 662 (1923).

The requirement of 71-3-511 (now repealed) that a mechanics' lien (now construction lien) must be verified as a "just and true account of the amount due, after allowing all credits", was held to have been met by a certification that the notice of lien and statement of account was true; that the statement contained a full and true amount due the lienor, signed by one of two partners and sworn to before a notary public. Leigland v. Rundle Land & Abstract Co., 64 M 154, 208 P 1075 (1922).

When the statements in an affidavit made under 71-3-511 (now repealed) are in full accord with its requirements and evince a faithful adherence to all its commands, it is sufficient, though obviously made on information and belief by the assistant secretary of the plaintiff corporation. Rogers-Templeton Lumber Co. v. Welch, 56 M 321, 184 P 838 (1919).

No set form or order is required for the component parts of a mechanics' lien (now construction lien), so long as they all appear; but it must be observed that the "account" mentioned in 71-3-511 (now repealed) does not include the description, and both are separate and distinct matters from the affidavit, which must verify each one of them. Crane & Ordway Co. v. Baatz, 53 M 438, 164 P 533 (1917).

The affidavit to the notice of a mechanics' or materialmen's lien (now construction lien) claim is essential and must verify both the account and the description. Both the account and the description must be verified as 71-3-511 (now repealed) requires. Otherwise, the affidavit is insufficient. A mere acknowledgment of the execution of the notice is not an affidavit. Crane & Ordway Co. v. Baatz, 53 M 438, 164 P 533 (1917).

A writing attached to an intended mechanics' lien (now construction lien), which contained no jurat or other evidence to show that the claimant made oath before a person authorized to administer oaths and which did not assume to verify either the description of the property affected or the account, did not constitute such an affidavit as is required by 71-3-511 (now repealed). Crane & Ordway Co. v. Baatz, 53 M 438, 164 P 533 (1917).

A verification, attached to a mechanics' lien (now construction lien) and executed by the president of a corporation in its behalf, stating "that the matters and things therein stated are true, to the best of his knowledge, information, and belief", is not an affidavit and is insufficient for the purpose intended. W. Plumbing Co. v. Fried, 33 M 7, 81 P 394 (1905).

Name of Owner Sought to Be Charged: A notice of a mechanics' lien (now construction lien) claim which instead of setting forth the name of the owner of the property sought to be charged, stated that the lienor was the owner, was fatally defective. Interstate Lumber Co. v. Magill-Nevin Plumbing & Heating Co., 57 M 334, 188 P 144 (1920).

PROPERTY AFFECTED BY LIEN

Lien — Property Description: In this case involving the validity of an electrical equipment supplier's mechanics' lien (now construction lien) on a building, the issue on appeal was whether the description of the property in the notice of the lien filed with the County Clerk and Recorder was legally sufficient to identify the property for purposes of enforcing the lien. The Supreme Court ruled in favor of the electrical supplier. The court held that once the procedural requirements of 71-3-511 (now repealed) have been satisfied, the mechanics' lien (now construction lien) statutes are to be construed liberally so as to give effect to their remedial character. Although the land on which the building was located was covered by the lien on the building, 71-3-514 (now repealed) does not require that the land be described. When, as here, the land is described, the erroneous part of the description should be deleted. If the description remains sufficient to identify the particular property sought to be charged, the lien will be upheld. Other documents filed with the notice of lien may be used to identify the property. Gen. Elec. Supply Co. v. Bennett, 192 M 110, 626 P2d 844, 38 St. Rep. 553 (1981).

Mining Claims:

Limit of 1 acre to mechanics' lien (now construction lien), as set forth in 71-3-514 (now repealed), does not apply to mining claim. Fausett v. Blanchard, 154 M 301, 463 P2d 319 (1969).

The provision of 71-3-514 (now repealed), limiting the operation of a mechanics' lien (now construction lien), does not apply to mining claims. A lien upon such property extends to the whole claim. Dean v. Stewart, 49 M 506, 143 P 966 (1914); McIntyre v. MacGinniss, 41 M 87, 108 P 353 (1910); Smith v. Sherman Min. Co., 12 M 524, 31 P 72 (1892). See also Big Blackfoot v. Blue Bird Min. Co., 19 M 454, 48 P 778 (1897).

Estoppel to Assert Lien:

Equitable estoppel will prevent a contractor from asserting a lien preference for an amount over the contract price against the first mortgagee when the contractor made representation as to the total price of the works to the mortgagee and knew that the loan would not have been granted had it been for a greater amount. McGaffick v. Leigland, 130 M 332, 303 P2d 247 (1956).

Where the vendor of real property under a contract of sale agreed, in consideration of return of the property, to assume the payment of a note signed by vendee and secured by a mortgage on the property, a mechanics' lien (now construction lien) assigned to the vendor was merged in the vendor's title and the vendor was estopped from foreclosing the lien as against the mortgage. Downing v. Crippen, 114 M 436, 138 P2d 575 (1943).

Liens for Services and Materials Furnished to Predecessor Lessees: A mining company will not be allowed to object to the allowance of liens for material and services rendered to the holders of leases prior to the time they were assumed by the mining company. Caird Eng'r Works v. Seven-Up Gold Min. Co., Inc., 111 M 471, 111 P2d 267 (1941).

Miners' Lien — Application to Property on Which No Labor Performed: Those working in a mine or quartz mill on property held under a lease may claim a lien upon the company's buildings, machinery, and other equipment regardless of whether their labor enhanced the value of the property and even though the lease provided that the premises and improvements should revert to the lessor in case of default by the lessee. The statute giving them a right to a lien, 71-3-501 (now repealed), is paramount to the conditions of the lease. Caird Eng'r Works v. Seven-Up Gold Min. Co., Inc., 111 M 471, 111 P2d 267 (1941).

Extent of Lien to Land:

The acre of ground to which a lien on a dwelling located outside a city or town extends may properly be described as an acre of land of which the dwelling constitutes the geographical center, in the absence of a statutory requirement of a more particular description. Fed. Land Bank of Spokane v. Green, 108 M 56, 90 P2d 489 (1939).

While a mechanics' or materialmen's lien (now construction lien) extends primarily to the building, if the land upon which it is erected "belongs" to, i.e., is the property of, the person who causes the building to be constructed, the lien extends also to the land; but if the owner of the building loses title to the land or if it is encumbered when work commences under the building contract, the lien attaches to the building only. Louis v. Theatorium Co., 69 M 50, 222 P 1062 (1923).

Mortgage Not to Reduce Owner's Interest to Less Than Fee Simple: Since a mortgage is merely security and creates no interest or estate in land, the existence of a mortgage on land on which was situated a building subject to a materialmen's lien (now construction lien) did not reduce the owner's interest in the land to less than fee simple estate within the meaning of 71-3-514 (now repealed). A mortgage is simply security for the performance of an act under 71-1-101. Fed. Land Bank of Spokane v. Green, 108 M 56, 90 P2d 489 (1939).

Owner's Consent Required: To render the owner of realty liable to a materialmen's lien (now construction lien), the lien must rest upon a contract debt incurred either directly or indirectly, unless the owner ratifies what was done or in some manner estops himself from questioning the lien. The mere fact that the material furnished enhances the value of the property is insufficient to establish liability. Dewey Lumber Co. v. McQuirk, 96 M 294, 30 P2d 475 (1934).

Removal of Fixtures Not to Injure Freehold:

Where the vendee of a dwelling house under a conditional contract of sale made extensive improvements which became an integral part of the structure and could not be removed without practically destroying the house itself, the provision of 71-3-514 (now repealed) authorizing their sale and removal by the holder of a materialmen's lien (now construction lien), upon default of the conditional buyer, was not applicable. Dewey Lumber Co. v. McQuirk, 96 M 294, 30 P2d 475 (1934).

The lien of a mechanic for material or labor furnished at the request of a lessee who afterwards forfeited his lease embraces only such improvements as the lessee himself might have removed during his lease and does not include a doorway cut between two buildings, paperhanging, or other improvements which cannot be removed without injury to the freehold. Stenberg v. Liennemann, 20 M 457, 52 P 84 (1898).

Removal of Building on Lien Foreclosure: When land is mortgaged at the time of the erection of a building or other improvement thereon, a mechanics' or materialmen's lien (now construction lien) attaches only to the building or improvement, and on lien foreclosure sale the purchaser has the right to remove the structure from the land. Interstate Lumber Co. v. Rider, 93 M 489, 19 P2d 644 (1933).

Effect of Forfeiture of Oil Lease: The forfeiture of the sales contract between defendant and the syndicate terminated the rights of plaintiff and intervener in and to the leasehold and the oil wells, fixtures, etc., except "the material and supplies so furnished" by plaintiff in drilling well No. 4, or the material furnished by intervener. Callender v. Crossfield Oil Synd., 84 M 263, 275 P 273 (1929).

Improvements Add Extent of Lien: A heating plant and connecting pipes installed in a greenhouse constructed by a mechanics' lien (now construction lien) claimant were fixtures and subject to removal as a part of the structure caused to be erected by the lessee of the land, the lien under 71-3-514 (now repealed) extending in such a case to the entire building and improvements added by the lessee to the lessor's land. Bartholomew v. James, 76 M 359, 246 P 771 (1926).

Statutory Right to Remove Fixtures Governs Over Conflicting Mining Lease: The provision in 71-3-514 (now repealed) permitting sale or removal of a structure on leased land is paramount to the provision of a mining lease to the effect that all improvements placed on the premises by the lessee should become the property of the lessor as soon as placed on the mine and remain a part thereof, and such lease will be presumed to have been made in contemplation of the statute. Mont. Lumber & Mfg. Co. v. Obelisk Min. Concentrating Co., 15 M 20, 37 P 897 (1894).

Part Attorney General's Opinions

DECISIONS FOLLOWING 1987 GENERAL REVISION OF MECHANICS' LIEN LAWS

Notice of Right to Claim Construction Lien — Acknowledgment Not Required: A notice of right to claim a construction lien filed with a County Clerk and Recorder pursuant to 71-3-531 is not subject to the acknowledgment requirements of 70-21-203. 42 A.G. Op. 53 (1988).

Part Law Review Articles

Mechanics' Liens in Montana, Stufflebean, 18 Mont. L. Rev. 53 (1956).

71-3-521. Scope.

Case Notes

Material Question Regarding Validity of Construction Lien — Summary Judgment Improper: Plaintiff drilling company filed to foreclose on a construction lien on defendants' property based on money owed for a partially drilled well on defendants' property. The District Court granted summary judgment for defendants on grounds that the lien was invalid because the well was not completed. On appeal, the Supreme Court determined that genuine issues of material fact remained regarding whether abandonment of the well constituted a change order or altered contract specification for which defendants were responsible or whether plaintiff breached the contract by drilling in the wrong place, thereby eliminating plaintiff's lien entitlement. Because questions of material fact existed, summary judgment was improper, and the case was remanded for further proceedings. Sudan Drilling, Inc. v. Anacker, 2009 MT 14, 349 M 42, 202 P3d 778 (2009).

71-3-522. Definitions.

Compiler's Comments

2007 Amendment: Chapter 293 inserted introductory clause; inserted definition of original contractor; and made minor changes in style. Amendment effective October 1, 2007.

Case Notes

Subcontractor Not Authorized to File Bond — Only Contracting Owner May File — Right to Challenge Bond Not Waived — District Court's Judgment Reversed. Skyline Consulting Group v. Mortensen Woodwork, Inc., 2022 MT 192, 410 Mont. 230, 518 P.3d 462.

Existence of Agency — "Contracting Owner" Established: The defendant property owner, acting through its agent construction company, was a "contracting owner" under 71-3-522 when the construction company was created to act and did act as the agent of the defendant for the purpose of contracting for improvements. Dick Anderson Constr., Inc. v. Monroe Property Co., LLC, 2011 MT 138, 361 Mont. 30, 255 P.3d 1257.

Construction Lien Attaches From Date Work Commenced - Priority Over Purchase Money Mortgage: Gaston began water monitoring and percolation tests on property to be purchased by Yellowstone Bank, even though ownership of the property had not yet passed to the Bank. When payments to Gaston for its work stopped, Gaston sued to foreclose its construction lien and to establish priority of the lien. The Supreme Court held that the lien was valid against the Bank and its financing company, that the lien attached the day Gaston began work, and that Gaston's construction lien had priority over the purchase money mortgage used to finance the purchase of the property by Yellowstone Bank. Gaston Eng'r & Surveying v. Oakwood Properties, LLC, 2011 MT 44, 359 Mont. 341, 249 P.3d 75.

Questions of Material Fact Regarding Excavation Project — Summary Judgment Inappropriate: Plaintiff was an excavation subcontractor on defendants' project. Several modifications arose during the project beyond the original contract bid. Plaintiff completed the requested modifications, but defendants offered only $180 to cover the extra work. Plaintiff filed a construction lien but failed to notify defendants and then sought to foreclose the lien. The District Court granted plaintiff's request for summary judgment, and defendants appealed, but the Supreme Court reversed because numerous fact issues remained that were not susceptible to summary judgment, including whether: (1) plaintiff's services were extras or alterations personally ordered by defendants; (2) leftover materials validated the construction lien by constituting substantial completion of the contract or whether the materials signified incomplete work; (3) defendants' failure to pay constituted a breach that prevented plaintiff from completing the work, thus enacting the exception to the substantial completion rule; (4) the parties intended an oral contract whereby defendants personally ordered plaintiff to complete additional work; and (5) the contract was substantially complete, thus validating the lien. Gwynn v. Cummins, 2006 MT 239, 333 M 522, 144 P3d 82 (2006).

Purpose of Procedural Lien Requirements to Provide Notice to and Protect Interests of Property Owners — Construction Lien Statutes Construed: The purpose of the procedural requirements in construction lien law is to impart notice to the owner of real property that a lien has been filed against the property and to protect all parties dealing with the property, including subsequent owners. The requirements will be strictly construed, but once the procedure is fulfilled, the statutes will be liberally construed so as to give effect to their remedial purpose. Failure to state on the lien statement the owner or person whose interest in property is sought to be charged is fatal to the lien. In the case at bar, Swain listed Battershell as the contracting owner, but Battershell held no interest in the property at the time that the lien was filed and was not listed as owner of record in the County Clerk's office; thus, the listing of Battershell as the contracting owner on the lien statement was fatal to the lien. Swain v. Battershell, 1999 MT 101, 294 M 282, 983 P2d 873, 56 St. Rep. 424 (1999), distinguishing Mtn. St. Resources, Inc. v. Ehlert, 195 M 496, 636 P2d 868, 38 St. Rep. 2061 (1981).

71-3-523. Who may claim construction lien — limitation.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Case Notes

Construction Lien Proper When Agreement to Furnish Services or Materials With Intent to Use in Construction — Attached to Lessor's Interest When Evidence That Lessor Contracted or Agreed to Purchase for Improvement. Thermal Design, Inc. v. Duffy, 2022 MT 191, 410 Mont. 211, 518 P.3d 467.

Interest Assessment on Construction Lien Not Applicable to Residential Construction Improvements Less Than $400,000 — Remand: As a discovery sanction and because the total cost of plaintiff's residential construction project exceeded $400,000, the District Court assessed interest against plaintiff on defendant's construction lien. The Supreme Court reversed and remanded. Although the total construction project cost exceeded $400,000, defendant's construction lien was based on improvements totaling only $16,763.81. The exception to the interest assessment clearly did not apply to the contract between the parties, nor could plaintiff be assessed interest as a discovery sanction based on a statute that did not apply. Weimar v. Lyons, 2007 MT 182, 338 M 242, 164 P3d 922 (2007).

Standing to File Construction Lien Despite Construction Corporation's Involuntary Dissolution: Plaintiff asserted that defendant had no standing to file a construction lien because defendant's corporation had been involuntarily dissolved for failure to file the first annual corporate report. The District Court disagreed, and the Supreme Court affirmed. Defendant filed the lien as an individual claimant and had standing to pursue the lien as a person who furnished services pursuant to a real estate improvement contract. It would have been inequitable for plaintiff to avoid an obligation because the corporation had been involuntarily dissolved after acting in good faith through its principals, and plaintiff was properly estopped from denying the status of the corporation. Weimar v. Lyons, 2007 MT 182, 338 M 242, 164 P3d 922 (2007), following Kosena v. Eck, 195 M 12, 635 P2d 1287 (1981).

Construction Lien Properly Found Valid: Defendant argued that plaintiff's construction lien was defective because: (1) there was no written contract for the construction work; (2) plaintiff failed to serve the lien on the city of Three Forks as owner of record of the property in question; (3) the lien inadequately described the property that was improved; (4) the lien incorrectly named the person entering into the contract; (5) the lien incorrectly identified who requested the construction work; and (6) the lien's statement that a notice of right to claim was not required was incorrect. The Supreme Court examined the evidence related to each claim and affirmed. Defendant herself testified that a contract existed. The city abandoned its interest in the property before the lien was filed. Plaintiff's description of the property that was subject to the lien encompassed the entire footprint of defendant's property and was sufficient to identify it. Although the lien identified defendant rather than defendant's trust as the person entering the contract and requesting the work, defendant and the trust were the same entity, and the trust was not authorized to transact business in Montana, so naming defendant as the party subject to the lien was proper. Last, there was no evidence that the city owned the property, so no service to the city was necessary. The procedural requirements of the construction lien statutes are strictly construed, but once the procedure has been fulfilled, the statutes are liberally construed to give effect to their remedial purpose. In this case, the validity of the lien was supported by the evidence. Johnston v. Palmer, 2007 MT 99, 337 M 101, 158 P3d 998 (2007).

Questions of Material Fact Regarding Excavation Project — Summary Judgment Inappropriate: Plaintiff was an excavation subcontractor on defendants' project. Several modifications arose during the project beyond the original contract bid. Plaintiff completed the requested modifications, but defendants offered only $180 to cover the extra work. Plaintiff filed a construction lien but failed to notify defendants and then sought to foreclose the lien. The District Court granted plaintiff's request for summary judgment, and defendants appealed, but the Supreme Court reversed because numerous fact issues remained that were not susceptible to summary judgment, including whether: (1) plaintiff's services were extras or alterations personally ordered by defendants; (2) leftover materials validated the construction lien by constituting substantial completion of the contract or whether the materials signified incomplete work; (3) defendants' failure to pay constituted a breach that prevented plaintiff from completing the work, thus enacting the exception to the substantial completion rule; (4) the parties intended an oral contract whereby defendants personally ordered plaintiff to complete additional work; and (5) the contract was substantially complete, thus validating the lien. Gwynn v. Cummins, 2006 MT 239, 333 M 522, 144 P3d 82 (2006).

Contract Remedy Providing Transfer of Twenty-Acre Parcel of Land as Security for Contractual Obligations Violative of Subdivision Laws: As part of a sale of real property, Canton pledged a 20-acre parcel to Riverview Homes II, Ltd. (Riverview), as security in the event that Canton breached his contractual obligation to complete a proposed subdivision and construct an artificial lake. Canton breached the contract, and Riverview sought to quiet title to the 20-acre parcel. The District Court agreed that Canton breached the contract, but held that the contract remedy violated subdivision laws. Riverview appealed, contending that the parcel was exempted from subdivision review as a division of land created to provide security for a lien under 76-3-201, and that the security provision was an enforceable construction lien because of Canton's contractual obligation to construct the lake. The Supreme Court noted that Riverview neither furnished services or materials to Canton for the lake construction nor satisfied any other requirement applicable to construction liens in this part, so the construction lien theory failed. If it was not a construction lien, it had to be considered a general lien under 71-3-101, which, pursuant to Reiter v. Reiter, 237 M 220, 772 P2d 314 (1989), can be claimed only as arising from dealings in particular trades or businesses in which the existence of a general lien has been recognized by judicial decisions or if a custom to that effect can be established by evidence. General liens are looked upon with disfavor, and the court refused to recognize a general lien for breach of a contract to provide equity in land in this case. The District Court's conclusion that the 20-acre parcel was not transferable under 76-3-302, and failed to qualify for an exemption under 76-3-201, was affirmed. Riverview Homes II, Ltd. v. Canton, 2001 MT 309, 307 M 517, 38 P3d 848 (2001).

Purpose of Procedural Lien Requirements to Provide Notice to and Protect Interests of Property Owners — Construction Lien Statutes Construed: The purpose of the procedural requirements in construction lien law is to impart notice to the owner of real property that a lien has been filed against the property and to protect all parties dealing with the property, including subsequent owners. The requirements will be strictly construed, but once the procedure is fulfilled, the statutes will be liberally construed so as to give effect to their remedial purpose. Failure to state on the lien statement the owner or person whose interest in property is sought to be charged is fatal to the lien. In the case at bar, Swain listed Battershell as the contracting owner, but Battershell held no interest in the property at the time that the lien was filed and was not listed as owner of record in the County Clerk's office; thus, the listing of Battershell as the contracting owner on the lien statement was fatal to the lien. Swain v. Battershell, 1999 MT 101, 294 M 282, 983 P2d 873, 56 St. Rep. 424 (1999), distinguishing Mtn. St. Resources, Inc. v. Ehlert, 195 M 496, 636 P2d 868, 38 St. Rep. 2061 (1981).

Law Review Articles

Mechanics' Liens in Montana, Stufflebean, 18 Mont. L. Rev. 54 (1956).

71-3-524. Limitation of lien for materials supplied.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Construction Lien Proper When Agreement to Furnish Services or Materials With Intent to Use in Construction — Attached to Lessor's Interest When Evidence That Lessor Contracted or Agreed to Purchase for Improvement. Thermal Design, Inc. v. Duffy, 2022 MT 191, 410 Mont. 211, 518 P.3d 467.

Contractor Entitled to Construction Lien Foreclosure — Standard of Whether Work Was Completed or Substantially Completed — Costs to Include Attorney Fees: In a dispute over a home construction contract, the District Court determined the plaintiff had a valid lien for outstanding labor and materials costs associated with masonry and stonework, but held the plaintiff was not entitled to a foreclosure judgment because the completed work was unsatisfactory to the defendants. The District Court also denied attorney fees to the plaintiff. On appeal, the Supreme Court held that the District Court had applied the wrong standard to the foreclosure of the lien and instead should have determined whether the work was completed or substantially completed. A lien is generally limited to services actually performed and materials actually supplied, and the District Court found the plaintiff was entitled to recover $8,317 for work and materials. The Supreme Court further held that the District Court erred when it failed to award attorney fees to the plaintiff. The District Court did not have discretion to waive attorney fees due to the defendants' dissatisfaction with the completed work once the plaintiff had shown it had an established lien. Vintage Constr., Inc., v. Feighner, 2017 MT 109, 387 Mont. 354, 394 P.3d 179.

Breach of Contract — Construction Lien for Work Not Completed: Under a construction contract for Spanish Peaks Lodge, LLC, for a resort, a contractor was entitled to the actual costs of construction plus 5% of the project's total cost and certain other fees. Spanish Peaks declared bankruptcy, and construction was terminated prior to the conclusion of the project. Subsequently, the contractor's successor in interest filed a construction lien for the unpaid portion of the contract price. On appeal, the Supreme Court reversed, finding that the District Court erred by holding that the construction lien had priority over a mortgage holder because a construction lien is limited to unpaid amounts for services rendered or materials furnished and the construction lien was based on work not yet performed. DCK Worldwide Holdings, Inc. v. CH SP Acquisition, LLC, 2015 MT 225, 380 Mont. 215, 355 P.3d 724.

71-3-525. Extent of lien.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Construction Lien Proper When Agreement to Furnish Services or Materials With Intent to Use in Construction — Attached to Lessor's Interest When Evidence That Lessor Contracted or Agreed to Purchase for Improvement. Thermal Design, Inc. v. Duffy, 2022 MT 191, 410 Mont. 211, 518 P.3d 467.

Existence of Agency — "Contracting Owner" Established: The defendant property owner, acting through its agent construction company, was a "contracting owner" under 71-3-522 when the construction company was created to act and did act as the agent of the defendant for the purpose of contracting for improvements. Dick Anderson Constr., Inc. v. Monroe Property Co., LLC, 2011 MT 138, 361 Mont. 30, 255 P.3d 1257.

Construction Lien Attaches From Date Work Commenced - Priority Over Purchase Money Mortgage: Gaston began water monitoring and percolation tests on property to be purchased by Yellowstone Bank, even though ownership of the property had not yet passed to the Bank. When payments to Gaston for its work stopped, Gaston sued to foreclose its construction lien and to establish priority of the lien. The Supreme Court held that the lien was valid against the Bank and its financing company, that the lien attached the day Gaston began work, and that Gaston's construction lien had priority over the purchase money mortgage used to finance the purchase of the property by Yellowstone Bank. Gaston Eng'r & Surveying v. Oakwood Properties, LLC, 2011 MT 44, 359 Mont. 341, 249 P.3d 75.

Contractor Entitled to Stop Work Pursuant to Developer's Breach of Contract — Contractor Improperly Required to Reimburse Postbreach Expenses: Plaintiff contractor submitted a claim for construction costs to defendant developer's architect, who approved payment, but the developer refused to pay the costs, so the contractor stopped work. The developer hired another contractor to finish the work, and the District Court penalized the contractor by requiring reimbursement of the developer's costs for finishing the work. The Supreme Court reversed the award. The contractor was entitled to stop work because of the developer's material breach of contract, and the developer was not entitled to benefit from its own wrong, so it was error to penalize the contractor for amounts expended by the developer to finish the work. James Talcott Constr., Inc. v. P&D Land Enterprises, 2006 MT 188, 333 M 107, 141 P3d 1200 (2006).

Insufficient Evidence to Warrant Award of Home Office Overhead: Plaintiff contractor sought to enforce a contractor's lien and was awarded damages, but the contractor sought additional damages to cover extended costs for home office overhead occasioned by delays caused by defendant, claiming that under the contract, delay costs were to be borne by the responsible party. A special master found that plaintiff had failed to establish entitlement to additional home office overhead costs and that the evidence submitted in support of the claim was not credible. The District Court adopted the special master's findings, and on appeal, the Supreme Court affirmed. Without addressing the credibility of the evidence, the Supreme Court held that the evidence submitted by the contractor was insufficient to establish entitlement to additional home office overhead costs. James Talcott Constr., Inc. v. P&D Land Enterprises, 2006 MT 188, 333 M 107, 141 P3d 1200 (2006).

Purpose of Procedural Lien Requirements to Provide Notice to and Protect Interests of Property Owners — Construction Lien Statutes Construed: The purpose of the procedural requirements in construction lien law is to impart notice to the owner of real property that a lien has been filed against the property and to protect all parties dealing with the property, including subsequent owners. The requirements will be strictly construed, but once the procedure is fulfilled, the statutes will be liberally construed so as to give effect to their remedial purpose. Failure to state on the lien statement the owner or person whose interest in property is sought to be charged is fatal to the lien. In the case at bar, Swain listed Battershell as the contracting owner, but Battershell held no interest in the property at the time that the lien was filed and was not listed as owner of record in the County Clerk's office; thus, the listing of Battershell as the contracting owner on the lien statement was fatal to the lien. Swain v. Battershell, 1999 MT 101, 294 M 282, 983 P2d 873, 56 St. Rep. 424 (1999), distinguishing Mtn. St. Resources, Inc. v. Ehlert, 195 M 496, 636 P2d 868, 38 St. Rep. 2061 (1981).

Law Review Articles

Mechanics' Liens in Montana, Stufflebean, 18 Mont. L. Rev. 62 (1956).

71-3-526. Amount of lien.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Case Notes

Contractor Entitled to Construction Lien Foreclosure — Standard of Whether Work Was Completed or Substantially Completed — Costs to Include Attorney Fees: In a dispute over a home construction contract, the District Court determined the plaintiff had a valid lien for outstanding labor and materials costs associated with masonry and stonework, but held the plaintiff was not entitled to a foreclosure judgment because the completed work was unsatisfactory to the defendants. The District Court also denied attorney fees to the plaintiff. On appeal, the Supreme Court held that the District Court had applied the wrong standard to the foreclosure of the lien and instead should have determined whether the work was completed or substantially completed. A lien is generally limited to services actually performed and materials actually supplied, and the District Court found the plaintiff was entitled to recover $8,317 for work and materials. The Supreme Court further held that the District Court erred when it failed to award attorney fees to the plaintiff. The District Court did not have discretion to waive attorney fees due to the defendants' dissatisfaction with the completed work once the plaintiff had shown it had an established lien. Vintage Constr., Inc., v. Feighner, 2017 MT 109, 387 Mont. 354, 394 P.3d 179.

Settled Subcontractor's Lien — Not Recoverable After Assignment or as Part of General Contractor's Lien: A subcontractor sued both a general contractor and the resort company that had contracted for the general contractor's construction services for payment of a $500,000 construction lien. To settle the claim, the resort company agreed to pay the subcontractor $500,000 through the intermediary of the general contractor. In exchange, the subcontractor released its claims against both the general contractor and the resort company, and it reassigned its claims to the general contractor. On appeal, the Supreme Court reversed, finding that the District Court erred by determining that the subcontractor's fee was subject to a lien by the general contractor against the resort company because, at the time of settlement, the subcontractor extinguished its claims against the resort. Thus, there was no claim by the subcontractor to be assigned to another party. Further, the amount of the subcontractor's lien could not be included in the general contractor's construction lien because, pursuant to this section, it must be reduced by the lien claimed by the subcontractor. DCK Worldwide Holdings, Inc. v. CH SP Acquisition, LLC, 2015 MT 225, 380 Mont. 215, 355 P.3d 724.

No Error in Calculation of Construction Lien: Although invoices to be timely paid according to a contract supported a higher award claim for a contractor's work building condominiums, the parties' subsequent conduct established other evidence concerning the parties' agreement and obligations. The contractor was not paid according to the invoices, as specified in the contract, but in bulk sums upon the completion of each condominium. Hence, because of the parties' conduct, the untimely and incomplete construction of the condos, and the amount of the invoices in excess of the original contact, there was substantial credible evidence that the District Court properly awarded a sum substantially lower than that established by the invoices. Mtn. W. Bank, N.A. v. Cherrad, LLC, 2013 MT 99, 369 Mont. 492, 301 P.3d 796.

Material Question Regarding Validity of Construction Lien — Summary Judgment Improper: Plaintiff drilling company filed to foreclose on a construction lien on defendants' property based on money owed for a partially drilled well on defendants' property. The District Court granted summary judgment for defendants on grounds that the lien was invalid because the well was not completed. On appeal, the Supreme Court determined that genuine issues of material fact remained regarding whether abandonment of the well constituted a change order or altered contract specification for which defendants were responsible or whether plaintiff breached the contract by drilling in the wrong place, thereby eliminating plaintiff's lien entitlement. Because questions of material fact existed, summary judgment was improper, and the case was remanded for further proceedings. Sudan Drilling, Inc. v. Anacker, 2009 MT 14, 349 M 42, 202 P3d 778 (2009).

71-3-531. Notice of right to claim lien required — exceptions.

Compiler's Comments

2009 Amendment: Chapter 182 in (6)(a) inserted third sentence requiring that the notice that is filed with the clerk and recorder must be signed; in (6)(b) inserted second sentence requiring that a notice that is electronically filed must be electronically signed; in (6)(d) at beginning of introductory clause after "continuation" substituted "of the notice must be signed by the person who filed the original notice of the right to claim a lien or by a person authorized to sign for the person who filed the original notice of the right to claim a lien and" for "statement"; in (6)(d)(i) before "notice" inserted "original"; in (6)(d)(ii) before "notice" inserted "original" and after "notice" deleted "originally"; and made minor changes in style. Amendment effective October 1, 2009.

2007 Amendment: Chapter 293 in (1)(a) at beginning substituted "an original contractor" for "a person"; in (4) near beginning after "contracting" substituted "owner" for "party"; in (5) in second sentence near middle after "delivered" inserted "personally to the contracting owner" and at end before "owner" inserted "contracting"; inserted (7) concerning requirements for inclusion in construction contract; in (8) in two places substituted references to original contractor for references to person; in (8)(a) at beginning inserted "street address or legal"; and made minor changes in style. Amendment effective October 1, 2007.

1999 Amendment: Chapter 357 inserted (6)(b) allowing notice of the right to claim a lien to be filed electronically; and made minor changes in style. Amendment effective October 1, 1999.

1991 Amendment: In (3), at beginning, inserted exception clause; inserted (4) regarding required notice when payment for services or materials furnished pursuant to a real estate improvement contract is made from funds provided by a regulated lender and secured to pay the improvement being liened; in (5) inserted third and fourth sentences requiring written acknowledgment of receipt of notice if delivered; and made minor changes in style. Amendment effective April 20, 1991.

Saving Clause: Section 3, Ch. 484, L. 1991, was a saving clause.

1989 Amendment: Inserted (5)(b) through (5)(d) relating to filing and lapse of a notice of a right to claim a lien.

Transition Provision — Temporary Applicability: Section 2, Ch. 291, L. 1989, provided: "Notwithstanding [section 1] [71-3-531], notice of a right to claim a lien that is filed with the clerk and recorder before October 1, 1989, lapses unless a continuation of the notice is filed before April 1, 1990."

Case Notes

Lien Notice Exception When Improvements Commercial in Character: After plaintiff provided gravel for defendant's subdivision, a dispute arose regarding the quantity of gravel installed as base material beneath the subdivision road, and plaintiff subsequently filed a construction lien on the property. When defendant did not pay in full, plaintiff filed to foreclose on the lien and claimed breach of contract and unjust enrichment. Defendant sought to dismiss the suit because plaintiff failed to file notice of the right to claim a construction lien. The District Court denied the motion, and on appeal the Supreme Court affirmed. One exception to the requirement for filing notice in 71-3-531 is the provision of materials or services for an improvement that is commercial in character. The subdivision improvements qualified as commercial improvements, so plaintiff was not required to provide notice of the lien filing. JTL Group, Inc. v. New Outlook, LLP, 2010 MT 1, 355 Mont. 1, 223 P.3d 912.

Proper Dismissal of Counterclaim When Conceded Amount Not Exceeded: After plaintiff provided gravel for defendant's subdivision, a dispute arose regarding the quantity of gravel installed as base material beneath the subdivision road, and plaintiff subsequently filed a construction lien on the property. When defendant did not pay in full, plaintiff filed to foreclose on the lien and claimed breach of contract and unjust enrichment. Defendant filed a counterclaim against the gravel company based on the prospect that plaintiff might be owed an amount in excess of the amount that defendant conceded was owed. The trial court found that defendant owed no more than the conceded amount and dismissed the counterclaim. On appeal, defendant argued that dismissal of the counterclaim was error and that the counterclaim should be allowed to proceed because defendant owed attorney fees and prejudgment interest in excess of $157,000. The Supreme Court disagreed. The counterclaim was properly dismissed, and the additional amounts owed by defendant were not relevant to the counterclaim posited at trial. JTL Group, Inc. v. New Outlook, LLP, 2010 MT 1, 355 Mont. 1, 223 P.3d 912.

Questions of Material Fact Regarding Excavation Project — Summary Judgment Inappropriate: Plaintiff was an excavation subcontractor on defendants' project. Several modifications arose during the project beyond the original contract bid. Plaintiff completed the requested modifications, but defendants offered only $180 to cover the extra work. Plaintiff filed a construction lien but failed to notify defendants and then sought to foreclose the lien. The District Court granted plaintiff's request for summary judgment, and defendants appealed, but the Supreme Court reversed because numerous fact issues remained that were not susceptible to summary judgment, including whether: (1) plaintiff's services were extras or alterations personally ordered by defendants; (2) leftover materials validated the construction lien by constituting substantial completion of the contract or whether the materials signified incomplete work; (3) defendants' failure to pay constituted a breach that prevented plaintiff from completing the work, thus enacting the exception to the substantial completion rule; (4) the parties intended an oral contract whereby defendants personally ordered plaintiff to complete additional work; and (5) the contract was substantially complete, thus validating the lien. Gwynn v. Cummins, 2006 MT 239, 333 M 522, 144 P3d 82 (2006).

Attorney General's Opinions

Notice of Right to Claim Construction Lien — Acknowledgment Not Required: A notice of right to claim a construction lien filed with a County Clerk and Recorder pursuant to this section is not subject to the acknowledgment requirements of 70-21-203. 42 A.G. Op. 53 (1988).

71-3-532. Content of notice of right to claim lien.

Compiler's Comments

1999 Amendment: Chapter 357 inserted (3)(a) through (3)(f) setting out information required in the notice; in (3)(g) substituted notice form for former form (see 1999 Session Law for text); and made minor changes in style. Amendment effective October 1, 1999.

1991 Amendment: In (3), in second paragraph of form of notice, inserted third and fourth sentences establishing a 45-day notice period when funds have been provided by a regulated lender; and made minor changes in style. Amendment effective April 20, 1991.

Saving Clause: Section 3, Ch. 484, L. 1991, was a saving clause.

71-3-533. Notice of completion.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1987 Amendment: In (1), (2)(a), and (4) inserted "contracting" before "owner"; in (3)(b) substituted language requiring the notice to state the contracting owner's name, address, and nature of the title of the signer for "the owner's name or owners' names, as the case may be, the address of the owner or addresses of the owners, as the case may be, and the nature of the title, if any, of the person signing the notice"; and inserted (6) requiring the contracting owner to provide a copy of the notice of completion to any person who has given the owner a notice of a right to claim a lien.

Case Notes

Lien — Liquidated Damages: Plaintiff was granted proper extensions for completion of construction, and defendant properly withheld $5,300 in liquidated damages for failure to complete construction by the contract completion date. The District Court entered these findings which were affirmed on appeal. Arrowhead, Inc. v. Safeway Stores, Inc., 179 M 510, 587 P2d 411 (1978).

Counterclaim by Home Owners Allowed: The rule denying a lien claimant a personal judgment against a property owner in a lien foreclosure action, when privity of contract is absent, cannot be conversely applied to deny a property owner a personal judgment against a lien claimant for damages attributable to the lien claimant and arising out of a contract between the property owner and the prime contractor. Miller v. Melaney, 172 M 74, 560 P2d 902 (1977).

Validity of Lien — Completion of Work Required: A lien is invalid and unenforceable if a contractor fails to substantially complete performance. The general rule is that a lien arises only upon completion of contracted work. Olson v. Westfork Properties, 171 M 154, 557 P2d 821 (1976).

When Lien Arises — Substantial Performance of Contract: A lien arises only upon completion of the contracted work, and although substantial performance of the contracted work meets this requirement, it is a condition precedent to liability of the home owners when there was a contract to perform work on their home. W. Plumbing of Bozeman v. Garrison, 171 M 85, 556 P2d 520 (1976).

71-3-534. Filing with county clerk — notification of owner.

Compiler's Comments

2005 Amendment: Chapter 130 in (2) near beginning of first sentence after "unless" substituted "it is accompanied by" for "there is attached thereto", in second sentence after "certified" deleted "or registered", and in third sentence at end after "certified" deleted "or registered"; and made minor changes in style. Amendment effective October 1, 2005.

1981 Amendment: Inserted (2) prohibiting the County Clerk from filing a lien without certification that a copy has been served on the owner and providing for methods of service.

Case Notes

Construction Lien Properly Found Valid: Defendant argued that plaintiff's construction lien was defective because: (1) there was no written contract for the construction work; (2) plaintiff failed to serve the lien on the city of Three Forks as owner of record of the property in question; (3) the lien inadequately described the property that was improved; (4) the lien incorrectly named the person entering into the contract; (5) the lien incorrectly identified who requested the construction work; and (6) the lien's statement that a notice of right to claim was not required was incorrect. The Supreme Court examined the evidence related to each claim and affirmed. Defendant herself testified that a contract existed. The city abandoned its interest in the property before the lien was filed. Plaintiff's description of the property that was subject to the lien encompassed the entire footprint of defendant's property and was sufficient to identify it. Although the lien identified defendant rather than defendant's trust as the person entering the contract and requesting the work, defendant and the trust were the same entity, and the trust was not authorized to transact business in Montana, so naming defendant as the party subject to the lien was proper. Last, there was no evidence that the city owned the property, so no service to the city was necessary. The procedural requirements of the construction lien statutes are strictly construed, but once the procedure has been fulfilled, the statutes are liberally construed to give effect to their remedial purpose. In this case, the validity of the lien was supported by the evidence. Johnston v. Palmer, 2007 MT 99, 337 M 101, 158 P3d 998 (2007).

Purpose of Procedural Lien Requirements to Provide Notice to and Protect Interests of Property Owners — Construction Lien Statutes Construed: The purpose of the procedural requirements in construction lien law is to impart notice to the owner of real property that a lien has been filed against the property and to protect all parties dealing with the property, including subsequent owners. The requirements will be strictly construed, but once the procedure is fulfilled, the statutes will be liberally construed so as to give effect to their remedial purpose. Failure to state on the lien statement the owner or person whose interest in property is sought to be charged is fatal to the lien. In the case at bar, Swain listed Battershell as the contracting owner, but Battershell held no interest in the property at the time that the lien was filed and was not listed as owner of record in the County Clerk's office; thus, the listing of Battershell as the contracting owner on the lien statement was fatal to the lien. Swain v. Battershell, 1999 MT 101, 294 M 282, 983 P2d 873, 56 St. Rep. 424 (1999), distinguishing Mtn. St. Resources, Inc. v. Ehlert, 195 M 496, 636 P2d 868, 38 St. Rep. 2061 (1981).

Failure to Answer Request for Admissions — Invalidity of Unserved Lien: On a question of validity of mechanics' lien (now construction lien), appellant failed to respond to a request for admissions. Under former Rule 36, M.R.Civ.P. (now superseded), all unanswered requests for admissions are admitted for all purposes. By failing to answer, appellant admitted that he had not served or billed respondent, so the requirement of 71-3-513 (now 71-3-534) that a copy of a lien must be served on the property owner in order to be valid was not met. The District Court properly found the unserved lien invalid as a matter of law. Toavs v. Billings Fed. Credit Union, 221 M 473, 719 P2d 428, 43 St. Rep. 985 (1986).

Name of Person Against Whose Property the Lien Is Filed:
Since mechanics' lien (now construction lien) was against the church which owned the property affected by the lien and notice of the lien was mailed to the church, the notice was served upon the proper party no matter who at the church received the mailed notice. Sheridan Ready Mix, Inc. v. First Congregational Church of Plentywood, 215 M 53, 695 P2d 456, 42 St. Rep. 175 (1985).

The mention of the record owner in the lien claim is not sufficient when he is not the person for whose use or benefit the property, building, or improvement is constructed, repaired, or altered. Blose v. Havre Oil & Gas Co., 96 M 450, 31 P2d 738 (1934); Missoula Mercantile Co. v. O'Donnell, 24 M 65, 60 P 594 (1900).

The filing of a notice of lien on the property of the Yellowstone Park Railway Company and the Yellowstone Park Railroad Company will not warrant intervention in a mechanics' lien (now construction lien) foreclosure against the Gallatin Railroad Company, though the complaint in intervention alleges, on information and belief, that the corporations are substantially the same. Merely a money demand in a mechanics' lien (now construction lien) foreclosure will not warrant intervention therein, even though plaintiffs have consented to the intervention. Cook v. Gallatin R.R. Co., 28 M 340, 72 P 678 (1903).

A recorded lien claim for materials furnished in the construction of a building, which fails to state the name of the owner or person whose interest is sought to be charged, is fatally defective. Missoula Mercantile Co. v. O'Donnell, 24 M 65, 60 P 594 (1900).

Service on Owner — When Effective: Service of a copy of a mechanics' lien (now construction lien) statement upon the owner of the affected property is effective when the notice is properly addressed and mailed by registered or certified mail, return receipt requested, to the owner's last-known address. Sheridan Ready Mix, Inc. v. First Congregational Church of Plentywood, 215 M 53, 695 P2d 456, 42 St. Rep. 175 (1985).

Sufficient Proof of Service on Owner: Proof of service of mechanics' lien (now construction lien) statement was sufficient where the statement stated that plaintiff's attorney certified that he had served upon the property owner by certified mail, return receipt requested and postage prepaid, at the owner's last-known address. This section does not require the plaintiff or his server to give the County Clerk a return receipt or other proof of actual receipt by the property owner. Sheridan Ready Mix, Inc. v. First Congregational Church of Plentywood, 215 M 53, 695 P2d 456, 42 St. Rep. 175 (1985).

Otherwise Valid Claim Not Defeated by Minor Technical Defect: Lumber company filed a materialmen's lien (now construction lien) for unpaid amounts for materials supplied for construction of an addition to real property. The District Court ordered foreclosure of the lien even though there was a discrepancy in the certificate of notice that was attached to the lien when filed. The certificate indicated that notice had been mailed 1 day later than the lien and certificate of notice were actually filed with the County Clerk and Recorder. The Supreme Court affirmed the District Court ruling and held that an otherwise valid mechanics' lien (now construction lien) should not be defeated when the lienor substantially complied with the statutory procedural requirement, notice was actually given, and no prejudice to the property holder had arisen because of the lienor's technical error. Simkins-Hallin Lumber Co. v. Simonson, 214 M 36, 692 P2d 424, 41 St. Rep. 2305 (1984).

71-3-535. Attachment of lien — filing.

Compiler's Comments

1999 Amendment: Chapter 357 in (2)(a) at end inserted "and the county clerk and recorder may allow the lien to be filed electronically"; and made minor changes in style. Amendment effective October 1, 1999.

Case Notes

Sale of Properties to Third Parties — Claim of Construction Lien Moot: Properties previously encumbered by a construction lien were purchased by third parties, in good faith, free of any encumbrances. The sales rendered the validity of the construction lien moot. As a result, the Supreme Court lacked jurisdiction over the matter. Mtn. W. Bank, N.A. v. Cherrad, LLC, 2013 MT 99, 369 Mont. 492, 301 P.3d 796.

Construction Lien Attaches From Date Work Commenced - Priority Over Purchase Money Mortgage: Gaston began water monitoring and percolation tests on property to be purchased by Yellowstone Bank, even though ownership of the property had not yet passed to the Bank. When payments to Gaston for its work stopped, Gaston sued to foreclose its construction lien and to establish priority of the lien. The Supreme Court held that the lien was valid against the Bank and its financing company, that the lien attached the day Gaston began work, and that Gaston's construction lien had priority over the purchase money mortgage used to finance the purchase of the property by Yellowstone Bank. Gaston Eng'r & Surveying v. Oakwood Properties, LLC, 2011 MT 44, 359 Mont. 341, 249 P.3d 75.

Waiver of Construction Lien Arguments Not Raised at Trial: Defendant argued in a posttrial motion that the property description in a lien notice was insufficient and that plaintiff failed to establish a valid construction lien. The District Court dismissed the arguments, and on appeal the Supreme Court affirmed. Defendant failed to raise the issues in the pretrial order or to object to the admissibility of the property description at trial and thus waived the arguments for purposes of appeal. JTL Group, Inc. v. New Outlook, LLP, 2010 MT 1, 355 Mont. 1, 223 P.3d 912.

Construction Lien Properly Found Valid: Defendant argued that plaintiff's construction lien was defective because: (1) there was no written contract for the construction work; (2) plaintiff failed to serve the lien on the city of Three Forks as owner of record of the property in question; (3) the lien inadequately described the property that was improved; (4) the lien incorrectly named the person entering into the contract; (5) the lien incorrectly identified who requested the construction work; and (6) the lien's statement that a notice of right to claim was not required was incorrect. The Supreme Court examined the evidence related to each claim and affirmed. Defendant herself testified that a contract existed. The city abandoned its interest in the property before the lien was filed. Plaintiff's description of the property that was subject to the lien encompassed the entire footprint of defendant's property and was sufficient to identify it. Although the lien identified defendant rather than defendant's trust as the person entering the contract and requesting the work, defendant and the trust were the same entity, and the trust was not authorized to transact business in Montana, so naming defendant as the party subject to the lien was proper. Last, there was no evidence that the city owned the property, so no service to the city was necessary. The procedural requirements of the construction lien statutes are strictly construed, but once the procedure has been fulfilled, the statutes are liberally construed to give effect to their remedial purpose. In this case, the validity of the lien was supported by the evidence. Johnston v. Palmer, 2007 MT 99, 337 M 101, 158 P3d 998 (2007).

Final Work Performed to Enhance Value of Project, Not to Extend Time for Lien Filing — Lien Timely Filed: Defendant initially ceased work on plaintiffs' residence on April 6 but returned on June 11 to try to clean some tile that was stained upon installation; however, the cleaning attempt was unsuccessful. On September 7, 88 days later, defendant filed a construction lien for the balance due, plus interest. The District Court held that the filing was timely because defendant had worked on the project within the previous 90 days and that the work was performed to enhance the value of the property, not to extend the time for filing a lien. Plaintiffs contended that the lien filing was untimely because the unsuccessful work on June 11 did not render a tangible improvement to the property and that the last actual work occurred on April 6, more than 90 days prior to filing. The Supreme Court affirmed. The fact that the June 11 work was unsuccessful or insignificant in relation to the overall work performed was not conclusive with regard to extending the time for lien filing. So long as the final work was done to enhance the property value, it was sufficient to extend the time for filing a construction lien. Rossi v. Pawiroredjo, 2004 MT 39, 320 M 63, 85 P3d 776 (2004).

Failure to Assert Timeliness as Affirmative Defense in Construction Lien Case Not Constituting Waiver of Issue — Burden on Lien Claimant to Establish Validity of Lien: Keating entered an agreement with Helena Coach House Partnership (Partnership) to purchase a Helena motel. The Burnses agreed to renovate the motel for Keating. Keating left the Helena area in January 1996 after leasing the motel to another party. On April 1, 1996, the Burnses filed construction liens for $48,539.19 and $7,403.30. Keating subsequently defaulted on the agreement to purchase the motel by allowing liens to encumber the property and by failing to pay property taxes, so the Partnership repossessed the motel and posted a cash construction lien bond in order to sell a portion of the motel property. The Burnses then filed a complaint against the Partnership, asserting that the action was commenced within the time prescribed by 71-3-562 and seeking judgment against the bond pursuant to 71-3-553. The Partnership admitted that the Burnses filed notices of liens and that the action was filed within 2 years of those filings, but denied that the filings constituted a valid lien. The District Court agreed, concluding that the liens were invalid because they were not timely filed. On appeal, the Burnses contended that the Partnership waived the issue of timeliness by failing to affirmatively plead the issue, relying on Brown v. Ehlert, 255 M 140, 841 P2d 510 (1992), for the proposition that the timeliness of a construction lien is an affirmative defense required to be pleaded affirmatively pursuant to former Rule 8(c), M.R.Civ.P. (now superseded). The Supreme Court held that Brown v. Ehlert did not support the contention that the timeliness of a construction lien must be affirmatively pleaded. Rather, the defense of timeliness went to the merits of the complaint because timeliness was an element of the claim, and the Partnership's pleading of timeliness did not implicate considerations of fairness or surprise for the Burnses, who were on notice under the 90-day filing requirement in this section that they had to establish the validity of their liens. The Partnership's specific denial that the liens were valid was a negative defense that warned the Burnses that they had to prove the validity of the liens as part of their prima facie case, and the Partnership's answer appropriately underscored the Burnses' burden of proof. Thus, the Partnership did not have to affirmatively plead the timeliness issue. The District Court properly concluded that the liens were not valid because the Burnses failed to satisfy the procedural requirement that their liens be timely filed, so the Burnses could not avail themselves of the remedies in the construction lien statutes. Burns v. A Cash Constr. Lien Bond, 2000 MT 233, 301 M 304, 8 P3d 795, 57 St. Rep. 966 (2000).

Failure to Establish Validity of Lien Preclusive of Remedies: Keating entered an agreement with Helena Coach House Partnership (Partnership) to purchase a Helena motel. Burns agreed to perform heating and air conditioning maintenance and repair services at the motel for Keating. Burns testified that he last performed maintenance services for Keating at some point in December 1995, and Keating left the Helena area in January 1996 after leasing the motel to another party. On April 1, 1996, Burns filed a construction lien for $7,403.30. Keating subsequently defaulted on the agreement to purchase the motel by allowing liens to encumber the property and by failing to pay property taxes, so the Partnership repossessed the motel and posted a cash construction lien bond in order to sell a portion of the motel property. Burns then filed a complaint against the Partnership, seeking judgment against the bond pursuant to 71-3-553. The District Court found that Burns had not met his burden of proving by a preponderance of the evidence that he had a valid lien. Burns claimed on appeal that he had last performed services on March 31, 1996, at the behest of the motel lessee, and that the filing of the lien on April 1 was therefore timely. The Partnership responded that Burns only claimed a lien for work performed on behalf of Keating prior to December 31, 1995, and that the claim did not extend to work performed for the motel lessee in 1996. The Supreme Court agreed with the Partnership and affirmed. The District Court correctly concluded that Burns failed to meet his burden of proof that he had filed the lien within 90 days of the final furnishing of services or materials pursuant to the contract with Keating under which the lien arose. Burns v. A Cash Constr. Lien Bond, 2000 MT 233, 301 M 304, 8 P3d 795, 57 St. Rep. 966 (2000).

Invalidity of Lien Not Timely Filed: Keating entered an agreement with Helena Coach House Partnership (Partnership) to purchase a Helena motel. Burns agreed to renovate the motel swimming pool for Keating. Burns's employment was terminated December 1, 1995, and Keating left the Helena area in January 1996 after leasing the motel to another party. On April 1, 1996, Burns filed a construction lien for $48,539.19. Keating subsequently defaulted on the agreement to purchase the motel by allowing liens to encumber the property and by failing to pay property taxes, so the Partnership repossessed the motel and posted a cash construction lien bond in order to sell a portion of the motel property. Burns then filed a complaint against the Partnership, seeking judgment against the bond pursuant to 71-3-553. The District Court concluded that Burns's lien was not timely filed within 90 days of the final furnishing of services or materials, as required in this section. On appeal, Burns argued that he supplied materials to the motel after December 31, 1995, in the form of tools that he left behind that were used by the motel staff, thereby bringing him within the 90-day filing requirement. The Supreme Court noted that Burns had no agreement with Keating to be paid for the use of the tools after Burns's services were terminated and that Burns's own testimony established that he performed no additional repair or maintenance services after December 1, 1995. Therefore, substantial credible evidence supported the District Court's conclusion that Burns's lien was not timely filed, and the Supreme Court affirmed. Burns v. A Cash Constr. Lien Bond, 2000 MT 233, 301 M 304, 8 P3d 795, 57 St. Rep. 966 (2000). See also Total Indus. Plant Serv., Inc. v. Turner Indus. Group, LLC, 2013 MT 5, 368 Mont. 189, 294 P.3d 363.

Purpose of Procedural Lien Requirements to Provide Notice to and Protect Interests of Property Owners — Construction Lien Statutes Construed: The purpose of the procedural requirements in construction lien law is to impart notice to the owner of real property that a lien has been filed against the property and to protect all parties dealing with the property, including subsequent owners. The requirements will be strictly construed, but once the procedure is fulfilled, the statutes will be liberally construed so as to give effect to their remedial purpose. Failure to state on the lien statement the owner or person whose interest in property is sought to be charged is fatal to the lien. In the case at bar, Swain listed Battershell as the contracting owner, but

Battershell held no interest in the property at the time that the lien was filed and was not listed as owner of record in the County Clerk's office; thus, the listing of Battershell as the contracting owner on the lien statement was fatal to the lien. Swain v. Battershell, 1999 MT 101, 294 M 282, 983 P2d 873, 56 St. Rep. 424 (1999), distinguishing Mtn. St. Resources, Inc. v. Ehlert, 195 M 496, 636 P2d 868, 38 St. Rep. 2061 (1981).

Consolidation, Rather Than Dismissal, of Lien Actions Proper: Having received no payment for installation of an elevator, Lagerquist filed a lien against Devoe's building. At the same time, DeVoe filed a complaint against Lagerquist, alleging breaches of contract and warranty, negligent or fraudulent misrepresentation, and breach of good faith and fair dealing. The following month, Lagerquist filed for lien foreclosure. DeVoe moved that either the lien foreclosure be dismissed or the actions be consolidated, and the court granted the motion to consolidate. On appeal, DeVoe argued that under the doctrine of election of remedies, Lagerquist was precluded from claiming both that the elevator was installed within the time allowed and that the lien was filed in a timely manner. However, the answer to DeVoe's action in tort did not dispose of the issue of when work was last done on the elevator; therefore, the court did not err in consolidating the actions rather than dismissing the lien foreclosure action. DeVoe v. Gust. Lagerquist & Sons, Inc., 244 M 141, 796 P2d 579, 47 St. Rep. 1527 (1990).

Interest Paid From Date of Filing of Construction Lien: When a construction lien was found to be enforceable, the award of prejudgment interest on the contract price was proper from the date the construction lien was filed. DeVoe v. Gust. Lagerquist & Sons, Inc., 244 M 141, 796 P2d 579, 47 St. Rep. 1527 (1990).

Attorney General's Opinions

Notice of Right to Claim Construction Lien — Acknowledgment Not Required: A notice of right to claim a construction lien filed with a County Clerk and Recorder pursuant to 71-3-531 is not subject to the acknowledgment requirements of 70-21-203. 42 A.G. Op. 53 (1988).

Law Review Articles

Mechanics' Liens in Montana, Stufflebean, 18 Mont. L. Rev. 58 (1956).

71-3-537. Acknowledgment of satisfaction of lien — penalty.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

71-3-538. Release of notice of right to claim lien.

Compiler's Comments

Effective Date: This section is effective October 1, 2009.

71-3-541. Priority among holders of construction liens.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

71-3-542. Priority of construction liens as against claims other than construction lien claims.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Construction Lien's Prioritization Over Mortgage Limited to Money Allocated for Construction: A District Court concluded that one party's loan, which included money allocated for construction, had priority as a construction lien over a mortgage, but only to the amount that had been allocated for construction work. The construction lien holder argued on appeal that under 71-3-542(4), nonconstruction costs associated with purchase of the property at issue should also be prioritized. The Supreme Court affirmed, explaining that such an argument would extend 71-3-542(4) beyond its plain terms. A.C.I. Constr., LLC v. Elevated Property Inv., LLC, 2021 MT 246, 405 Mont. 456, 495 P.3d 1054.

Construction Lien Attaches From Date Work Commenced - Priority Over Purchase Money Mortgage: Gaston began water monitoring and percolation tests on property to be purchased by Yellowstone Bank, even though ownership of the property had not yet passed to the Bank. When payments to Gaston for its work stopped, Gaston sued to foreclose its construction lien and to establish priority of the lien. The Supreme Court held that the lien was valid against the Bank and its financing company, that the lien attached the day Gaston began work, and that Gaston's construction lien had priority over the purchase money mortgage used to finance the purchase of the property by Yellowstone Bank. Gaston Eng'r & Surveying v. Oakwood Properties, LLC, 2011 MT 44, 359 Mont. 341, 249 P.3d 75.

Priority of Construction Lien — Trust Indenture Taken to Secure Loan Made to Pay for Improvements Liened — Partial Priority Not Applicable: Plaintiff company installed equipment at a casino and restaurant complex but did not receive payment, so plaintiff filed a construction lien and sought to have the lien adjudged to be prior and superior to any interest that defendant bank had in the property. The bank asserted that its trust indenture had priority over plaintiff's lien. The District Court granted summary judgment to plaintiff, holding that the lien was superior to the trust indenture because the trust indenture was taken to secure the construction loan that was made to pay for the improvements liened. On appeal, the Supreme Court affirmed. It was undisputed that the trust indenture was executed for the exclusive purpose of securing advances for construction and that the liens attached to the construction. Therefore, under 71-3-542(4), the liens had priority over the entirety of the trust indenture. Additionally, the statute does not allow courts to parse encumbrances and then assign priority among the constituent parts. The bank loaned money for the express purpose of constructing the complex and had the opportunity when making the loan to protect itself either by not making the loan or by conditioning the loan on the ability to obtain waivers from the contractors, so the concept of partial priority was not supported. Signal Perfection, Ltd. v. Rocky Mtn. Bank—Billings, 2009 MT 365, 353 M 237, 224 P3d 604 (2009), distinguishing Am. Fed. S&L Ass'n v. Schenk, 241 M 177, 785 P2d 1024 (1990).

Trust Indenture Given Priority Over Mechanics' Lien: The plaintiff notified the defendant bank that he had contracted with the home owners to remodel their home. However, the notice was given 3 months after the bank had closed its loan with the home owners and recorded its trust indenture. The proceeds of the bank's loan were not used to remodel the home. The Supreme Court affirmed the lower court's ruling that the bank's lien had priority over the plaintiff's mechanics' lien. Corscadden v. Komrosky, 242 M 7, 788 P2d 321, 47 St. Rep. 493 (1990).

Priority of Recorded Trust Deed Over Mechanics' Lien for Improvements: Schenk borrowed $80,000 from American Federal Savings and Loan Association (American) to purchase a bar, executing a promissory note secured by a deed of trust in favor of American. None of the loan proceeds were used as payment for improvements. Subsequent to completion of remodeling and electrical work on the bar, an electric company perfected a mechanics' lien. American later filed a complaint seeking foreclosure of the deed of trust, and the electric company asserted as an affirmative defense the priority of the mechanics' lien. The District Court granted summary judgment to the company, citing the lien priority. The Supreme Court reversed, based on the facts that: (1) the parties entered into the loan agreement almost 1 year prior to the commencement of improvements; (2) American lacked any resource to determine that improvements would be commenced at a date far removed from the loan date; (3) American could not withhold funds intended for construction because the loan was used for purchase rather than improvements; and (4) Schenk was under no obligation to notify American of the remodeling, and even if notified, American had no legal means to further secure its lien position. Am. Fed. S&L Ass'n v. Schenk, 241 M 177, 785 P2d 1024, 47 St. Rep. 177 (1990), distinguishing Beck v. Hanson, 180 M 82, 589 P2d 141 (1979), Home Interiors, Inc. v. Henderson, 214 M 194, 692 P2d 1229 (1984), and Tri-County Plumbing & Heating, Inc. v. Levee Restorations, Inc., 221 M 403, 720 P2d 247 (1986).

Law Review Articles

Liens: Priority of Mechanics' Lien Over Small Business Administration Mortgage, 28 Mont. L. Rev. 117 (1966).

Mechanics' Liens in Montana, Stufflebean, 18 Mont. L. Rev. 64 (1956).

71-3-551. Substitution of bond allowed — filing — amount — condition.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 407, L. 2023. Amendment effective May 3, 2023.

2007 Amendment: Chapter 204 in (1) near middle after "lien" inserted "or within 30 days of the service of a complaint in an action to foreclose the construction lien"; and made minor changes in style. Amendment effective October 1, 2007.

1987 Amendment: In (1), near beginning, substituted "construction lien" for "mechanic's lien", deleted reference to 71-3-501, and inserted "contracting" before "owner".

Case Notes

Subcontractor Not Authorized to File Bond — Only Contracting Owner May File — Right to Challenge Bond Not Waived — District Court's Judgment Reversed. Skyline Consulting Group v. Mortensen Woodwork, Inc., 2022 MT 192, 410 Mont. 230, 518 P.3d 462.

Substitution of Surety Bond for Lien — Lienee Not Entitled to Attorney Fees: Although the District Court discharged a construction lien after the property owner substituted a surety bond pursuant to 71-3-551, the substitution did not mean that the subcontractor failed to establish the lien and that the property owner was entitled to attorney fees. The Legislature did not intend for the lien substitute statute to allow lienees to recover their attorney fees by securing a surety bond despite their underlying liability. AAA Constr. of Missoula, LLC v. Choice Land Corp., 2011 MT 262, 362 Mont. 264, 264 P.3d 709.

Enforcement of Construction Lien Affirmed Despite Failure to Recognize Surety as Party: Plaintiff sought to enforce a construction lien against Puffer and Puffer's surety through a show cause proceeding. The District Court enforced plaintiff's arbitration award against the surety. Puffer asserted that the surety was insulated from enforcement of the lien because of its status as surety. However, this section clearly allows recovery from the principal or the surety. Puffer also contended that the arbitration award against the surety was void because the surety was never made a party to the litigation. The Supreme Court agreed that the surety was not named as a party or served a summons or copy of the formal complaint. However, Puffer's attorney acted as counsel for both Puffer and the surety, so the District Court acquired jurisdiction over the surety through the attorney's voluntary appearance on behalf of the surety. The surety had adequate notice of the proceeding through counsel and an adequate opportunity to present itscase. Thus, the District Court did not err in allowing plaintiff to recover the arbitration award from the surety by way of a de facto judgment. The District Court was affirmed. Eisenhart v. Puffer, 2008 MT 58, 341 M 508, 178 P3d 139 (2008).

Surety Bond to Be Filed Before Lien Claimant Commences Action: Talcott Construction brought an action to foreclose on its construction lien on certain condominiums. Mountain Bank filed an irrevocable letter of credit with the District Court on behalf of the defendant, P&D Land Enterprises, 10 days after the action was initiated, and the court entered an order dissolving Talcott's lien. Talcott argued that this section requires the surety bond to be filed before the action is commenced. (See 2007 amendment.) The lower court held that this section states that the bond "may" be filed at any time before the lien claimant commences an action and that therefore the provision is not mandatory and the bond may be filed after the action is initiated. The Supreme Court held that the statute means a bond does not have to be filed but that if one is filed, it has to filed before the action is commenced. James Talcott Constr., Inc. v. P&D Land Enterprises, 261 M 260, 862 P2d 395, 50 St. Rep. 1313 (1993).

71-3-553. Action upon bond — period of limitation same.

Compiler's Comments

2007 Amendment: Chapter 204 in (1) near beginning after "filed" inserted "prior to the service of a complaint in an action to foreclose upon a construction lien"; and made minor changes in style. Amendment effective October 1, 2007.

Case Notes

Failure to Establish Validity of Lien Preclusive of Remedies: Keating entered an agreement with Helena Coach House Partnership (Partnership) to purchase a Helena motel. Burns agreed to perform heating and air conditioning maintenance and repair services at the motel for Keating. Burns testified that he last performed maintenance services for Keating at some point in December 1995, and Keating left the Helena area in January 1996 after leasing the motel to another party. On April 1, 1996, Burns filed a construction lien for $7,403.30. Keating subsequently defaulted on the agreement to purchase the motel by allowing liens to encumber the property and by failing to pay property taxes, so the Partnership repossessed the motel and posted a cash construction lien bond in order to sell a portion of the motel property. Burns then filed a complaint against the Partnership, seeking judgment against the bond pursuant to this section. The District Court found that Burns had not met his burden of proving by a preponderance of the evidence that he had a valid lien. Burns claimed on appeal that he had last performed services on March 31, 1996, at the behest of the motel lessee, and that the filing of the lien on April 1 was therefore timely. The Partnership responded that Burns only claimed a lien for work performed on behalf of Keating prior to December 31, 1995, and that the claim did not extend to work performed for the motel lessee in 1996. The Supreme Court agreed with the Partnership and affirmed. The District Court correctly concluded that Burns failed to meet his burden of proof that he had filed the lien within 90 days of the final furnishing of services or materials pursuant to the contract with Keating under which the lien arose. Burns v. A Cash Constr. Lien Bond, 2000 MT 233, 301 M 304, 8 P3d 795, 57 St. Rep. 966 (2000).

Invalidity of Lien Not Timely Filed: Keating entered an agreement with Helena Coach House Partnership (Partnership) to purchase a Helena motel. Burns agreed to renovate the motel swimming pool for Keating. Burns's employment was terminated December 1, 1995, and Keating left the Helena area in January 1996 after leasing the motel to another party. On April 1, 1996, Burns filed a construction lien for $48,539.19. Keating subsequently defaulted on the agreement to purchase the motel by allowing liens to encumber the property and by failing to pay property taxes, so the Partnership repossessed the motel and posted a cash construction lien bond in order to sell a portion of the motel property. Burns then filed a complaint against the Partnership, seeking judgment against the bond pursuant to this section. The District Court concluded that Burns's lien was not timely filed within 90 days of the final furnishing of services or materials, as required in 71-3-535. On appeal, Burns argued that he supplied materials to the motel after December 31, 1995, in the form of tools that he left behind that were used by the motel staff, thereby bringing him within the 90-day filing requirement. The Supreme Court noted that Burns had no agreement with Keating to be paid for the use of the tools after Burns's services were terminated and that Burns's own testimony established that he performed no additional repair or maintenance services after December 1, 1995. Therefore, substantial credible evidence supported the District Court's conclusion that Burns's lien was not timely filed, and the Supreme Court affirmed. Burns v. A Cash Constr. Lien Bond, 2000 MT 233, 301 M 304, 8 P3d 795, 57 St. Rep. 966 (2000). See also Total Indus. Plant Serv., Inc. v. Turner Indus. Group, LLC, 2013 MT 5, 368 Mont. 189, 294 P.3d 363.

71-3-561. Parties.

Case Notes

Counterclaim by Home Owners Allowed: The rule denying a lien claimant a personal judgment against a property owner in a lien foreclosure action, when privity of contract is absent, cannot be conversely applied to deny a property owner a personal judgment against a lien claimant for damages attributable to the lien claimant and arising out of a contract between the property owner and the prime contractor. Miller v. Melaney, 172 M 74, 560 P2d 902 (1977).

Bankrupt Party: Ordinarily, in a suit to establish a materialmen's lien (now construction lien) the principal contractor is an indispensable party. However, when plaintiff had named the contractor as a defendant, but he had not been served, and the contractor's trustee in bankruptcy was also named and relief was sought against him, the absence of the principal contractor as a party was immaterial. Monarch Lumber Co. v. Wallace, 132 M 163, 314 P2d 884 (1957).

Owner as Necessary Party: In a suit seeking to enforce or establish the validity of a mechanics' lien (now construction lien), the owner or person whose interest is sought to be charged is a necessary party to the action. Cascade Elec. Co. v. Assoc. Creditors, Inc., 124 M 370, 224 P2d 146 (1950).

Execution Creditor: An execution creditor of an oil well operator who on judicial sale had bought casing furnished by plaintiff lienholder after the lien claim had been filed was a proper party defendant in the action to foreclose the lien. Cont. Supply Co. v. White, 92 M 254, 12 P2d 569 (1932).

Complaint Naming Parties Not Within Rule: The naming of persons in the complaint to enforce the lien does not make them parties unless they are within the rule defining necessary parties. Missoula Mercantile Co. v. O'Donnell, 24 M 65, 60 P 594 (1900).

71-3-562. Limitation on actions.

Case Notes

Failure to Assert Timeliness as Affirmative Defense in Construction Lien Case Not Constituting Waiver of Issue — Burden on Lien Claimant to Establish Validity of Lien: Keating entered an agreement with Helena Coach House Partnership (Partnership) to purchase a Helena motel. The Burnses agreed to renovate the motel for Keating. Keating left the Helena area in January 1996 after leasing the motel to another party. On April 1, 1996, the Burnses filed construction liens for $48,539.19 and $7,403.30. Keating subsequently defaulted on the agreement to purchase the motel by allowing liens to encumber the property and by failing to pay property taxes, so the Partnership repossessed the motel and posted a cash construction lien bond in order to sell a portion of the motel property. The Burnses then filed a complaint against the Partnership, asserting that the action was commenced within the time prescribed by this section and seeking judgment against the bond pursuant to 71-3-553. The Partnership admitted that the Burnses filed notices of liens and that the action was filed within 2 years of those filings, but denied that the filings constituted a valid lien. The District Court agreed, concluding that the liens were invalid because they were not timely filed. On appeal, the Burnses contended that the Partnership waived the issue of timeliness by failing to affirmatively plead the issue, relying on Brown v. Ehlert, 255 M 140, 841 P2d 510 (1992), for the proposition that the timeliness of a construction lien is an affirmative defense required to be pleaded affirmatively pursuant to former Rule 8(c), M.R.Civ.P. (now superseded). The Supreme Court held that Brown v. Ehlert did not support the contention that the timeliness of a construction lien must be affirmatively pleaded. Rather, the defense of timeliness went to the merits of the complaint because timeliness was an element of the claim, and the Partnership's pleading of timeliness did not implicate considerations of fairness or surprise for the Burnses, who were on notice under the 90-day filing requirement in 71-3-535 that they had to establish the validity of their liens. The Partnership's specific denial that the liens were valid was a negative defense that warned the Burnses that they had to prove the validity of the liens as part of their prima facie case, and the Partnership's answer appropriately underscored the Burnses' burden of proof. Thus, the Partnership did not have to affirmatively plead the timeliness issue. The District Court properly concluded that the liens were not valid because the Burnses failed to satisfy the procedural requirement that their liens be timely filed, so the Burnses could not avail themselves of the remedies in the construction lien statutes. Burns v. A Cash Constr. Lien Bond, 2000 MT 233, 301 M 304, 8 P3d 795, 57 St. Rep. 966 (2000).

71-3-563. Rules of practice.

Case Notes

Validity of Lien — Attorney's Fees: The tenant is entitled to attorney's fees for the cost incurred in establishing the validity of his mechanics' lien (now construction lien). Kosena v. Eck, 195 M 12, 635 P2d 1287, 38 St. Rep. 1736 (1981).

71-3-564. Arbitration of lien disputes.

Compiler's Comments

Effective Date: This section is effective October 1, 2013.

Part 6
Loggers' Liens

71-3-601. Definition of lumber — who may have lien.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Logging Corporation Not a "Person": A logging corporation acting in the capacity of an independent contractor was not a "person" as set forth in this part and was not entitled to a lien thereunder. (A 1967 amendment allowed corporation to acquire a lien under this section.) Jack Long Logging Co. v. Pyramid Mtn. Lumber, Inc., 143 M 87, 387 P2d 712 (1963).

New Right Created Burden of Proof on Claimant: This section creates a new right, and therefore the claimant must show that he is within the class for whose benefit it was enacted. Billings v. Missoula White Pine Sash Co., 88 M 322, 292 P 714 (1930).

Hauler Not Entitled to Lien: One who hauled lumber from a sawmill, the owner of which manufactured it under contract with the owner of the logs, to a railroad spur (some 12 miles distant from the mill), where he delivered it on board cars for shipment to the log owner or piled it in yards, may not be said to have furnished work or labor in assisting in the manufacture of the lumber within the meaning of this section. Therefore, he was not entitled to a lien on the lumber on failure of the sawmill owner to pay for the hauling. Billings v. Missoula White Pine Sash Co., 88 M 322, 292 P 714 (1930).

Agency of Contractor: The use of the words "whether such work or labor was done at the instance of the owner of the same or his agent" in this section implies that the employment may be made only by the owner or one employed by him as agent. One who occupies toward the owner merely the relation of contractor is not his agent for any purpose unless, by the terms of the contract, authority is given him to act as such. Lane v. Lane Potter Lumber Co., 40 M 541, 107 P 898 (1910).

New Right Created — Strict Construction: This section creates a right where none existed before, and the requirements as to the steps necessary to secure that right must be strictly construed. Lane v. Lane Potter Lumber Co., 40 M 541, 107 P 898 (1910).

Persons Entitled to Lien: The loggers' lien legislation was enacted to create an equity in favor of three classes of persons: (1) those who are employed to obtain or secure rough timber and transport it to the mill for manufacture; (2) those who are employed to assist in the manufacture of it into lumber in any form; and (3) those who own the land from which the timber is taken. Lane v. Lane Potter Lumber Co., 40 M 541, 107 P 898 (1910).

Lien Distinguished: Section 71-3-501 (now repealed), providing for mechanics' liens (now construction liens), is materially different from this section, concerning loggers' liens, and cases upon the former are inapplicable to the latter. Lane v. Lane Potter Lumber Co., 40 M 541, 107 P 898 (1910).

71-3-603. Extent of liens.

Compiler's Comments

1987 Amendment: At end of (1) changed "71-3-606" to "71-3-605"; and at end of (2) changed "71-3-605" to "71-3-606".

71-3-605. How to obtain lien — form of claim.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Advances in Excess of Promised Compensation: Loggers who had originally agreed to compensation of $5 per thousand board feet and who, upon finding that scaling process was not proceeding at a rapid enough rate to determine their payment on a timely basis, agreed to an advance of 50 cents per tree cut were not entitled to loggers' lien on remaining timber cut but not scaled since they had received advances in excess of the original rate of compensation on all the timber cut. Alexander v. Hardy, 161 M 327, 505 P2d 1201 (1973).

71-3-608. Duties of county clerk.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

71-3-611. Enforcement of lien.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1987 Amendment: Near end of (2) changed "71-3-605" to "71-3-603".

Case Notes

Action for Personal Judgment: When plaintiff's complaint in an action under this section to foreclose a loggers' lien alleged all the facts necessary to recover for his services performed in sawing the lumber under an express contract, he was properly allowed to waive his lien and proceed against the defendant for a personal judgment for the amount claimed to be due under the contract. Logan v. Billings & N. Ry. Co., 40 M 467, 107 P 415 (1910).

Joinder of Defendants: Though plaintiff had in his complaint alleged a common liability of all of defendants joined in the action, the evidence disclosed a contract with only one of them. Plaintiff was entitled to judgment against the defendant, who was shown to be liable, even though the proof had failed as to the others. Logan v. Billings & N. Ry. Co., 40 M 467, 107 P 415 (1910).

71-3-612. Requirements to be bona fide purchaser.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

71-3-614. Judgment and execution.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

71-3-616. Penalty for destroying means of identification of property.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 7
Crop Liens for Seed or Grain and Liens for Hail Insurance

Part Law Review Articles

Agricultural Liens Under Revised Article 9, Burnham, 63 Mont. L. Rev. 91 (2002).

71-3-701. Lien for seed or grain.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: Near middle, after "not exceeding the purchase price of", substituted "the seed or grain furnished" for "700 bushels"; and made minor changes in grammar and style.

Case Notes

Equity Jurisdiction on Legal Issues — Jury Trial Denied: In an action on a promissory note given in payment of premiums on hail insurance policies and secured by lien on crops, defendant was not entitled to jury trial when he interposed counterclaim presenting issues at law. When equity takes jurisdiction, its power to decide is full and complete. Merchants Fire Assurance Corp. of New York v. Watson, 104 M 1, 64 P2d 617 (1937).

Suit in Equity Proper Remedy: When a statute creating a lien does not provide a remedy for its enforcement, a suit in equity is the proper remedy. Merchants Fire Assurance Corp. of New York v. Watson, 104 M 1, 64 P2d 617 (1937).

71-3-703. How to obtain lien.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: Near beginning, after "person", inserted "company, association, or corporation" and after "office of the" deleted "county clerk and recorder of the county in which such seed or grain is to be planted or used a statement in writing verified under oath showing the kind and quantity of the seed or grain furnished, its value, or the amount of the funds or money advanced to pay therefor, the name of the person or persons to whom furnished, and a description of the land and of each tract of land upon which the same is to be or has been planted or sown or used in the production of a crop"; substituted "secretary of state a statement of agricultural lien as provided in 71-3-125" for former (2) that read: "(2) Notice of the lien also must be filed in the office of the secretary of state as required by 71-3-125"; and made minor changes in phraseology.

Applicability: Section 10, Ch. 529, L. 1989, provided: "[This act] applies to agricultural liens filed after September 30, 1989."

1987 Amendment: Inserted (2) requiring filing of the lien notice with the Secretary of State.

1983 Amendment: Increased time for filing lien from 30 days to 90 days.

Case Notes

Verification by Corporation: Section 71-3-701 provides that a corporation may perfect a seed lien, but 71-3-703 does not specify how a lien shall be verified if the claimant is a corporation. A corporation can only act through its officers, and an affidavit attached to the lien claim signed First National Bank of Savage by its president and cashier is sufficient. Thedin v. First Nat'l Bank of Savage, 67 M 65, 214 P 956 (1923).

71-3-704. Acknowledgment of satisfaction of lien — penalty.

Compiler's Comments

1999 Amendment: Chapter 305 in (2) substituted "30-9-533" (renumbered 30-9A-513) for "30-9-404"; and made minor changes in style. Amendment effective July 1, 2001.

1987 Amendment: Inserted (2) requiring filing of a termination statement with the Secretary of State.

71-3-705. Destruction of records — when allowed.

Compiler's Comments

Code Commissioner Correction: Pursuant to sec. 40, Ch. 55, L. 2015, the code commissioner in (2) substituted "2-6-1202" for "2-6-403" to correct reference rendered erroneous when Title 2, chapter 6, part 4, was repealed and replaced by Ch. 348, L. 2015.

1993 Amendment: Chapter 420 in (2), at end, inserted requirement for approval by local government records destruction subcommittee; and made minor changes in style. Amendment effective April 20, 1993.

71-3-712. How lien obtained.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: Near beginning, after "person", inserted "company, association, or corporation" and after "office of the" deleted "county clerk and recorder of the county in which the crop so insured is located a statement in writing verified under oath giving the description of the land upon which the crop is planted, together with the kind of crop insured"; substituted "secretary of state a statement of agricultural lien as provided in 71-3-125" for former (2) that read: "(2) Notice of the lien also must be filed in the office of the secretary of state as required by 71-3-125"; and made minor changes in phraseology and punctuation.

Applicability: Section 10, Ch. 529, L. 1989, provided: "[This act] applies to agricultural liens filed after September 30, 1989."

1987 Amendment: Inserted (2) requiring filing of the lien notice with the Secretary of State.

71-3-713. Acknowledgment of satisfaction of lien — penalty.

Compiler's Comments

1999 Amendment: Chapter 305 in (2) substituted "30-9-533" (renumbered 30-9A-513) for "30-9-404"; and made minor changes in style. Amendment effective July 1, 2001.

1987 Amendment: Inserted (2) requiring filing of a termination statement with the Secretary of State.

Part 8
Threshers' Liens

Part Law Review Articles

Agricultural Liens Under Revised Article 9, Burnham, 63 Mont. L. Rev. 91 (2002).

71-3-801. Who may have lien — amount.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1985 Amendment: At end of (2) substituted "[sections 1 through 21]" for "chapter 5, Title 27". Sections 1 through 21 replaced repealed sections and were codified in Title 27, chapter 5. The Code Commissioner therefore changed the reference to "[sections 1 through 21]" to "Title 27, chapter 5".

Case Notes

Account to Be Filed: One claiming a threshers' lien under this part must at least substantially follow the procedural steps by which the right to the lien is perfected, including its initiation by filing a just and true account of the amount due him for the services performed. Great Falls Farm Mach. Co. v. Rocky Mtn. Elev. Co., 94 M 188, 22 P2d 303 (1933).

71-3-802. How lien obtained.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: In beginning of (1) substituted "entitled to a lien under 71-3-801" for "intending to avail himself of the benefits of this part", near middle substituted "30 days" for "10 days", and at end deleted "a notice that within 20 days a lien, as specified in 71-3-801, will be claimed"; and in (2) inserted last sentence concerning notice by certified mail.

1989 Amendment: Near beginning of (1), after "file with the", substituted "office of the secretary of state a statement of agricultural lien as provided in 71-3-125" for "county clerk of the county in which said grain or other crops were grown" and at end, after "claimed", deleted "and within 20 days thereafter shall file with the county clerk and recorder of the county in which said grain or other crops were grown a just and true account of the amount due him or them for such services or labor after allowing all just credits and offsets and containing a correct description of the grain or other crops to be charged with such lien, the price agreed upon for such threshing or cutting and harvesting, the name of the person, firm, or corporation for whom such labor and services were performed, and a description of the lands as nearly as possible upon which said grain or other crops were raised, and a description of the legal subdivision of land upon which said grain is stored and, if said grain is stored in an elevator, the locality of the elevator, which statements of facts shall be verified by affidavit of the person claiming such lien or his duly authorized agent or attorney having knowledge of the facts. Any error or mistake in the account or description of the grain or other crops or of the property upon which it was raised shall not invalidate such lien"; near beginning of (2), after "threshermen", inserted "swather"; deleted former (3) that read: "(3) Notice of the lien also must be filed in the office of the secretary of state as required by 71-3-125"; and made minor changes in phraseology.

Applicability: Section 10, Ch. 529, L. 1989, provided: "[This act] applies to agricultural liens filed after September 30, 1989."

1987 Amendment: Inserted (3) requiring filing of the lien notice with the Secretary of State.

Case Notes

Conversion by Payment on Unperfected Lien: A thresher served a notice of claim of lien on a crop threshed by him, as required by this section, upon an elevator company. However, since he never initiated his right to a lien by filing an account of the amount due him with the County Clerk, he never acquired a lien. The crop was subject to a chattel mortgage. The elevator company paid the amount claimed by the supposed lienholder with the consent of the mortgagor and therefore was without defense to the mortgagee's action in conversion. Great Falls Farm Mach. Co. v. Rocky Mtn. Elev. Co., 94 M 188, 22 P2d 303 (1933).

Creation of Lien: Contention that a threshers' lien is created by the services and labor performed by him and not by the filing of the account required by this section is without merit. Great Falls Farm Mach. Co. v. Rocky Mtn. Elev. Co., 94 M 188, 22 P2d 303 (1933).

Account to Be Filed: One claiming a threshers' lien under this part must at least substantially follow the procedural steps by which the right to the lien is perfected, including its initiation by filing a just and true account of the amount due him for the services performed. Great Falls Farm Mach. Co. v. Rocky Mtn. Elev. Co., 94 M 188, 22 P2d 303 (1933).

71-3-808. Acknowledgment of satisfaction of lien — penalty.

Compiler's Comments

1999 Amendment: Chapter 305 in (2) substituted "30-9-533" (renumbered 30-9A-513) for "30-9-404"; and made minor changes in style. Amendment effective July 1, 2001.

1987 Amendment: Inserted (2) requiring filing of a termination statement with the Secretary of State.

71-3-810. Destruction of records — when allowed.

Compiler's Comments

Code Commissioner Correction: Pursuant to sec. 40, Ch. 55, L. 2015, the code commissioner in (2) substituted "2-6-1202" for "2-6-403" to correct reference rendered erroneous when Title 2, chapter 6, part 4, was repealed and replaced by Ch. 348, L. 2015.

1993 Amendment: Chapter 420 in (2), at end, inserted requirement for approval by local government records destruction subcommittee; and made minor changes in style. Amendment effective April 20, 1993.

Part 9

Fertilizer and Pesticide Liens

Part Law Review Articles

Agricultural Liens Under Revised Article 9, Burnham, 63 Mont. L. Rev. 91 (2002).

71-3-901. Who may have lien — amount.

Compiler's Comments

1993 Amendment: Chapter 125 near middle of first sentence inserted "whether by aerial or ground application" and before "weed" inserted "fertilization or"; and made minor changes in style. Amendment effective March 18, 1993.

1983 Amendment: Near end of section after "shall not exceed" deleted "$1.50 per acre for spraying or dusting wheat, and in the case of other grain or crops, such lien shall not exceed"; and made minor phraseology changes.

Case Notes

Applicability of Local Law When Perfecting Agricultural Liens: In a dispute over priority of an agricultural lien versus a security interest in the same profits from agricultural products, plaintiff who held a security interest asserted that defendant who held an agricultural lien did not satisfy the requirements of the Uniform Commercial Code (U.C.C.) regarding perfection because defendant's lien was not perfected in North Dakota where the farm products were located, as required by 30-9A-302, at the time that the dispute arose. However, agricultural liens follow the location of the farm products, not the location of the debtor, and when defendant's lien was created, the products in question were located in Montana. Therefore, Montana's local law was the local law designated by the U.C.C. to govern perfection of the lien. Defendant properly filed the lien in Montana and therefore did not violate the U.C.C. in perfecting the lien. Stockman Bank of Mont. v. Mon-Kota, Inc., 2008 MT 74, 342 M 115, 180 P3d 1125 (2008).

Continuation of Agricultural Lien of Farm Products After Sale, but Not on Sale Proceeds — Inchoate, Unperfected Agricultural Lien Interests Allowed: The Uniform Commercial Code (U.C.C.) leaves to other law the determination of whether an agricultural lien extends to proceeds. This section, which is Montana's agricultural lien law, does not extend to an agricultural supplier the right to a lien on the proceeds from the sale of liened farm products. However, a perfected agricultural lien remains attached to the collateral, even after its sale or transfer, until the secured party releases its lien. The right to judicially enforce or foreclose an agricultural lien is not lost upon sale or transfer of farm products. Stockman Bank of Mont. v. Mon-Kota, Inc., 2008 MT 74, 342 M 115, 180 P3d 1125 (2008).

Enforcement of Agricultural Lien Following Sale or Transfer of Farm Products — Assignment of Inchoate or Unperfected Lien Interests Allowed: A crop of sugar beets was sold, and a pesticide sprayer that held an agricultural lien sought to enforce the lien after the sale. Plaintiff bank also held a secured interest on the proceeds of the crop. The buyer issued checks made payable jointly to the bank and the sprayer, honoring the agricultural lien, and the lienholder's unconditioned negotiation of the check acknowledged satisfaction and release of its lien. The bank asserted that, not being an agricultural supplier, the sprayer had no right to file the lien and further contended that because inchoate or unperfected liens are not assignable, any argument that the supplier had assigned its lien right to the sprayer must fail as a matter of law. The sprayer argued that the supplier was clearly eligible to file an agricultural lien and that all actions taken by the sprayer were taken in an agency capacity for the supplier, as indicated in the lien filing, so the payment was not an assignment. Alternatively, the sprayer contended that the transaction was a pass-through between related entities constituting a limited assignment for collection purposes only and that even if the bank's evidence was sufficient to demonstrate that the transaction was a full assignment supported by consideration, inchoate lien interests are nonetheless assignable. The Supreme Court concluded that the dispute was best resolved on the issue of the assignability of inchoate lien interests, noting that generally property of any kind may be transferred, that a right arising out of an obligation is the property of the person to whom it is due and may be transferred, and that Montana's general policy supports the free assignability of rights and obligations stemming from contractual obligations. An agricultural lien is a security and ought to follow the debt or contract to which it pertains, and the free assignability of the right to perfect an agricultural lien comports with lien statutes as well as modern business practices. Thus, even though the supplier's lien was not yet perfected when transferred to the sprayer, it was assignable, and the sprayer validly proceeded to perfect and enforce the lien and was entitled to funds in the amount stipulated by the parties as payment for the chemicals sold by the supplier to the farm and applied by the sprayer and was entitled to the interest on the funds to be credited on that sum. Stockman Bank of Mont. v. Mon-Kota, Inc., 2008 MT 74, 342 M 115, 180 P3d 1125 (2008).

Interaction of Agricultural Lien Law and Uniform Commercial Code on Secured Transactions — Filing of Agricultural Lien Adequate to Fulfill Financing Statement Requirements of Uniform Commercial Code: Agricultural liens are not security interests, and only the parts of Article 9 of the Uniform Commercial Code (U.C.C.) that expressly refer to agricultural liens, rather than those that refer only to security interests, apply to agricultural liens. Merely because collateral consists of farm products does not automatically turn an agricultural lien into a security interest. The attachment rules of Article 9 do not apply to agricultural liens; rather, agricultural liens attach according to the rules in the statutes that created agricultural liens. Similarly, 71-3-902 clearly delineates the procedure for perfecting an agricultural lien. This case presented a potential conflict regarding lien priority in that 71-3-904 grants agricultural liens a superpriority status that is not dependent on being the first to file, while 30-9A-322 states that an agricultural lien has priority over a conflicting security interest on the same collateral if the lien is perfected pursuant to 30-9A-310 of the U.C.C. Thus, agricultural lienors must satisfy the perfection requirements of 30-9A-310 in addition to the perfection requirements of 71-3-902, and by doing so, the lienors will be insulated from the U.C.C. first-in-time rule and retain the superpriority status pursuant to 71-3-904. However, because agricultural liens require the same and more information as a U.C.C. filing and both filings are documented in the same database, the filing of an agricultural lien with the Secretary of State also satisfied the financing statement requirements of the U.C.C., and a duplicate filing of a U.C.C. financing statement is not required. Stockman Bank of Mont. v. Mon-Kota, Inc., 2008 MT 74, 342 M 115, 180 P3d 1125 (2008).

71-3-902. How lien obtained.

Compiler's Comments

1999 Amendment: Chapter 152 in (2) before "notice" deleted "30 days'"; and made minor changes in style. Amendment effective March 23, 1999.

1995 Amendment: Chapter 56 in (1), near middle, increased from 60 days to 90 days the time allowed for filing a lien; inserted (2) requiring a person entitled to file a lien to give 30 days' notice, by certified mail, of the intent to file; and made minor changes in style. Amendment effective February 10, 1995.

1989 Amendment: Near beginning, after "office of the", deleted "county clerk and recorder of the county in which said grains or crops were grown a just and true account of the amount due for such services, labor, or material after allowing all proper credits and offsets and containing a description of the grain or crops to be charged with such lien, the price agreed upon for such labor or service or material or, if no price was agreed upon, the reasonable value of the same, together with the name of the person, firm, or corporation for whom such labor or services were performed or material furnished and a description of the lands as nearly as possible upon which said grains or crops were raised, which statements of fact shall be verified by affidavit of the person, firm, corporation, or partnership claiming such lien or his, their, or its duly authorized agent or attorney having knowledge of the facts"; substituted "secretary of state a statement of agricultural lien as provided in 71-3-125" for former (2) that read: "(2) Notice of the lien also must be filed in the office of the secretary of state as required by 71-3-125."

Applicability: Section 10, Ch. 529, L. 1989, provided: "[This act] applies to agricultural liens filed after September 30, 1989."

1987 Amendment: Inserted (2) requiring filing of the lien notice with the Secretary of State.

Case Notes

No Requirement of Advance Notice to File Lien: This section has no requirement that a claimant give advance notice of intent to file an agricultural lien. The filing of a lien and mailing notice on the same day met the statutory notice requirement. Stockman Bank of Mont. v. Mon-Kota, Inc., 2008 MT 74, 342 M 115, 180 P3d 1125 (2008).

71-3-904. Priority.

Case Notes

Applicability of Local Law When Perfecting Agricultural Liens: In a dispute over priority of an agricultural lien versus a security interest in the same profits from agricultural products, plaintiff who held a security interest asserted that defendant who held an agricultural lien did not satisfy the requirements of the Uniform Commercial Code (U.C.C.) regarding perfection because defendant's lien was not perfected in North Dakota where the farm products were located, as required by 30-9A-302, at the time that the dispute arose. However, agricultural liens follow the location of the farm products, not the location of the debtor, and when defendant's lien was created, the products in question were located in Montana. Therefore, Montana's local law was the local law designated by the U.C.C. to govern perfection of the lien. Defendant properly filed the lien in Montana and therefore did not violate the U.C.C. in perfecting the lien. Stockman Bank of Mont. v. Mon-Kota, Inc., 2008 MT 74, 342 M 115, 180 P3d 1125 (2008).

Interaction of Agricultural Lien Law and Uniform Commercial Code on Secured Transactions — Filing of Agricultural Lien Adequate to Fulfill Financing Statement Requirements of Uniform Commercial Code: Agricultural liens are not security interests, and only the parts of Article 9 of the Uniform Commercial Code (U.C.C.) that expressly refer to agricultural liens, rather than those that refer only to security interests, apply to agricultural liens. Merely because collateral consists of farm products does not automatically turn an agricultural lien into a security interest. The attachment rules of Article 9 do not apply to agricultural liens; rather, agricultural liens attach according to the rules in the statutes that created agricultural liens. Similarly, 71-3-902 clearly delineates the procedure for perfecting an agricultural lien. This case presented a potential conflict regarding lien priority in that this section grants agricultural liens a superpriority status that is not dependent on being the first to file, while 30-9A-322 states that an agricultural lien has priority over a conflicting security interest on the same collateral if the lien is perfected pursuant to 30-9A-310 of the U.C.C. Thus, agricultural lienors must satisfy the perfection requirements of 30-9A-310 in addition to the perfection requirements of 71-3-902, and by doing so, the lienors will be insulated from the U.C.C. first-in-time rule and retain the superpriority status pursuant to this section. However, because agricultural liens require the same and more information as a U.C.C. filing and both filings are documented in the same database, the filing of an agricultural lien with the Secretary of State also satisfied the financing statement requirements of the U.C.C., and a duplicate filing of a U.C.C. financing statement is not required. Stockman Bank of Mont. v. Mon-Kota, Inc., 2008 MT 74, 342 M 115, 180 P3d 1125 (2008).

71-3-908. Acknowledgment of satisfaction and discharge of lien — penalty.

Compiler's Comments

1999 Amendment: Chapter 305 in (2) substituted "30-9-533" (renumbered 30-9A-513) for "30-9-404"; and made minor changes in style. Amendment effective July 1, 2001.

1987 Amendment: Inserted (2) requiring filing of a termination statement with the Secretary of State.

Part 10
Labor and Material Liens on Oil and Gas Wells and Pipelines

71-3-1002. Lien for labor and materials furnished for use on leasehold for oil and gas purposes or pipelines — exceptions.

Compiler's Comments

2009 Amendment: Chapter 367 in (1) near end of introductory clause substituted "may have a lien" for "shall have a lien"; in (1)(e) after "leasehold" substituted "subject to the provisions of Title 71, chapter 3, part 16" for "and the proceeds thereof inuring to the working interest therein as such working interest existed on the date the labor was first performed or materials or services were first furnished"; in (3) near beginning after "granted" inserted "under subsection (1)"; and made minor changes in style. Amendment effective October 1, 2009.

Saving Clause: Section 13, Ch. 367, L. 2009, was a saving clause.

Case Notes

Amount of Lien — Overstatement Not to Invalidate in Absence of Fraud: An overstatement of the amount due does not invalidate a lien, absent fraud or bad faith. Mtn. States Resources, Inc. v. Ehlert, 195 M 496, 636 P2d 868, 38 St. Rep. 2061 (1981).

Lien Statutes to Receive Liberal Construction — Exact Language Not Required in Filing: Lien statutes should receive a liberal construction to the end that the objects and purposes of the statutes may be carried out. Therefore, there is no legal requirement that parties filing liens must use the exact language of the statute relied on. Mtn. States Resources, Inc. v. Ehlert, 195 M 496, 636 P2d 868, 38 St. Rep. 2061 (1981).

Naming Undisclosed Principal in Original Lien: On September 27, 1977, plaintiff Mountain States Resources, Inc. (MSR) contracted with defendant to have him furnish and erect three steel buildings to be used in connection with the Gypsy-Highview Gathering System (GHGS) for natural gas. Monte Grand Exploration, Inc. (MGE) was an undisclosed principal of MSR. The buildings were completed, and at the request of MSR's supervisory agent, flashing was installed on two buildings, which flashing was not called for in the contract. On January 18, 1978, MSR paid the contract but refused to pay for the additional flashing. On March 8, 1978, defendant filed a lien against the proceeds of any gas MSR sold to Montana Power Company. MSR sued to set aside the lien and to recover for slander of title. Defendant joined MGE and sought to foreclose the lien. MGE contended the lien against it was invalid because it was not named in the original lien. MGE was not named in the lien as required by 71-3-1002, but the District Court found that there was an agent-undisclosed principal relationship between MSR and MGE. Defendant was unaware of this relationship until after he filed the lien. Consequently, defendant joined MGE in the suit when he filed his answer and counterclaim. The lien was valid. Mtn. States Resources, Inc. v. Ehlert, 195 M 496, 636 P2d 868, 38 St. Rep. 2061 (1981).

Oil and Gas Lien Proper for Labor and Materials on Pipeline: This section provides a lien is valid "whether or not such material is incorporated therein or becomes a part thereof". Therefore, an oil and gas lien on labor, services, and materials provided on a gas pipeline was valid. Mtn. States Resources, Inc. v. Ehlert, 195 M 496, 636 P2d 868, 38 St. Rep. 2061 (1981).

Agent or Trustee Empowered to Contract: The contract for work or materials, express or implied, which under this section forms the basis for the lien thereby created, may be with the owner of an oil and gas leasehold or with his agent or trustee. Blose v. Havre Oil & Gas Co., 96 M 450, 31 P2d 738 (1934), followed in Mtn. States Resources, Inc. v. Ehlert, 195 M 496, 636 P2d 868, 38 St. Rep. 2061 (1981).

Time of Attachment of Lien:

When a mechanic for work performed on an oil and gas leasehold perfects his lien by compliance with the provisions of Title 71, ch. 3, part 10, it takes effect as of the date of the commencement of his work on the property charged. Blose v. Havre Oil & Gas Co., 96 M 450, 31 P2d 738 (1934).

The lien of one who furnishes material for the drilling of an oil well attaches under this section when he parts with his material on credit. Cont. Supply Co. v. White, 92 M 254, 12 P2d 569 (1932).

Construction to Effect Purpose: Mechanics' and materialmen's lien (now construction lien) laws should be construed whenever possible to promote their purpose, which is to secure payment of those who by their labor or materials enhance the value of the lienee's property. Blose v. Havre Oil and Gas Co., 96 M 450, 31 P2d 738 (1934).

Third Person's Interest: The lien granted by this section to one performing labor in drilling an oil well for the owner of a leasehold on oil and gas lands attaches only to any right, title, or interest of such owner. Therefore, when casing for a well was furnished to the leaseholder by a third person under a contract that if the well should prove a nonproducer the casing should be salvaged and returned to its owner, the lien of the drillers of the well did not extend to the casing. Cheadle v. Bardwell, 95 M 299, 26 P2d 336 (1933).

Deficiency Judgment Proper: In an action under this section to foreclose a lien for labor performed about an oil well, the court may, in the event the sale of the property covered by the lien is insufficient to pay the amount due plaintiff, provide for a deficiency judgment. Hockman v. Sunhew Petroleum Corp., 92 M 174, 11 P2d 778 (1932).

Federal Lease Prohibiting Assignment: The clause in an oil and gas lease issued by the federal government under which the lessee is prohibited from assigning or subletting it without the written consent of the Secretary of the Interior under penalty of forfeiture does not bar enforcement of a decree of foreclosure of a mechanics' lien (now construction lien) granted by this section on such leasehold. Hockman v. Sunhew Petroleum Corp., 92 M 174, 11 P2d 778 (1932).

Description of Property:

Section 71-3-511 (now repealed), made applicable by this section, requires no more than a description by which the property may be identified and makes no provision for a description of the owner. Cont. Supply Co. v. White, 92 M 254, 12 P2d 569 (1932).

Courts are reluctant to set aside mechanics' liens (now construction liens) merely because of a loose description of the property. The general rule is that if there be a substantial compliance with the statutory provisions and there appears enough in the description to enable one familiar with the locality to identify the property upon which the lien is claimed, it is sufficient. Callender v. Crossfield Oil Synd., 84 M 263, 275 P 273 (1929).

Material Not Furnished by Lienor: It was immaterial that complaint in an action to foreclose an oil well materialmen's lien (now construction lien), brought under this section and 71-3-1005, and special in character, affirmatively showed upon its face that certain casing on which the lien was claimed had not been furnished by plaintiff, though perhaps fatal under the general materialmen's (now construction lien) statute, 71-3-502 (now repealed). Cont. Supply Co. v. White, 92 M 254, 12 P2d 569 (1932).

Definition of "Owner": The word "owner" as used in this section does not mean the record owner, but does mean one who has an estate in the property which may be assigned or transferred. Therefore, a notice of lien which named the transferee under an agreement of sale of a lease as the "owner" of a leasehold (the owner of an equitable interest) was not defective in not naming as owner the legal owner. Callender v. Crossfield Oil Synd., 84 M 263, 275 P 273 (1929).

Parties to Foreclosure: In a proceeding to foreclose a mechanics' lien (now construction lien) instituted by an oil well driller under 71-3-501 (now repealed) and this section, asserted against a leasehold interest, neither the lessor nor, in the case of an assigned lease, the assignor is a necessary party. Sunburst Oil & Ref. Co. v. Callender, 84 M 178, 274 P 834 (1929).

71-3-1004. How lien perfected.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Lessee to Be Named: Under Title 71, ch. 3, part 10, the name of the owner of the leasehold rather than the owner of the land must appear in the lien claim. Blose v. Havre Oil & Gas Co., 96 M 450, 31 P2d 738 (1934).

71-3-1009. Liability fixed.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

71-3-1011. Notice to purchaser of oil and gas.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 367 in (1) at beginning deleted "Anything in this part to the contrary notwithstanding" and at end substituted "is subject to the provisions of Title 71, chapter 3, part 16, and must meet the requirements of subsection (2) before taking effect" for "shall not be effective against any purchaser of such oil or gas until"; in (2)(b) at end of first sentence after "proceeds" substituted "of the oil or gas upon which the lien is claimed" for "thereof, except to the extent of such part of the purchase price of such oil or gas or the proceeds thereof as may be owing by such purchaser at the time of delivery of such written notice"; and made minor changes in style. Amendment effective October 1, 2009.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

Saving Clause: Section 13, Ch. 367, L. 2009, was a saving clause.

Part 11
Liens of Certain Health Care Providers

71-3-1111. Short title.

Compiler's Comments

2015 Amendment: Chapter 224 inserted "Optometrist, Naturopathic Physician, Podiatrist, Ambulance Service, Rehabilitation Facility, Long-Term Care Facility". Amendment effective October 1, 2015.

2007 Amendment: Chapter 502 near middle after "Occupational Therapist" inserted "Acupuncturist" and near end before "Lien" substituted "Outpatient Center for Surgical Services" for "Ambulatory Surgical Facility"; and made minor changes in style. Amendment effective October 1, 2007.

Saving Clause: Section 52, Ch. 502, L. 2007, was a saving clause.

2001 Amendment: Chapter 86 near end after "Hospital" inserted "and Ambulatory Surgical Facility"; and made minor changes in style. Amendment effective March 20, 2001.

1993 Amendment: Chapter 384 after "Dentist" inserted "Psychologist, Licensed Social Worker, Licensed Professional Counselor".

1987 Amendment: Inserted "Physical Therapist, Occupational Therapist, Chiropractor, Dentist".

71-3-1112. Purpose.

Compiler's Comments

2015 Amendment: Chapter 224 inserted "optometrists, naturopathic physicians, podiatrists, ambulance services, rehabilitation facilities, long-term care facilities". Amendment effective October 1, 2015.

2007 Amendment: Chapter 502 in introductory clause near middle after "occupational therapists" inserted "acupuncturists" and after "hospitals" substituted "and outpatient centers for surgical services" for "ambulatory surgical facilities"; and made minor changes in style. Amendment effective October 1, 2007.

Saving Clause: Section 52, Ch. 502, L. 2007, was a saving clause.

2001 Amendment: Chapter 86 near beginning after "hospitals" inserted "and ambulatory surgical facilities"; and made minor changes in style. Amendment effective March 20, 2001.

1993 Amendments: Chapter 384 in introductory clause, after "dentistry", inserted "psychologists, licensed social workers, licensed professional counselors" and at end, after "medical", inserted "or other".

Chapter 454 near middle of introductory clause, after "hospitals", inserted "for the value of services rendered and products provided for the diagnosis and treatment of medical conditions and to establish lien rights for psychologists, licensed social workers, and licensed professional counselors for services rendered and products provided" and near end, after "receiving", deleted "medical".

Coordination: Section 3, Ch. 454, L. 1993, provided: "If Senate Bill No. 352 and [this act] are both passed and approved, then 71-3-1112 and 71-3-1114 must read as follows". A version of each section followed that combined the amendments from both Senate Bill No. 352 and Ch. 454, L. 1993, with some additional changes in grammar and style. Senate Bill No. 352 was approved as Ch. 384, L. 1993; therefore, the amendments in sec. 3, Ch. 454, L. 1993, were codified as directed. See Ch. 454 1993 amendment note for actual language of amendments.

1987 Amendment: In introductory clause inserted "physical therapists, occupational therapists, chiropractors, persons practicing dentistry".

1983 Amendment: In (2), substituted "either insured or a beneficiary under insurance" for "insured".

71-3-1113. Definitions.

Compiler's Comments

2017 Amendment — Coordination: Chapter 314 inserted definition of ambulance service and substituted current definition of insurer for former definition that read: ""Insurer" includes a health service corporation"; and made minor changes in style. Amendment effective May 4, 2017.

Pursuant to sec. 2, Ch. 314, L. 2017, a coordination section, the code commissioner in definition of ambulance service substituted "Title 33, chapter 2, part 22" for "50-6-320".

2007 Amendment: Chapter 502 inserted definition of outpatient center for surgical services; deleted definition of ambulatory surgical facility that read: ""Ambulatory surgical facility" means a facility registered as provided in 50-32-314"; and made minor changes in style. Amendment effective October 1, 2007.

Saving Clause: Section 52, Ch. 502, L. 2007, was a saving clause.

2001 Amendment: Chapter 86 inserted definition of ambulatory surgical facility; inserted definition of dentist; and made minor changes in style. Amendment effective March 20, 2001.

Repeal of Termination Date: Section 4, Ch. 469, L. 1991, which provided that the 1991 amendments to this section terminated April 17, 1993, was repealed by sec. 1, Ch. 35, L. 1993. Repealer effective February 11, 1993.

1991 Amendment: In definition of insurance inserted second sentence to include a health service corporation. Amendment effective April 17, 1991.

Termination Date: Section 4, Ch. 469, L. 1991, provided: "[This act] terminates [2 years after the effective date of this act]." Effective April 17, 1991, and terminates April 17, 1993.

71-3-1114. Liens of certain health care providers and health care facilities.

Compiler's Comments

2015 Amendment: Chapter 224 in (1)(a)(i), (1)(b), (2)(a)(i), and (3) inserted "optometrist, naturopathic physician, podiatrist, rehabilitation facility, long-term care facility". Amendment effective October 1, 2015.

2007 Amendments — Composite Section: Chapter 295 in (1)(a)(i), (1)(b), (2)(a)(i), and (3) inserted reference to ambulance service; and made minor changes in style. Amendment effective October 1, 2007.

Chapter 502 throughout section after "occupational therapist" inserted "acupuncturist" and throughout section substituted "outpatient center for surgical services" for "ambulatory surgical facility"; and made minor changes in style. Amendment effective October 1, 2007.

Saving Clause: Section 52, Ch. 502, L. 2007, was a saving clause.

2001 Amendments — Composite Section: Chapter 86 throughout section after "hospital" inserted reference to ambulatory surgical facility; and made minor changes in style. Amendment effective March 20, 2001.

Chapter 236 substituted (3) providing that certain health care workers who claim a lien are not liable for attorney fees and costs for former (3) that read: "(3) The lien is subject to the lien of an attorney provided in 37-61-420." Amendment effective October 1, 2001.

Coordination Instruction: Section 2, Ch. 236, L. 2001, a coordination instruction, provided that if House Bill No. 309 and [this act] (Ch. 236, L. 2001) were both passed and approved, then 71-3-1114(3) must be amended by adding "ambulatory surgical facility" to the list of entities that are not liable for attorney fees and costs. House Bill No. 309 was approved as Ch. 86, L. 2001.

1993 Amendments: Chapter 384 throughout section, after "dentistry", inserted reference to psychologists, licensed social workers, and licensed professional counselors; near end of (1)(a) and (1)(b), after "disease", inserted "counseling service"; and made minor changes in style.

Chapter 454 at beginning of (1)(a) inserted "Upon the required notice of a lien being given, there is a lien as provided in subsection (1)(b)"; in (1)(a)(i), after "services", inserted "or provides products for the diagnosis and treatment of a medical condition"; inserted (1)(a)(ii) that read: "(ii) a psychologist, licensed social worker, or licensed professional counselor renders services or provides products"; at beginning of (1)(a)(iii) inserted "the services rendered or products provided under subsection (1)(a)(i) or (1)(a)(ii) are rendered or provided"; near middle of (1)(b), after "hospital", substituted "psychologist, licensed social worker, or licensed professional counselor" for "upon giving the required notice of lien" and near end, after "rendered", inserted "or products provided"; in (2)(a), after "disease", inserted "there is a lien as provided in subsection (2)(b) upon required notice of a lien being given by"; in (2)(a)(i), after "hospital", deleted "upon giving the required notice of lien, has a lien" and after "rendered" inserted "or products provided for the diagnosis and treatment of a medical condition"; inserted (2)(a)(ii) that read: "(ii) a psychologist, licensed social worker, or licensed professional counselor for services rendered or products provided"; and made minor changes in style.

Coordination: Section 3, Ch. 454, L. 1993, provided: "If Senate Bill No. 352 and [this act] are both passed and approved, then 71-3-1112 and 71-3-1114 must read as follows". A version of each section followed that combined the amendments from both Senate Bill No. 352 and Ch. 454, L. 1993, with some additional changes in grammar and style. Senate Bill No. 352 was approved as Ch. 384, L. 1993; therefore, the amendments in sec. 3, Ch. 454, L. 1993, were codified as directed. See Ch. 454 1993 amendment note for actual language of amendments.

1987 Amendment: In three places inserted "physical therapist, occupational therapist, chiropractor, person practicing dentistry".

Interim Study Committee Bill: Chapter 85, L. 1987, was introduced at the request of the Joint Interim Subcommittee on Lien Laws. See "Creditor's Rights vs. Debtor's Shields", A Report to the 50th Legislature, Mont. Leg. Council, Nov. 1986.

Case Notes

Attorney Lien Priority Over Chiropractor Lien: Under 71-3-113, other things being equal, different liens on the same property have priority according to the time of their creation. Relying on 71-3-113, the District Court concluded that, having been filed first, a chiropractor's lien had priority over an attorney's lien. However, this section specifically provides that an attorney's lien has priority over a chiropractor's lien, regardless of the time of the liens' creation, so the District Court's declaration of lien priority was reversible error. Wyant v. Kenda, 2004 MT 348, 324 M 342, 102 P3d 1260 (2004).

Common Fund Doctrine Equitable Exception to American Rule Regarding Award of Attorney Fees Applicable to Medical Services Lien — Elements of Doctrine: Kilmer suffered severe injuries as a passenger in a vehicle driven by Hall. Kilmer received medical attention from a North Dakota hospital, which subsequently perfected a lien for the value of its services in the amount of $309,000. Hall had no insurance, but the co-owner of the vehicle had a $500,000 policy with Mountain West Farm Bureau (Mountain West). The policy had a step-down provision limiting Mountain West's liability to $25,000 for passengers other than the insured or a relative of the insured, so Mountain West initially found that Kilmer was entitled to only $25,000. However, after negotiating with Kilmer's attorney, Mountain West agreed to proffer the policy limit of $500,000, plus $30,000 in no-fault coverage. Mountain West then filed a complaint for interpleader, the hospital cross-claimed against Kilmer for satisfaction of its lien, and Kilmer cross-claimed against the hospital for a reduction in the hospital's recovery for a pro rata portion of Kilmer's attorney fees incurred in negotiating the settlement with Mountain West. The District Court applied Sisters of Charity of Providence of Mont. v. Nichols, 157 M 106, 483 P2d 279 (1971), and held that the hospital was not liable for a pro rata portion of Kilmer's attorney fees. Kilmer appealed, and the Supreme Court reversed. Under the 1999 version of this section applicable to this case, the hospital had a valid lien for its medical services; however, the statute was silent on the issue of attorney fee apportionment (see, however, 2001 amendments addressing a hospital's pro rata liability for an injured person's attorney fees). Generally, Montana follows the American rule that a party in a civil action is not entitled to attorney fees absent a specific contractual or statutory grant of those fees. There are exceptions to the American rule, one of which is the common fund doctrine authorizing the spread of fees among the individuals who benefit from the litigation that created the common fund. The three elements necessary to establish a common fund, as set out in Means v. Mont. Power Co., 191 M 395, 625 P2d 32 (1981), and Murer v. St. Comp. Mut. Ins. Fund, 283 M 210, 942 P2d 69 (1997), are: (1) one party, known as the active beneficiary, must create, reserve, or increase a common fund; (2) the active beneficiary must incur legal fees in establishing the common fund; and (3) the common fund must benefit ascertainable, nonparticipating beneficiaries. To the extent that there are inequities in the contributions of participating counsel, the court may then intervene to allocate fees accordingly. Because the common fund doctrine was not raised in Sisters of Charity of Providence of Mont. v. Nichols, the Supreme Court held that that case did not preclude application of the doctrine in the present case. Thus, the District Court erred as a matter of law in relying on Sisters of Charity of Providence of Mont. v. Nichols to grant the hospital's partial summary judgment. Although the Supreme Court declined to rule on the applicability of the common fund doctrine here because the parties did not present arguments in District Court as to whether Kilmer could satisfy the elements of the doctrine, the case was remanded to allow Kilmer to present arguments on the applicability of the common fund doctrine. Mtn. W. Farm Bureau Mut. Ins. Co. v. Hall, 2001 MT 314, 308 M 29, 38 P3d 825 (2001), followed in Flynn v. St. Comp. Ins. Fund, 2002 MT 279, 312 M 410, 60 P3d 397 (2002).

Health Service Corporations Not Subject to Physician Liens: In 1987, the Legislature amended the insurance code to include health service corporations. The plaintiff sent a lien notice to the defendant that was ignored by the defendant, and the insurance proceeds were paid directly to the patient. The lower court ruled that the 1987 amendment to the insurance code made health service corporations subject to the physician lien statutes. The Supreme Court reversed, stating that the Legislature did not specifically state that it was subjecting health service corporations to the lien statutes and that therefore the Supreme Court would not presume that intention. (See 1991 amendment to 71-3-1113.) Anesthesiology, P.C. v. Blue Cross & Blue Shield, 246 M 277, 806 P2d 16, 47 St. Rep. 2015 (1990).

71-3-1115. Notice of lien.

Compiler's Comments

2015 Amendment: Chapter 224 in (1) and (2) inserted "optometrist, naturopathic physician, podiatrist, ambulance service, rehabilitation facility, long-term care facility". Amendment effective October 1, 2015.

2007 Amendment: Chapter 502 in (1) and (2) after "occupational therapist" inserted "acupuncturist" and substituted "outpatient center for surgical services" for "ambulatory surgical facility"; and made minor changes in style. Amendment effective October 1, 2007.

Saving Clause: Section 52, Ch. 502, L. 2007, was a saving clause.

2001 Amendment: Chapter 86 in (1) and (2) after "hospital" inserted "or ambulatory surgical facility"; and made minor changes in style. Amendment effective March 20, 2001.

1993 Amendment: Chapter 384 in (1) and (2), after "dentistry", inserted "psychologist, licensed social worker, licensed professional counselor"; in (1), after "disease", inserted "counseling service"; and made minor changes in style.

1987 Amendment: In (1) and (2) inserted "physical therapist, occupational therapist, chiropractor, person practicing dentistry".

71-3-1117. Liability for failure to recognize lien.

Compiler's Comments

2015 Amendment: Chapter 224 in two places inserted "optometrist, naturopathic physician, podiatrist, ambulance service, rehabilitation facility, long-term care facility"; and made minor changes in style. Amendment effective October 1, 2015.

2007 Amendment: Chapter 502 in two places after "occupational therapist" inserted "acupuncturist" and substituted "outpatient center for surgical services" for "ambulatory surgical facility"; and made minor changes in style. Amendment effective October 1, 2007.

Saving Clause: Section 52, Ch. 502, L. 2007, was a saving clause.

2001 Amendment: Chapter 86 in two places after "hospital" inserted "or ambulatory surgical facility"; and made minor changes in style. Amendment effective March 20, 2001.

1993 Amendment: Chapter 384 near beginning, after "disease", inserted "counseling service" and in two places, after "dentistry", inserted "psychologist, licensed social worker, licensed professional counselor".

1987 Amendment: In two places inserted "physical therapist, occupational therapist, chiropractor, person practicing dentistry".

Case Notes

Assignment of Interest in Insurance Proceeds to Chiropractor for Cost of Services — Chiropractor Properly Designated Payee: Following an automobile accident, Wyant assigned her interest in payment of insurance proceeds to her chiropractor to the extent of the cost of the chiropractor's services. The chiropractor then filed a notice of lien with the insurer. The insurer's offer of settlement was for the full sum and included the chiropractor's bill. To honor the lien, the insurer named the chiropractor as payee on the settlement check, which was an appropriate way for the insurer to satisfy its statutory obligation. Although not required, naming the chiropractor as payee was not error. Wyant v. Kenda, 2004 MT 348, 324 M 342, 102 P3d 1260 (2004).

71-3-1118. Applicability.

Compiler's Comments

2015 Amendment: Chapter 224 in (3)(b) inserted "optometrist, naturopathic physician, podiatrist, ambulance service, rehabilitation facility, long-term care facility". Amendment effective October 1, 2015.

2007 Amendment: Chapter 502 in (2) after "therapy" inserted "acupuncture"; in (3)(b) after "occupational therapist" inserted "acupuncturist" and at end substituted "outpatient center for surgical services" for "ambulatory surgical facility"; and made minor changes in style. Amendment effective October 1, 2007.

Saving Clause: Section 52, Ch. 502, L. 2007, was a saving clause.

2005 Amendment: Chapter 416 in (1) at end after "Compensation Act" deleted "or the Occupational Disease Act of Montana". Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

2001 Amendment: Chapter 86 in (3)(b) after "hospital" inserted "or ambulatory surgical facility"; and made minor changes in style. Amendment effective March 20, 2001.

1993 Amendment: Chapter 384 in (2), after "dentistry", inserted "counseling"; and in (3), after "dentistry", inserted "psychologist, licensed social worker, licensed professional counselor".

Repeal of Termination Date: Section 4, Ch. 469, L. 1991, which provided that the 1991 amendments to this section terminated April 17, 1993, was repealed by sec. 1, Ch. 35, L. 1993. Repealer effective February 11, 1993.

1991 Amendment: In (3), near middle after "disability insurance", inserted exception clause. Amendment effective April 17, 1991.

Termination Date: Section 4, Ch. 469, L. 1991, provided: "[This act] terminates [2 years after the effective date of this act]." Effective April 17, 1991, and terminates April 17, 1993.

1987 Amendment: In (2), after "medical", inserted "therapy, chiropractic, dentistry".

1983 Amendment: In (1), at beginning inserted exception clause and after "does not apply to" substituted "compensation awarded to workers for injury, disease, or death" for "any injury, disease, or death for which compensation is awarded"; and inserted (2) making part applicable to medical and hospital payments awarded under Acts referred to in subsection (1).

Part 12

Agisters' Liens and Liens for Service

71-3-1201. Liens for service — towing and storage lien — extension of lien to certain personal property contained in motor vehicle that is subject to lien — nonpossessory special liens.

Compiler's Comments

2021 Amendment: Chapter 391 in (2)(a) at beginning of second sentence inserted exception clause; inserted (2)(c) regarding a nonpossessory special lien; inserted (2)(d) concerning the precedence over perfected security interests and service of process; and made minor changes in style. Amendment effective October 1, 2021.

2013 Amendment: Chapter 124 deleted former (1)(a) that read: "(1) (a) If there is an express or implied contract for keeping, feeding, herding, pasturing, or ranching stock, a rancher, farmer, agister, herder, hotelkeeper, livery, stablekeeper, or reproductive technology business to whom any horses, mules, cattle, sheep, hogs, or other stock are entrusted has a lien upon the stock for the amount due for keeping, feeding, herding, pasturing, or ranching the stock or for providing a service listed in subsection (1)(b) and may retain possession of the stock until the sum due is paid"; in (1) after "livestock" deleted "provided for in this subsection (1)"; and made minor changes in style. Amendment effective October 1, 2013.

2007 Amendment: Chapter 134 inserted (2)(b) providing that personal property in a motor vehicle subject to a lien is also subject to lien and listing personal property items not subject to lien; and made minor changes in style. Amendment effective October 1, 2007.

2003 Amendment: Chapter 444 in (1)(a) near middle after "stablekeeper" inserted "or reproductive technology business" and near end after "ranching the stock" inserted "or for providing a service listed in subsection (1)(b)"; inserted (1)(b) providing that a reproductive technology business is entitled to a lien on and to retain possession of embryos or semen until paid; and made minor changes in style. Amendment effective April 21, 2003.

Saving Clause: Section 5, Ch. 444, L. 2003, was a saving clause.

1999 Amendment: Chapter 169 in (2) in first sentence after "carriage" inserted "towing, or storage of the article or tows or stores the article as directed under authority of law" and inserted third sentence establishing that the lien is for the reasonable cost of the towing or storage; and made minor changes in style. Amendment effective October 1, 1999.

Case Notes

No Implied Contract Agister's Lien Absent Custody or Control of Cattle: Bellanger obtained loans from the Daniels-Sheridan Federal Credit Union to finance a ranching operation, securing the loans with several promissory notes securing an interest in the cattle on the ranch. Bellanger subsequently defaulted on the loans, and the credit union initiated an action to enforce the promissory notes pursuant to the Uniform Commercial Code. The case broadened to encompass a dispute over proceeds from the sale of the cattle to include Bellanger's father Alfred, who asserted an agister's lien for having kept the cattle on his property. The cattle were subsequently seized and sold for $79,012.27, and the District Court split the proceeds, with $45,467.94 paid to the credit union and a judgment for the remainder owed on the promissory notes and $33,544.33 paid to the owner of the auction company where Bellanger customarily sold cattle, but Alfred and Bellanger were foreclosed of all interest in the proceeds. On appeal, Alfred asserted that his agister's lien should have entitled him to some of the proceeds. Alfred contended that an agister's lien was commenced via an implied contract when the credit union obtained a preliminary injunction against removal or sale of the cattle, which required Alfred to care for the cattle on his property, pursuant to 27-1-222, 45-8-211, and 70-6-206. The Supreme Court affirmed the District Court's finding that because Alfred never had custody or control of the cattle, allowing Bellanger to run the cattle on the property rent-free in exchange for looking after Alfred's cattle, the statutory duties upon which Alfred relied in support of an implied contract agister's lien were inapplicable. The court declined to recognize any manner for the creation of an agister's lien except as provided in this section. Daniels-Sheridan Fed. Credit Union v. Bellanger, 2001 MT 235, 307 M 22, 36 P3d 397 (2001). (See 2013 amendment deleting language pertaining to the keeping of livestock.)

Denial of Agister's Lien by Summary Judgment — Vagueness of Underlying Agreement: While acknowledging that pursuant to Heckman & Shell v. Wilson, 158 M 47, 487 P2d 1141 (1971), an agister's lien may be enforceable without further specification in the underlying agreement regarding the price for the services, at a minimum, the material elements of a contract must be present in general terms. In the present case, not only were the material terms missing, but the agreement upon which the lien was based was so vague as to create more questions about the parties' expectations than it did purported certainties about their alleged obligations to perform. Because the agreement on which the claim of an agister's lien against the estate was unenforceable, the District Court did not err in summarily denying the existence of the lien. In re Estate of Bolinger, 1998 MT 303, 292 M 97, 971 P2d 761, 55 St. Rep. 1251 (1998).

Possession by Repair Facility Not Depriving Owner of Use — No Lien: A pickup truck that had money owing for repairs and was subsequently located at the repair facility may have been in the possession of the repair facility, but that possession did not imply that there was an artisan's lien on it, nor was the owner prevented from taking possession of the truck at any time; thus, the Supreme Court held the District Court did not err in holding that the owner of the truck was not deprived of use of the vehicle. Willoughby v. Sweeny, 222 M 231, 720 P2d 1202, 43 St. Rep. 1222 (1986).

Effect of Jury Verdict: The parties entered into an oral agreement for the lease of the defendants' lands for the purpose of grazing cattle. Payments were monthly. Plaintiff claimed the lease was month-to-month. Defendants claimed the lease was a 3-year lease. After 1½ years, the plaintiff terminated the lease. Defendants refused to allow the plaintiff to remove his cattle, asserted an agister's lien on the cattle, and sought damages for overgrazing and rental payments for the remainder of the second year of the lease. The jury found in favor of the defendants, awarded them damages of $7,000, and directed that the plaintiff's cattle be returned to him. The Supreme Court refused to alter or amend the judgment on the limited issue of damages on the grounds that to do so would frustrate the purpose of the jury, regardless of whether the defendants' claim of an agister's lien was valid. Hill v. Turley, 218 M 511, 710 P2d 50, 42 St. Rep. 1783 (1985). (See 2013 amendment deleting language pertaining to the keeping of livestock.)

Improper Jury Instructions — Elements of Crime — Failure to Pursue Civil Lien Remedy Implying Theft — "Plain Error": The jury was not instructed on the statutory elements of the crime. The jury's instructions on the defendant's civil remedy, an agister's lien, permitted the inference from his failure to pursue the civil remedy that he was guilty of theft. In granting a new trial, the Supreme Court noted that the issue of jury instructions not offered or objected to at trial, usually a nonappealable issue, was reviewed here to determine if the jury was properly instructed. The failure to instruct on the elements of the crime constituted "plain error". Instructing the jury that each element of the crime had to be proved was insufficient if the elements were not given to the jury as well. St. v. Lundblade, 191 M 526, 625 P2d 545, 38 St. Rep. 441 (1981), distinguished in St. v. Williams, 2015 MT 247, 380 Mont. 445, 358 P.3d 127.

Contract Required:

Under this statute there must be a delivery of possession and a contract for the keeping before a lien is created. Engle v. Pfister, 127 M 65, 257 P2d 561 (1953).

An agisters' lien can arise only when the owner or person in lawful possession of the stock delivers it to the ranchman or farmer under a contract, express or implied, to care for the stock. Noel v. Cowan, 80 M 258, 260 P 116 (1927).

Mechanics' Lien: The fact that a machinery repair company did not assert a lien under this section does not deprive it of the right to claim a mechanics' lien (now construction lien) under 71-3-501 (now repealed). Caird Eng'r Works v. Seven-Up Gold Min. Co., Inc., 111 M 471, 111 P2d 267 (1941).

Motor Vehicle Storage: An operator of a garage who claimed to hold an automobile for storage charges was entitled to a lien on the car and, in retaining same to secure his lien for storage charges, he was not liable for wrongful conversion thereof. Bethel v. Giebel, 101 M 410, 55 P2d 1287 (1936).

Employee Claims Not Covered:

This section applies only to one entrusted with the care, custody, and control of animals under a contract of bailment, and under it a lien is not given to an employee or a herder on the livestock of his employer for wages due for herding them. Love v. Hecer, 67 M 497, 215 P 1099 (1923).

Persons employed to drive cattle are not herders and, consequently, are not entitled to a herders' lien. Before a lien is created, there must be a delivery of possession and a contract for the keeping of the cattle for the purpose of feeding, herding, ranching, or pasturing. Underwood v. Birdsell, 6 M 142, 9 P 922 (1886). See Vose v. Whitney, 7 M 385, 16 P 846 (1888).

Sheriff Appointing Agister: When cattle are taken into the possession of the Sheriff by virtue of the terms of a chattel mortgage authorizing such possession in case of default and plaintiff, by direction of a deputy of the Sheriff, took charge of the cattle and fed and pastured them, during which time the debt secured by the mortgage was settled, the plaintiff has a lien on the cattle. Vose v. Whitney, 7 M 385, 16 P 846 (1888).

71-3-1202. Priority.

Compiler's Comments

2003 Amendment: Chapter 444 in (1) at beginning inserted "Subject to subsection (4)"; inserted (4) providing that for a reproductive technology business's lien to take precedence over other perfected security interests, a written notice must be given to the other secured parties; and made minor changes in style. Amendment effective April 21, 2003.

Saving Clause: Section 5, Ch. 444, L. 2003, was a saving clause.

1983 Amendment: In (1), increased time of giving notice to 30 days from 10 days; near end of (1) after "amount of work" deleted "or feed"; after "performed or" inserted "feed or other services"; in (3) increased time for taking possession from 10 days to 20 days in case of mailing notice and from 5 days to 10 days after personal service.

Case Notes

Notice to Secured Party: Automobile repairman's asserted agisters' lien did not have priority over bank's security interest when person authorizing repairs was not registered owner or agent of owner and notice of lien was not given to bank within 10 days of receipt of vehicle for repair.

Failure to file copy of lien with Registrar of Motor Vehicles as required by 61-3-103 also rendered the asserted agisters' lien invalid. Repossession of vehicle on behalf of bank did not, under these circumstances, constitute conversion. Parker v. West, 161 M 170, 505 P2d 94 (1973).

Other Recorded Liens: The term "other recorded liens" includes conditional sales contracts. Williamson v. Skerritt, 141 M 422, 378 P2d 215 (1963).

71-3-1203. Enforcement of lien — sale.

Compiler's Comments

2021 Amendment: Chapter 391 in (2) after "is made under this section" inserted "for a lien other than a nonpossessory special lien"; inserted (3) regarding a nonpossessory special lien; and made minor changes in style. Amendment effective October 1, 2021.

2013 Amendment: Chapter 186 in first sentence substituted "lienor" for "person entitled to a lien"; inserted (1) providing jurisdiction in which lienor may file an action; inserted (2) describing required contents of affidavit; inserted (3) requiring court to hold show cause hearing and providing deadlines; in (4) substituted "lienor" for "person", after "sheriff" deleted "or a constable", and after "located" substituted "a copy of the court's lien enforcement judgment" for "an affidavit of the amount of the person's claim against the property, a description of the property, and the name of the owner of the property or of the person at whose request the work, labor, or services were performed or the feed or material was furnished"; deleted former (4) that read: "(4) Before the sheriff or constable sells the property at public auction, the sheriff or constable shall give notice of the sale to the owner or person at whose request the work, labor, or services were performed or the feed or material was furnished.

(a) Notice to the owner must be given at least 10 days before the sale.
(b) The notice must state:
(i) the time and place of the sale;
(ii) the amount of the claim against the property;
(iii) a description of the property;
(iv) the name of the owner or person who contracted for the services or materials; and
(v) the name of the person claiming the lien.

(c) The notice may be given by personal service or by mailing by certified mail a copy of the notice to the last-known post-office address of the owner or person who contracted for the work, labor, or services performed or the feed or material furnished.

(d) If the sheriff or constable is not able to effect personal service or service by mail because the location and mailing address of the owner or the contracting person are unknown, the sheriff or constable may give notice by posting notice of the sale in three public places in the county in which the property is located"; in (5) substituted "court's lien enforcement judgment" for "affidavit", after "sheriff" deleted "or constable", and after "shall" deleted "proceed to"; deleted former (6) that read: "(6) However, before seizing any property under the provisions of this section, the sheriff may require an indemnity bond from the lienor that may not exceed double the amount of the claim against the property. The bond and the surety or sureties on the bond must be approved by the sheriff"; inserted (7) allowing a property owner to request a hearing; and made minor changes in style. Amendment effective July 1, 2013.

Preamble: The preamble attached to Ch. 186, L. 2013, provided: "WHEREAS, Article II, section 17, of the Montana Constitution provides "No person shall be deprived of life, liberty, or property without due process of law" and Section 1 of the Fourteenth Amendment to the United States Constitution provides "nor shall any State deprive any person of life, liberty, or property, without due process of law"; and

WHEREAS, in light of these constitutional due process provisions, the United States District Court for the District of Montana in Cox v. Yellowstone County, 795 F. Supp. 2d 1128 (2011), held that the Court "can conceive of no set of circumstances under which Montana's agisters' lien statute could pass constitutional muster in view of procedural due process requirements. Particularly, the need to provide a meaningful opportunity to be heard prior to a government deprivation of property"; and

WHEREAS, the Court in Cox v. Yellowstone County further held that "the enforcement provision of Montana's agisters' lien statute, Mont. Code Ann. § 71-3-1203, is unconstitutional as written"; and

WHEREAS, this Act revises Montana's agisters' lien enforcement laws to conform with the due process provisions of the Montana and United States Constitutions."

Applicability: Section 3, Ch. 186, L. 2013, provided: "[This act] applies to all proceedings and actions initiated on or after [the effective date of this act]." Effective July 1, 2013.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1987 Amendments: Chapter 87 in introduction substituted "this part" for "this section"; in (1) substituted "an affidavit" for "a statement"; in (2) substituted "affidavit" for "statement"; and inserted (4) requiring notice of the sale and stating the notice procedure and requirements. (Note: amendment to (3) concerning public notice of sale was voided by Ch. 88.)

Chapter 88 at end of (3) substituted "prescribed in 25-13-701(1)(b)" for "provided by law for the sale of mortgaged personal property by sheriffs. Such notice shall be given for not less than 5 or more than 10 days prior to the date of sale"; and in (6), before "double the amount", substituted "that may not exceed" for "in not to exceed".

Interim Study Committee Bill: Chapter 87, L. 1987, was introduced at the request of the Joint Interim Subcommittee on Lien Laws. See "Creditor's Rights vs. Debtor's Shields", A Report to the 50th Legislature, Mont. Leg. Council, Nov. 1986.

Case Notes

Actual Notice of Agisters' Lien Sale: The notice in this section must be reasonably calculated to reach the owners of the livestock. Two written notices were mailed to plaintiffs 10 days before sale. Plaintiffs also received two telephone calls 1 week before the sale. Because plaintiffs received sufficient actual notice, the Supreme Court refused to consider due process arguments and directed the attention of the Montana Legislature to the notice provisions in this section. Rose v. Myers, 223 M 13, 724 P2d 176, 43 St. Rep. 1493 (1986). See also Cox v. Yellowstone County, 795 F.Supp. 2d 1128 (2011), holding the pre-2013 amended version of 71-3-1203 unconstitutional for failing to provide an opportunity for a hearing prior to the sale of the property.

Commercial Reasonableness of Agisters' Lien Sale: Appellants claimed the sale of horses at an agisters' lien sale was not commercially reasonable because the horses were sold in lots at less than their value. Looking to 30-9-507 (now repealed) for guidance, the Supreme Court stated that the sale of horses at a low price in lots instead of individually did not make the sale commercially unreasonable. Testimony indicated that horses were often sold in this manner and could have been sold individually if a bidder had so requested. Rose v. Myers, 223 M 13, 724 P2d 176, 43 St. Rep. 1493 (1986).

71-3-1205. Definition.

Compiler's Comments

Saving Clause: Section 5, Ch. 444, L. 2003, was a saving clause.

Effective Date: Section 6, Ch. 444, L. 2003, provided that this section is effective on passage and approval. Approved April 21, 2003.

71-3-1211. Agister's lien — finding — who may hold lien.

Compiler's Comments

Effective Date: This section is effective October 1, 2013.

71-3-1212. Priority

Compiler's Comments

Effective Date: This section is effective October 1, 2013.

71-3-1213. Enforcement of agister's lien — sale

Compiler's Comments

Effective Date: This section is effective October 1, 2013.

71-3-1214. Lien not lost by fraudulent taking of property

Compiler's Comments

Effective Date: This section is effective October 1, 2013.

Part 13
Liens on Real Estate

71-3-1301. Lien of seller of real property — waiver.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Transaction Neither Sale nor Mortgage — No Security Interest Created: Plaintiff purchased a ranch on behalf of defendant with defendant's money but put title to the ranch in plaintiff's name and operated the ranch for defendant. The parties subsequently executed documents to settle the dispute between them concerning the ranch property, including plaintiff's quitclaim deed of the property to defendant. Since the transaction did not involve either a sale or mortgage of the property, plaintiff did not hold a security interest in the ranch. An equitable lien did not arise under this section because there was no sale or mortgage, merely a contract to settle a dispute. O'Connor v. Lewis, 238 M 270, 776 P2d 1228, 46 St. Rep. 1260 (1989).

Revival of Contract of Sale: After several years default in installments, interest, and taxes on a contract for the sale of real property, defendant vendee gave plaintiff vendor a quitclaim deed to the property. The vendor then leased the property to vendee. The lease contained a provision that the property could be sold to vendee or anyone else during the term of the lease. The Supreme Court held that the ruling by the trial court that the sales contract had not been revived by the acts of the parties was proper. Spratt v. Pfeifle, 115 M 232, 142 P2d 563 (1943).

Retention of Title by Vendor:

This section, providing for a vendors' lien for so much of the purchase price of real property as remains unpaid and unsecured, has no application to an executory contract of sale under which the vendor retains title in himself until the purchase price is fully paid. Smith v. Bunston, 72 M 535, 234 P 836 (1925).

Under a contract of sale of property, legal title was to remain in the vendor until several of the deferred payments had been made. When the vendee failed to make a payment the vendor sued, asking for cancellation of the contract and for enforcement of the contractual provision requiring forfeiture of advance payments. The Supreme Court ruled that under 28-1-104, total forfeiture was not proper. However, the court stated that neither this section nor the provision of 71-3-109 declaring void "contracts for the forfeiture of property subject to a lien" was applicable. Cook-Reynolds Co. v. Chipman, 47 M 289, 133 P 694 (1913).

71-3-1302. Purchaser's lien on real property.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Rescission Not Granted — Failure of Consideration Required to Trigger Purchaser's Lien: Plaintiffs sought restitution in a rescission case, seeking return of their downpayment, investment in improvements, and payments on certain loans. Following their default, the property was resold, and plaintiffs contended that this section allowed them a purchaser's lien on the property. However, this section only applies to a case in which there is a failure of consideration and the purchaser is entitled to recover part of the amount paid. When, as here, rescission was not granted, there was no failure of consideration; therefore, this section did not apply. Schweigert v. Fowler, 240 M 424, 784 P2d 405, 47 St. Rep. 1 (1990).

Litigation Costs and Attorney Fees of Buyer as Part of Amount Paid for Property — Effect of Seller's Mortgage of Property to His Attorney to Secure Payment of Seller's Attorney Fees: In a dispute over a contract for the sale of a resort, buyer was granted rescission. Buyer was also granted costs and attorney fees. During the trial, sellers mortgaged the property to their attorney to secure their attorney fees. The words "amount paid" in a statute stating that one who pays any part of the price of real property has a special lien on the property for the part of "the amount paid" as he may be entitled to recover back in case of failure of consideration does not include that person's litigation costs and attorney fees. The statute did not give buyer a lien for the costs and attorney fees with priority over the mortgage of sellers' attorney. However, the equities of the case favored giving payment of buyer's costs and attorney fees priority over the mortgage of sellers' attorney. Sellers and their attorney knew a possible result of the litigation might be an award of costs and attorney fees to buyer, preventing sellers and their attorney from circumventing the ultimate result of the litigation. Warner v. Peterson, 234 M 319, 762 P2d 872, 45 St. Rep. 1939 (1988).

Foreclosure of Lien Not Rescission of Sale: In an action to foreclose a vendees' lien on land independent of possession under this section, the rules governing an action for the rescission of a contract are not applicable, and therefore plaintiff was not required to show that he had placed or offered to place defendant in the position in which he was at the time the contract was entered into. Hollensteiner v. Anderson, 78 M 122, 252 P 796 (1927).

Part 14
Hotel Liens

71-3-1401. Lien of hotelkeepers.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

71-3-1402. Enforcement of lien.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

71-3-1403. Notice of sale.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 15
Miscellaneous Liens

71-3-1501. Lien of factor.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

71-3-1502. Banker's lien.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Common-Law Right to Setoff Clarified: The right of setoff exists between any mutual debtors and creditors where the debts have matured and the parties mutually are debtors and creditors of and to each other. It is a general rule that when a depositor is indebted to a bank and the debts are mutual, the bank may apply deposits to a payment of the debt due it by the depositor, provided there is no express agreement to the contrary and the deposit is not specifically applicable to some other purpose. For a bank to establish the right to setoff, the fund to be set off must be owed by the bank to the debtor, the fund must be deposited without restrictions, and the existing indebtedness must be due and owing. Victor Werlhof Aviation Ins. v. Farmers St. Bank, 237 M 51, 771 P2d 962, 46 St. Rep. 613 (1989). See also Sec. St. Bank v. First Nat'l Bank, 78 M 389, 254 P 417 (1927).

Setoff Improperly Applied Before Note Due or Default Occurs: A bank applied a setoff before any demand for payment was made or indebtedness matured under the theory of the general bank lien expressed in this section and the right to accelerate performance in good faith under 30-1-208. The argument was discounted by the Supreme Court, noting that the right of setoff does not arise simply from the lien and that under the long-established rule that when money is deposited in a bank to the credit of one of its debtors without an express agreement to the contrary or direction to apply to a specific purpose, the bank may apply the deposit only to satisfy past-due indebtedness. Bottrell v. Am. Bank, 237 M 1, 773 P2d 694, 46 St. Rep. 561 (1989), following Sec. St. Bank v. First Nat'l Bank, 78 M 389, 254 P 417 (1927).

71-3-1503. Officer's lien.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

71-3-1504. Judgment lien.

Law Review Articles

Montana and the Federal Judgment Lien, Weber, 8 Mont. L. Rev. 65 (1947).

71-3-1505. Lien for rental on frozen food compartments.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

71-3-1506. Tax deficiency lien.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 689, L. 2023. Amendment effective May 19, 2023.

Effective Date: Section 7, Ch. 545, L. 2005, provided that this section is effective July 1, 2005.

Part 16

Oil and Gas Owners' Lien

Part Compiler's Comments

Effective Date: This part is effective October 1, 2009.

Saving Clause: Section 13, Ch. 367, L. 2009, was a saving clause.

TITLE 72
ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS

CHAPTER 1
UNIFORM PROBATE CODE GENERAL PROVISIONS

Chapter Compiler's Comments

Comments for 1992 CLE Presentation on the "Montana" Uniform Probate Code:

This Comment was prepared for a CLE presentation entitled "The "Montana" Uniform Probate Code". The material was prepared and presented by Bjarne Johnson at the Uniform Law CLE in Missoula on April 25, 1992. Mr. Johnson can be considered the "father" of the Uniform Probate Code in Montana. The Code Commissioner has determined that the history and insight reflected in this material should be preserved and available to probate practitioners in Montana. The material follows:

Uniform Codes do not "just happen." After a Code is drafted and ready for submission to the various legislatures, what happens during that period of time can have a significant influence and impact on the Uniform Code that is ultimately adopted. At least this was true for the Uniform Probate Code in Montana, and many of the changes in the Code relate back to matters and events that occurred before and after the time the Code was submitted to the legislature for enactment.

BACKGROUND

Shortly after the Uniform Probate Code was approved by the National Conference of Commissioners on uniform state laws and the American Bar Association in 1969, Chief Justice Harrison and Joe McCaffery, then president of the Montana Bar Association, jointly appointed a special committee to study the Code and make recommendations back to the Bar Association and to the Court. Chief Justice Harrison had spent several years working on the Code before the final draft was submitted to the ABA for approval.

COMMITTEE MEMBERS

Committee members were Jack Dietrich and Bob Hendrickson from Billings, Sherman Lohn and Professor Lester Rusoff from Missoula, James Poore, Jr., Harold Dean and Bob Corette from Butte, James Morrow from Bozeman, Grover Schmidt from Fort Benton, Bill Baucus, Jack Stephenson, Dale Forbes and Bjarne Johnson from Great Falls, with Bjarne Johnson as chairman of the committee. The committee carefully studied the Code on a line-by-line, paragraph-by-paragraph basis. During the course of the study, the committee tried to compare the informal procedures of the new Code with the strictly supervised probate procedure in Montana, and it became more and more apparent that the Uniform Probate Code was a substantial improvement over the existing Montana law.

In the following year, the same committee approached the problem from a different direction. It endeavored to rewrite the existing Montana Code by incorporating into it what it thought were certain desirable provisions of the Uniform Probate Code. The effort was not successful. You simply cannot mix the informal procedures of the Uniform Probate Code with the formal procedures of the Montana Code.

Before the 1973 legislature convened, several legislators requested copies of the Uniform Probate Code as drafted by the National Conference of Commissioners on uniform state laws. A copy was furnished to John Hall and other legislators, and John Hall was instrumental in having the bill drafted and introduced in the 1973 session. The bill was immediately referred to a Joint Committee of the House and Senate with instructions to study the bill and report back to the 1974 legislature. John Hall of Great Falls was designated as chairman of the Interim committee.

A majority of our special committee was of the opinion that the Uniform Probate Code was a substantial improvement over the existing Montana Code and that we should make every effort to have it adopted. A majority of our committee also thought that the lawyers should be in the forefront of any reform movement. The experience in Idaho, which had adopted the Code in 1972, and other states, demonstrated that opposition to the Uniform Probate Code by the organized Bar was ineffectual. A minority of the committee felt that perhaps some change was necessary, but the time was not now; that the informal provisions of the proposed code was a license for the personal representatives to steal and that we ought to wait and see what happened in other states before we took such a drastic step as to repeal our entire existing probate code and substitute something in its place. The committee was divided on the merits of the UPC from the day the committee was appointed.

A majority of the committee voted to recommend to the Bar Association at its annual meeting in Missoula in 1973 that it approve the Uniform Probate Code in principle with such changes as might be necessary to meet local conditions. By that time the Code was taking on a momentum of its own. There were at least eleven other organizations then actively urging adoption of the Code, and several on the committee were of the view that we were going to have the Uniform Probate Code in Montana regardless of any action the organized Bar might take. The Montana Bar approved the committee report.

The Legislative Interim Committee conducted a series of public hearings. The chairman and other members of our committee were invited to attend and submit testimony. One Montana lawyer, a member of our committee, appeared in opposition to the Code, both at the first public hearing and again when it was being considered by the Senate Judiciary Committee. Several years after the Code was adopted the dissident member apologized, said he was wrong - that the UPC was a good Code and he would not consider going back to the previous probate code. The Legislative Interim Committee made a number of changes in the Code and then reported the bill out favorably for passage. The bill passed both houses of the 1974 legislature without a dissenting vote and was to be effective July 1, 1975.

IMPLEMENTING THE CODE

Dick Josephson, chairman of the Montana Bar Continuing Legal Education Committee, and Diana Dowling, then executive secretary of the Montana Bar Association, thought the Bar Association should take an active part in introducing the new Code to the Montana lawyers and preparing forms for their use. With such prodding, I asked for volunteers from the Probate and Trust Section of the Montana Bar Association to help draft forms and help prepare a commentary on the Code. From the volunteers, a new committee was composed of J. C. Garlington from Missoula, Jack Dietrich and Hugh Sweeney of Billings, David Niklas, Ada Harlen and John Lane III from Helena, Bill Baucus and Bjarne Johnson from Great Falls, with Bjarne Johnson as chairman of the new committee.

Several meetings were held in Great Falls and Helena, and it was not unusual to have 100 percent attendance at these meetings. We divided the Code into several parts and asked that individual committee members prepare forms suitable for the portion of the Code for which he or she was responsible. After each lawyer drafted his set of forms (and all of them were drafted on time), we then met to critique the work of each other. The forms were published in a probate manual entitled "Montana Probate Procedure." The Procedure form book was published by the State Bar of Montana and is now being regularly updated after each session of the legislature by David N. Niklas of Helena. David N. Niklas was one of the original members of our committee.

The publication of the form book probably did more than anything else we could have done to make the probate forms uniform within the state of Montana. We believe that the use of the forms prepared by our Code committee has resulted in substantial uniformity in practice throughout all of the judicial districts of the state.

The Forms Committee spent hundreds of hours in what must have been by then the largest publishing effort in the history of the Montana Bar Association. Several committee members appeared many times in hearings before various legislative committees in Helena. The committee arranged for and sponsored in the name of the Montana Bar Association two state-wide seminars featuring Professor Dick Wellman and Professor Richard W. Effland. In addition, the committee arranged for and personally conducted at least ten intensive workshop seminars for lawyers throughout the state.

The adoption of the Code with an effective date of July 1, 1975, represented the culmination of six years of work for several of us on the two committees.

"MONTANA" UNIFORM CODE

The Uniform Probate Code adopted by Chapter 365, laws of 1974, with an effective date of July 1, 1975, was not a model of anything. The Legislative Interim Committee amended it in many particulars in what it thought was necessary to comply with "local conditions." Shortly after the Uniform Probate Code was adopted in Montana, I sent a copy of it to Dick Wellman. Dick wrote a memorandum to me April 29, 1975, preceded by the statement: "The following deviations from UPC move me to conclude that the state should *not* be considered a UPC state."

The Allen Smith Company published the 1947 Revised Codes of Montana entitled Title 91A as the "Montana Uniform Probate Code." The designation is perhaps a contradiction in terms, but also fairly well describes what we originally came up with.

CODIFICATION

When originally enacted, the legislature followed the headings and numbering of the code sections adopted by the Joint Editorial Board. When the Code Commission recodified the Montana Uniform Probate Code, it divided some sections and renumbered others so now it is cumbersome trying to go from a Montana MCA section to the Uniform Laws Annotated.

A LOOK BACK

The Code has been in effect since July 1, 1975, and now some sixteen years later, it is time to take a look at what the legislature and the Montana Supreme Court have done to the Code since its original date of enactment. It is also time to take a look at what the practice is under the Code and if the Montana lawyer is taking full advantage of the many opportunities offered by the Uniform Probate Code.

The new Code (if a code adopted in 1975 can now be called new) makes available to us many estate planning techniques and simplification of probate procedures that were not available to us before. It is something like a very fine kit of tools that can be very useful in the hands of a skilled practitioner. The Code cannot be applied in isolation, but must be viewed in context of treatment of the Code by the Montana Supreme Court and must also be considered in the context of our tax laws. It is essential if a lawyer is going to practice successfully in the estate planning and probate field that he have a very good understanding of the tax law applicable to properly represent his client as well as to avoid claims of malpractice. When you are engaged, you represent to your client that you have a good understanding of probate law and tax law. You must have both. Estate planning is a high risk area of the practice of law.

In the materials that follow, I have commented on certain Code sections, what the Montana Supreme Court has done with reference to each, and tax laws that have a connection with the Code. The tax references are inserted simply to make you aware of some possibilities and also some pitfalls in the tax area. The tax references are very basic and represent only a small part of the tax law with which you must be familiar. Every action you take with the probate of even a simple estate has a tax consequence of some kind. There is no logic in the tax law, and frequently a general statement is followed by an exception and sometimes an exception to the exception. The tax law changes daily.

SUPREME COURT TREATMENT

Chapters 1, 2, 3 and 5 of Title 72 of the MCA have been referred to or interpreted in at least 77 cases in the Montana Supreme Court. In general, we can say that the Supreme Court fairly well carries out the purposes and intent of the Code with some decisions that can only be considered as aberrations. MCA § 72-1-102 [now repealed] provides [provided]:

Purposes — liberal construction. (1) This code shall be liberally construed and applied to promote its underlying purposes and policies.

(2) The underlying purposes and policies of this code are to:

(a) simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors, and incapacitated persons;

(b) discover and make effective the intent of a decedent in distribution of his property;

(c) promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to its successors;

(d) make uniform the law among the various jurisdictions.

In the matter of Merkel's Estate, 190 Mont. 78, 618 P.2d 872 (1980), the court held that the UPC sections which provide for a homestead allowance and exempt property contemplate estates in fee and not life estates only. The court went on to say terming these interests as a life estate would appear to undercut one of the express purposes of the UPC, that is, "to simplify . . . the law concerning the affairs of decedents."

JURISDICTION

MCA 72-1-202. Subject matter jurisdiction. (1) To the full extent permitted by the constitution, the court has jurisdiction over all subject matter relating to:

(a) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons; and

(b) protection of minors and incapacitated persons.

(2) The court has full power to make orders, judgments, and decrees and take all other action necessary and proper to administer justice in the matters which come before it.

The Legislative Interim Committee found the Code section quoted and MCA § 72-1-203 to 209 inclusive to be straightforward and simple to understand. There was never any doubt but that we were dealing with the district court and that on any matter that might be brought before it involving probate or a related action that the court had complete and full jurisdiction to do whatever might be necessary to do in the premises. The Interim Committee did not find any limitation, but the Montana Supreme Court did.

In Re the Matter of the Estate of Alice Dullenty Thomas, Deceased, 699 P.2d 1072, 190 Mont. 78, Alice Dullenty Thomas and Albert Thomas were husband and wife. They originally had wills leaving all of their estate to the survivor and on the death of both, to the heirs of Albert Thomas. In 1980 and before her death in 1982, Alice gave a power of attorney to her nephew, Bill Bresnahan, who conveyed Alice's real property to Alice's heirs. After her death, a sister acting as conservator for the husband who was now incompetent, brought an action to set aside the conveyance and to include the real property in the inventory of the estate of the deceased wife. The District Court, Thirteenth Judicial District, Yellowstone County, Robert J. Holstrom, District Judge, held that while sitting in probate, the court lacked jurisdiction to consider propriety of pre-death transfers of real property. The heirs who would have inherited under a will appealed. The Supreme Court, through Justice Hunt, held that the district court sitting in probate did not have jurisdiction to determine title to real property. In support of its position, the court cited several cases that had been decided in Montana before the adoption of the Uniform Probate Code. Justice Sheehy, specially concurring in the result, said, "It would be my suggestion to the district court and the parties that a special administrator be appointed under MCA § 72-3-701, charged with the duty to bring an action on behalf of the estate against the transferee to determine the issues of title raised by the conservator. The special administrator should be a neutral person to the contending parties here. The determination of the court in such special action would determine for the probate court whether the real property should be included as an asset of Alice's estate."

It seems to me the Supreme Court is in error. If the legislative committee had determined that the district court should be a court of limited jurisdiction on any matter dealing with probate, then it would have said so. All of the many references to the district court throughout the Code treat the court as one of general jurisdiction and not one of limitation. The decision flies in the face of MCA § 72-1-102(c) [now repealed] that one of the purposes of the Code was to "promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to its successors." I do not find where this case has been cited in any subsequent case by the Montana Supreme Court or any other court. It is a dangerous decision if you were relying on a district court being a court of general jurisdiction and the Supreme Court decides that if it is a matter involving probate that the district court is a court of limited jurisdiction and therefore without power to act. You may find yourself caught up in a statute of limitations.

The Supreme Court, in a number of other decisions, referred to "probate court" by way of definition to describe probate matters but not by way of limitation of the power of the court to act in a broad spectrum of cases.

FEES

The original version of the Uniform Probate Code submitted to John Hall for introduction in the 1973 legislature simply provided that a personal representative is entitled to a reasonable compensation for his services. Nothing was said about attorneys' fees. When the matter got to the Joint Committee of the House and Senate, all of the members were aware that in one jurisdiction in Montana, the court generally and consistently allowed an attorney's fee of 9 percent of the estate. If any outsider went into that jurisdiction to probate an estate and asked for a lesser fee than 9 percent, he was considered as committing malpractice against the local bar. The Joint Committee was determined to put a stop to what it considered to be excessive fee allowances in the one jurisdiction. From that point of departure, the Committee decided that the maximum personal representative's fee would be 3 percent of the first $40,000 and 2 percent for everything beyond that, and that the attorney's fee should not exceed one and one-half times the personal representative's fee. I have correspondence from an attorney in the offending jurisdiction that the fee schedule proposed by the Interim Committee was much too low and that I should use my best efforts to increase the maximum attorney's fee allowable.

I replied that I could not in good conscience ask the committee to do this, but that we would try to get an additional provision to the effect that the parties could agree on what a reasonable fee would be under the circumstances and which would not necessarily be the maximum fee established by the Code. The Joint Committee would have none of it, and as a result, we have MCA §§ 72-3-631 and 72-3-633 [72-3-633 now repealed]. It was intended that a personal representative was entitled to reasonable compensation for his services and that the fee quoted was simply a maximum which could not be exceeded without approval of the court. What was quoted as the maximum has frequently become the minimum with many attorneys and can make probate much more expensive than was contemplated by the Uniform Probate Code. In many instances, there is not much relationship between the maximum fee and the services performed to probate a simple estate and particularly so if the attorney has no understanding or little understanding of tax implications in the estate. If there are significant tax implications or problems in an estate, then a qualified attorney is entitled to compensation accordingly. I find that as the consumer becomes more knowledgeable that more and more fees are negotiated in advance, and all parties are much happier.

The matter of fees has been before the Montana Supreme Court on more than one occasion. *In the Estate of William Magelssen*, 182 Mont 372, 597 P.2d 90 (1979). William Magelssen died in 1976, leaving an estate valued in excess of $3.5 million. After the estate was opened, the attorney and personal representative discussed fees, and the attorney advised the personal representative by letter that his firm would charge the full 3 percent of the value of the estate as valued for federal estate tax purposes for the ordinary services to the estate. The court referred to MCA § 72-3-633 [now repealed] entitled "Compensation of Attorney," which the Court said merely places a ceiling on the amount of compensation payable to an attorney for ordinary services. These provisions establish the boundaries of the personal representative's authority to contract for the services of an attorney. The fee involved in the instant case fits within these limits. Accordingly, the fee contract was valid under the applicable provisions of the Montana Uniform Probate Code.

The court went on to say:

Though the fee contract is open to review under MCA § 72-3-634, the amount of the fee is not automatically converted into a quantum meruit measure of compensation. Indeed, quantum meruit compensation is normally appropriate only where a valid contract does not exist.

The court also noted:

Considering the principal purpose of § 91A-3-722 and the exceptional circumstances surrounding its invocation in this case, the district court did not err in refusing quantum meruit as the measure of compensation. The court's threshold determination of reasonableness, followed by an apportionment of the agreed fee to the percentage of the job completed, was proper.

The court further stated:

Based on these factors, we see no error in the exclusion of evidence as to the attorney's actual time expended in probate. We note in this regard that the time factor has, generally speaking, played a relatively minor role in determination by a court of a reasonable attorney's fee in probate.

IN A DIFFERENT CASE

The Montana Supreme Court has concluded that our fee statutes require that the fee charts for legal services be reasonable and, further, *In the Matter of the Estate of Robert E. Stone*, 236 Mont 1, 768 P.2d 334 (1989), the court held that reasonableness is to be ascertained by considering the time spent, the nature of the service, and the skill and experience required. In the same case, the court expressly rejected the argument that the percentages set forth in MCA §§ 72-3-631 and 72-3-633 [72-3-633 now repealed] are "standard fees."

It appears that if the personal representative and the attorney enter into a written agreement providing for the maximum statutory fee that such agreement is reasonable and the fees are fair. *In Re the Estate of Magelssen.* The manner in which the Montana Supreme Court has treated fees compels the attorney to enter into a written agreement with the personal representative for the basis of his fees. Not only is it legally sound to do so, but in most cases will remove any disagreement between the personal representative and the attorney as to the reasonableness of the fee. Such agreement, however, does not preclude some other interested party from bringing the matter to the court as provided by MCA § 72-3-634.

HOMESTEAD, EXEMPT PROPERTY AND FAMILY ALLOWANCE

When drafting a will or advising your client on the rights of the parties in an intestacy you must keep in mind MCA 72-2-801 [72-2-412] providing for Homestead Allowance and MCA 72-2-802 [72-2-413] providing for exempt property. The statutes are simple to read but not always easy to apply.

MCA § 72-2-801 [now 72-2-412 and substantially revised] provides [provided] for a $20,000 homestead allowance and further provides [provided] "(3) Homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the will of decedent *unless otherwise provided, by intestate succession, or by way of elective share."* (Emphasis added.)

MCA § 72-2-802 [now 72-2-413 and substantially revised] provides [provided] for $3500 of exempt property and further provides "(3) These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent *unless otherwise provided, by intestate succession, or by way of elective share."* (Emphasis added.)

There have been several Supreme Court decisions on the rights of the parties, and we can expect more. *Matter of Merkel's Estate,* 190 Mont. 78, 618 P.2d 872 (1980). Herman Merkel died in December 1978, having executed a will earlier which left nothing to his wife. The guardian for Celia Merkel, on June 4, 1979, filed a claim for elective share, exempt property and homestead allowance. Celia died nine days later on June 13, 1979. Despite the will that gave Celia nothing, the court held that the wife's estate was entitled to the homestead allowance and the exempt property, that such interests were in fee and by surviving the decedent by 120 hours, Celia Merkel and her estate became entitled to those benefits absolutely.

In the Matter of the Estate of Florence I. Heiser, 207 Mont. 126, 672 P.2d 1124 (1983), the facts were Florence Heiser had five children by a previous husband. She married Frank Heiser, then died intestate on September 6, 1980. Frank Heiser executed a new will September 16, 1980, leaving his entire estate to a former wife. Frank Heiser made no claim against the estate of Florence Heiser during his lifetime. On his death, his estate filed a claim against the Florence Heiser estate for homestead allowance and exempt property, the sum of which exceeded the total assets in the estate. The district court ordered that the petition of the Estate of Frank Heiser, for the homestead allowance in the Florence Heiser Estate, be granted. On appeal, the Supreme Court said: "The sole issue on appeal is whether the homestead allowance vests as a matter of law in the surviving spouse upon outliving the deceased for 120 hours, or whether a surviving spouse personally must first make a **claim** for the homestead allowance."

The Court said they could find no statutory, claim-filing requirement for the homestead allowance to vest, and declined to create such requirement. Notwithstanding the laws of intestate succession, the entire estate went to satisfy the homestead allowance. The homestead allowance vests without notice or claim.

In the Matter of the Estate of Bessie Eva Dunlap, 199 Mont. 488, 649 P.2d 1303, the court held that a child specifically disinherited by will was entitled to take $3,500 exempt property allowance under statute governing exemption of property for certain heirs. The Court said: "The family protection provisions of the Uniform Code were intended by the drafters to protect a surviving spouse and children from disinheritance by a decedent."

In all cases when there is a surviving spouse or children entitled to take, we are dealing with a fee interest that vests automatically 120 hours after death. Once vested, we must specifically deal with it whether any claim is made or not. It appears we cannot rely on a will or the law of intestacy to divest the fee interest. I find the language underlined in the statute quoted above confusing.

LEGISLATIVE TREATMENT

The original forms drafting committee became aware in drafting forms that the 1974 legislature had added some new provisions to the code that were contradictory and in conflict with other provisions already in the Code. Even before the Code became effective, we submitted some amendments that were readily accepted by the legislature. Since then the Montana Bar, Trust and Probate Committee, has sponsored several amendments which took out changes made by the Interim Committee and replaced the changes with provisions of the Uniform Probate Code. The Trust and Probate Committee in 1989, with Professor Ed Eck as chairman, made an extensive revision of the Montana Code and bringing our code more in line with the Uniform Probate Code. The Interim Committee - and I share the blame - did not realize that changing a single word in an integrated code could completely change the meaning of a code section and make it unworkable. An example of this is when we changed "allowance" to "disallowance" in what is now MCA § 72-3-804(1). Fortunately, Professor Eck and his committee have corrected this. I understand the Montana Bar, Trust and Probate Committee, along with a representative of the Uniform Laws Commission and the Joint Editorial Board, will review the entire probate code and make its recommendations to the next legislative session.

RENUNCIATION

MCA § 72-2-101 [72-2-811, now repealed] provides [provided] for renunciation of succession [replaced by disclaimer]. This was something new for the Montana practitioner. There were no provisions in the prior Code pertaining to renunciation. Under the common law, Montana would permit renunciation of a devise by will. However, the common law did not permit renunciation of an intestate share. There is no valid reason for this distinction, and the Uniform Probate Code simply provided that in a proper case, the devisee under a will or the beneficiary of an intestate estate could renounce his or her share. Under this rule, renounced property passes as if the renouncing person had failed to survive the decedent, and in the case of intestate property, the heir who would be the next in line in succession would take. Often this would be the issue of the renouncing person taking by representation.

A few years after the adoption of the Uniform Probate Code, a Montana lawyer probated the will of a fairly wealthy rancher. The testator had a simple will leaving all of his estate to his surviving wife, and if she should predecease, then to his two surviving adult children. The widow wanted to make a gift of some land she was inheriting to her children as she was concerned about the size of her estate for federal estate tax purposes. Carrying out the widow's request, the attorney prepared a deed from the widow to her children and then filed a gift tax return. The Internal Revenue Service would not accept the valuation placed on the property by the parties and significantly raised the value and also the gift tax. The attorney must not have read the Uniform Probate Code nor could he have been familiar with gift taxes. If he had, he simply would have advised the widow early on to file a disclaimer with respect to the property that she wanted to gift to her children, and the property would have passed to her children without gift tax consequences or transfer taxes of any kind. Is this malpractice? It should be standard practice at the outset to advise the heirs of their right to disclaim.

It must be remembered that a disclaimer or renunciation is an option available to a beneficiary and can only be exercised by a beneficiary. The availability of the option is something frequently we consider in estate planning and will drafting. To use it in this fashion, you must notify the client in writing what the disclaimer is, when it can be used, and what the results would be with or without the disclaimer. The use of a disclaimer is a device that should be used in estate planning and will drafting much more often than many of us are prone to do. Let me illustrate. You are drafting wills for a young couple who now have very little by way of assets, but who you think have the potential for acquiring a great deal more. The common practice is to draft a simple will and tell the clients when their assets reach $600,00.00 [sic], they should come back to rewrite their wills and do some tax planning. Wouldn't it be much better to put a by-pass trust in the will with a provision that any disclaimer made by the surviving spouse, the property disclaimed would fall into the by-pass trust? The surviving spouse would have the income and the remainder would go into a credit shelter trust. IRC § 2518(b)(4) specifically permits a spouse to retain the income interest and disclaim the remainder.

Even in cases where you haven't contemplated the use of a disclaimer in the will, it can still be a useful device in post mortem estate planning. For example, a disclaimer can be used to prevent an estate from "over qualifying" for the marital deduction. In other cases it can be used to increase the marital deduction.

EARLY PLANNING FOR PROBATE

Planning for a probate begins before you file the application or petition for appointment of a personal representative. You must ascertain early on if there appears to be any problem with the will or determination of heirs in an intestacy. I think in either case, it is an acceptable practice to file an informal application for probate of a will, if there is one, and for the appointment of a personal representative. If you perceive a possible problem, you would have the personal representative first publish notice to creditors, then file a petition in a formal testacy proceeding requesting the court to take whatever action appears to be appropriate. The advantage is that the probate can proceed while the court makes whatever formal adjudication it deems appropriate. MCA § 72-3-304 specifically authorizes this procedure.

SELECTION OF A PERSONAL REPRESENTATIVE

If you have a family that is friendly with each other, you may want to consider who should act as personal representative. I found this particularly useful when all of the family were gainfully employed and self-sufficient except a divorced daughter with two small children and who had been living for some time on gifts from her parents. The daughter would be entitled to the personal representative's fee, and in a proper case, her duties might be expanded by separate contract with approval of the court for additional payment of fees.

UPC IN CONTEXT OF FEDERAL TAX CODE

It is a fundamental principle that the operation of federal tax law is itself dependent on local law. This concept was clearly stated by the U.S. Supreme Court in *Morgan v. Comr.*, 309 U.S.

78, 80 (1940), wherein the court stated: "State law creates legal interest and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed."

With the Uniform Probate Code as the basic local law, the personal representative is required to consider the consequences of many alternative courses of action, and he must also keep in mind the interaction of the law governing estate, gift and income taxation. In addition to the tax considerations, he must always keep in mind that he is a fiduciary, and he is required to observe the standards of care applicable to trustees under the laws of the state of Montana. At the time of the adoption of the Uniform Probate Code in 1974, our trust provisions were somewhat like the Montana Probate Code prior to the Uniform Probate Code in the sense that they simply grew whenever the legislature perceived there was a problem that needed a solution. It was something of a hodgepodge of laws, but not any more. In 1989, Professor Ed Eck, as chairman of a committee, succeeded in having the legislature adopt the "Trust Code."

POTENTIAL CONFLICT IN FIDUCIARY TAX ELECTIONS

The fiduciary is required to deal fairly among beneficiaries and classes of beneficiaries and all other persons with whom he may deal. Any steps the fiduciary may take that save taxes for all beneficiaries, of course, will be welcome. Many tax options not only save taxes but shift tax burdens from one beneficiary to another or even alter the manner in which the estate is ultimately distributed. Any tax option that shifts the burden of tax must necessarily, or certainly should be, approved specifically by the parties affected.

ESTATE AS SEPARATE ENTITY

For taxable purposes, the estate is a separate taxable entity with income to be computed generally in the same fashion as for an individual, and unlike a corporation, the income is taxed only once, either to the estate or to the beneficiaries. If the gross income exceeds $600, the estate must file a fiduciary income tax return. Failure to file carries with it the same penalties as apply to an individual failing to file when required to do so. Life is much simpler if you start at the outset with a separate account to reflect income and expense of the estate. Unless a fiduciary tax return is filed, there is no conduit to carry any losses or expenses to the beneficiaries and they are lost for all purposes. The Uniform Probate Code offers many options and choices for the personal representative to take with respect to taxes. However, he must exercise caution because frequently options elected cannot be undone, and also the personal representative must determine who benefits and who hurts from the election.

FLEXIBILITY OF UPC

One of the best features of the UPC is the flexibility of the code. The attorney decides if the estate is to be probated formally or informally and proceeds accordingly. If he discovers a problem, he simply petitions the district court for a judicial determination, and once that is completed, he can continue to probate the estate informally. It is sometimes described as an "in and out" procedure. There are some things that the Code requires, other things that are specifically permitted, and a large area of circumstances that do not fit in either category. In the latter area, the attorney must use his best judgment on what is in the best interest of the estate and the heirs.

SOME TAX OPTIONS

The Internal Revenue Code § 661(a) provides:

(a) DEDUCTION - In any taxable year, there shall be allowed as a deduction in computing the taxable income of an estate or trust . . ., the sum of - (1) any amount of income for such taxable year required to be distributed currently . . .; and (2) any other amounts properly paid or credited or required to be distributed for such taxable year; but such deduction shall not exceed the distributable net income of the estate or trust.

The Uniform Probate Code does not specifically authorize a partial distribution out of an estate at any time nor does it prohibit it. The Montana Code makes a backhanded reference to partial distributions. MCA § 72-3-1006 requires that before any distribution is made, the state inheritance tax must be paid or arrangements made for an extension. However, sub-section (2) provides: "This section shall not prohibit such partial distributions as may become necessary in the course of administration."

If there is distributable net income in the estate, any partial distribution could very well carry the distributable net income out to the taxpayer who receives the distribution, and he in turn must report it as income on his tax return. There are times, of course, simply for tax considerations you want to make a distribution during the taxable year of the estate. Because of the compression of tax rates for estates and trusts - the 28 percent rate starts at $5,000, and the 33 percent rate starts at $13,000, it may be advantageous to distribute some of the income to a lower bracket taxpayer. Although the Uniform Probate Code does not require a court order or formal order to distribute property, I think it would be advisable to secure a court order for partial distribution to try to comply with IRC § 661A that "any other amounts properly paid or credited" would be an income tax deduction to the estate. The attorney must determine what the income tax consequences are to the estate as well as the individual beneficiaries.

FEES AS DEDUCTIONS

Attorney fees and personal representative fees are deductible either against estate or income taxes. To the extent that the attorneys' fees and costs exceed distributable net income, the excess will be lost unless they are paid in the last taxable year of the estate. In the first year, the personal representative can select either a fiscal year or calendar year, whichever may best suit the purposes of the estate. With the Uniform Probate Code, the estate can be closed at any time after the period of notice to creditors has expired and the state inheritance taxes determined and paid without prior notice and without a court hearing. The ability to close on short notice can be extremely valuable for purposes of controlling when taxes will be paid and by whom.

POSSESSION OF ESTATE PROPERTY

The personal representative should take into consideration MCA § 72-3-606 which provides that every "personal representative has a right to and shall take possession or control of the decedent's property except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by him would be necessary for purposes of administration." If the beneficiary receives the income, it should be reportable by him as income, and it should not be reportable as estate income. I have found this Code section useful for other purposes. Besides tax considerations, the options available in MCA § 72-3-606 can greatly simplify the handling of some estates. I can think of nothing better than leaving an old apartment house or other real estate rentals in the hands of the ultimate beneficiary. In other words, there may be very practical reasons for not taking possession of certain property in an estate in addition to tax considerations.

FINAL TAX RETURNS FOR THE DECEDENT

The Uniform Probate Code does not require the filing of final tax returns, but our tax laws do. It is the responsibility of the personal representative to file the final income tax return for the decedent and also take into account any income that is deemed to be income in respect of a decedent.

INVENTORY AND APPRAISEMENT

MCA § 72-3-607 requires that within the time required for the filing of a U.S. estate tax return (nine months), plus any extensions granted by the Internal Revenue Service, a personal representative shall prepare and file or mail an inventory which inventory shall include listing of all the property which the decedent owned and also its value. For some reason or other, probate practitioners have a habit of waiting until a document is due before they prepare it. If the inventory is not required for a period of nine months, why hurry? There are lots of reasons.

If you are representing a larger estate that clearly is going to be subject to federal estate tax or be in a bracket where a federal estate tax return is required to be filed, then you should, immediately after appointment, make a general survey of what all of the assets are in the estate and how the values relate to each other. You may find some of decedent's ranch holdings in his individual name, some as joint tenants with the right of survivorship, some held in a partnership, and some may be held in one or more corporate entities. When you have a good idea of what the total estate consists of, then hire a qualified appraiser who should not be permitted to operate blindly. The appraiser should know, and you should know, what the tax consequences are that flow from the appraisal of each of the various assets in the estate.

CORPORATE STOCK REDEMPTION

IRC § 303 permits a closely-held corporation to redeem shares of its stock held by the estate without dividend consequences in an amount not exceeding the sum of the estate taxes, plus funeral and administration expenses. The 303 election is available if the value of the stock of the closely-held corporation included in the gross estate constitutes more than 35 percent of the gross estate reduced by debts, funeral and administration expenses and losses.

DEFERRED PAYMENT OF ESTATE TAXES

IRC § 6166 permits an executor to pay estate tax on specified business interests in two or more (but not exceeding ten) equal installments, the first of which is due five years after the normal due date. The 6166 election is available if the interest in the closely-held business exceeds 35 percent of the adjusted gross estate. It results in deferral of the estate tax attributable to the closely-held business with interest only for the first five years. The interest rate is 4 percent on the first $1,000,000 of value (approximately $190,000 of tax considering the $600,000 exemption) and the current federal deficiency rate on the balance. The interest can be claimed as an estate tax deduction (at a more favorable rate than for income taxes), but the deduction cannot be claimed until the interest payment is made, resulting in periodic amendments to the entire return.

SPECIAL USE ELECTION

In dealing with a ranch estate, we must always take into consideration whether IRC § 2032(A) is available and if the benefits provided by that section should be elected. As a threshold requirement, (a) 50 percent or more of the adjusted value of the gross estate consists of the adjusted value of real or personal property which _; and (b) 25 percent or more of the adjusted value of the gross estate consists of the adjusted value of real property which meets the requirements of subparagraphs (A)(ii) and (C). It is said by many that IRC § 2032(A) is the most complicated section of the entire Federal Tax Code. Many Montana lawyers have paid substantial malpractice claims for ineffective election and, in some cases, for failure to elect. It is dangerous to elect and dangerous not to elect. If you have a farm or ranch in your probate, you must take the statute into consideration and take action one way or the other. The Code has many tax implications that are not readily apparent. Good luck.

VALUATION OF ASSETS

Some practitioners, when they find that there is no federal estate tax because of the marital deduction or other reasons, are inclined to inflate the value of some assets in order to obtain a higher cost basis. Before you do this, I think you should take a look at IRC § 6662 which imposes a rather severe penalty for over-valuation of assets for income tax purposes. Appraising is not an exact science, and there is always some leeway in fixing an evaluation. Within reasonable and non-fraudulent parameters for assets where value is not readily ascertainable, it would be beneficial to under-value assets passing to the credit shelter trust and over-value assets passing to the marital deduction trust. However, an under-valuation of assets passing into the credit shelter trust could result in assertion by the IRS that the surviving spouse had made an adjusted taxable gift and/or that some of the credit shelter assets were, in fact, included in the surviving spouse's estate.

PARTNERSHIP TAXATION-ADJUSTMENT TO BASIS

There isn't anything simple about partnership taxation, and it gets worse when you have a partnership interest in an estate. A partnership, unlike a trust or estate, is not taxed as a separate entity; it is nevertheless recognized by federal tax laws as a separate entity for certain purposes. The partners are deemed for tax purposes to own an interest in the partnership rather than an interest in the underlying assets. A partner's basis for his partnership interest is separate and distinct from the partnership's own basis in the underlying assets.

When a partner dies, his partnership interest receives a stepped-up basis, but there is no stepped-up basis for the partnership assets.

Assume for our purposes that the decedent owned a 50 percent interest in a cattle partnership where all of the animals are raised and for income tax purposes have no cost basis. If an animal is sold by the partnership for $1,000, the partnership has $1,000 of ordinary income, and the estate reports a gain of $500 on its return.

Partnership law under certain specified conditions will permit an adjustment to basis of property in the partnership. Under IRC §§ 734, 743, and 754, a partnership can elect to have the basis of all partnership assets adjusted when (1) there is a distribution to a partner; or (2) a partnership interest is sold or a partner dies. The election has to be made on the partnership level, and if made on or before the due date for the partnership return for the year in which the partner died, the basis of the partnership assets, as far as the partner's estate is concerned, will be their estate tax value.

What does this all mean? Let us assume all of the facts in the above cattle example, and you have now had the partnership make the necessary elections. Then on the sale of an animal for $1,000, the estate would have a cost basis of $500 and no income tax.

In some cases, the window of opportunity is a short one, and if you wait nine months to prepare the inventory, the opportunity may be gone.

SOME VESTIGES OF THE OLD PROBATE CODE REMAIN

The Uniform Probate Code is not the only probate code in Montana. When Ch. 365, L 1974, the Uniform Probate Code, was being drafted by the Legislative Council, it had the problem of determining what code sections should be repealed and what to do with other probate code sections that were not necessarily in conflict with the UPC. The code sections that were in direct conflict were repealed, and the others were allowed to remain as part of our probate code and are still there. These laws are found in MCA Chapters 10 through 13, Title 72, and are designated as "supplementary." [These provisions were repealed in large part by the 1993 revision of the Uniform Probate Code.] On any research of the UPC, you must also keep in mind that one or more "supplementary" laws may also apply.

WHERE DO WE GO FROM HERE?

An estate can neither be planned nor administered adequately by reference to the Uniform Probate Code alone. As comprehensive and flexible as it is, the Code cannot be applied in isolation.

With this flexibility comes the responsibility to anticipate all of the non-Code consequences of any decision made.

The practice of law under these circumstances brings a number of demands, few of them easily reconcilable. An understanding of the law, no matter how thorough, is not enough. An understanding of how to martial all of that knowledge efficiently toward the solution of a client's problems is becoming increasingly critical. In the future, a few will have mastered the ability to produce the right document or solution the first time with the fewest resources, and do so in a timely and cost-efficient fashion. They will be called survivors.

The essence of a skilled lawyer is the ability to apply a comprehensive legal knowledge and the lawyer's intellectual capital to the timely and correct resolution of a client's matters. This has remained an inexact process for a number of reasons.

For one, assuming this intellectual capital exists within an office, its consistent application has been difficult. Knowledge levels among members of a firm tend to vary widely, and even the most knowledgeable are subject to such pressures of time and billing that a consistent, methodical examination of every possibility is likely more aspiration than fact.

Once this knowledge exists, it still must be translated into documents or other work product. Simple in concept, this process alone consumes much of an office's most expensive resources, people. Lawyers commonly seem to take a perverse pride in the number of staff they can keep occupied. It is true that the use of staff is less expensive than the use of lawyers. It is also true, however, that the use of fewer staff is less expensive than the use of many. Pride would more justifiably be placed in devising ways to produce better documents with fewer people.

Finally, knowledge possessed by any particular lawyer cannot be readily transmitted to others. In other words, a younger associate may have access to a senior lawyer to ask questions, but the more senior lawyer's work and thinking cannot be directly and immediately applied by that associate to current projects.

Imagine, then, a law office that had the ability to do the following things:

capture the knowledge of the best lawyer or lawyers in the office, and make it directly available to everyone, resulting in a uniformly high level of quality;

insure that, in the preparation of documents, only the most current language is available to a lawyer, rather than depend upon a system where the best language is used only if the lawyer happens to pick the most current form to use as a guide or was not on vacation when the latest changes were discussed;

automatically convert legal decisions made by a lawyer, such as whether to use a QTIP or outright marital devise, into an essentially complete draft, and do so in under a minute.

These capabilities are now within reach for any law firm willing to take the step. Some already have.

This is now possible using the latest generation of document assembly software. No longer limited to simply filling in the blanks or requiring a lawyer to use someone else's rigidly programmed forms, the new document assembly software is now a very powerful and flexible programming tool which allows lawyers to convert their own work product into a complete practice system, and do so in a manner tailored to their own needs and style of practice.

According to one of the developers of such software, "document processing" represents the same leap beyond work processing as word processing did to the typewriter. In other words, we are probably looking at the new standard. The advantage will be to those who implement it first.

Source — Explanation of Editorial Comments for 1989 Amendments: Chapter 582, L. 1989, generally revised the Uniform Probate Code and related law. The editorial comments that follow each section amended by Ch. 582 were prepared by Professor E. Edwin Eck of the University of Montana (now University of Montana-Missoula) School of Law.

Chapter Collateral References

Montana Probate Forms, State Bar of Montana (2006).

Part 1

Short Title, Definitions, Construction, and General Provisions

Part Case Notes

Claim Barred by Failure to Meet Filing Time — Subsequent Acknowledgement of Claim Not Relevant to Estoppel: Notwithstanding the exception for equitable estoppel outlined in NW. Bank of Lewistown v. Estate of Coppedge, 219 M 473, 713 P2d 523, 43 St. Rep. 102 (1986), failure of a creditor to meet the time limits for filing a claim against an estate forever bars such claim. Further, there is no provision in the Uniform Probate Code extending the time for filing or contesting claims based upon subsequent acknowledgement of debt. Bozeman Deaconess Hosp. v. In re Estate of Rosenberg, 225 M 232, 731 P2d 1305, 44 St. Rep. 195 (1987).

Probate Court's Jurisdiction Over Wrongful Death Action in Another District: Estate was being probated in one District Court, and personal representative's wrongful death action was being considered in another district. The probate court exceeded its jurisdiction when it assumed jurisdiction over the settlement of the wrongful death action, approved it, and ordered dismissal of the action. The Supreme Court stated that whether the proceeds of the settlement or award in the wrongful death action belonged to the estate or to the heirs was pertinent to the issue of the probate court's jurisdiction over the wrongful death action and that the probate court had jurisdiction only if the proceeds belonged to the estate. The Supreme Court did not appear to definitively decide the underlying issue, though it leaned toward the traditional rule that the proceeds belong to the heirs, are personal to them, and constitute no part of the estate. The court stated that it was for the Legislature to decide whether a District Court acting as a probate court should have some jurisdiction over a wrongful death claim filed in another District Court. In re Pegg's Estate, 209 M 71, 680 P2d 316, 41 St. Rep. 558 (1984).

Joint Tenancy in Certificate and Account Upheld by Contract and Gift Theories — Single Signature on Bank Card Sufficient: The deceased sister of the plaintiff had purchased certificates of deposit and opened a checking account, all made payable to the decedent or the defendant husband, but only the decedent signed the bank's signature cards and the defendant was never told of the certificates and the account. After the decedent was declared to have died intestate, the plaintiff brought an action to recover the amount of the account and certificates. The Supreme Court affirmed judgment for the defendant, holding that the decedent had established a valid joint tenancy, under either a gift or contract legal theory, in both the account and certificates. The decedent's signature alone on the bank card is sufficient donative intent to make a gift under the rationale of St. Bd. of Equalization v. Cole, 122 M 9, 195 P2d 989 (1943), and there was sufficient evidence to hold that a contract existed to constitute a gift to the defendant. Malek v. Patten, 208 M 237, 678 P2d 201, 41 St. Rep. 305 (1984).

Mortmain Statute Impliedly Repealed as Contrary to MUPC: The MUPC clearly requires that the intent of the testator control the passing of his property. The mortmain statute, 72-11-334 (repealed 1981), restricting charitable devises, prevents implementation of the intent expressed in a will and was impliedly repealed by the adoption of the MUPC. In re Estate of Holmes, 183 M 290, 599 P2d 344 (1979).

72-1-101. Short title — purpose.

Compiler's Comments

Effective Date: Subsection (2) of this section, enacted by sec 1, Ch. 313, L. 2019, is effective October 1, 2019.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 1-101.

72-1-103. General definitions.

Official Comments

Special definitions for Articles V and VI are contained in Sections 5-103 [72-5-101], 6-201 [72-6-201], and 6-301 [72-6-301]. Except as controlled by special definitions applicable to these particular Articles, or applicable to particular sections, the definitions in Section 1-201 [72-1-103] apply to the entire Code.

Compiler's Comments

2023 Amendments — Composite Section: Section 1, Ch. 564, L. 2023, inserted definition of verification; and made minor changes in style. Amendment effective October 1, 2023.

Section 41, Ch. 685, L. 2023, in definition of testator at end inserted "as defined in 1-1-201". Amendment effective October 1, 2023.

Severability: Section 42, Ch. 685, L. 2023, was a severability clause.

2019 Amendment: Chapter 313 in definition of descendant at end substituted "code" for "section"; inserted definitions of record and sign; and made minor changes in style. Amendment effective October 1, 2019.

2013 Amendment: Chapter 264 in introductory material substituted "chapters 1 through 6" for "chapters 1 through 5". Amendment effective October 1, 2013.

Severability: Section 161, Ch. 264, L. 2013, was a severability clause.

2005 Amendment: Chapter 130 in definition of devisee after "trustee" substituted "or" for "on". Amendment effective October 1, 2005.

2000 Amendment by Referendum: Chapter 9 in definition of claims in (b) after "estate" deleted "or inheritance"; and made minor changes in style. Amendment effective November 7, 2000.

Applicability: Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

1995 Amendment: Chapter 592 in definition of beneficiary, in (c)(i) at beginning, deleted "an insurance or annuity policy", deleted former (c)(ii) that read: "(ii) a pension, profit-sharing, retirement, or similar benefit plan", and in (d), after "donee", deleted "appointee, or taker in default of a power of appointment"; in definition of beneficiary designation, at beginning of (a), deleted "an insurance or annuity policy" and deleted former (b) that read: "(b) a pension, profit-sharing, retirement, or similar benefit plan"; and in definition of survive, at beginning, deleted "except for purposes of Title 72, chapter 6, part 3".

1993 Amendment: Chapter 494 inserted definitions of agent, beneficiary designation, descendant, governing instrument, joint tenants with right of survivorship, payor, survive, and testator; in introductory clause, after "parts", inserted "or sections" and substituted "chapters 1 through 5" for "this code"; in definition of beneficiary inserted (c) concerning a beneficiary of a beneficiary designation and inserted (d) concerning a beneficiary designated in a governing instrument; in definition of child, after "under", substituted "chapters 1 through 5" for "this code" and inserted last clause excluding certain descendants; in definition of court substituted "district court in this state" for "court" and deleted last sentence that read: "This court in this state is known as district court"; in definition of devisee, at beginning of second sentence, inserted "For purposes of chapter 3"; in definition of estate substituted "chapters 1 through 5" for "this code"; in definition of foreign personal representative substituted "appointed by" for "of"; in definition of heirs, near beginning, inserted exception clause and after "spouse" inserted "and the state"; in definition of interested person, at end of first sentence, deleted "which may be affected by the proceeding"; in definition of issue substituted "a descendant as defined in subsection (10)" for "all his lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this code"; in definition of organization, after "partnership", inserted "joint venture", after "association" deleted "two or more persons having a joint or common interest", and at end, before "entity", inserted "or commercial"; in definition of parent substituted "chapters 1 through 5" for "this code" and at end inserted clause excluding certain individuals; in definition of state, before "possession", inserted "insular" and after "subject to the" substituted "jurisdiction" for "legislative authority"; in definition of successors, at end, substituted "chapters 1 through 5" for "this code"; in definition of trust, in third sentence, inserted reference to trust accounts; in definition of will, at end, inserted "nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 1-201.

Changes From Uniform Act:

The Montana enactment substituted the definition of "Clerk" or "clerk of court" and made minor changes in phraseology.

Case Notes

Motion to Dismiss Appeal of Distribution of Personal Property — Motion Not Filed Within 30 Days of Order on Distribution — Intervening Motion on Attorney Fees — Neither Party Served Notice of Entry of Judgment — Status of Motion for Attorney Fees Before District Court Uncertain — Motion to Dismiss Appeal Denied by Supreme Court as Untimely. In re Estate of Field, 2023 MT 48, 411 Mont. 333, 526 P.3d 1085.

Trust Properly Ruled as Nonprobate Asset: A man and his first wife executed a revocable living trust. One-half of the trust became irrevocable on the death of the wife. The man remarried and executed a codicil to his will to include his new wife and child and devised all tangible personal property to his new wife. Litigation followed the man's death. The Supreme Court found after extensive discussion of trust statutes that the District Court correctly concluded that trust assets were nonprobate assets and could only be used to satisfy the new wife's statutory allowances when and to the extent the probate estate was insufficient. In re Estate of Dower, 2021 MT 245, 405 Mont. 443, 495 P.3d 1083.

Definition of "Interested Person" to Be Read More Expansively, Not More Restrictively: The respondent was the conservator for his permanently disabled brother, whose will includes the petitioners, the sons of the respondent, as devisees. The petitioners filed an action seeking to remove their father as their uncle's conservator. The District Court granted the respondent's motion for summary judgment on grounds that the petitioners lacked standing because they were not interested persons under 72-5-413. On appeal, the Supreme Court reversed the District Court and remanded for further proceedings. Relying on the definitions in 72-1-103, the court determined first that the petitioners were devisees and then determined that devisees are interested persons. Looking then to the definition language in 72-5-413(4), the court concluded this definition was an additional definition in the Uniform Probate Code and was meant to expand the definition of "interested person" in 72-1-103, not supplant it. In re Estate of Engellant, 2017 MT 100, 387 Mont. 313, 400 P.3d 218, following In re Estates of Esterbrook, Simmons, & Simmons, 2003 MT 317, 318 Mont. 275, 80 P.3d 419.

Denial of Final Accounting — Joint Tenancy Property Passes Immediately Upon Death: According to the terms of his will, the testator did not intend ademption of three real estate lots when he sold them prior to his death but did intend ademption of five certificates of deposit that were no longer in existence. Although erroneously concluding that the certificates of deposit were not adeemed, the District Court did not err when it denied a final accounting and petition for distribution because the accounting contained errors. The accounting also erroneously included the value of joint tenancy property in the distributable estate. Property held in joint tenancy by the decedent should have passed immediately upon the decedent's death and should not have been included in the distributable estate. In re Estate of Schreiber, 2015 MT 282, 381 Mont. 173, 357 P.3d 920.

Interested Person — No Standing to Assert Incapacitated Person's Due Process Rights: In a guardianship proceeding, although the adult child of an incapacitated person is an interested person under 72-1-103, being an interested person does not confer standing on the adult child to assert the incapacitated person's constitutional rights. In re Guardianship of A.M.M., 2015 MT 250, 380 Mont. 451, 356 P.3d 474.

No Standing to Remove Personal Representative for Cause: In determining whether a party has standing to petition for removal of a personal representative for cause, the Supreme Court held that "a person interested in the estate" is synonymous with "interested person" in 72-1-103, and that a pending will contest does not change a presumption of testacy or create a property right on which standing to remove a personal representative can be based. In re Estate of Lawlor, 2015 MT 54, 378 Mont. 281, 343 P.3d 577.

Illinois Partnership Agreement Ruled a Controlling Document Under Montana Law — Shares Pass as if Decedent Died Intestate: The decedent was a member of a family limited partnership agreement formed under Illinois law. The decedent, a Montana resident, devised 65% of the residual estate to her nieces and nephews. However, the decedent's will did not mention the interest in the limited partnership. Siblings to the decedent petitioned the District Court to determine whether the interest was included in the residual estate. The District Court held that the partnership agreement was a governing instrument under 72-2-721 and that the interest was a nonprobate asset and not part of the residual estate. The Supreme Court affirmed, holding that 72-2-721 applied instead of Illinois law and that the partnership interest must pass to the heirs in the manner it would had she died intestate. Estate of Kelly, 2014 MT 254, 376 Mont. 361, 334 P.3d 911.

Standing of Any Interested Third Party to Petition for Appointment of Conservator: An attorney for an adverse party in a related case discovered that 97-year-old widow Kloss's estate had been significantly depleted under the management of her 71-year-old nephew and petitioned for a conservatorship for Kloss. Kloss objected on grounds that the attorney could not be considered to be interested in Kloss's welfare under 72-5-401 and thus lacked standing to petition for a conservatorship on her behalf. The District Court concluded that the attorney's representation of Kloss's adversary in a separate action did not preclude the attorney from acting in Kloss's best interests and dismissed Kloss's objection to the appointment. On appeal, Kloss contended that "any person who is interested" in 72-5-401 be interpreted as "interested person" as used in the general definitions of the Uniform Probate Code, which would limit persons who may petition for a conservatorship to those who have a property right in or claim against the estate. The Supreme Court declined Kloss's interpretation, noting the Legislature's intent to broadly define those who have standing to petition on behalf of another under the statute. Kloss failed to demonstrate that the attorney had a conflict of interest or would benefit from the appointment. Rather, the attorney was requesting that Kloss and her estate be protected from further alleged exploitation. The District Court was affirmed. In re Conservatorship of Kloss, 2005 MT 39, 326 M 117, 109 P3d 205 (2005).

No Error When Probate Estate Not Defined Between Probate and Nonprobate Assets: The District Court found that "Stukey's estate which is subject to estate tax, meaning assets of the decedent which are required to be probated, was less than the amount of $1,250,000". Stukey's daughter Evon contended that the court's finding incorrectly equated estate subject to tax with assets required to be probated, which was a flawed definition that was not supported by substantial evidence. The Supreme Court disagreed. Given that the division of property was based on Evon's final inventory and that the District Court made no attempt to define the estate or to divide the assets between probate and nonprobate, any error attributable to the court's finding was immaterial in light of the fact that Evon made no attempt to inform anyone that the amount to be divided was an amount other than $1,250,000. In re Estate of Stukey, 2004 MT 279, 323 M 241, 100 P3d 114 (2004).

Grandparents Properly Included as Parties to Future Matters Involving Grandchildren's Conservatorships: The grandparents were court-appointed guardians for their three grandchildren. Following a train derailment and chlorine spill, the grandparents negotiated settlements with two railroads for personal injuries and damages to the children and then sought appointment of a guardian ad litem to manage and protect the settlements. The children's mother did not object to the settlement amounts but opposed a proposed plan for administering the trust and asked to be substituted for the grandparents as petitioner. Just prior to a hearing approving the settlements, the grandparents' guardianships were dissolved and the children began living with their mother. The settlements were approved, and the District Court appointed an attorney as conservator of the estates. The court also included the grandparents as parties to future matters involving the conservatorship of the children, including requiring the grandparents' consent to stipulations for disbursement of settlement money. The mother appealed on grounds that the grandparents' interest terminated with the dissolution of their guardianships. The Supreme Court disagreed. By definition, the grandparents remained interested persons in terms of the conservatorships, and they were properly included as parties to future matters involving the conservatorship of the children, including disbursement of settlement money. In re Estates of Esterbrook, Simmons, & Simmons, 2003 MT 317, 318 M 275, 80 P3d 419 (2003).

Property Right in or Claim Against Estate Required to Be Considered Interested Person: When claimant's only claim against the estate was to the extent to which they were entitled to one-half of any insurance proceeds payable to the estate and there were no insurance proceeds, the claimants had no right in or claim against the estate, were not "interested persons", and had no standing to contest fees or to argue reasonableness of the fees of the personal representative or the estate's attorneys. An annuity contract did not constitute insurance proceeds. In re Estate of Miles v. Miles, 2000 MT 41, 298 M 312, 994 P2d 1139, 57 St. Rep. 191 (2000).

Conservator as Interested Person: A conservator is an "interested person", under the definition in 72-1-103, and has the right to oppose or contest the probate of a will. In re Tennant, 220 M 78, 714 P2d 122, 43 St. Rep. 189 (1986).

Proper "Heir" to Bring Wrongful Death Action — Daughter Survived by Mother and Sister: When decedent was killed in an auto accident, her only surviving relatives of any degree of kinship mentioned in the intestate succession statute were her mother and a sister, who filed a joint petition for a declaratory judgment as to who could maintain an action for decedent's wrongful death. The District Court correctly ruled that the mother was the sole heir for purposes of bringing the action. The court applied the intestate succession statutory definition of "heirs" in effect at the time the wrongful death act was amended to allow only the "heirs and personal representatives" of the decedent to recover. "Heirs" means those who take upon decedent's death under the intestacy statute. In re Norwest Capital Management & Trust Co., 215 M 399, 697 P2d 930, 42 St. Rep. 493 (1985).

Right of Minor Children to Bring Wrongful Death Action Though Spouse Survives: The issue of a decedent who is survived by his spouse may maintain an action for damages under 27-1-513, even though the Uniform Probate Code (UPC) now defines "heirs" as those who are entitled to the property of the decedent under intestate succession and, under the intestate succession statutes, a surviving spouse is entitled to all of the estate. Prior to enactment of the UPC, minor children could bring a wrongful death action. That right was not repealed by adoption of the UPC. Section 72-1-106 does not obviate a minor's right since the UPC provisions control only if other statutory provisions conflict with probate, guardianship, and estate matters. Wrongful death is not within these subjects. Johnson v. Marias River Elec. Co-op, Inc., 211 M 518, 687 P2d 668, 41 St. Rep. 1528 (1984).

Named Devisees Entitled to Notice of Entry of Order in a Formal Probate Proceeding: Named devisees are "interested persons" under 72-1-103 and must be given notice of the initiation of formal probate proceedings under 72-3-305, which indicates that the Legislature intended named devisees to be parties to formal probate proceedings, and as such they are entitled to notice of the entry of an order in the proceeding as required by former Rule 77(d), M.R.Civ.P. (now superseded). In re Estate of Holmes, 183 M 290, 599 P2d 344 (1979).

72-1-104. Supplementary general principles of law applicable.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 1-103.

Case Notes

Probate Court's Jurisdiction Over Wrongful Death Action in Another District: Estate was being probated in one District Court, and personal representative's wrongful death action was being considered in another district. The probate court exceeded its jurisdiction when it assumed jurisdiction over the settlement of the wrongful death action, approved it, and ordered dismissal of the action. The Supreme Court stated that whether the proceeds of the settlement or award in the wrongful death action belonged to the estate or to the heirs was pertinent to the issue of the probate court's jurisdiction over the wrongful death action and that the probate court had jurisdiction only if the proceeds belonged to the estate. The Supreme Court did not appear to definitively decide the underlying issue, though it leaned toward the traditional rule that the proceeds belong to the heirs, are personal to them, and constitute no part of the estate. The court stated that it was for the Legislature to decide whether a District Court acting as a probate court should have some jurisdiction over a wrongful death claim filed in another District Court. In re Pegg's Estate, 209 M 71, 680 P2d 316, 41 St. Rep. 558 (1984).

Statute of Limitations Barring Probate Based on Equitable Estoppel: Where the decedent had executed a will leaving most of his estate to the petitioner but had died allegedly intestate, the District Court did not err in holding that a petition for the probate of the decedent's will filed 7 years after his death was barred by the Statute of Limitations, even though the decedent's wife had made oral representations to the petitioner leading the petitioner to wrongly assume that his share of the estate had not been changed. The Statute of Limitations is clear and unambiguous, and the comments to the Uniform Probate Code from which the statute is taken also show that there are to be no exceptions for late filings of petitions based on facts constituting collateral estoppel. Neither the cases cited by the petitioner, which applied to general statutes of limitations, nor the principles of law and equity contained in 72-1-104 convince the court otherwise. In re the Estate of Taylor, 207 M 400, 675 P2d 944, 41 St. Rep. 34 (1984), overruled in part by In re Estate of Harris, 2015 MT 182, 379 Mont. 474, 352 P.3d 20.

72-1-105. Construction against implied repeal.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 1-105.

72-1-106. Uniform Probate Code to take precedence.

Case Notes

Right of Minor Children to Bring Wrongful Death Action Though Spouse Survives: The issue of a decedent who is survived by his spouse may maintain an action for damages under 27-1-513, even though the Uniform Probate Code (UPC) now defines "heirs" as those who are entitled to the property of the decedent under intestate succession and, under the intestate succession statutes, a surviving spouse is entitled to all of the estate. Prior to enactment of the UPC, minor children could bring a wrongful death action. That right was not repealed by adoption of the UPC. Section 72-1-106 does not obviate a minor's right since the UPC provisions control only if other statutory provisions conflict with probate, guardianship, and estate matters. Wrongful death is not within these subjects. Johnson v. Marias River Elec. Co-op, Inc., 211 M 518, 687 P2d 668, 41 St. Rep. 1528 (1984).

Implied Repeal of Statute by Adoption of Code: A statute must be declared impliedly repealed by the adoption of the MUPC if the statute conflicts with the Uniform Code in such a manner as to be wholly inconsistent, incompatible, and not capable of being reconciled with the Code. In re Estate of Holmes, 183 M 290, 599 P2d 344 (1979).

72-1-107. Effective date — applicability.

Case Notes

Impairment of Rights Accrued Prior to Effective Date of Code — Statute of Limitations — Application: Where the District Court held that the 3-year Statute of Limitations of the Uniform Probate Code would bar an attempt, based upon equitable estoppel, to probate a will 7 years after the death of a decedent who died prior to the effective date of the Code, the Supreme Court refused to rule on the argument that the Code in fact impaired rights (accrued prior to July 1, 1975) of the petitioner seeking to probate the will, since that argument had been raised for the first time on appeal. The court noted in passing, however, that the only right that had accrued by July 1, 1975, was the right to offer the purported will for probate under the prior probate code in effect until that date. In re the Estate of Taylor, 207 M 400, 675 P2d 944, 41 St. Rep. 34 (1984), overruled in part by In re Estate of Harris, 2015 MT 182, 379 Mont. 474, 352 P.3d 20.

72-1-108. Evidence of death or status.

Official Comments

Paragraph (1) defines death by reference to the Uniform Determination of Death Act (UDDA) [50-22-101]. States that have adopted the UDDA should use the first set of bracketed language. States that have not adopted the UDDA should use the second set of bracketed language.

Note that paragraph (6) is made desirable by the fact that Sections 2-104 [72-2-114] and 2-702 [72-2-712] require that survival by 120 hours must be established by clear and convincing evidence.

Compiler's Comments

1993 Amendment: Chapter 494 in introductory clause, at beginning after "In", substituted "addition to" for "proceedings under this code" and after "jurisdiction" substituted "the following rules relating to a determination of death or status apply" for "including any relating to simultaneous deaths, are applicable unless specifically displaced by the code"; substituted (1) concerning when death occurs for former text that read: "In addition, the following rules relating to determination of death and status are applicable"; in (3) and (5) substituted "individual" for "person"; in (4) substituted "subsection (2) or (3)" for "subsection (2)(a) or (2)(b)"; in (5) substituted "subsections (2) through (4)" for "subsections (2)(a) through (2)(c)"; inserted (6) concerning establishment of time of death by statement in a document; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

1989 Amendment: Inserted (2)(c) relating to establishment of death by clear and convincing evidence; and in (2)(d) inserted "whose death is not established under subsections (2)(a) through (2)(c)" and reduced period for presumption of death from 7 years to 5 years.

1989 Editorial Comment: This change results from an amendment proposed by the Joint Editorial Board of the national Uniform Probate Code in 1987. Apparently some lawyers and judges read the section so narrowly as to permit proof of death only by evidence specified in subsections (2)(a) and (2)(b) and former subsection (2)(c). So read, proof of disappearance under circumstances tending to establish death, such as disappearance following departure by airplane or boat in an area hit shortly thereafter by hurricane-force winds, has been ruled inadmissible prior to 5 years following the disappearance.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 1-107.

72-1-109. Acts by holder of general power.

Official Comments

The status of a holder of a general power in estate litigation is dealt with by [72-1-303].

This section permits the settlor of a revocable trust to prevent the trustee from registering the trust so long as the power of revocation continues.

"General power," as used in this section, is intended to refer to the common-law concept, rather than to tax or other statutory meanings. A general power, as used herein, is one which enables the power holder to draw absolute ownership to himself.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 1-108.

72-1-111. Remedies for fraud — statute of limitations.

Official Comments

This is an overriding provision that provides an exception to the procedures and limitations provided in the code. The remedy of a party wronged by fraud is intended to be supplementary to other protections provided in the code and can be maintained outside the process of settlement of the estate. Thus, if a will which is known to be forgery is probated informally, and the forgery is not discovered until after the period for contest has run, the defrauded heirs still could bring a fraud action under this section. Or if a will is fraudulently concealed after the testator's death and its existence not discovered until after the basic three-year period [72-3-122] has elapsed, there still may be an action under this section. Similarly, a closing statement normally provides binding protection for the personal representative after six months from filing [72-3-1011]. However, if there is fraudulent misrepresentation or concealment in the preparation of the claim, a later suit may be brought under this section against the personal representative for damages; or restitution may be obtained from those distributees who benefit by the fraud. In any case innocent purchasers for value are protected.

Any action under this section is subject to usual rules of res judicata; thus, if a forged will has been informally probated, an heir discovers the forgery, and then there is a formal proceeding under [72-3-1001 and 72-3-1002] of which the heir is given notice, followed by an order of complete settlement of the estate, the heir could not bring a subsequent action under [72-1-111] but would be bound by the litigation in which the issue could have been raised.

The usual rules for securing relief for fraud on a court would govern, however.

The final limitation in this section is designed to protect innocent distributees after a reasonable period of time. There is no limit (other than the two years from discovery of the fraud) against the wrongdoer. But there ought to be some limit after which innocent persons who have built up expectations in good faith cannot be deprived of the property by a restitution action.

The time of "discovery" of a fraud is a fact question to be determined in the individual case. In some situations persons may not actually know that a fraud has been perpetrated but have such strong suspicion and evidence that a court may conclude there has been a discovery of the fraud at that stage. On the other hand there is no duty to exercise reasonable care to discover fraud; the burden should not be on the heirs and devisees to check on the honesty of the other interested persons or the fiduciary.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 1-106.

Case Notes

Time-Barred Claim for Relief from Formal Testacy Order: Adult children who would have inherited more under a prior will alleged they were told by the estate representative that they would receive their "fair share". They did not challenge the will until years later, alleging that the testator lacked capacity and the representative perpetrated fraud. The District Court found their claim was time-barred. On appeal, the Supreme Court affirmed the dismissal of the petition to reopen the estate, noting that 72-1-111 has no bearing on a claim of testamentary capacity and that the adult children's claims were not sufficient to toll the statute of limitations of 72-3-317. In re Estate of Swanberg, 2020 MT 153, 400 Mont. 247, 465 P.3d 1165.

Sufficient Indica of Mutual Assent to Find Written Contract — Compensatory Damages — Constructive Fraud — Statute of Frauds — Statute of Limitations: The defendants sold a tract of land from their parents' estate despite the fact that the plaintiffs had an oral agreement with the parents for the purchase of a portion of the property. The District Court properly determined that the plaintiffs had an enforceable contract to buy the property under 70-20-102 and 30-11-111 based on (1) an unsigned land purchase agreement, (2) a land survey, (3) a check issued by one of the plaintiffs that was endorsed and deposited, and (4) a letter to a tax preparer referencing the check received as partial payment for the property at issue. Because the plaintiffs had an enforceable contract, the District Court properly determined that the plaintiffs suffered compensatory damages and that the personal representative's statements showed constructive fraud. The Supreme Court held that the District Court did not err in its conclusion that the limitations provided under 72-3-803 did not bar the plaintiffs' claim. Wood v. Anderson, 2017 MT 180, 388 Mont. 166, 399 P.3d 304.

Distribution of Property Based on Fraud — Burden of Proof: Where appellants alleged that a decree of distribution of the decedent's estate was based on a fraudulently obtained consent decree, the District Court's decree was proper, as the appellants failed to prove by a preponderance of the evidence that they would have taken more under the will but for the alleged fraud. Estate of Wallace v. McAlear, 186 M 18, 606 P2d 136, 37 St. Rep. 158 (1980).

Part 2

Scope, Jurisdiction, and Courts

Part Compiler's Comments

Changes From the Uniform Act: Montana omitted section 1-309 of the Uniform Probate Code pertaining to qualifications of a judge of the Court.

72-1-201. Territorial application.

Compiler's Comments

2019 Amendment: Chapter 313 inserted (4) regarding survivorship and related accounts; and made minor changes in style. Amendment effective October 1, 2019.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 1-301.

Case Notes

Illinois Partnership Agreement Ruled a Controlling Document Under Montana Law — Shares Pass as if Decedent Died Intestate: The decedent was a member of a family limited partnership agreement formed under Illinois law. The decedent, a Montana resident, devised 65% of the residual estate to her nieces and nephews. However, the decedent's will did not mention the interest in the limited partnership. Siblings to the decedent petitioned the District Court to determine whether the interest was included in the residual estate. The District Court held that the partnership agreement was a governing instrument under 72-2-721 and that the interest was a nonprobate asset and not part of the residual estate. The Supreme Court affirmed, holding that 72-2-721 applied instead of Illinois law and that the partnership interest must pass to the heirs in the manner it would had she died intestate. Estate of Kelly, 2014 MT 254, 376 Mont. 361, 334 P.3d 911.

Analysis for Jurisdiction of District Court Over Tribal Member and Tribal Property: The correct analysis in both regulatory and adjudicatory actions involving tribal members or lands is whether the exercise of jurisdiction by a state court or regulatory body is preempted by federal law or, if not, whether it infringes on tribal self-government. If either element is met, a state may not assume civil jurisdiction or take regulatory action over Indian people or their territories within the boundaries of their reservations. In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121, overruling Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292 (1973), in its entirety and In re Marriage of Skillen, 1998 MT 43, 287 Mont. 399, 956 P.2d 1, in part and overruling numerous cases to the extent they followed the principles of Iron Bear or Skillen.

No Subject Matter Jurisdiction for District Court in Probate for Tribal Member — Jurisdiction Presumptively With Tribal Court — Proceedings Before District Court Void: The District Court erred when it assumed subject matter jurisdiction over the probate of an enrolled Blackfeet Tribal member's estate when all of the decedent's estate property was located within the exterior boundaries of the Blackfeet Reservation. The Supreme Court overruled Iron Bear and held that civil jurisdiction over non-Indians and Indians on reservation lands presumptively lies in the tribal court. Absent express congressional limitation, the tribe maintained sovereign power and exclusive jurisdiction over the probate of the decedent. A state court has an independent obligation to determine whether it has jurisdiction in a case involving an Indian person and Indian Country. The court declared void the 7 years of proceedings before the District Court with reference to the decedent's estate. In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121, overruling Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292 (1973), in its entirety and In re Marriage of Skillen, 1998 MT 43, 287 Mont. 399, 956 P.2d 1, in part and overruling numerous cases to the extent they followed the principles of Iron Bear or Skillen.

No Requirement That Decedent's Montana Property Have Significant Connection to Montana — Venue in Montana County Proper: Strange died in Arizona and never resided in Montana but had periodically visited his son in Billings and had left a small amount of property of little value with the son. The son also managed a small investment account in Strange's name with a company in Massachusetts. When Strange died, the son applied for informal probate and for appointment as personal representative in Montana, having been named as a corepresentative with his brother. Strange's wife moved to dismiss the application, arguing that the District Court lacked both venue and jurisdiction. The court concluded that it had jurisdiction over the son, but that venue in Montana was not proper because Strange's Montana assets did not establish a significant connection to Montana, so the motion to dismiss the application was granted. The son appealed, and the Supreme Court reversed. There is no "single forum" requirement under the Uniform Probate Code (UPC). Rather, the UPC allows for an initial filing in Montana if a decedent owned property here, followed by ancillary probate proceedings in other jurisdictions when necessary. The probate venue statutes do not require that a decedent have a certain type or amount of property in Montana, but rather provide that venue is proper in any county where the decedent had assets. Regardless of whether Strange's property was de minimis, the District Court should have concluded that venue was proper in Yellowstone County because there was no evidence that Strange had property elsewhere in Montana, so dismissal of the son's application on venue grounds was reversible error. In re Estate of Strange, 2008 MT 158, 343 M 296, 184 P3d 1029 (2008).

Land Below High-Water Mark of Flathead Lake Tribal Property Not Subject to Distribution by Estate: When she died, Hobbs owned property on the south shore of Flathead Lake. Her will designated that three nieces divide one parcel of about 1 acre above the high-water mark and that a fourth niece and her husband, the Conrads, receive an adjacent 1.9-acre parcel from the high-water mark inland. A survey established the boundary between the parcels, but did not include any land below the high-water mark to the meander line of the lake. The District Court approved the survey, distributed the property, and closed the estate. The parties later became involved in a dispute over zoning and building regulations. The personal representative petitioned to reopen the estate for the purpose of filing a corrected survey and to distribute the portion of land lying below the high-water mark to the meander line, thereby increasing the acreage of both lots. The personal representative presented exhibits and affidavits verifying that Hobbs had paid taxes on the land out to the meander line. The Conrads objected on grounds that Hobbs's will specifically left land above the high-water mark and that because the estate did not own the land below the high-water mark, it could not be distributed to anyone. Nevertheless, the District Court approved the corrected survey and distributed the land below the high-water mark to the meander line between the heirs. The Supreme Court noted that the bed and banks of Flathead Lake within Indian reservation boundaries are held by the United States in trust for the tribes, and that any private title to Flathead Lake shore property extends only to the high-water mark. The District Court erroneously distributed the land below the high-water mark to the meander line, because the court did not have jurisdiction to distribute the tribal trust property. The estate could not distribute property that it did not own. In re Estate of Hobbs, 2002 MT 85, 309 M 308, 46 P3d 594 (2002), following Mont. Power Co. v. Rochester, 127 F2d 189 (9th Cir. 1942), and Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen, 665 F2d 951 (9th Cir. 1982).

No In Rem Jurisdiction Over Trust Property Located Out of State: The deceased resided in Montana for several years before her death, and her will was placed in probate in Montana. She established a trust in Nevada when she was a resident of that state. The administrator of the will petitioned the Montana court for an order to have the proceeds of the Nevada trust transferred to Montana for distribution under Montana's probate proceedings. The Supreme Court ruled that the fact that the deceased lived in Montana was not a sufficient affiliation with the property upon which to base in rem jurisdiction. In re Estate of Ducey, 241 M 419, 787 P2d 749, 47 St. Rep. 232 (1990).

Probate Court Jurisdiction — Settlement of Survival and Wrongful Death Actions in Same District: The probate court in the Eleventh Judicial District had jurisdiction to settle both a survival and wrongful death action filed there by the mother, who was personal representative, despite the fact that a separate wrongful death action was filed in the Thirteenth Judicial District by the father, who was never appointed personal representative. The wrongful death settlement was inextricably linked to the survival action, and jurisdiction of the estate was in the Eleventh Judicial District. In re Estate of Farnum, 224 M 304, 730 P2d 391, 43 St. Rep. 2205 (1986).

Probate Court's Jurisdiction Over Wrongful Death Action in Another District: Estate was being probated in one District Court, and personal representative's wrongful death action was being considered in another district. The probate court exceeded its jurisdiction when it assumed jurisdiction over the settlement of the wrongful death action, approved it, and ordered dismissal of the action. The Supreme Court stated that whether the proceeds of the settlement or award in the wrongful death action belonged to the estate or to the heirs was pertinent to the issue of the probate court's jurisdiction over the wrongful death action and that the probate court had jurisdiction only if the proceeds belonged to the estate. The Supreme Court did not appear to definitively decide the underlying issue, though it leaned toward the traditional rule that the proceeds belong to the heirs, are personal to them, and constitute no part of the estate. The court stated that it was for the Legislature to decide whether a District Court acting as a probate court should have some jurisdiction over a wrongful death claim filed in another District Court. In re Pegg's Estate, 209 M 71, 680 P2d 316, 41 St. Rep. 558 (1984).

72-1-202. Subject matter jurisdiction.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 1-302.

Case Notes

District Court Sitting in Probate — Motion to Strike Notice of Disallowance Improper — Reversed for Lack of Subject Matter Jurisdiction. In re Estate of Scott, 2023 MT 97, 412 Mont. 303, 529 P.3d 867.

Subject Matter Jurisdiction to Probate Multiple Instruments Offered for Probate Held by District Court — Court Did Not Lack Jurisdiction to Interpret Stipulated Marital and Property Settlement Agreement. In re Estate of Williams, 2023 MT 72, 412 Mont. 58, 528 P.3d 1087.

Contract Claim Under Succession Contract — Probate Court Lacks Subject Matter Jurisdiction: In a dissolution of marriage agreement ("separation agreement"), the decedent agreed to devise his real property equally among the children of the marriage and any future children, but at the time of his death, the decedent's will left all his real property to his sole son. The three daughters sued in Probate Court to enforce the terms of the separation agreement but were denied by the Probate Court for lack of subject matter jurisdiction. On appeal, the Supreme Court upheld the lack of jurisdiction. Noting that a District Court sitting probate has no jurisdiction to consider matters that are equitable in nature, the Supreme Court found that the separation agreement is a succession contract, and that the daughters' request for specific performance of the separation agreement is an equitable remedy. In upholding the Probate Court's dismissal of the claim, the Supreme Court noted the daughters could pursue a contract claim to enforce the separation agreement in a civil action against the personal representative of the decedent's estate. In re Estate of Cooney, 2019 MT 293, 398 Mont. 166, 454 P.3d 1190.

District Court Assuming Subject Matter Jurisdiction Over Estate When Tribal Council Unequivocally Declined to Assert Subject Matter Jurisdiction — No Error: A court may take judicial notice of records of any court of this state or of any court of record of the United States or any court of record of any state of the United States. A tribal court order, though not expressly listed in the rule, is a record analogous to those listed in Rule 202(b)(6), M.R.Ev. (Title 26, ch. 10), and is thus law of which the Supreme Court may take judicial notice. In re Estate of Gopher, 2013 MT 264, 372 Mont. 9, 310 P.3d 521.

Analysis for Jurisdiction of District Court Over Tribal Member and Tribal Property: The correct analysis in both regulatory and adjudicatory actions involving tribal members or lands is whether the exercise of jurisdiction by a state court or regulatory body is preempted by federal law or, if not, whether it infringes on tribal self-government. If either element is met, a state may not assume civil jurisdiction or take regulatory action over Indian people or their territories within the boundaries of their reservations. In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121, overruling Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292 (1973), in its entirety and In re Marriage of Skillen, 1998 MT 43, 287 Mont. 399, 956 P.2d 1, in part and overruling numerous cases to the extent they followed the principles of Iron Bear or Skillen.

No Subject Matter Jurisdiction for District Court in Probate for Tribal Member — Jurisdiction Presumptively With Tribal Court — Proceedings Before District Court Void: The District Court erred when it assumed subject matter jurisdiction over the probate of an enrolled Blackfeet Tribal member's estate when all of the decedent's estate property was located within the exterior boundaries of the Blackfeet Reservation. The Supreme Court overruled Iron Bear and held that civil jurisdiction over non-Indians and Indians on reservation lands presumptively lies in the tribal court. Absent express congressional limitation, the tribe maintained sovereign power and exclusive jurisdiction over the probate of the decedent. A state court has an independent obligation to determine whether it has jurisdiction in a case involving an Indian person and Indian Country. The court declared void the 7 years of proceedings before the District Court with reference to the decedent's estate. In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121, overruling Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292 (1973), in its entirety and In re Marriage of Skillen, 1998 MT 43, 287 Mont. 399, 956 P.2d 1, in part and overruling numerous cases to the extent they followed the principles of Iron Bear or Skillen.

District Court Sitting in Probate — Lack of Subject Matter Jurisdiction Over Trust Code Issue: Two daughters sought to have the wife, Audrey, removed as trustee of their father's estate because of alleged mismanagement of the family trust. Before that action was addressed, Audrey petitioned the District Court under the closed probate proceedings to have herself removed as trustee and requested appointment of a corporate trustee successor. The two sisters moved to dismiss the petition on grounds that the court lacked subject matter jurisdiction. Without formally ruling on the motion to dismiss, the court concluded that Audrey's motion was properly filed under the original probate and proceeded to rule on other matters, including a motion for substitution of the judge. On appeal, the Supreme Court held that because Audrey was not attempting to reopen the probate proceedings or to relitigate any probate matter, Audrey's petition was a trust proceeding rather than a proceeding over the closed probate, and as such the District Court did not have subject matter jurisdiction to entertain Audrey's petition. The daughters' motion to dismiss should have been granted because a District Court sitting in probate has no jurisdiction over testamentary trusts that arise after probate is closed, so the case was remanded for further proceedings. In re Estate of Haugen, 2008 MT 304, 346 M 1, 192 P3d 1132 (2008). See also Stanley v. Lemire, 2006 MT 304, 334 M 489, 148 P3d 643 (2006).

No Standing of One Parent to Assert Due Process Rights of Another Parent — No Eradication of Court Jurisdiction Based on Lack of Notice to Purported Fathers: A mother asserted that guardianship proceedings regarding her children were invalid because the purported fathers, whose identities or whereabouts were unknown, were not notified, in violation of the fathers' due process rights. The Supreme Court disagreed. Regardless of whether the notice statute was fully complied with, the mother's rights were not compromised, nor was she injured by the statutory violation; thus, the mother had no standing to assert a violation of the purported fathers' due process rights. Further, the District Court had statutory subject matter jurisdiction over the guardianship proceedings, and any failure of the court to comply with the notice requirements would have resulted in lack of personal jurisdiction over the fathers, but not eradication of the court's jurisdiction over the subject matter. In re B.F. & A.W., 2004 MT 61, 320 M 261, 87 P3d 427 (2004).

Lack of Probate Court Jurisdiction in Deciding Attorney Fee Related to Tort Claim: A probate attorney requested that the District Court stay proceedings on a claim that the attorney had wrongfully converted estate property until the probate court finally determined applicable attorney fees. The probate court had jurisdiction over and decided the amount of the attorney fees for probate of the estate but had no jurisdiction to decide the attorney fee related to the tort claim. Thus, the District Court did not abuse its discretion in refusing to delay trial of the conversion claim until the probate court determined the amount of the attorney fee. Eatinger v. Johnson, 269 M 99, 887 P2d 231, 51 St. Rep. 1484 (1994).

No In Rem Jurisdiction Over Trust Property Located Out of State: The deceased resided in Montana for several years before her death, and her will was placed in probate in Montana. She established a trust in Nevada when she was a resident of that state. The administrator of the will petitioned the Montana court for an order to have the proceeds of the Nevada trust transferred to Montana for distribution under Montana's probate proceedings. The Supreme Court ruled that the fact that the deceased lived in Montana was not a sufficient affiliation with the property upon which to base in rem jurisdiction. In re Estate of Ducey, 241 M 419, 787 P2d 749, 47 St. Rep. 232 (1990).

State Probate Jurisdiction of Federal Claim — Homestead Exemption — Priority of Liens: Creditor obtained a default judgment in the U.S. District Court for the Southern District of

New York against an Alaska resident and attempted to execute on property in Montana that had subsequently come under Montana's exclusive probate jurisdiction. While the federal court retained jurisdiction over claims impacting the estate, the court could not seize and control property in the possession of the state probate court. It was within the jurisdiction of the state court to determine that the real property was subject to family protection allowances and exempt from execution. Although the lien was attached prior to debtor's death, the lien was extinguished upon the exercise of the family protection allowances, and the homestead allowance was exempt from and had priority over all other claims against the estate. In re Estate of Wilhelm, 233 M 255, 760 P2d 718, 45 St. Rep. 1468 (1988).

Probate Court Jurisdiction — Settlement of Survival and Wrongful Death Actions in Same District: The probate court in the Eleventh Judicial District had jurisdiction to settle both a survival and wrongful death action filed there by the mother, who was personal representative, despite the fact that a separate wrongful death action was filed in the Thirteenth Judicial District by the father, who was never appointed personal representative. The wrongful death settlement was inextricably linked to the survival action, and jurisdiction of the estate was in the Eleventh Judicial District. In re Estate of Farnum, 224 M 304, 730 P2d 391, 43 St. Rep. 2205 (1986).

Probate Court's Jurisdiction Over Wrongful Death Action in Another District: Estate was being probated in one District Court, and personal representative's wrongful death action was being considered in another district. The probate court exceeded its jurisdiction when it assumed jurisdiction over the settlement of the wrongful death action, approved it, and ordered dismissal of the action. The Supreme Court stated that whether the proceeds of the settlement or award in the wrongful death action belonged to the estate or to the heirs was pertinent to the issue of the probate court's jurisdiction over the wrongful death action and that the probate court had jurisdiction only if the proceeds belonged to the estate. The Supreme Court did not appear to definitively decide the underlying issue, though it leaned toward the traditional rule that the proceeds belong to the heirs, are personal to them, and constitute no part of the estate. The court stated that it was for the Legislature to decide whether a District Court acting as a probate court should have some jurisdiction over a wrongful death claim filed in another District Court. In re Pegg's Estate, 209 M 71, 680 P2d 316, 41 St. Rep. 558 (1984).

72-1-203. Venue — multiple proceedings — transfer.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 1-303.

Case Notes

Transference of Venue After a Year — No Abuse of Discretion: The District Court did not abuse its discretion by ordering that venue be transferred in the case of a guardianship of an elderly ward after the ward moved from one county to another county. Although the originating court had the exclusive right to proceed before the ward moved, after the ward moved the new county also became a proper venue, and the District Court exercised its discretion to transfer the venue after finding that it should be located in the new county, even though more than a year had passed since the proceeding commenced. In re Guardianship of H.O., 2014 MT 285, 376 Mont. 519, 337 P.3d 91.

72-1-204. Records and certified copies.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 1-305.

72-1-205. Powers of clerk — performable by clerk or court.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 1-307.

72-1-206. Oath or affirmation on filed documents.

Compiler's Comments

2011 Amendment: Chapter 238 in (1) near beginning after "this code" deleted "or by rule", inserted "reports, accounts, objections, responses", and inserted "declaration under penalty of perjury as provided in 1-6-105"; in (2) substituted "of any document filed with the court pursuant to this section constitutes the offense of perjury and is punishable as" for "therein shall constitute"; and made minor changes in style. Amendment effective October 1, 2011.

Saving Clause: Section 11, Ch. 238, L. 2011, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 1-310.

Changes From Uniform Act: The Montana enactment omitted section 1-309 of the Uniform Probate Code pertaining to qualifications of a judge of the Court.

72-1-207. Rules of civil procedure to apply.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 1-304.

Case Notes

Formal Testacy Order — Governed Under Uniform Probate Code — Rule 60, M.R.Civ.P., Inapplicable: Because appeals or vacations from a formal testacy order are subject to 72-3-317 and 72-3-318, and because those sections are inconsistent with Rule 60, M.R.Civ.P. (Title 25, ch. 20), the District Court did not err in determining that a motion for relief from a formal testacy order must be considered under those sections rather than under Rule 60. In re Estate of Erickson, 2017 MT 260, 389 Mont. 147, 406 P.3d 1.

Misrepresentation of Value of Estate — Estoppel Applicable to Prevent Advantage From Misrepresentation: A conservator knew, but failed to mention, that an estate included annuities and jointly held property that was not included in the final estate inventory. Other parties, to their detriment, relied on the inventory as an accurate representation of the value of the estate. The District Court properly held that it would not be equitable for the conservator to take advantage of the misrepresentation of the value of the estate by reducing the distribution to the other parties. The Supreme Court held that the elements of equitable estoppel were met, and the District Court was affirmed. In re Estate of Stukey, 2004 MT 279, 323 M 241, 100 P3d 114 (2004). See also Elk Park Ranch, Inc. v. Park County, 282 M 154, 935 P2d 1131 (1997).

Conversion of Probate Proceeding From Informal to Formal Proceeding and Effect of Failure to Give Proper Notices: When the personal representative of an estate in informal proceedings petitioned for judicial approval of his final account and for the settlement and distribution of the estate, the proceeding was converted into a formal proceeding for those purposes. The Montana Rules of Civil Procedure apply to formal proceedings. The bank, which was a creditor of the estate and filed a claim against the estate, was entitled to notice of the hearing on the petition and entitled to an opportunity to appear and contest. Because the notice was not given, the court's decree was void and reversed as to the bank. The bank was also entitled to notice of the entry of the formal estate decree, and because that notice was not given, the 30-day time period for the bank to appeal did not run and the bank's appeal, filed after that period, was timely. In re Estate of Spencer, 2002 MT 304, 313 M 40, 59 P3d 1160 (2002).

No Estate Inventory and Inventory Discovery Required Prior to Grant of Statutory Homestead, Exempt Property, and Family Allowances to Surviving Spouse: No estate inventory or scheduling order was filed prior to the District Court award of a homestead allowance, an exempt property allowance, and a family allowance to the surviving spouse. The decedent's son and sister contested the award, relying on former Rule 16(b), M.R.Civ.P. (now superseded), for the proposition that they were entitled to an inventory and related discovery before the allowances were granted. The Supreme Court found that application of the rule to probate proceedings would be administratively inefficient and contrary to the purposes of the rule. The District Court properly found that the surviving spouse was entitled to the allowances as a matter of law, and because these were legal issues, it was within the court's discretion to decide them prior to a scheduling order or estate inventory. In re Estate of Martelle, 2001 MT 194, 306 M 253, 32 P3d 758 (2001).

Notice of Entry of Order in Formal Probate Proceeding: The notice required on the entry of an order in a formal probate proceeding is controlled by the Montana Rules of Civil Procedure. In re Estate of Holmes, 183 M 290, 599 P2d 344 (1979).

72-1-208. Jury trial.

Compiler's Comments

2019 Amendment: Chapter 313 in (1) at end substituted "and any proceeding in which any controverted question of fact arises as to which any party has a constitutional right to trial by jury" for "a formal proceeding for determination of heirship, and any other proceeding as may be provided for by law". Amendment effective October 1, 2019.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 1-306.

Case Notes

Question Whether Holographic Document Intended as Codicil or List of Property to Be Dispensed — Testamentary Intent Question of Fact to Be Determined by Judge or Jury — Summary Judgment Improper: Johnson executed a formal will and also executed and signed a holographic document consisting of a handwritten list of possessions and names. The District Court concluded that the holographic document was a personal property list made pursuant to 72-2-533, rather than a codicil, and applied 72-2-523 in ordering distribution of the property because there was no intent by Johnson that the holographic document should constitute the complete will. The Supreme Court held that the District Court should have applied 72-2-522, which deals with holographic wills, rather than 72-2-523. The three requirements for a valid holographic will are: (1) individuals must be at least 18 years old and of sound mind; (2) the material provisions of the will must be in the handwriting of the testator and signed by the testator; and (3) the individual must have testamentary intent that the document will dispose of the individual's property after death. Here, the first two elements were met, but a question of fact remained concerning Johnson's intent, precluding summary judgment. The case was remanded to give the parties an opportunity to present evidence concerning Johnson's intent so that the trier of fact could decide the issue under the correct standard. In re Estate of Johnson, 2002 MT 341, 313 M 316, 60 P3d 1014 (2002).

Named Devisees Entitled to Notice of Entry of Order in a Formal Probate Proceeding: Named devisees are "interested persons" under 72-1-103 and must be given notice of the initiation of formal probate proceedings under 72-3-305, which indicates that the Legislature intended named devisees to be parties to formal probate proceedings, and as such they are entitled to notice of the entry of an order in the proceeding as required by former Rule 77(d), M.R.Civ.P. (now superseded). In re Estate of Holmes, 183 M 290, 599 P2d 344 (1979).

72-1-209. Appeals.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 1-308.

Case Notes

Appellate Review — Substantial Evidence to Support District Court's Findings of Fact: On appeal, the plaintiff asserted that conflicting evidence presented at trial undermined the District Court's findings. The Supreme Court disagreed and held that neither the factfinder's determination of witness credibility nor the weight assigned by the factfinder to the testimony of each witness would be disturbed on appeal. Substantial evidence supported the District Court's findings and the Supreme Court upheld the findings. Shephard v. Widhalm, 2012 MT 276, 367 Mont. 166, 290 P.3d 712.

Late Appeal — New Grounds for Argument Below — Failure to Argue on Appeal: The merits of appellants' arguments in support of removal of personal representative of an estate could not be considered on appeal from denial of final order denying motion to remove when: (1) since the order was final and appealable, it had to be appealed within 30 days of notice of its entry; (2) appeal was filed 34 days after notice of entry of the order; and (3) though appellants had, within the 30 days prior to their notice of appeal, filed a second petition for removal that raised a new ground for removal, appellants did not argue that failure to raise the ground earlier was excusable because of inadvertence, excusable neglect, or newly discovered evidence, and the lower court found appellants had earlier been in possession of all the facts. The order was conclusive as to all matters that could have been raised under the issues raised in the original petition for removal. In re Pegg's Estate, 209 M 71, 680 P2d 316, 41 St. Rep. 558 (1984).

Part 3
Notices, Parties, and Representation Generally

72-1-301. Notice — method and time of giving.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 1-401.

Case Notes

Service of Process by Publication Proper When Diligent Inquiry Made for Heirs: Following service of process by publication, default judgment was entered against any potential heirs who failed to appear. The doctrine of laches precluded claimants from obtaining redistribution of an estate following distribution to heirs who timely appeared and litigated the distribution. In re Estate of Bovey, 2010 MT 217, 358 Mont. 14, 244 P.3d 716.

No Standing of One Parent to Assert Due Process Rights of Another Parent — No Eradication of Court Jurisdiction Based on Lack of Notice to Purported Fathers: A mother asserted that guardianship proceedings regarding her children were invalid because the purported fathers, whose identities or whereabouts were unknown, were not notified, in violation of the fathers' due process rights. The Supreme Court disagreed. Regardless of whether the notice statute was fully complied with, the mother's rights were not compromised, nor was she injured by the statutory violation; thus, the mother had no standing to assert a violation of the purported fathers' due process rights. Further, the District Court had statutory subject matter jurisdiction over the guardianship proceedings, and any failure of the court to comply with the notice requirements would have resulted in lack of personal jurisdiction over the fathers, but not eradication of the court's jurisdiction over the subject matter. In re B.F. & A.W., 2004 MT 61, 320 M 261, 87 P3d 427 (2004).

Allegation of Insufficient Notice — First Raised on Appeal: Estate argued that it was denied fair hearing by what it termed repeated errors in setting the petition for a hearing, complaining that it was not given 14-day notice of hearing on petition for allowances. Since the record showed that the appellant did not object to notices or request continuances at District Court level and raised the issues for the first time on appeal, the Supreme Court rejected appellant's arguments. In re Estate of Lawson, 222 M 276, 721 P2d 760, 43 St. Rep. 1261 (1986).

Issue of Notice of Conservatorship and Guardianship Proceedings Not Raised at Trial — No Appeal: At the request of her doctor, Myrtle Mae Tennant (Mae) was declared an incompetent by the District Court so that a conservator and guardian could be appointed for her. Thereafter, the conservator filed an action to recover from appellants Evans and Williams funds that they had received from Mae. On appeal, appellants claimed that the District Court erred by not giving Mae any notice of the conservatorship and guardianship proceedings and that therefore the appointments made during the proceedings were void ab initio. The Supreme Court found that the issue of notice to Mae was not previously raised or presented to the trial court and that therefore the issue could not be properly raised on appeal. Consequently, the appellants' claim of error was disregarded. In re Tennant, 220 M 78, 714 P2d 122, 43 St. Rep. 189 (1986).

72-1-302. Waiver of notice.

Official Comments

The subject of appearance is covered by [72-1-207].

Compiler's Comments

2019 Amendment: Chapter 313 inserted second sentence regarding restrictions on who may waive notice. Amendment effective October 1, 2019.

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 1-402.

72-1-303. Pleadings — when orders or notice binding one binds another — representation.

Official Comments

A general power, as used here and in [72-1-109], is one which enables the power holder to draw absolute ownership to himself. The section assumes a valid general power. If the validity of the power itself were in issue, the power holder could not represent others, as for example, the takers in default.

The general rules of civil procedure are applicable where not replaced by specific provision, see [72-1-207]. Those rules would determine the mode of giving notice or serving process on a minor or the mode of notice in class suits involving large groups of persons made party to a suit.

Compiler's Comments

2019 Amendment: Chapter 313 inserted (2)(b)(i)(E) regarding a sole holder or all co-holders of a general testamentary power of appointment; and made minor changes in style. Amendment effective October 1, 2019.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 1-403.

Case Notes

Appointment of Mother Married to Manager of Ranch That Might Be Sued for Her Children's Injuries — No Conflict of Interest: The mother's four children were injured in a one-vehicle accident while an employee of the ranch that her husband managed was, at the mother's request, driving the children home to the ranch after school. The parties agreed that the employee was acting in the course and scope of his employment, that the ranch owned the pickup, that the ranch had about $800,000 of available insurance coverage, that the damages could exceed the limits of the insurance, and that a suit against the ranch was a possibility. The mother's ex-husband petitioned for his appointment as the children's guardian ad litem and conservator. The mother cross-petitioned that she be appointed. The District Court did not err in appointing the mother and deciding that she did not suffer from a conflict of interest that precluded her from serving as guardian ad litem and conservator of the children. The District Court found that she "would fulfill her fiduciary duties to her children tenaciously", that she would consider their emotional needs and future financial security, and that the evidence showed that she was an extremely involved and protective mother who gave much time, love, and attention to the children. In re Watson, 283 M 57, 939 P2d 982, 54 St. Rep. 492 (1997).

Issue of Notice of Conservatorship and Guardianship Proceedings Not Raised at Trial — No Appeal: At the request of her doctor, Myrtle Mae Tennant (Mae) was declared an incompetent by the District Court so that a conservator and guardian could be appointed for her. Thereafter, the conservator filed an action to recover from appellants Evans and Williams funds that they had received from Mae. On appeal, appellants claimed that the District Court erred by not giving Mae any notice of the conservatorship and guardianship proceedings and that therefore the appointments made during the proceedings were void ab initio. The Supreme Court found that the issue of notice to Mae was not previously raised or presented to the trial court and that therefore the issue could not be properly raised on appeal. Consequently, the appellants' claim of error was disregarded. In re Tennant, 220 M 78, 714 P2d 122, 43 St. Rep. 189 (1986).

Notice Required in Will Contests: Since 72-3-308 requires parties who oppose the probate of a will to state their objections in the form of pleadings, will contests are pleadings, and all interested persons must be given notice that they have been filed. In re Estate of Holmes, 183 M 290, 599 P2d 344 (1979).

72-1-310. Permitted pleadings — verification required.

Compiler's Comments

2013 Amendment: Chapter 264 in (1) after "probate" deleted "and trust". Amendment effective October 1, 2013.

Severability: Section 161, Ch. 264, L. 2013, was a severability clause.

Effective Date: This section is effective October 1, 2011.

Saving Clause: Section 11, Ch. 238, L. 2011, was a saving clause.

72-1-311. Affidavit or verified petition as evidence in uncontested proceedings.

Compiler's Comments

2013 Amendment: Chapter 264 after "probate" deleted "or trust". Amendment effective October 1, 2013.

Severability: Section 161, Ch. 264, L. 2013, was a severability clause.

Effective Date: This section is effective October 1, 2011.

Saving Clause: Section 11, Ch. 238, L. 2011, was a saving clause.

72-1-312. Attorney signature — pleadings.

Compiler's Comments

2013 Amendment: Chapter 264 after "probate" deleted "or trust". Amendment effective October 1, 2013.

Severability: Section 161, Ch. 264, L. 2013, was a severability clause.

Effective Date: This section is effective October 1, 2011.

Saving Clause: Section 11, Ch. 238, L. 2011, was a saving clause.

CHAPTER 2
UPC — INTESTACY, WILLS, AND DONATIVE TRANSFERS

Chapter Official Comments

PREFATORY NOTE

The Uniform Probate Code was promulgated in 1969. In 1990, Article II of the Code underwent significant revision. The 1990 revisions are the culmination of a systematic study of the Code conducted by the Joint Editorial Board for the Uniform Probate Code (JEB-UPC) and a special Drafting Committee to Revise Article II. The 1990 revisions concentrate on Article II, which is the article that covers the substantive law of intestate succession; spouse's elective share; omitted spouse and children; probate exemptions and allowances; execution and revocation of wills; will contracts; rules of construction; disclaimers; the effect of homicide and divorce on succession rights; and the rule against perpetuities and honor trusts.

In the twenty or so years between the original promulgation of the Code and the 1990 revisions, several developments occurred that prompted the systematic round of review. Three themes were sounded: (1) the decline of formalism in favor of intent-serving policies; (2) the recognition that will substitutes and other inter-vivos transfers have so proliferated that they now constitute a major, if not the major, form of wealth transmission; (3) the advent of the multiple-marriage society, resulting in a significant fraction of the population being married more than once and having stepchildren and children by previous marriages and in the acceptance of a partnership or marital-sharing theory of marriage.

The 1990 revisions respond to these themes. The multiple-marriage society and the partnership/marital-sharing theory are reflected in the revised elective-share provisions of Part 2. As the General Comment to Part 2 explains, the revised elective share grants the surviving spouse a right of election that implements the partnership/marital-sharing theory by adjusting the elective share to the length of the marriage.

The children-of-previous-marriages and stepchildren phenomena are reflected most prominently in the revised rules on the spouse's share in intestacy.

The proliferation of will substitutes and other inter-vivos transfers is recognized, mainly, in measures tending to bring the law of probate and nonprobate transfers into greater unison. One aspect of this tendency is reflected in the restructuring of the rules of construction. Rules of construction are rules that supply presumptive meaning to dispositive and similar provisions of governing instruments. Part 6 of the pre-1990 Code contained several rules of construction that applied only to wills. Some of those rules of construction appropriately applied only to wills; provisions relating to lapse, testamentary exercise of a power of appointment, and ademption of a devise by satisfaction exemplify such rules of construction. Other rules of construction, however, properly apply to all governing instruments, not just wills; the provision relating to inclusion of adopted persons in class gift language exemplifies this type of rule of construction. The 1990 revisions divide pre-1990 Part 6 into two parts — Part 6, containing rules of construction for wills only; and Part 7, containing rules of construction for wills and other governing instruments. A few new rules of construction are also added.

In addition to separating the rules of construction into two parts, and adding new rules of construction, the revocation-upon-divorce provision (Section 2-804 [72-2-814]) is substantially revised so that divorce not only revokes devises, but also nonprobate beneficiary designations, in favor of the former spouse. Another feature of the 1990 revisions is a new section (Section 2-503) [72-2-523] that brings the execution formalities for wills more into line with those for nonprobate transfers.

The 1990 Article II revisions also respond to other modern trends. During the period from 1969 to 1990, many developments occurred in the case law and statutory law. Also, many specific topics in probate, estate, and future-interests law were examined in the scholarly literature. The influence of many of these developments is seen in the 1990 revisions of Article II.

Chapter Compiler's Comments

Source — Explanation of Editorial Comments for 1989 Amendments: Chapter 582, L. 1989, generally revised the Uniform Probate Code and related law. The editorial comments that follow each section amended by Ch. 582 were prepared by Professor E. Edwin Eck of the University of Montana (now University of Montana-Missoula) School of Law.

Chapter Case Notes

Illinois Partnership Agreement Ruled a Controlling Document Under Montana Law — Shares Pass as if Decedent Died Intestate: The decedent was a member of a family limited partnership agreement formed under Illinois law. The decedent, a Montana resident, devised 65% of the residual estate to her nieces and nephews. However, the decedent's will did not mention the interest in the limited partnership. Siblings to the decedent petitioned the District Court to determine whether the interest was included in the residual estate. The District Court held that the partnership agreement was a governing instrument under 72-2-721 and that the interest was a nonprobate asset and not part of the residual estate. The Supreme Court affirmed, holding that 72-2-721 applied instead of Illinois law and that the partnership interest must pass to the heirs in the manner it would had she died intestate. Estate of Kelly, 2014 MT 254, 376 Mont. 361, 334 P.3d 911.

Chapter Collateral References

Montana Probate Forms, State Bar of Montana (2006).

Part 1
Intestate Succession

Part Official Comments

GENERAL COMMENT

The pre-1990 Code's basic pattern of intestate succession, contained in Part 1, was designed to provide suitable rules for the person of modest means who relies on the estate plan provided by law. The 1990 revisions are intended to further that purpose, by fine tuning the various sections and bringing them into line with developing public policy.

The principal features of the 1990 revisions are:

1. So-called negative wills are authorized, under which the decedent who dies intestate, in whole or in part, can by will disinherit a particular heir.
2. A surviving spouse receives the whole of the intestate estate, if the decedent left no surviving descendants and no parents or if the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has no descendants who are not descendants of the decedent. The surviving spouse receives the first $200,000 plus three-fourths of the balance if the decedent left no surviving descendants but a surviving parent. The surviving spouse receives the first $150,000 plus one-half of the balance of the intestate estate, if the decedent's surviving descendants are also descendants of the surviving spouse but the surviving spouse has one or more other descendants. The surviving spouse receives the first $100,000 plus one-half of the balance of the intestate estate, if the decedent has one or more surviving descendants who are not descendants of the surviving spouse.
3. A system of representation called per capita at each generation is adopted as a means of more faithfully carrying out the underlying premise of the pre-1990 UPC system of representation. Under the per-capita-at-each-generation system, all grandchildren (whose parent has predeceased the intestate) receive equal shares.
4. Although only a modest revision of the section dealing with the status of adopted children and children born of unmarried parents is made at this time, the question is under continuing review and further revisions may be presented in the future.
5. The section on advancements is revised so that it applies to partially intestate estates as well as to wholly intestate estates.

Part Case Notes

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Application of Half-Blood Statute: Upon appeal, the Supreme Court ruled that the District Court properly interpreted provisions of Title 72, ch. 2, part 2 (now part 1), in determining that half-aunts and half-uncles are entitled to equal one-third shares of the intestate residue by per capita and not by right of representation. Dahood v. Frankovich, 229 M 287, 746 P2d 115, 44 St. Rep. 1972 (1987).

Allocation of Award for Wrongful Death of Child to One Parent Only: While generally both parents are entitled to share any award for the wrongful death of a child, where evidence demonstrated that only the mother could reasonably be expected to suffer damages, including loss of consortium, mental anguish, and loss of future support, it was not error for the District Court to allocate all proceeds of the wrongful death action to the mother. In re Estate of Farnum, 224 M 304, 730 P2d 391, 43 St. Rep. 2205 (1986).

One-Action Rule Not Applicable to Death of Minor — Action for Wrongful Death of Child Settled by Personal Representative — Allocation of Proceeds: The one-action rule applied to wrongful death of an adult under 27-1-513, providing that only one action may be brought by the personal representative, does not apply to the wrongful death of a child in 27-1-512, under which either parent may bring an action. However, where the mother was properly appointed personal representative, it was not error for the probate court to authorize her to settle both the wrongful death action and the survival action, which could only be settled by the personal representative, and to approve allocation of the proceeds of the settlement between the two actions. In re Estate of Farnum, 224 M 304, 730 P2d 391, 43 St. Rep. 2205 (1986).

Proper "Heir" to Bring Wrongful Death Action — Daughter Survived by Mother and Sister: When decedent was killed in an auto accident, her only surviving relatives of any degree of kinship mentioned in the intestate succession statute were her mother and a sister, who filed a joint petition for a declaratory judgment as to who could maintain an action for decedent's wrongful death. The District Court correctly ruled that the mother was the sole heir for purposes of bringing the action. The court applied the intestate succession statutory definition of "heirs" in effect at the time the wrongful death act was amended to allow only the "heirs and personal representatives" of the decedent to recover. "Heirs" means those who take upon decedent's death under the intestacy statute. In re Norwest Capital Management & Trust Co., 215 M 399, 697 P2d 930, 42 St. Rep. 493 (1985).

District Court Jurisdiction Over Probate of and Claim and Delivery Action by Estate of Enrolled Tribal Indian: Following the death of an enrolled member of an Indian tribe, the decedent's wife petitioned the District Court to probate her deceased husband's estate. A road grader which was property of the estate was unlawfully sold by the deceased's wife to her brother. The District Court erred in holding that it did not have jurisdiction over the claim and delivery action instituted on behalf of the estate to recover the road grader or its value. The fact that there is no federal treaty or statute preempting the jurisdiction of the District Court and the fact that the tribal court has not had and is not exercising jurisdiction over the case properly resulted in the District Court's taking jurisdiction of the probate of the estate. Because the action for claim and delivery is the enforcement process to recover property within the jurisdiction of the probate court, the District Court should have exercised subject matter jurisdiction over the claim and delivery action as well. Estate of Standing Bear v. Belcourt, 193 M 174, 631 P2d 285, 38 St. Rep. 1064 (1981), overruled in part in In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121.

DECISIONS UNDER FORMER LAW

Unsuccessful Proponents of Will: Under 72-10-111 (now repealed) unsuccessful proponents of a will were allowed their costs as a charge against the estate involved in the discretion of the Court. (See 72-12-206, allowing proponent's costs in a contest after admission of the will to probate.) In re Mickich's Estate, 114 M 258, 136 P2d 223 (1943), overruled on another point, Williams v. Swords, 129 M 165, 284 P2d 674 (1955).

Attorneys' Fees:

Attorneys' fees were not allowable out of the assets of the decedent's estate to the unsuccessful proponents of a will to probate. In re Mickich's Estate, 114 M 258, 136 P2d 223 (1943), overruled on another point, Williams v. Swords, 129 M 165, 284 P2d 674 (1955).

Attorneys' fees incurred by a devisee under a will to defend a contest thereof were not allowable as costs and disbursements out of the assets of the estate within the purview of 25-10-301 or under 72-10-111 (now repealed) and 72-12-206. In re Baxter's Estate, 94 M 257, 22 P2d 182 (1933), explained in In re Mickich's Estate, 114 M 258, 136 P2d 223 (1943).

Under the rule that reasonable attorneys' fees are proper charges against an estate as costs where a will contest is initiated and defended in good faith, and under authority lodged in it in that behalf by 72-10-111 (now repealed), the Supreme Court could, in a proper case, fix the amounts the attorneys, for such sides were entitled to for their services on appeal. to be paid out of the assets of the estate. In re Bielenberg's Estate, 86 M 521, 284 P 546 (1930), explained in In re Baxter's Estate, 94 M 257, 22 P2d 182 (1933), and In re Mickich's Estate, 114 M 258, 136 P2d 223 (1943).

Interested Person: Section 72-10-105 (now repealed) in substance and effect disqualified a judge when he was interested in the estate or had served as attorney for an interested party. It had nothing to do with disqualification for imputed bias or prejudice. State ex rel. O'Sullivan v. District Court, 127 M 32, 256 P2d 1076 (1953).

Strict Compliance:
The provisions of 72-10-113 (now repealed) were mandatory and jurisdictional. State ex rel. Reid v. District Court, 126 M 489, 255 P2d 693 (1953).

The notice of appeal, being jurisdictional, must be filed and served within the time prescribed, and the Courts cannot lawfully extend the time nor excuse a failure to comply with the statute. Where, as here, an application for a new trial is not prerequisite to review by appeal, the filing of a motion for a new trial did not have the effect of extending the statutory period prescribed for the giving of notice of appeal. Neither was such time extended by a motion for relief from the judgment on the ground of mistake, inadvertence, or excusable neglect. State ex rel. Reid v. District Court, 126 M 489, 255 P2d 693 (1953).

Time Required No Reason for Issuance of Writ: Since under 72-10-113 (now repealed) an appeal from a judgment in a will contest was required to be taken within 60 days after its entry, contention of petitioner for a Writ of Supervisory Control to review action of Probate Court in rejecting a special finding of the jury, that appeal would not afford adequate relief because of the time required to take it, was held not meritorious. State ex rel. Furshong v. District Court, 105 M 37, 69 P2d 119 (1937), distinguished in State ex rel. Nelson v. District Court, 107 M 167, 81 P2d 699 (1938).

Time for Taking Appeal: In a proceeding to set aside a testamentary trust brought under 72-12-101 (now repealed), an appeal from an order or decree made therein was required to be taken within 60 days after its making under 72-10-113 (now repealed). In re Roberts' Estate, 102 M 240, 58 P2d 495 (1936), overruled on another point, Hardy v. Hardy, 133 M 536, 326 P2d 692 (1958).

Determination of Heirship: When it appeared that in a proceeding to determine heirship the appeal of unsuccessful claimants was prosecuted in good faith, the District Court (as well as the Supreme Court on appeal) could in its discretion, under 72-10-111 (now repealed), order all costs including reasonable attorneys' fees to be paid from the corpus of the estate; counsel for the executor of the estate was entitled to additional compensation for increased labor because of the appeal. In re Hauge's Estate, 92 M 36, 9 P2d 1065 (1932), explained in In re Baxter's Estate, 94 M 257, 22 P2d 182 (1933), and In re Mickich's Estate, 114 M 258, 136 P2d 223 (1943).

Personal Liability of Administrator:
Where the Supreme Court in the disposition of an appeal from an order settling an administrator's account remanded the cause with directions to require that officer to file a further account and orders, as it could do under 72-10-111 (now repealed), that the costs incident to the appeal shall be paid by the administrator personally, the jurisdiction of the District Court was limited to the enforcement of the order, except that it could determine disputed questions of costs or on final settlement of the account allow such portions of the costs incurred as a charge against the estate as justice required. In re Jennings' Estate, 79 M 73, 254 P 1067 (1927).

Speaking generally, costs in probate proceedings were governed by 72-10-111 (now repealed). When it was sought to have costs taxed against an administrator personally, the controlling inquiry was whether he acted in good faith; if so, justice required that they be paid out of the funds of the estate. In re Williams' Estate, 55 M 63, 173 P 790, 1 ALR 1639 (1918).

Citation Served as a Summons: The notice required by section 91-4701, R.C.M. 1947 (since repealed), to be served upon a person sought to be placed under guardianship as an incompetent must be served as a citation, which in turn must be served as a summons; therefore, since a summons cannot be served by a party to the proceeding, service made by petitioner for letters of guardianship was void. State ex rel. Kelly v. District Court, 73 M 84, 235 P 751 (1925).

Order to Show Cause: Where the Clerk enters at length in the minute book an order to show cause why real estate should not be sold, though the order purports to have been signed by the judge, such entry was sufficient evidence of the fact that the order was duly made, as the signature may be treated as surplusage; and there is no requirement that the Clerk shall recite that the order was made. Plains Land & Improvement Co. v. Lynch, 38 M 271, 99 P 847 (1909).

Time of Disqualification: The provision of 72-10-106 (now repealed) declared that the judge, whenever any of the grounds of disqualification were made to appear of record, was required to call in another judge, who from time to time presided in the place of the disqualified judge, and implied that any of the disqualifications enumerated could be made to appear at any time. State ex rel. Nissler v. Donlan, 32 M 256, 80 P 244 (1905).

72-2-111. Intestate estate.

Official Comments

Purpose of Revision. The amendments to subsection (a) [72-2-111(1)] are stylistic, not substantive.

New subsection (b) [72-2-111(2)] authorizes the decedent, by will, to exclude or limit the right of an individual or class to share in the decedent's intestate estate, in effect disinheriting that individual or class. By specifically authorizing so-called negative wills, subsection (b) [72-2-111(2)] reverses the usually accepted common-law rule, which defeats a testator's intent for no sufficient reason. See Note, "The Intestate Claims of Heirs Excluded by Will: Should 'Negative Wills' Be Enforced?," 52 U. Chi. L. Rev. 177 (1985).

Whether or not in an individual case the decedent's will has excluded or limited the right of an individual or class to take a share of the decedent's intestate estate is a question of construction. A clear case would be one in which the decedent's will expressly states that an individual is to receive none of the decedent's estate. Examples would be testamentary language such as "my brother, Hector, is not to receive any of my property" or "Brother Hector is disinherited."

Another rather clear case would be one in which the will states that an individual is to receive only a nominal devise, such as "I devise $50.00 to my brother, Hector, and no more."

An individual need not be identified by name to be excluded. Thus, if brother Hector is the decedent's only brother, Hector could be identified by a term such as "my brother." A group or class of relatives (such as "my brothers and sisters") can also be excluded under this provision.

Subsection (b) [72-2-111(2)] establishes the consequence of a disinheritance — the share of the decedent's intestate estate to which the disinherited individual or class would have succeeded passes as if that individual or class had disclaimed the intestate share. Thus, if the decedent's will provides that brother Hector is to receive $50.00 and no more, Hector is entitled to the $50.00 devise (because Hector is *not* treated as having predeceased the decedent for purposes of testate succession), but the portion of the decedent's intestate estate to which Hector would have succeeded passes as if Hector had disclaimed his intestate share. The consequence of a disclaimer by Hector of his intestate share is governed by Section 2-801(d)(1) [72-2-811(4)(a), now repealed], which provides that Hector's intestate share passes to Hector's descendants by representation.

Example: G died partially intestate. G is survived by brother Hector, Hector's 3 children (X, Y, and Z), and the child (V) of a deceased sister. G's will excluded Hector from sharing in G's intestate estate.

Solution: V takes half of G's intestate estate. X, Y, and Z split the other half, i.e., they take 1/6 each. Sections 2-103(3) [72-2-113(3)]; 2-106 [72-2-116]; 2-801(d)(1) [72-2-811(4)(a), now repealed]. Had Hector not been excluded by G's will, the share to which Hector would have succeeded would have been 1/2. Under Section 2-801(d)(1) [72-2-811(4)(a), now repealed], that half, not the whole of G's intestate estate, is what passes to Hector's descendants by representation as if Hector had disclaimed his intestate share.

Note that if brother Hector had actually predeceased G, or was treated as if he predeceased G by reason of not surviving G by 120 hours (see Section 2-104) [72-2-114], then no consequence flows from Hector's disinheritance: V, X, Y, and Z would each take 1/4 of G's intestate estate under Sections 2-103(3) [72-2-113(3)] and 2-106 [72-2-116].

Compiler's Comments

1993 Amendment: Chapter 494 in (1), after "passes", inserted "by intestate succession" and at end substituted "chapters 1 through 5, except as modified by the decedent's will" for "the following sections of this code"; inserted (2) concerning an express exclusion or limitation by will; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-101.

Case Notes

No Error in Applying Intestate Succession Absent Valid Devise of Real Property in Will or in Conclusion That Probate Needs to Halt After Prolonged Litigation: Ayers left property valued at about $100,000 to her daughters, but the will was not clear regarding how the daughters' ownership interests would be divided, and the daughters proceeded to litigate their respective rights to the property for 8 years. The District Court determined that Ayers mistakenly stated one daughter's ownership interest and that because the will made no valid devise of the estate's 50% ownership in the property, the estate's share should pass subject to the laws of intestate succession. The court also noted that the prolonged litigation had dissipated one-third of the estate's value in attorney fees and expenses and that probate should come to a halt before more of the estate's value was gone. One daughter appealed the distribution pursuant to intestate succession, but the Supreme Court affirmed. Ayers' misstatement of one daughter's interests in the property was not evidence of Ayers' intent to devise the property. Thus, the District Court's conclusion that the will made no valid devise of the property and that the property should pass subject to the laws of intestate succession was not erroneous. Under the circumstances, the District Court did not abuse its discretion or commit clear error when it determined that probate needed to come to a halt and that distribution of the property subject to the laws of intestate succession would help move probate along. In re Estate of Ayers, 2007 MT 155, 338 M 12, 161 P3d 833 (2007).

Intent Construed From Four Corners of Will: The testatrix, on a form will, crossed out the "and" in a bequest to two heirs and substituted the word "or". The Supreme Court held that in examining the entire will and interpreting the language in its ordinary sense, the court still could not ascertain the intent of the testatrix and therefore the property passed by intestacy. Drabant v. DeLong, 242 M 15, 788 P2d 889, 47 St. Rep. 496 (1990).

Determination of Resulting Trust on Intestate Succession: In this case it was possible for the District Court to have declared a resulting trust on behalf of defendants and/or plaintiffs. An intent to create a trust could have been implied from the circumstances surrounding the conveyances. Hubbard's statement that he wanted the property to go to his "children" could also have been regarded as sufficiently definite to include his children as a class or his children at the time of the conveyances. However, the Trial Court held instead that it was immaterial whether a trust was created because, under a resulting trust, the property would vest in the estate. The result would be the same regardless of whether a trust was found, so that it was not an abuse of discretion to pass the property by intestacy. Eckart v. Hubbard, 184 M 320, 602 P2d 988 (1979).

72-2-112. Share of spouse.

Official Comments

Purpose and Scope of Revisions. This section is revised to give the surviving spouse a larger share than the pre-1990 UPC. If the decedent leaves no surviving descendants and no surviving parent or if the decedent does leave surviving descendants but neither the decedent nor the surviving spouse has other descendants, the surviving spouse is entitled to all of the decedent's intestate estate.

If the decedent leaves no surviving descendants but does leave a surviving parent, the decedent's surviving spouse receives the first $200,000 plus three-fourths of the balance of the intestate estate.

If the decedent leaves surviving descendants and if the surviving spouse (but not the decedent) has other descendants, and thus the decedent's descendants are unlikely to be the *exclusive* beneficiaries of the surviving spouse's estate, the surviving spouse receives the first $150,000 plus one-half of the balance of the intestate estate. The purpose is to assure the decedent's own descendants of a share in the decedent's intestate estate when the estate exceeds $150,000.

If the decedent has other descendants, the surviving spouse receives $100,000 plus one half of the balance. In this type of case, the decedent's descendants who are not descendants of the surviving spouse are not natural objects of the bounty of the surviving spouse.

Note that in all the cases where the surviving spouse receives a lump sum plus a fraction of the balance, the lump sums must be understood to be in addition to the probate exemptions and allowances to which the surviving spouse is entitled under Part 4. These can add up to a minimum of $43,000.

Under the pre-1990 Code, the decedent's surviving spouse received the entire intestate estate only if there were neither surviving descendants nor parents. If there were surviving descendants, the descendants took one-half of the balance of the estate in excess of $50,000 (for example, $25,000 in a $100,000 estate). If there were no surviving descendants, but there was a surviving parent or parents, the parent or parents took that one-half of the balance in excess of $50,000.

References. The theory of this section is discussed in Waggoner, "The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code," 76 Iowa L. Rev. 223, 229-35 (1991).

Empirical studies support the increase in the surviving spouse's intestate share, reflected in the revisions of this section. The studies have shown that testators in smaller estates (which intestate estates overwhelmingly tend to be) tend to devise their *entire* estates to their surviving spouses, even when the couple has children. See C. Shammas, M. Salmon & M. Bahlin, Inheritance in America from Colonial Times to the Present 184-85 (1987); M. Sussman, J. Cates & D. Smith, The Family and Inheritance (1970); Browder, "Recent Patterns of Testate Succession in the United States and England," 67 Mich. L. Rev. 1303, 1307-08 (1969); Dunham, "The Method, Process and Frequency of Wealth Transmission at Death," 30 U. Chi. L. Rev. 241, 252 (1963); Gibson, "Inheritance of Community Property in Texas — A Need for Reform," 47 Texas L. Rev. 359, 364-66 (1969); Price, "The Transmission of Wealth at Death in a Community Property Jurisdiction," 50 Wash. L. Rev. 277, 283, 311-17 (1975). See also Fellows, Simon & Rau, "Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States," 1978 Am. B. F. Research J. 319, 355-68; Note, "A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes," 63 Iowa L. Rev. 1041, 1091-92 (1978).

Cross Reference. See Section 2-802 [72-2-812] for the definition of spouse, which controls for purposes of intestate succession.

Compiler's Comments

2019 Amendment: Chapter 313 in (2) increased share from $200,000 to $300,000; in (3) increased share from $150,000 to $225,000; and in (4) increased share from $100,000 to $150,000. Amendment effective October 1, 2019.

1993 Amendment: Chapter 494 substituted current text concerning the intestate share of a decedent's surviving spouse for former text that read: "The intestate share of the surviving spouse is:

(1) if there is no surviving issue or if there are surviving issue all of whom are issue of the surviving spouse also, the entire remaining estate;

(2) if there are surviving issue one or more of whom are not issue of the surviving spouse, as follows:

(a) if there is surviving only one child or the issue of one child, one-half of the intestate estate;

(b) if there are surviving two or more children, the issue of two or more deceased children, or one or more children and the issue of one or more deceased children, one-third of the intestate estate."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

1989 Amendment: In (2)(b) substituted "two or more children, the issue of two or more deceased children, or one or more children" for "more than one such child or one such child".

1989 Editorial Comment: Subsection (2)(b) was ambiguous. The subsection provided that the surviving spouse should receive one-third of the intestate estate when there are living issue of the decedent who ar not issue of the surviving spouse in two situations: (1) two or more children survived the decedent; and (2) at least one child and at least one issue of a deceased child survived the decedent. However, the subsection did not expressly deal with the situation where there are issue of two or more deceased children. As amended, the statute expressly includes this latter situation.

Further, some attorneys disagreed about another application of the one-third distribution of subsection (2)(b). Some argued that in order for the one-third distribution of subsection (2)(b) to apply, it was necessary that there be two children both of whom were not issue of the surviving spouse (or some combination of such children and issue of such children. Other attorneys took a second position that the one-third distribution applied if there was only one child (or the issue of one child) who was not the issue of the surviving spouse, plus another child, children, or issue of a child or children who were issue of the surviving spouse. As amended, the statute adopts this second position. If the decedent is survived by one child (or the issue of one child) which child is not the issue of the surviving spouse and the decedent is survived by another child, children, or issue who are also issue of the surviving spouse, the one-third distribution applies.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-102.

Case Notes

Right of Minor Children to Bring Wrongful Death Action Though Spouse Survives: The issue of a decedent who is survived by his spouse may maintain an action for damages under 27-1-513, even though the Uniform Probate Code (UPC) now defines "heirs" as those who are entitled to the property of the decedent under intestate succession and, under the intestate succession statutes, a surviving spouse is entitled to all of the estate. Prior to enactment of the UPC, minor children could bring a wrongful death action. That right was not repealed by adoption of the UPC. Section 72-1-106 does not obviate a minor's right since the UPC provisions control only if other statutory provisions conflict with probate, guardianship, and estate matters. Wrongful death is not within these subjects. Johnson v. Marias River Elec. Co-op, Inc., 211 M 518, 687 P2d 668, 41 St. Rep. 1528 (1984).

Personal Representative's Right to Pursue Wrongful Death Action Instead of Survivorship Action: A decedent's personal representative clearly has a prior right to pursue a wrongful death action on behalf of the heirs in order to avoid the diseconomies and confusion caused by a plethora of lawsuits. Decedent's wife could thus, as his personal representative, pursue a wrongful death action. Decedent's ex-wives claimed that the personal representative had improperly failed to file a survivorship action instead of a wrongful death action in the hopes that she could (unfairly) increase her portion of any recovery. In re Pegg's Estate, 209 M 71, 680 P2d 316, 41 St. Rep. 558 (1984).

72-2-113. Share of heirs other than surviving spouse.

Official Comments

This section provides for inheritance by descendants of the decedent, parents and their descendants, and grandparents and collateral relatives descended from grandparents; in line with modern policy, it eliminates more remote relatives tracing through great-grandparents.

Purpose and Scope of Revisions. The revisions are stylistic and clarifying, not substantive. The pre-1990 version of this section contained the phrase "if they are all of the same degree of kinship to the decedent they take equally (etc.)." That language has been removed. It was unnecessary and confusing because the system of representation in Section 2-106 [72-2-116] gives equal shares if the decedent's descendants are all of the same degree of kinship to the decedent.

The word "descendants" replaces the word "issue" in this section and throughout the revisions of Article II. The term issue is a term of art having a biological connotation. Now that inheritance rights, in certain cases, are extended to adopted children, the term descendants is a more appropriate term.

Compiler's Comments

1995 Amendment: Chapter 18 adjusted subsection references; and made minor changes in style.

1993 Amendment: Chapter 494 substituted current text concerning the share of the intestate estate of heirs other than the surviving spouse for former text that read: "The part of the intestate estate not passing to the surviving spouse under 72-2-202, or the entire intestate estate if there is no surviving spouse, passes as follows:

(1) to the issue of the decedent; if they are all of the same degree of kinship to the decedent, they take equally, but if of unequal degree, then those of more remote degree take by representation;

(2) if there is no surviving issue, to his parent or parents equally;

(3) if there is no surviving issue or parent, to the brothers and sisters and the children or grandchildren of any deceased brother or sister, by representation;

(4) if there is no surviving issue, parent, brother, sister, or children or grandchildren of a deceased brother or sister, to the next of kin in equal degree, except that where there are two or more collateral kindred in equal degree but claiming through different ancestors, those who claim through the nearer ancestors must be preferred to those claiming through an ancestor more remote."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

1981 Amendment: Deleted former subsection (2) concerning inheritance from a child that dies under age not having been married.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-103.

Changes From Uniform Act: Subsection (4) of this section is not part of the corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Determination That Decedent Died Intestate Not Erroneous: Bradshaw's mother contended that Bradshaw executed a valid holographic will in 1988 and introduced the document into evidence. Pursuant to the document, Bradshaw left his vehicle to a nephew and the rest of his estate to be equally divided among his mother, father, brother, and sister. The District Court held that the document was not submitted into evidence as a holographic will and that Bradshaw died intestate. Bradshaw's two sons were born in 1992 and 1995. Under 72-2-332, children born after the making of a will who are not provided for in the will take as if the decedent died intestate. Therefore, even if the document had been properly submitted as a holographic will, the children, in the absence of a surviving spouse, were entitled to Bradshaw's estate. In re Estate of Bradshaw, 2001 MT 92, 305 M 178, 24 P3d 211 (2001).

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Division Between Nieces and Nephews and Their Surviving Children: Decedent died intestate with no surviving spouse, parents, or children. He had 3 brothers and a sister, all of whom predeceased him, who had a total of 11 nieces and nephews, 3 of whom were dead. The only surviving heirs were the eight surviving nieces and nephews and the children of the three deceased nieces and nephews. It was proper for the lower court to divide the estate into 11 equal shares and give a share to each of the 8 surviving nieces and nephews and equally divide the share of each of the three deceased nieces and nephews among that person's children. In re Estate of Mebust, 255 M 287, 843 P2d 310, 49 St. Rep. 1019 (1992).

Right of Minor Children to Bring Wrongful Death Action Though Spouse Survives: The issue of a decedent who is survived by his spouse may maintain an action for damages under 27-1-513, even though the Uniform Probate Code (UPC) now defines "heirs" as those who are entitled to the property of the decedent under intestate succession and, under the intestate succession statutes, a surviving spouse is entitled to all of the estate. Prior to enactment of the UPC, minor children could bring a wrongful death action. That right was not repealed by adoption of the UPC. Section 72-1-106 does not obviate a minor's right since the UPC provisions control only if other statutory provisions conflict with probate, guardianship, and estate matters. Wrongful death is not within these subjects. Johnson v. Marias River Elec. Co-op, Inc., 211 M 518, 687 P2d 668, 41 St. Rep. 1528 (1984).

Determination of Resulting Trust on Intestate Succession: In this case it was possible for the District Court to have declared a resulting trust on behalf of defendants and/or plaintiffs. An intent to create a trust could have been implied from the circumstances surrounding the conveyances. Hubbard's statement that he wanted the property to go to his "children" could also have been regarded as sufficiently definite to include his children as a class or his children at the time of the conveyances. However, the Trial Court held instead that it was immaterial whether a trust was created because, under a resulting trust, the property would vest in the estate. The result would be the same regardless of whether a trust was found, so that it was not an abuse of discretion to pass the property by intestacy. Eckart v. Hubbard, 184 M 320, 602 P2d 988 (1979).

Next of Kin: Blood relatives of a predeceased spouse are not next of kin of or "related" to the spouse last to die. In re Brewington, 173 M 458, 568 P2d 133 (1977).

DECISIONS UNDER FORMER LAW

Undevised Remainder: Holographic will, which devised a life estate to the surviving spouse and which provided that if it became necessary to liquidate the estate it should be divided equally between testator's wife and son and daughter, did not make a testamentary disposition of the remainder after the life estate, and therefore remainder would be distributed according to intestate succession. In re Hetland's Estate, 166 M 122, 531 P2d 367 (1975).

Nieces and Nephews: When decedent was survived only by nieces and nephews and children of deceased nephews, the nieces and nephews took per capita, and the children of the deceased nephews took per stirpes, the share that their fathers would have taken. In re Estate of Brown, 158 M 413, 492 P2d 914 (1972).

Surviving Parent: When decedent left no surviving wife or children and his father was dead, his mother was the sole beneficiary of his estate. Cowan v. Pac. Gamble Robinson Co., 232 F. Supp. 403 (D.C. Mont. 1964).

72-2-114. Requirement that heir survive decedent for 120 hours.

Official Comments

This section is a limited version of the type of clause frequently found in wills to take care of the common accident situation, in which several members of the same family are injured and die within a few days of one another. The Uniform Simultaneous Death Act provides only a partial solution, since it applies only if there is no proof that the parties died otherwise than simultaneously. (Section 2-702 [72-2-712] recommends revision of the Uniform Simultaneous Death Act.)

This section requires an heir to survive by five days in order to succeed to the decedent's intestate property; for a comparable provision as to wills and other governing instruments, see Section 2-702 [72-2-712]. This section avoids multiple administrations and in some instances prevents the property from passing to persons not desired by the decedent. The 120-hour period will not delay the administration of a decedent's estate because Sections 3-302 [72-3-215] and 3-307 [72-3-225] prevent informal issuance of letters for a period of five days from death. The last sentence prevents the survivorship requirement from defeating inheritance by the last eligible relative of the intestate who survives him or her for any period.

In the case of a surviving spouse who survives the 120-hour period, the 120-hour requirement of survivorship does not disqualify the spouse's intestate share for the federal estate-tax marital deduction. See Int. Rev. Code § 2056(b)(3).

Compiler's Comments

2019 Amendment: Chapter 313 in two places substituted "is deemed" for "is considered". Amendment effective October 1, 2019.

1993 Amendment: Chapter 494 throughout section substituted "individual" for "person"; in second sentence substituted "If it is not established by clear and convincing evidence" for "If the time of death of the decedent or of the person who would otherwise be an heir or the times of death of both cannot be determined"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-104.

Case Notes

Homestead Allowance — Exempt Property — Fee Interest: Sections 72-2-801 (renumbered 72-2-412) and 72-2-802 (renumbered 72-2-413), giving a homestead allowance and exempt property rights to a surviving spouse, contemplate an interest that does not terminate at the surviving spouse's death so long as the spouse survives the decedent for the required 120 hours under this section. In re Estate of Merkel, 190 M 78, 618 P2d 872, 37 St. Rep. 1782 (1980).

72-2-115. No taker.

Compiler's Comments

1993 Amendment: Chapter 494 substituted "this chapter" for "72-2-202 and 72-2-203".

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-105.

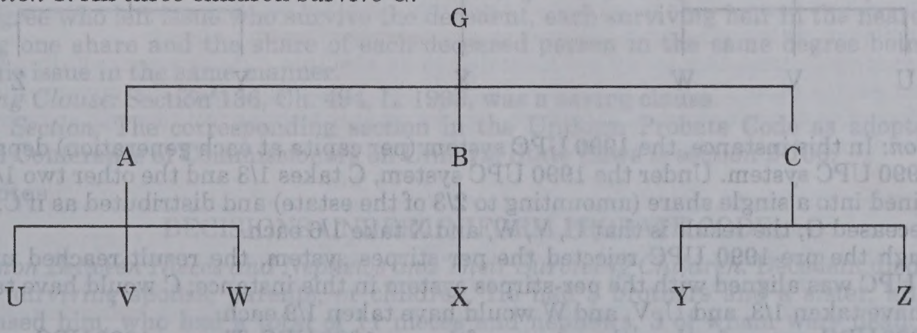
72-2-116. Representation.

Official Comments

Purpose and Scope of Revisions. This section is revised to adopt the system of representation called per capita at each generation. The per-capita-at-each-generation system is more responsive to the underlying premise of the original UPC system, in that it always provides equal shares to those equally related; the pre-1990 UPC achieved this objective in most but not all cases. (See Variation 4, below, for an illustration of this point.) In addition, a recent survey of client preferences, conducted by Fellows of the American College of Trust and Estate Counsel, suggests that the per-capita-at-each-generation system of representation is preferred by most clients. See Young, "Meaning of 'Issue' and 'Descendants,'" 13 ACTEC Probate Notes 225 (1988). The survey results were striking: Of 761 responses, 541 (71.1%) chose the per-capita-at-each-generation system; 145 (19.1%) chose the per-stirpes system, and 70 (9.2%) chose the pre-1990 UPC system.

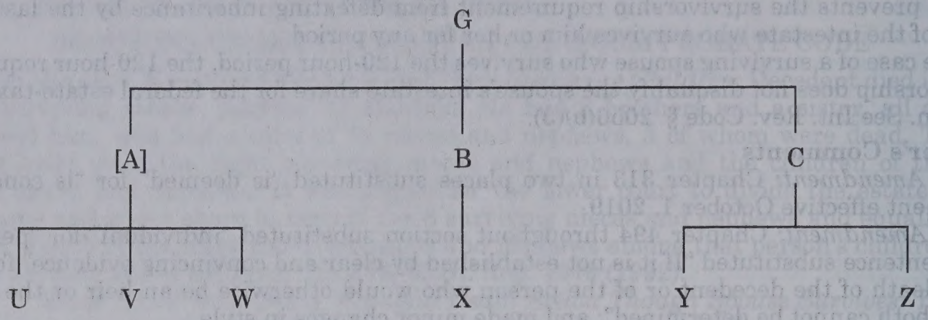
To illustrate the differences among the three systems, consider a family, in which G is the intestate. G has 3 children, A, B, and C. Child A has 3 children, U, V, and W. Child B has 1 child, X. Child C has 2 children, Y and Z. Consider four variations.

Variation 1: All three children survive G.



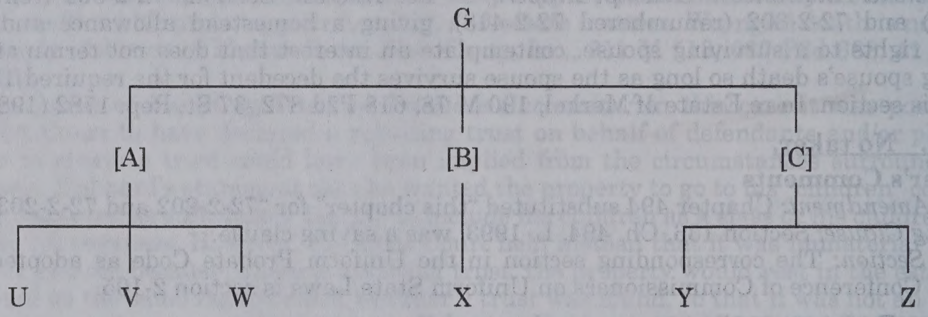
Solution: All three systems reach the same result: A, B, and C take 1/3 each.

Variation 2: One child, A, predeceases G; the other two survive G.



Solution: Again, all three systems reach the same result: B and C take 1/3 each; U, V, and W take 1/9 each.

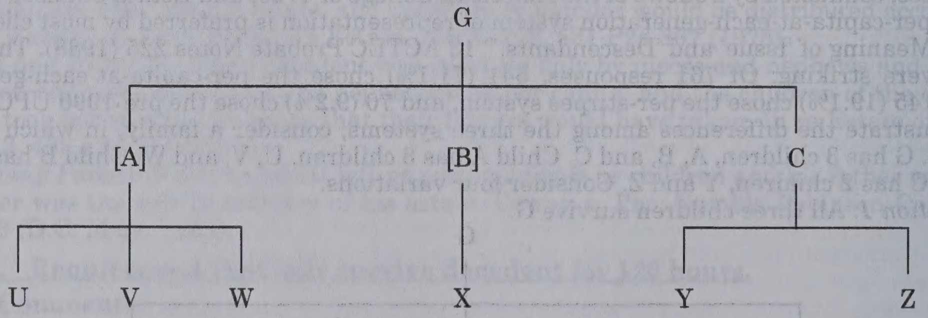
Variation 3: All three children predecease G.



Solution: The pre-1990 UPC and the 1990 UPC systems reach the same result: U, V, W, X, Y, and Z take 1/6 each.

The per-stirpes system gives a different result: U, V, and W take 1/9 each; X takes 1/3; and Y and Z take 1/6 each.

Variation 4: Two of the three children, A and B, predecease G; C survives G.



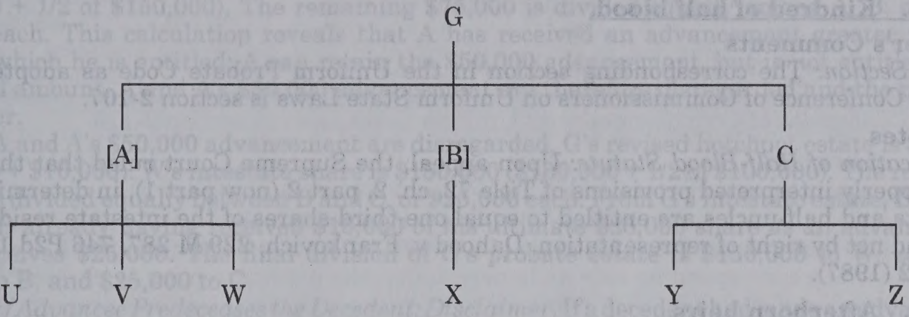
Solution: In this instance, the 1990 UPC system (per capita at each generation) departs from the pre-1990 UPC system. Under the 1990 UPC system, C takes 1/3 and the other two 1/3 shares are combined into a single share (amounting to 2/3 of the estate) and distributed as if C, Y and Z had predeceased G; the result is that U, V, W, and X take 1/6 each.

Although the pre-1990 UPC rejected the per-stirpes system, the result reached under the pre-1990 UPC was aligned with the per-stirpes system in this instance: C would have taken 1/3, X would have taken 1/3, and U, V, and W would have taken 1/9 each.

The 1990 UPC system furthers the *purpose* of the pre-1990 UPC. The pre-1990 UPC system was premised on a desire to provide equality among those equally related. The pre-1990 UPC system failed to achieve that objective in this instance. The 1990 system (per-capita-at-each-generation) remedies that defect in the pre-1990 system.

Reference. Waggoner, "A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution among Descendants," 66 Nw. U. L. Rev. 626 (1971).

Effect of Disclaimer. By virtue of Section 2-801(d)(1) [72-2-811(4)(a), now repealed], an heir cannot use a disclaimer to effect a change in the division of an intestate's estate. To illustrate this point, consider the following example:



As it stands, G's intestate estate is divided into two equal parts: A takes half and B's child, Z, takes the other half. Suppose, however, that A files a disclaimer under Section 2-801 [72-2-811, now repealed]. A cannot affect the basic division of G's intestate estate by this maneuver. Section 2-801(d)(1) [72-2-811(4)(a), now repealed] provides that "the disclaimed interest devolves as if the disclaimant had predeceased the decedent, except that if by law or under the testamentary instrument the disclaimant's descendants would take the disclaimant's share by representation if the disclaimant actually predeceased the decedent, and if the disclaimant left descendants who survive the decedent, the disclaimed interest passes by representation to the disclaimant's descendants who survive the decedent." In this example, the "disclaimed interest" is A's share (1/2) of G's estate; thus the 1/2 interest renounced by A devolves to A's children, X and Y, who take 1/4 each.

If Section 2-801(d) [72-2-811(4), now repealed] had provided that G's "estate" is to be divided as if A predeceased G, A could have used his disclaimer to increase the share going to his children from 1/2 to 2/3 (1/3 for each child) and to decrease Z's share to 1/3. The careful wording of Section 2-801(d)(1) [72-2-811(4)(a), now repealed], however, prevents A from manipulating the result by this method.

Compiler's Comments

2019 Amendment: Chapter 313 in definitions of deceased descendant and surviving descendant substituted "is deemed" for "is considered". Amendment effective October 1, 2019.

1995 Amendments: Chapter 18 adjusted subsection references.

Chapter 592 in (2)(a), after "part of the estate", deleted "is divided into decedent's descendants and the estate or part of the estate".

1993 Amendment: Chapter 494 substituted current text concerning representation for former text that read: "If representation is called for by this code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-106.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Division Between Nieces and Nephews and Their Surviving Children: Decedent died intestate with no surviving spouse, parents, or children. He had 3 brothers and a sister, all of whom predeceased him, who had a total of 11 nieces and nephews, 3 of whom were dead. The only surviving heirs were the eight surviving nieces and nephews and the children of the three deceased nieces and nephews. It was proper for the lower court to divide the estate into 11 equal shares and give a share to each of the 8 surviving nieces and nephews and equally divide the share of each of the three deceased nieces and nephews among that person's children. In re Estate of Mebust, 255 M 287, 843 P2d 310, 49 St. Rep. 1019 (1992).

DECISIONS UNDER FORMER LAW

Degree of Kinship: The right of representation applied to any degree of kinship, and where the nearest heirs were nieces and nephews, the children of deceased nephews were heirs by right of representation. In re Estate of Brown, 158 M 413, 492 P2d 914 (1972).

72-2-117. Kindred of half blood.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-107.

Case Notes

Application of Half-Blood Statute: Upon appeal, the Supreme Court ruled that the District Court properly interpreted provisions of Title 72, ch. 2, part 2 (now part 1), in determining that half-aunts and half-uncles are entitled to equal one-third shares of the intestate residue by per capita and not by right of representation. Dahood v. Frankovich, 229 M 287, 746 P2d 115, 44 St. Rep. 1972 (1987).

72-2-118. Afterborn heirs.

Compiler's Comments

2019 Amendment: Chapter 313 inserted last sentence regarding clear and convincing presumption for establishing 120 hours of survival; and made minor changes in style. Amendment effective October 1, 2019.

1993 Amendment: Chapter 494 substituted current text concerning individual in gestation surviving for 120 hours for former text that read: "Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-108.

72-2-119. Advancements.

Official Comments

Purpose of the Revisions. This section is revised so that an advancement can be taken into account with respect to the intestate portion of a partially intestate estate.

Other than these revisions, and a few stylistic and clarifying amendments, the original content of the section is maintained, under which the common law relating to advancements is altered by requiring written evidence of the intent that an inter-vivos gift be an advancement.

The statute is phrased in terms of the donee being an heir "at the decedent's death." The donee need not be a prospective heir at the time of the gift. For example, if the intestate, G, made an inter-vivos gift intended to be an advancement to a grandchild at a time when the intestate's child who is the grandchild's parent is alive, the grandchild would not then be a prospective heir. Nevertheless, if G's intent that the gift be an advancement is contained in a written declaration or acknowledgment as provided in subsection (a), the gift *is* regarded as an advancement if G's child (who is the grandchild's parent) predeceases G, making the grandchild an heir.

To be an advancement, the gift need not be an outright gift; it can be in the form of a will substitute, such as designating the donee as the beneficiary of the intestate's life-insurance policy or the beneficiary of the remainder interest in a revocable inter-vivos trust.

Most inter-vivos transfers today are intended to be absolute gifts or are carefully integrated into a total estate plan. If the donor intends that any transfer during the donor's lifetime be deducted from the donee's share of his estate, the donor may either execute a will so providing or, if he or she intends to die intestate, charge the gift as an advance by a writing within the present section.

This section applies to advances to the decedent's spouse and collaterals (such as nephews and nieces) as well as to descendants.

Computation of Shares — Hotchpot Method. This section does not specify the method of taking an advancement into account in distributing the decedent's intestate estate. That process, called the hotchpot method, is provided by the common law. The hotchpot method is illustrated by the following example.

Example: G died intestate, survived by his wife (W) and his three children (A, B, and C) by a prior marriage. G's probate estate is valued at $190,000. During his lifetime, G had advanced A $50,000 and B $10,000. G memorialized both gifts in a writing declaring his intent that they be advancements.

Solution. The first step in the hotchpot method is to add the value of the advancements to the value of G's probate estate. This combined figure is called the hotchpot estate.

In this case, G's hotchpot estate preliminarily comes to $250,000 ($190,000 + $50,000 + $10,000). W's intestate share of a $250,000 estate under Section 2-102(4) [72-2-112(4)] is $175,000 ($100,000 + 1/2 of $150,000). The remaining $75,000 is divided equally among A, B, and C, or $25,000 each. This calculation reveals that A has received an advancement greater than the share to which he is entitled; A can retain the $50,000 advancement, but is not entitled to any additional amount. A and A's $50,000 advancement are therefore disregarded and the process is begun over.

Once A and A's $50,000 advancement are disregarded, G's revised hotchpot estate is $200,000 ($190,000 + $10,000). W's intestate share is $150,000 ($100,000 + 1/2 of $100,000). The remaining $50,000 is divided equally between B and C, or $25,000 each. From G's intestate estate, B receives $15,000 (B already having received $10,000 of his ultimate $25,000 share as an advancement); and C receives $25,000. The final division of G's probate estate is $150,000 to W, zero to A, $15,000 to B, and $25,000 to C.

Effect if Advancee Predeceases the Decedent; Disclaimer. If a decedent had made an advancement to a person who predeceased the decedent, the last sentence of Section 2-109 [72-2-119] provides that the advancement is not taken into account in computing the intestate share of the recipient's descendants (unless the decedent's declaration provides otherwise). The rationale is that there is no guarantee that the recipient's descendants received the advanced property or its value from the recipient's estate.

To illustrate the application of the last sentence of Section 2-109 [72-2-119], consider this case: During her lifetime, G had advanced $10,000 to her son, A. G died intestate, leaving a probate estate of $50,000. G was survived by her daughter, B, and by A's child, X. A predeceased G.

G's advancement to A is *disregarded*. G's $50,000 intestate estate is divided into two equal shares, half ($25,000) going to B and the other half ($25,000) going to A's child, X.

Now, suppose that A survived G. In this situation, of course, the advancement to A *is* taken into account in the division of G's intestate estate. Under the hotchpot method, illustrated above, G's hotchpot estate is $60,000 (probate estate of $50,000 plus advancement to A of $10,000). A takes half of this $60,000 amount, or $30,000, but is charged with already having received $10,000 of it. Consequently, A takes only a 2/5 share ($20,000) of G's intestate estate, and B takes the remaining 3/5 share ($30,000).

Note that A cannot use a disclaimer under Section 2-801 [72-2-811, now repealed] in effect to give his child, X, a larger share than A was entitled to. Under Section 2-801(d)(1) [72-2-811(4)(a), now repealed], the effect of a disclaimer by A is that the disclaimant's "interest" devolves to A's descendants as if the disclaimant had predeceased the decedent. The "interest" that A renounced was a right to a 2/5 share of G's estate, not a 1/2 share. Consequently, A's 2/5 share ($20,000) passes to A's child, X.

Compiler's Comments

1993 Amendment: Chapter 494 in (1), at beginning, substituted "individual" for "person", after "all" inserted "or a portion of", near middle, before "heir", inserted "individual who, at the decedent's death, is an", and near end substituted "heir's intestate share" for "latter's share of the estate"; in (1)(a), before "acknowledged", inserted "the heir" and after "writing" substituted "that the gift is" for "by the heir to be"; inserted (1)(b) concerning written indication that gift is accounted for in division and distribution of intestate estate; in (3) substituted "division and distribution of the decedent's intestate estate, unless the decedent's contemporaneous writing" for "intestate share to be received by the recipient's issue unless the declaration or acknowledgement"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-109.

72-2-120. Debts to decedent.

Official Comments

Section 2-110 [72-2-120] supplements Section 3-903 [72-3-912], Right of Retainer.

Effect of Disclaimer. Section 2-801(d)(1) [72-2-811(4)(a), now repealed] prevents a living debtor from using the combined effects of the last sentence of Section 2-110 [72-2-120] and a disclaimer to avoid a set-off. Although Section 2-110 [72-2-120] provides that, if the debtor actually fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's descendants, the same result is not produced when a living debtor disclaims. Section 2-801(d) [72-2-811(4), now repealed] provides that the "interest" disclaimed, not the decedent's estate as a whole, devolves as though the disclaimant predeceased the decedent. The "interest" disclaimed by a living debtor is the share the *debtor* would have taken had he or she not disclaimed — his or her intestate share minus the debt.

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-110.

72-2-121. Alienage.

Official Comments

This section eliminates the ancient rule that an alien cannot acquire or transmit land by descent, a rule based on the feudal notions of the obligations of the tenant to the King. Although there never was a corresponding rule as to personalty, the present section is phrased in light of the basic premise of the Code that distinctions between real and personal property should be abolished.

Compiler's Comments

1993 Amendment: Chapter 494 in two places substituted "individual" for "person"; at end deleted "unless the country in which he resides does not allow reciprocity"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-111.

Case Notes

DECISIONS UNDER FORMER LAW

Reciprocity: Pursuant to former Rule 44.1, M.R.Civ.P. (now superseded), the trial court had power to fashion procedures for determination of whether reciprocity of transfer and reciprocity of inheritance existed between citizens of state and citizens of foreign country. In re Estate of Giurgiu, 155 M 18, 466 P2d 83 (1970), appeal dismissed 399 US 901, 26 L Ed 2d 555, 90 S Ct 2195 (1970).

Injunction: Residents of Romania could not enjoin enforcement of statutes while probate case was at intermediate stage since state was free to fashion procedure for applying statute in manner not offensive to Constitution. Gorun v. Fall, 287 F. Supp. 725 (D.C. Mont. 1968), affirmed 393 US 398, 21 L Ed 2d 628, 89 S Ct 678 (1969).

72-2-122. Dower and curtesy abolished.

Official Comments

The provisions of this Code replace the common-law concepts of dower and curtesy and their statutory counterparts. Those estates provided both a share in intestacy and a protection against disinheritance.

In states that have previously abolished dower and curtesy, or where those estates have never existed, the above section should be omitted.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-112.

72-2-123. Individuals related to decedent through two lines.

Official Comments

This section prevents double inheritance. It has potential application in a case in which a deceased person's brother or sister marries the spouse of the decedent and adopts a child of the former marriage; if the adopting parent died thereafter leaving the child as a natural and adopted grandchild of its grandparents, this section prevents the child from taking as an heir from the grandparents in both capacities.

Compiler's Comments

1993 Amendment: Chapter 494 at beginning substituted "An individual" for "A person"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section of the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-113.

72-2-124. Parent and child relationship.

Official Comments

Subsection (a) [72-2-124(1)]. Subsection (a) [72-2-124(1)] sets forth the general rule: For purposes of intestate succession, a child is the child of his or her natural parents, regardless of their marital status. In states that have enacted the Uniform Parentage Act (UPA), the parent and child relationship may be established under the UPA. Non-UPA states should insert a reference to its own statute or, if it has no statute on the question, should insert the phrase "applicable state law."

Subsection (b) [72-2-124(2)]. Subsection (b) [72-2-124(2)] contains exceptions to the general rule of subsection (a) [(1)]. Subsection (b) [72-2-124(2)] states the rule that, for inheritance purposes, an adopted individual becomes part of the adopting family and is no longer part of the natural family.

The revision of subsection (b) [72-2-124(2)] affects only the exception from the rule pertaining to the adoption of an individual by that individual's stepparent. As revised, an individual who is adopted by his or her stepparent (the spouse of the custodial natural parent) becomes part of the adopting stepparent's family for inheritance purposes but also continues to be part of the family of the custodial natural parent. With respect to the noncustodial natural parent and that parent's family, however, a different rule is promulgated. The adopted individual and the adopted individual's descendants continue to have a right of inheritance from and through that noncustodial natural parent, but that noncustodial natural parent and that noncustodial natural parent's family do not have a right to inherit from or through the adopted individual.

Subsection (c) [72-2-124(3)]. Subsection (c) [72-2-124(3)] is revised to provide that neither natural parent (nor that natural parent's kindred) can inherit from or through a child unless that natural parent, mother or father, has openly treated the child as his or hers and has not refused to support the child. Prior to the revision, that rule was applied only to the father. The phrase "has not refused to support the child" refers to the time period during which the parent has a legal obligation to support the child.

Compiler's Comments

1999 Amendment: Chapter 290 in (2)(a) substituted "that natural parent" for "either natural parent". Amendment effective April 9, 1999.

1993 Amendment: Chapter 494 in (1), at beginning, inserted exception clause, after "succession" deleted "a relationship of parent and child must be established to determine succession", and after "person" inserted "an individual is the child of the child's natural parents, regardless of their marital status. The parent and child relationship may be established under Title 40, chapter 6, part 1"; in (2), near beginning, substituted "individual" for "person", after "adopting parent" inserted "or parents", and before "natural parent" inserted "either"; inserted (2)(b) concerning right to inherit from or through the other natural parent; deleted former (2) that read: "(2) In cases not covered by subsection (1), a person is the child of its parents regardless of the marital status of its parents, and the parent and child relationship may be established under the Uniform Parentage Act, Title 40, chapter 6, part 1"; inserted (3) limiting inheritance from or through a natural child; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

1981 Amendment: In (1) substituted "is the child of" for "shall inherit as the child of" and inserted "and not of the natural parents, except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and either natural parent"; in (2) substituted "In cases not covered by subsection (1), a person is the child of its parents regardless of the marital status of its parents, and the parent and child relationship may be established under the Uniform Parentage Act, Title 40, chapter 6, part 1." for language concerning an attempted marriage ceremony by natural parents or adjudication of paternity and open treatment and support of a child by the father.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-114.

Case Notes

DECISIONS UNDER FORMER LAW

Conflict of Law — Law Determining Legitimacy: When alleged children of the decedent were born in California, the relationship between the decedent and the children's mother occurred in California, and the children had no contact with Montana, the local law of California governed the issue of the children's legitimacy. In re Dauenhauer, 167 M 83, 535 P2d 1005 (1975).

72-2-125. Parent barred from inheriting in certain circumstances.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

Erroneous Codification Instruction: Section 104(3), Ch. 313, L. 2019, provided that this section was to be codified as an integral part of Title 72, chapter 2, part 2. The Code Commissioner has codified this section in Title 72, chapter 2, part 1, to more closely reflect the subject matter.

Part 2
Elective Share of Surviving Spouse

Part Official Comments

GENERAL COMMENT

The elective share of the surviving spouse is substantially revised. The revised elective share has been endorsed by the Assembly of the National Association of Women Lawyers (NAWL), on the unanimous recommendation of NAWL's Executive Board.

The main purpose of the revisions is to bring elective-share law into line with the contemporary view of marriage as an economic partnership. The economic partnership theory of marriage is already implemented under the equitable-distribution system applied in both the common-law and community-property states when a marriage ends in divorce. When a marriage ends in death, that theory is also already implemented under the community-property system and under the system promulgated in the Uniform Marital Property Act. In the common-law states, however, elective-share law has not caught up to the partnership theory of marriage.

The general effect of implementing the partnership theory in elective-share law is to increase the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were disproportionately titled in the decedent's name; and to decrease or even eliminate the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were more or less equally titled or disproportionately titled in the surviving spouse's name. A further general effect is to decrease or even eliminate the entitlement of a surviving spouse in a short-term, later-in-life marriage in which neither spouse contributed much, if anything, to the acquisition of the other's wealth, except that a special supplemental elective-share amount is provided in cases in which the surviving spouse would otherwise be left without sufficient funds for support.

The Partnership Theory of Marriage

The partnership theory of marriage, sometimes also called the marital-sharing theory, is stated in various ways. Sometimes it is thought of "as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike." M. Glendon, The Transformation of Family Law 131 (1989). Under this approach, the economic rights of each spouse are seen as deriving from an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage, i.e., in the property nominally acquired by and titled in the sole name of either partner during the marriage (other than in property acquired by gift or inheritance). A decedent who disinherits his or her surviving spouse is seen as having reneged on the bargain. Sometimes the theory is expressed in restitutionary terms, a return-of-contribution notion. Under this approach, the law grants each spouse an entitlement to compensation for non-monetary contributions to the marital enterprise, as "a recognition of the activity of one spouse in the home and to compensate not only for this activity but for opportunities lost." Id.

No matter how the rationale is expressed, it is sometimes thought that the community-property system, including that version of community law promulgated in the Uniform Marital Property Act, recognizes the partnership theory, but that the common-law system denies it. In the ongoing marriage, it is true that the basic principle in the common-law (title-based) states is that marital status does not affect the ownership of property. The regime is one of separate property. Each spouse owns all that he or she earns. By contrast, in the community-property states, each spouse acquires an ownership interest in half the property the other earns during the marriage. By granting each spouse *upon acquisition* an immediate half interest in the earnings of the other, the community-property regimes directly recognize that the couple's enterprise is in essence collaborative.

The common-law states, however, also give effect or purport to give effect to the partnership theory when a marriage is dissolved by divorce. If the marriage ends in divorce, a spouse who sacrificed his or her financial-earning opportunities to contribute so-called domestic services to the marital enterprise (such as child-rearing and homemaking) stands to be recompensed. All states now follow the equitable-distribution system upon divorce, under which "broad discretion [is given to] trial courts to assign to either spouse property acquired during the marriage, irrespective of title, taking into account the circumstances of the particular case and recognizing the value of the contributions of a nonworking spouse or homemaker to the acquisition of that property. Simply stated, the system of equitable distribution views marriage as essentially a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute — directly and indirectly, financially and nonfinancially — the fruits of which are distributable at divorce." J. Gregory, The Law of Equitable Distribution ¶ 1.03, at p. 1-6 (1989).

The other situation in which spousal property rights figure prominently is disinheritance at death. The pre-1990 Uniform Probate Code, along with almost all other non-UPC common-law states, treats this as one of the few instances in American law where the decedent's testamentary freedom with respect to his or her title-based ownership interests must be curtailed. No matter what the decedent's intent, the pre-1990 Uniform Probate Code and almost all of the non-UPC common-law states recognize that the surviving spouse does have some claim to a portion of the decedent's estate. These statutes provide the spouse a so-called forced share. The forced share is expressed as an option that the survivor can elect or let lapse during the administration of the decedent's estate, hence in the UPC the forced share is termed the "elective" share.

Elective-share law in the common-law states, however, has not caught up to the partnership theory of marriage. Under typical American elective-share law, including the elective share provided by the pre-1990 Uniform Probate Code, a surviving spouse may claim a one-third share of the decedent's estate — not the 50 percent share of the couple's combined assets that the partnership theory would imply.

Long-term Marriages. To illustrate the discrepancy between the partnership theory and conventional elective-share law, consider first a long-term marriage, in which the couple's combined assets were accumulated mostly during the course of the marriage. The pre-1990 elective-share fraction of one-third of the decedent's estate plainly does not implement a partnership principle. The actual result depends on which spouse happens to die first and on how the property accumulated during the marriage was nominally titled.

Example 1 — Long-term Marriage under Conventional Forced-share Law. Consider A and B, who were married in their twenties or early thirties; they never divorced, and A died at age, say, 70, survived by B. For whatever reason, A left a will entirely disinheriting B.

Throughout their long life together, the couple managed to accumulate assets worth $600,000, marking them as a somewhat affluent but hardly wealthy couple.

Under conventional elective-share law, B's ultimate entitlement depends on the manner in which these $600,000 in assets were nominally titled as between them. B could end up much poorer or much richer than a 50/50 partnership principle would suggest. The reason is that under conventional elective-share law, B has a claim to one-third of A's "estate."

Marital Assets Disproportionately Titled in Decedent's Name; Conventional Elective-share Law Frequently Entitles Survivor to Less Than Equal Share of Marital Assets. If all the marital assets were titled in A's name, B's claim against A's estate would only be for $200,000 — well below B's $300,000 entitlement produced by the partnership/marital-sharing principle.

If $500,000 of the marital assets were titled in A's name, B's claim against A's estate would still only be for $166,500 (1/3 of $500,000), which when combined with B's "own" $100,000 yields a $266,500 cut for B — still below the $300,000 figure produced by the partnership/marital-sharing principle.

Marital Assets Equally Titled; Conventional Elective-share Law Entitles Survivor to Disproportionately Large Share. If $300,000 of the marital assets were titled in A's name, B would still have a claim against A's estate for $100,000, which when combined with B's "own" $300,000 yields a $400,000 cut for B — well above the $300,000 amount to which the partnership/marital-sharing principle would lead.

Marital Assets Disproportionately Titled in Survivor's Name; Conventional Elective-share Law Entitles Survivor to Magnify the Disproportion. If only $200,000 were titled in A's name, B would still have a claim against A's estate for $66,667 (1/3 of $200,000), even though B was *already* overcompensated as judged by the partnership/marital-sharing theory.

Short-term, Later-in-Life Marriages. Short-term marriages, particularly the short-term marriage later in life, present different considerations. Because each spouse in this type of marriage typically comes into the marriage owning assets derived from a former marriage, the one-third fraction of the decedent's estate far exceeds a 50/50 division of assets acquired during the marriage.

Example 2 — Short-term, Later-in-Life Marriage under Conventional Elective-share Law. Consider B and C. A year or so after A's death, B married C. Both B and C are in their seventies, and after five years of marriage, B dies survived by C. Both B and C have adult children and a few grandchildren by their prior marriages, and each naturally would prefer to leave most or all of his or her property to those children.

The value of the couple's combined assets is $600,000, $300,000 of which is titled in B's name (the decedent) and $300,000 of which is titled in C's name (the survivor).

For reasons that are not immediately apparent, conventional elective-share law gives the survivor, C, a right to claim one-third of B's estate, thereby shrinking B's estate (and hence the share of B's children by B's prior marriage to A) by $100,000 (reducing it to $200,000) while supplementing C's assets (which will likely go to C's children by C's prior marriage) by $100,000 (increasing their value to $400,000).

Conventional elective-share law, in other words, basically rewards the children of the remarried spouse who manages to outlive the other, arranging for those children a windfall share of one third of the "loser's" estate. The "winning" spouse who chanced to survive gains a windfall, for this "winner" is unlikely to have made a contribution, monetary or otherwise, to the "loser's" wealth remotely worth one-third.

The Redesigned Elective Share

The redesigned elective share is intended to bring elective-share law into line with the partnership theory of marriage.

In the long-term marriage illustrated in Example 1, the effect of implementing a partnership theory is to increase the entitlement of the surviving spouse when the marital assets were disproportionately titled in the decedent's name; and to decrease or even eliminate the entitlement of the surviving spouse when the marital assets were more or less equally titled or disproportionately titled in the surviving spouse's name. Put differently, the effect is both to reward the surviving spouse who sacrificed his or her financial-earning opportunities in order to contribute so-called domestic services to the marital enterprise and to deny an additional windfall to the surviving spouse in whose name the fruits of a long-term marriage were mostly titled.

In the short-term, later-in-life marriage illustrated in Example 2, the effect of implementing a partnership theory is to decrease or even eliminate the entitlement of the surviving spouse because in such a marriage neither spouse is likely to have contributed much, if anything, to the acquisition of the other's wealth. Put differently, the effect is to deny a windfall to the survivor who contributed little to the decedent's wealth, and ultimately to deny a windfall to the survivor's children by a prior marriage at the expense of the decedent's children by a prior marriage. Bear in mind that in such a marriage, which produces no children, a decedent who disinherits or largely disinherits the surviving spouse may not be acting so much from malice or spite toward the surviving spouse, but from a natural instinct to want to leave most or all of his or her property to the children of his or her former, long-term marriage. In hardship cases, however, as explained later, a special supplemental elective-share amount is provided when the surviving spouse would otherwise be left without sufficient funds for support.

Specific Features of the Redesigned Elective Share

Because ease of administration and predictability of result are prized features of the probate system, the redesigned elective share implements the marital-partnership theory by means of a mechanically determined approximation system, which can be called an accrual-type elective share. Under the accrual-type elective share, there is no need to identify which of the couple's property was earned during the marriage and which was acquired prior to the marriage or acquired during the marriage by gift or inheritance. For further discussion of the reasons for choosing this method, see Waggoner, "The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code," 76 Iowa L. Rev. 223, 235-53 (1991).

Section 2-201(a) [72-2-221(1), now repealed] — The "Elective-share Percentage." Section 2-201(a) [72-2-221(1), now repealed] establishes the first step in the overall redesign of the elective share. Section 2-201(a) [72-2-221(1), now repealed] implements the accrual-type elective share by adjusting the surviving spouse's ultimate entitlement to the length of the marriage. The longer the marriage, the larger the "elective-share percentage." The sliding scale adjusts for the correspondingly greater contribution to the acquisition of the couple's marital property in a marriage of 15 years than in a marriage of 15 days. Specifically, the "elective-share percentage" starts low and increases annually according to a graduated schedule until it levels off at fifty percent. The schedule established in Section 2-201(a) [72-2-221(1), now repealed] starts by providing the surviving spouse, during the first year of marriage, a right to elect the "supplemental elective-share amount" only. (The supplemental-elective share amount is explained later.) After one year of marriage, the surviving spouse's "elective-share percentage" is three percent of the augmented estate and it increases with each additional year of marriage until it reaches the maximum 50 percent level after 15 years of marriage.

Section 2-202(b) [72-2-222(2), now repealed] — the "Augmented Estate." The elective-share percentage determined under Section 2-201(a) [72-2-221(1), now repealed] is applied to the value of the "augmented estate." As defined in Section 2-202(b) [72-2-222(2), now repealed], the "augmented estate" equals the value of the couple's *combined* assets, not merely to the value of the assets nominally titled in the decedent's name.

More specifically, the "augmented estate" is composed of the sum of four elements:

Subsection (b)(1) [72-2-222(2)(a), now repealed] — the value of the decedent's net probate estate;

Subsection (b)(2) [72-2-222(2)(b), now repealed] — the value of the decedent's "reclaimable estate," composed of will-substitute-type inter-vivos transfers made by the decedent to others than the surviving spouse during the marriage and property subject to a presently exercisable general power of appointment held by the decedent;

Subsection (b)(3) [72-2-222(2)(c), now repealed] — the value of property shifting to the surviving spouse by reason of the decedent's death, such as life insurance on the decedent's life payable to the surviving spouse as the beneficiary; and

Subsection (b)(4) [72-2-222(2)(d), now repealed] — the value of the surviving spouse's assets at the decedent's death, plus any property that would have been in the surviving spouse's reclaimable estate under subsection (b)(2) [72-2-222(2)(b), now repealed] had the surviving spouse predeceased the decedent.

Section 2-201(a) [72-2-221(1), now repealed] — the "Elective-share Amount." Section 2-201(a) [72-2-221(1), now repealed] requires the elective-share percentage to be applied to the augmented estate. This calculation yields the "elective-share amount" — the amount to which the surviving spouse is entitled. If the elective-share percentage were to be applied only to the *decedent's* assets, a surviving spouse who has already been overcompensated in terms of the way the couple's marital assets have been nominally titled would receive a further windfall under the elective-share system. The couple's marital assets, in other words, would not be equalized. By applying the elective-share percentage to the augmented estate (the couple's combined assets), the redesigned system denies any significance to the possibly fortuitous factor of how the spouses happened to have taken title to particular assets.

Section 2-207 [72-2-227, now repealed] — Satisfying the Elective-share Amount. Section 2-207 [72-2-227, now repealed] determines how the elective-share amount is to be satisfied. Under Section 2-207 [72-2-227, now repealed], the decedent's net probate and reclaimable estates are liable to contribute to the satisfaction of the elective-share amount only to the extent the elective-share amount is not fully satisfied by the sum of the following amounts:

Subsection (a)(1) [72-2-227(1)(a), now repealed] — amounts that pass or have passed from the decedent to the surviving spouse by testate or intestate succession;

Subsection (a)(2) [72-2-227(1)(b), now repealed] — amounts included in the augmented estate under Section 2-202(b)(3) [72-2-222(2)(c), now repealed], i.e., the value of property to which the surviving spouse succeeds by reason of the decedent's death;

Subsection (a)(3) [72-2-227(1)(c), now repealed] — amounts that would have passed to the spouse but were disclaimed; and

Subsection (a)(4) [72-2-227(1)(d), now repealed] — twice the elective-share percentage, under Section 2-201(a) [72-2-221(1), now repealed], of the survivor's owned or reclaimable assets as determined under Section 2-202(b)(4) [72-2-222(2)(d), now repealed].

If the combined value of these amounts equals or exceeds the elective-share amount, the surviving spouse is not entitled to any further amount from the decedent's probate estate or recipients of the decedent's reclaimable estate, unless the surviving spouse is entitled to a supplemental elective-share amount under Section 2-201(b) [72-2-221(2), now repealed].

Note that under Section 2-207(a)(4) [72-2-227(1)(d), now repealed], the portion of the surviving spouse's assets that counts toward making up the elective-share amount is derived by applying a percentage to the survivor's assets equal to double the elective-share percentage. In a long-term marriage, the elective-share percentage will be 50%; thus, in such a marriage, *all* of the survivor's assets are counted toward making up the spouse's elective-share amount.

Example 3 — 15-Year or Longer Marriage under Redesigned Elective Share; Marital Assets Disproportionately Titled in Decedent's Name. A and B were married to each other more than 15 years. A died, survived by B. A's will left nothing to B, and no amounts shifted to B by reason of A's death. A made no transfers to others during the marriage and held no presently exercisable general power of appointment at death.

The augmented estate is the sum of the amounts described in Section 2-202(b) [72-2-222(2), now repealed]:

(1)	(A's net probate estate)	$400,000
(2)	(A's reclaimable estate)	0
(3)	(amounts shifting to B)	0
(4)	(B's assets and reclaimables)	$200,000
	Augmented Estate	$600,000

The elective-share percentage for a 15-year or longer marriage is 50%. This means that B's elective-share amount is $300,000 (50% of $600,000).

Under Section 2-207(a)(4) [72-2-227(1)(d), now repealed], the percentage of B's assets that counts first toward making up B's entitlement is 100% (twice the elective-share percentage of 50%), or $200,000. B, therefore, is treated as already having received $200,000 of B's ultimate entitlement of $300,000. Section 2-207(b) [72-2-227(2), now repealed] makes A's net probate estate liable for the unsatisfied balance of the elective-share amount, $100,000, which is the amount needed to bring B's own $200,000 up to the $300,000 level.

Example 4 — 15-Year or Longer Marriage under Redesigned Elective Share; Marital Assets Disproportionately Titled in Survivor's Name. As in Example 3, A and B were married to each other more than 15 years. A died, survived by B. A's will left nothing to B, and no amounts shifted to B by reason of A's death. A made no transfers to others during the marriage and held no presently exercisable general power of appointment at death.

The augmented estate is the sum of the amounts described in Section 2-202(b) [72-2-222(2), now repealed]:

(1)	(A's net probate estate)	$200,000
(2)	(A's reclaimable estate)	0
(3)	(amounts shifting to B)	0
(4)	(B's assets and reclaimables)	$400,000
	Augmented Estate	$600,000

The elective-share percentage for a 15-year or longer marriage is 50%. This means that B's elective-share amount is $300,000 (50% of $600,000).

Under Section 2-207(a)(4) [72-2-227(1)(d), now repealed], the percentage of B's assets that counts first toward making up B's entitlement is 100% (twice the elective-share percentage of 50%), or $400,000. B, therefore, is treated as already having received more than B's ultimate entitlement of $300,000. B has no claim on A's net probate estate.

In a marriage that has lasted less than 15 years, only a portion of the survivor's assets — not all — count toward making up the elective-share amount. This is because the elective-share percentage in these shorter-term marriages is less than 50% and, under Section 2-207(a)(4) [72-2-227(1)(d), now repealed], the portion of the survivor's assets that count toward making up the elective-share amount is double the elective-share percentage.

To explain why this is appropriate requires further elaboration of the underlying theory of the redesigned system. The system avoids the tracing-to-source problem by applying an ever-increasing percentage to the couple's combined assets without regard to when or how those assets were acquired, rather than applying a constant percentage (50%) to an ever-growing accumulation of assets. By approximation, the redesigned system equates the elective-share percentage of the couple's combined assets with 50% of the couple's marital assets — assets subject to equalization under the partnership/marital-sharing theory. Thus, in a marriage that has endured long enough for the elective-share percentage to be 30%, Section 2-207(a)(4) [72-2-227(1)(d), now repealed] in effect equates 30% of the couple's combined assets with 50% of those assets that were acquired during the marriage (other than by gift or inheritance). In the aggregate, Section 2-207(a)(4) [72-2-227(1)(d), now repealed] equates 60% of the couple's combined assets with the assets acquired during the marriage (other than by gift or inheritance).

Example 5 — Under 15-Year Marriage under the Redesigned Elective Share; Marital Assets Disproportionately Titled in Decedent's Name. A and B were married to each other more than 5 but less than 6 years. A died, survived by B. A's will left nothing to B, and no amounts shifted to B by reason of A's death. A made no transfers to others during the marriage and held no presently exercisable general power of appointment at death.

The augmented estate is the sum of the amounts described in Section 2-202(b) [72-2-222(2), now repealed]:

(1)	(A's net probate estate)	$400,000
(2)	(A's reclaimable estate)	0
(3)	(amounts shifting to B)	0
(4)	(B's assets and reclaimables)	$200,000
	Augmented Estate	$600,000

Under Section 2-201(a) [72-2-221(1), now repealed], the elective-share percentage for a 5-year marriage is 15%. This means that B's elective-share amount is $90,000 (15% of $600,000).

To say that B's entitlement is $90,000 presupposes (by approximation) that $180,000 of their $600,000 are marital assets — assets subject to equalization. Hence, B's entitlement is half of that amount, or $90,000. Exempted from equalization is the other $420,000 of their combined assets, some of which would have been A's individual or exempted property and the rest of which would have been B's individual or exempted property.

The redesigned system applies the same ratio to the asset mix of each spouse as it does to the couple's combined assets. To say that the elective-share percentage is 15% means that the combined assets are treated as being in a 30/70 ratio (30% marital, subject to equalization; 70% individual, exempted from equalization). This same ratio, in turn, governs the approximation of each spouse's mix of marital and individual property. Consequently, the redesigned system attributes 30% of A's $400,000 ($120,000) to marital property and the other 70% ($280,000) to individual property. And, the system does the same for B's $200,000, i.e., it treats 30% ($60,000) as marital property and 70% ($140,000) as individual property.

Accordingly, B is treated as already owning $60,000 of the $180,000 of marital property. Under Section 2-207(a)(4) [72-2-227(1)(d), now repealed], $60,000 of B's $90,000 elective-share amount comes from B's own assets. Section 2-207(b) [72-2-227(2), now repealed] makes A's net probate estate liable for the unsatisfied balance — $30,000. (Remember that $120,000 of A's assets are attributed to marital property; thus, removing $30,000 of those $120,000 from A and adding that $30,000 to B's $60,000 in marital assets equalizes the aggregate $180,000 marital assets in a 50/50 split — $90,000 for A and $90,000 for B.)

The Support Theory

The partnership/marital-sharing theory is not the only driving force behind elective-share law. Another theoretical basis for elective-share law is that the spouses' mutual duties of support during their joint lifetimes should be continued in some form after death in favor of the survivor, as a claim on the decedent's estate. Current elective-share law implements this theory poorly. The fixed fraction, whether it is the typical one-third or some other fraction, disregards the survivor's actual need. A one-third share may be inadequate to the surviving spouse's needs, especially in a modest estate. On the other hand, in a very large estate, it may go far beyond the survivor's needs. In either a modest or a large estate, the survivor may or may not have ample independent means, and this factor, too, is disregarded in conventional elective-share law.

The redesigned elective share system implements the support theory by granting the survivor a supplemental elective-share amount related to the survivor's actual needs. In implementing a support rationale, the length of the marriage is quite irrelevant. Because the duty of support is founded upon status, it arises at the time of the marriage.

Section 2-201(b) [72-2-221(2), now repealed] — the "Supplemental Elective-share Amount." Section 2-201(b) [72-2-221(2), now repealed] is the provision that implements the support theory by providing a supplemental elective-share amount of $50,000. The $50,000 figure is bracketed to indicate that individual states may wish to select a higher or lower amount.

In making up this $50,000 amount, the surviving spouse's own titled-based ownership interests count first toward making up this supplemental amount; included in the survivor's assets for this purpose are amounts shifting to the survivor at the decedent's death and amounts owing to the survivor from the decedent's estate under the accrual-type elective-share apparatus discussed above, but excluded are (1) amounts going to the survivor under the Code's probate exemptions and allowances and (2) the survivor's Social Security benefits (and other governmental benefits, such as Medicare insurance coverage). If the survivor's assets are less than the $50,000 minimum, then the survivor is entitled to whatever additional portion of the decedent's estate is necessary, up to 100 percent of it, to bring the survivor's assets up to that minimum level. In the case of a late marriage, in which the survivor is perhaps aged in the mid-seventies, the minimum figure plus the probate exemptions and allowances (which under the Code amounts to a minimum of another $43,000) is pretty much on target — in conjunction with Social Security payments and other governmental benefits — to provide the survivor with a fairly adequate means of support.

Example 6 — Supplemental Elective-share Amount. After A's death in Example 1, B married C. Five years later, B died, survived by C. B's will left nothing to C, and no amounts shifted to C by reason of B's death. B made no transfers to others during the marriage and held no presently exercisable general power of appointment at death.

The augmented estate is the sum of the amounts described in Section 2-202(b) [72-2-222(2), now repealed]:

(1) (B's net probate estate)	$90,000
(2) (B's reclaimable estate)	0
(3) (amounts shifting to C)	0
(4) (C's assets and reclaimables)	$10,000
Augmented Estate	$100,000

The elective-share percentage for a 5-year marriage is 15%. This means that C's elective-share amount is $15,000 (15% of $100,000).

Solution under Redesigned Elective Share. Under Section 2-207(a)(4) [72-2-227(1)(d), now repealed], $3,000 (30%) of C's assets count first toward making up C's elective-share amount; under Section 2-207(b) [72-2-227(2), now repealed], the remaining $12,000 elective-share amount would come from B's net probate estate.

Application of Section 2-201(b) [72-2-221(2), now repealed] shows that C is entitled to a supplemental elective-share amount. The sum of the amounts described in sections:

2-202(b)(3) [72-2-222(2)(c), now repealed]	0
2-202(b)(4) [72-2-222(2)(d), now repealed]	$10,000
2-207(a)(1) [72-2-227(1)(a), now repealed]	0
Elective-share amount payable from decedent's probate estate under Section 2-207(b) [72-2-227(2), now repealed]	$12,000
Total	$22,000

The above calculation shows that C is entitled to a supplemental elective-share amount under Section 2-201(b) [72-2-221(2), now repealed] of $28,000 ($50,000 minus $22,000). The supplemental elective-share amount is payable entirely from B's net probate estate, as prescribed in Section 2-207(b) [72-2-227(2), now repealed].

The end result is that C is entitled to $40,000 ($12,000 + $28,000) by way of elective share from B's net probate estate (and reclaimable estate, had there been any). Forty thousand dollars is the amount necessary to bring C's $10,000 in assets up to $50,000.

Decedent's Reclaimable Estate

The pre-1990 Code made great strides toward preventing "fraud on the spouse's share." The problem of "fraud on the spouse's share" arises when the decedent seeks to evade the spouse's elective share by engaging in various kinds of nominal inter-vivos transfers. To render that type of behavior ineffective, the pre-1990 Code adopted the augmented-estate concept, which extended the elective-share entitlement to property that was the subject of specified types of inter-vivos transfer, such as revocable inter-vivos trusts.

In the redesign of the elective share, the augmented-estate concept has been strengthened. The pre-1990 Code left several loopholes ajar in the augmented estate — a notable one being life insurance the decedent buys, naming someone other than his or her surviving spouse as the beneficiary. With appropriate protection for the insurance company that pays off before receiving notice of an elective-share claim, the redesigned elective-share system includes these types of insurance policies in the augmented estate as part of the decedent's reclaimable estate under Section 2-202(b)(2) [72-2-222(2)(b), now repealed].

72-2-231. Definitions.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-232. Elective share.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

TRO in Dissolution Proceedings Never Served — Change of Beneficiary After Deadline for Service Expired — Change of Beneficiary Allowed: Four years before his death, the decedent filed a petition for dissolution of marriage and a temporary restraining order (TRO) was issued. Under the TRO, the decedent could not change the beneficiary of his IRA; however, he never had his spouse served with the TRO. One month before his death, the decedent amended the beneficiary of his IRA to be his children instead of his wife. The wife made a claim against the estate for her elective share of the IRA. The District Court granted summary judgment in favor of the estate, ruling that although the decedent violated the TRO, equity would not support voiding the change of the beneficiary. On appeal, the Supreme Court affirmed, but it disagreed with the District Court's reasoning. Instead, the Supreme Court held the decedent's failure to serve the dissolution papers on the wife within 3 years rendered the TRO ineffective. Therefore, the Supreme Court reasoned, nothing prohibited the decedent from amending his IRA beneficiary. In re Estate of Corrigan, 2014 MT 337, 377 Mont. 364, 341 P.3d 623.

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Valuation of Estate: A dispute arose as to the proper fair market value of decedent's estate for purposes of applying the marital deduction. A hearing was held, and both sides presented testimony of various witnesses with varying valuations. The judge entered findings and conclusions adopting the valuation of one expert as the most credible and convincing. Appellant contended that the court erred by not giving sufficient reason for adopting the valuation, relying on In re the Marriage of Peterson, 195 M 157, 636 P2d 821 (1981). The Supreme Court found substantial evidence in the record to support the judgment, especially based on the expert's experience when compared to the other evidence. Frazier v. Frazier, 208 M 150, 676 P2d 217, 41 St. Rep. 233 (1984).

Federal Estate Taxes: Where a widow renounced the will and elected to take her dower and intestate share pursuant to section 22-107, R.C.M. 1947 (since repealed), and her intestate share was one-third of the decedent's net estate in accordance with section 91-403(1), R.C.M. 1947 (since repealed), such elected statutory share, which qualified for the marital deduction and generated no federal estate tax liability, was nonetheless chargeable with a proportionate share of the estate's total estate tax liability. In re Estate of Mosby, 170 M 463, 554 P2d 1341 (1976).

Widow's Elective Share — Apportionment of Share of Tax Liability: Under former law, the widow's elective intestate share of the decedent's estate was not exempt from payment of a proportionate share of federal estate tax. In re Estate of Mosby, 170 M 463, 554 P2d 1341 (1976).

Constitutionality of Former Statute Restricting Terms of Married Women's Wills: In determining the constitutionality of a statute, all statutes should be read together to fully understand the meaning of any individual statute. Section 91-102, R.C.M. 1947 (since repealed), which operated to limit to two-thirds the amount a wife could deprive her husband of by will, did not impose a discriminatory restriction on a wife solely because of her sex as section 22-107, R.C.M. 1947 (since repealed), regarding statutory dower allowing the wife two-thirds of her husband's estate, provided the wife with a greater potential if she chose to elect to take against her husband's will. In re Estate of Kujath, 169 M 128, 545 P2d 662 (1976).

DECISIONS UNDER FORMER LAW

Federal Estate Taxes: Where a will does not otherwise provide for the payment of federal estate taxes, the payment must be equitably apportioned among residuary interests so that a residuary interest not generating any estate taxes does not bear any burden for their payment. Robinson v. U.S., 518 F2d 1105 (9th Cir. 1975), reversing 369 F. Supp. 925 (D.C. Mont. 1974).

Invalid Renunciation: Widow's renunciation of her husband's will was not valid, even though widow purchased family home from executor and executed a deed quitclaiming all interest in real and personal property of the estate, and even though there may have been no fraud, misrepresentation or breach of confidential relationship, in view of evidence that widow did not know her rights, did not understand terms of will and did not understand the significance of signing the quitclaim deed. Ericksen v. Ericksen, 152 M 179, 448 P2d 144 (1968).

72-2-233. Composition of the augmented estate.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

Case Notes

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Election From Augmented Estate When Contract Held in Joint Tenancy With Right of Survivorship: Property held by the decedent and the surviving spouse as joint tenants with the right of survivorship is included in an augmented estate only to the extent that the property was derived from decedent without full consideration in money or money's worth. When the record established that a ranch sold under a contract for deed was purchased at least in part with funds gained from the sale of property owned solely by the surviving spouse and that decedent contributed money for ranch payments, it was not error for the District Court to find that the parties contributed equally to the purchase of the ranch. Further, it was not error to deny the surviving spouse an elective share of the estate when the value the surviving spouse received from joint tenancy property derived from decedent more than satisfied the spouse's one-third share of the augmented estate. In re Estate of Lettengarver, 249 M 92, 813 P2d 468, 48 St. Rep. 593 (1991).

No Distribution From Augmented Estate to Remaining Heirs: Personal representatives argued that it was error to fail to distribute the remaining two-thirds of an augmented estate to the son and daughter. However, an augmented estate is merely an accounting device designed to protect a surviving spouse who was a domiciliary against donative transfers by will and will substitutes that would deprive the survivor of a fair share of the estate. The remaining heirs do not receive distributions from an augmented estate. In re Estate of Lettengarver, 249 M 92, 813 P2d 468, 48 St. Rep. 593 (1991).

72-2-234. Decedent's net probate estate.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-235. Decedent's nonprobate transfers to others.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-236. Decedent's nonprobate transfers to surviving spouse.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-237. Surviving spouse's property and nonprobate transfers to others.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-238. Exclusions, valuation, and overlapping application.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-239. Sources from which elective share payable.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

Case Notes

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Election From Augmented Estate When Contract Held in Joint Tenancy With Right of Survivorship: Property held by the decedent and the surviving spouse as joint tenants with the right of survivorship is included in an augmented estate only to the extent that the property was derived from decedent without full consideration in money or money's worth. When the record established that a ranch sold under a contract for deed was purchased at least in part with funds gained from the sale of property owned solely by the surviving spouse and that decedent contributed money for ranch payments, it was not error for the District Court to find that the parties contributed equally to the purchase of the ranch. Further, it was not error to deny the surviving spouse an elective share of the estate when the value the surviving spouse received from joint tenancy property derived from decedent more than satisfied the spouse's one-third share of the augmented estate. In re Estate of Lettengarver, 249 M 92, 813 P2d 468, 48 St. Rep. 593 (1991).

72-2-240. Personal liability of recipients.

Compiler's Comments

2019 Amendment: Chapter 313 in (2) near end substituted "72-2-239" for "72-2-227". Amendment effective October 1, 2019.

72-2-241. Proceeding for elective share — time limit.

Official Comments

This section is revised to coordinate the terminology with that used in revised Section 2-202 [72-2-222, now repealed] and with the fact that an election can be made by a conservator, guardian, or agent on behalf of a surviving spouse, as provided in Section 2-203(a) [72-2-223(1), renumbered 72-2-242(1)].

Compiler's Comments

2019 Amendment: Chapter 313 in (1) in last sentence and in (2) in third sentence substituted "72-2-235" for "72-2-222(2)(b)"; and in (4) at end of first sentence and near middle of last sentence substituted "72-2-239" for "72-2-227". Amendment effective October 1, 2019.

1995 Amendment: Chapter 592 in (1), in third sentence, and in two places in (2), after "decedent's", substituted "nonprobate transfers to others" for "reclaimable estate".

1993 Amendment: Chapter 494 substituted (1) concerning notice of time and place of election for former (1) that read: "The surviving spouse may elect to take his elective share in the augmented estate by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within 9 months after the date of death or within 6 months after the probate of the decedent's will, whichever limitation last expires. However, the nonprobate transfers described in 72-2-705(1) shall not be included within the augmented estate for the purpose of computing the elective share if the petition is filed later than 9 months after death. The court may extend the time for election as it sees fit for cause shown by the surviving spouse before the time for election has expired"; substituted (2) imposing 9-month limit on time for petition for former (2) that read: "The surviving spouse shall give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented net estate whose interests will be adversely affected by the taking of the elective share"; in (4), near beginning of first sentence, substituted "elective-share and supplemental elective-share amounts" for "amount of the elective share" and in last sentence inserted reference to 72-2-227; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

1981 Amendment: Deleted "net" following "augmented" near beginning of (1); extended the time for filing the petition for elective share from 6 to 9 months after the date of death or within 6 months after probate; and inserted next to last sentence in (1) concerning nonprobate transfers.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-205.

72-2-242. Right of election personal to surviving spouse — incapacitated surviving spouse.

Official Comments

Subsection (a) [72-2-223(1), renumbered 72-2-242(1)]. Subsection (a) [72-2-223(1), renumbered 72-2-242(1)] is revised to make it clear that the right of election may be exercised only by or on behalf of a living surviving spouse. If the election is not made by the surviving spouse personally, it can be made on behalf of the surviving spouse by the spouse's conservator, guardian, or agent. In any case, the surviving spouse must be alive when the election is made. The election cannot be made on behalf of a deceased surviving spouse.

Subsections (b) and (c) [Montana adopted alternative subsection (b) as 72-2-223(2) (renumbered 72-2-242(2))]. If the election is made on behalf of a surviving spouse who is an "incapacitated person," as defined in Section 5-103(7) [72-5-101(1)], that portion of the elective-share and supplemental elective-share amounts which, under Sections 2-207(b) and (c) [72-2-227(2) and (3), now repealed], are payable from the decedent's probate and reclaimable estates must go into a custodial trust under the Uniform Custodial Trust Act, as adjusted in subsection (c).

If the election is made on behalf of the surviving spouse by his or her guardian or conservator, the surviving spouse is by definition an "incapacitated person." If the election is made by the surviving spouse's agent under a durable power of attorney, the surviving spouse is presumed to be an "incapacitated person"; the presumption is rebuttable.

The terms of the custodial trust are governed by the Uniform Custodial Trust Act, except as adjusted in subsection (c) [not adopted in Montana].

The custodial trustee is authorized to expend the custodial trust property for the use and benefit of the surviving spouse to the extent the custodial trustee considers it advisable. In determining the amounts, if any, to be expended for the spouse's benefit, the custodial trustee is directed to take into account the spouse's other support, income, and property; these items would include governmental benefits such as Social Security and Medicare.

Bracketed language in subsection (c)(2) [not adopted in Montana] (and in Alternative subsection (b)(1) [72-2-223(2)(a), renumbered 72-2-242(2)(a)]) gives enacting states a choice as to whether governmental benefits for which the spouse must qualify on the basis of need, such as Medicaid, are also to be considered. If so, the enacting state should include the bracketed word "and" but not the bracketed phrase "exclusive of" in its enactment; if not, the enacting state should include the bracketed phrase "exclusive of" and not include the bracketed word "and" in its enactment.

At the surviving spouse's death, the remaining custodial trust property does not go to the surviving spouse's estate, but rather under the residuary clause of the will of the predeceased spouse whose probate and reclaimable estates were the source of the property in the custodial trust, as if the predeceased spouse died immediately after the surviving spouse. In the absence of a residuary clause, the property goes to the predeceased spouse's heirs. See Section 2-711 [72-2-721].

Alternative Subsection (b) [Montana adopted this alternative as 72-2-223(2) (renumbered 72-2-242(2)]. For states that have not enacted the Uniform Custodial Trust Act, an Alternative subsection (b) [72-2-223(2), renumbered 72-2-242(2)] is provided under which the court must set aside that portion of the elective-share and supplemental elective-share amounts which, under Sections 2-207(b) and (c) [72-2-227(2) and (3), now repealed], are due from the decedent's probate and reclaimable estates and must appoint a trustee to administer that property for the support of the surviving spouse, in accordance with the terms set forth in Alternative subsection (b) [72-2-223(2), renumbered 72-2-242(2)].

Planning for an Incapacitated Surviving Spouse Not Disrupted. Note that the portion of the elective-share or supplemental elective-share amounts that go into the custodial or support trust is that portion due from the decedent's probate and reclaimable estates under Sections 2-207(b) and (c) [72-2-227(2) and (3), now repealed]. These amounts constitute the involuntary transfers to the surviving spouse under the elective-share system. Amounts voluntarily transferred to the surviving spouse under the decedent's will, by intestacy, or by nonprobate transfer, if any, do not go into the custodial or support trust. Thus, estate planning measures deliberately established for a surviving spouse who is incapacitated are not disrupted. For example, the decedent's will might establish a trust that qualifies for or that can be elected as qualifying for the federal estate tax marital deduction. Although the value of the surviving spouse's interests in such a trust count toward satisfying the elective-share amount under Section 2-207(a)(1) [72-2-227(1)(a), now repealed], the trust itself is not dismantled by virtue of Section 2-203(b) [Montana adopted alternative subsection (b) as 72-2-223(2) (renumbered 72-2-242(2)); subsection (c) was not adopted in Montana] in order to force that property into the nonqualifying custodial or support trust.

Rationale. The approach of this section is based on a general expectation that most surviving spouses are, at the least, generally aware of and accept their decedents' overall estate plans and are not antagonistic to them. Consequently, to elect the elective share, and not have the disposition of that part of it that is payable from the decedent's probate and reclaimable estates under Sections 2-207(b) and (c) [72-2-227(2) and (3), now repealed] governed by subsections (b) and (c) [Montana adopted alternative subsection (b) as 72-2-223(2) (renumbered 72-2-242(2)); subsection (c) was not adopted in Montana], the surviving spouse must not be an incapacitated person. When the election is made by or on behalf of a surviving spouse who is not an incapacitated person, the surviving spouse has personally signified his or her opposition to the decedent's overall estate plan.

If the election is made on behalf of a surviving spouse who is an incapacitated person, subsections (b) and (c) [Montana adopted alternative subsection (b) as 72-2-223(2) (renumbered 72-2-242(2)); subsection (c) was not adopted in Montana] control the disposition of that part of the elective-share amount or supplemental elective-share amount payable under Sections 2-207(b) and (c) [72-2-227(2) and (3), now repealed] from the decedent's probate and reclaimable estates. The purpose of subsections (b) and (c) [Montana adopted alternative subsection (b) as 72-2-223(2) (renumbered 72-2-242(2)); subsection (c) was not adopted in Montana], generally speaking, is to assure that that part of the elective share is devoted to the personal economic benefit and needs of the surviving spouse, but not to the economic benefit of the surviving spouse's heirs or devisees.

Compiler's Comments

2019 Amendment: Chapter 313 in (2) in first sentence substituted "72-2-239(3) and (4)" for "72-2-227(2) and (3)". Amendment effective October 1, 2019.

1995 Amendment: Chapter 592 in (2), near middle of first sentence after "decedent's", substituted "nonprobate transfers to others" for "reclaimable estate".

1993 Amendment: Chapter 494 substituted current text concerning election of surviving spouse for former text that read: "The right of election of the surviving spouse may be exercised only by him. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending after finding that exercise is necessary to provide adequate support for the protected person during his probable life expectancy."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-203.

Case Notes

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Incompetent Spouse — Elective Share Requirement — Reasonable Classification: A requirement under this section that an incompetent spouse obtain a court-ordered finding of financial need before she can exercise her right to an elective share of her husband's estate, while a competent spouse is not restricted in any way in exercising the right to an elective share, does not create an arbitrary or unreasonable classification. This section ensures that the spouse will be adequately cared for, thus fulfilling the ultimate purpose of the statute, while denying the incompetent spouse only the discretionary income. In re Estate of Merkel, 190 M 78, 618 P2d 872, 37 St. Rep. 1782 (1980).

72-2-243. Effect of premarital or marital agreement right to elect and of other rights.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Mental Weakness Short of Incapacity Not Sufficient to Invalidate Premarital Agreement: When Mary and Larry were married, Mary was 21 and developmentally disabled and Larry was 62 and in poor health. Larry had three children from a previous marriage. Two days before the marriage, Mary and Larry signed a prenuptial agreement prepared by Larry's attorney that provided that each would keep the individual's separate property, whether owned then or acquired thereafter, free from any claim of the other by virtue of the marriage. Two years later, Larry died, and Mary brought an action to challenge the enforcement of the premarital agreement on grounds that, because of her disability, she was incapable of understanding the agreement and thus could not have given the required consent. The District Court found that Mary was mentally competent to understand the agreement when she signed it and that the contract was valid. The Supreme Court applied Gen. Motors v. Jackson, 900 P2d 345 (Nev. 1995), for the proposition that a person is mentally defective for purposes of capacity when the party, for any reason, is incapable of understanding the force and effect of the agreement, but that a mere mental weakness short of incapacity does not invalidate the agreement because capacity deals with the ability to understand the terms of the agreement, not a person's actual understanding. Capacity relates to the status of the person rather than the circumstances surrounding the transaction. Mary attended special education classes, but nevertheless graduated from high school. She could read and write, although poorly, and could drive a car, although she had no license. Absent any medical or expert testimony regarding Mary's level of competency, the District Court relied on lay testimony, including Mary's, to determine whether Mary met the burden of establishing incompetence. Substantial evidence supported the court's conclusion that Mary failed to meet her burden of proof, and the Supreme Court affirmed the validity of the premarital contract. Wilkes v. Estate of Wilkes, 2001 MT 118, 305 M 335, 27 P3d 433 (2001).

No Finding of Unconscionability in Premarital Agreement: When Mary and Larry were married, Mary was 21 and developmentally disabled and Larry was 62 and in poor health. Larry had three children from a previous marriage. Two days before the marriage, Mary and Larry signed a prenuptial agreement prepared by Larry's attorney that provided that each would keep the individual's separate property, whether owned then or acquired thereafter, free from any claim of the other by virtue of the marriage. Two years later, Larry died, and Mary brought an action to challenge the enforcement of the premarital agreement on grounds that the agreement was unconscionable. The District Court concluded that although Mary's circumstances were not enviable in some respects, it was logical that Larry would desire to, and had the right to, protect the assets that he acquired during a lifetime of work and pass them on to his children. The mere fact that Mary functioned at a low intellectual level did not make it less conscionable that she would keep only what she brought to the marriage and share only whatever assets might have been added to the marital estate had the marriage lasted longer. The court properly applied the guidelines in this section, and absent clear error, the validity of the premarital agreement was affirmed. Wilkes v. Estate of Wilkes, 2001 MT 118, 305 M 335, 27 P3d 433 (2001).

Antenuptial Agreement Enforceable if Contract Conditions Met — Burden of Surviving Spouse to Prove Invalidity of Waiver and Absence of Fair Disclosure: Generally, an antenuptial agreement is valid and enforceable between two consenting parties if the agreement meets the requirements of a contract. Under 26-1-401, the party asserting a right in a case bears the burden of proving each of the material allegations of the cause of action. Thus, antenuptial agreements receive the same scrutiny as any other contract, except that there is an additional requirement of fair disclosure imposed on both parties in recognition of the confidential relationship between them. Therefore, the burden is on the surviving spouse to prove an invalid contractual waiver and to prove the absence of fair disclosure. Here, the surviving wife did not meet these burdens of proof, and the District Court did not err in holding that an antenuptial agreement was valid, precluding the wife from collecting a homestead allowance, an exempt property allowance, a family allowance, or an elective share from the husband's estate. Wiley v. Iverson, 1999 MT 214, 295 M 511, 985 P2d 1176, 56 St. Rep. 838 (1999). See also In re Estate of Lopata, 641 P2d 952 (Colo. 1982), and In re Estate of Thies, 273 M 272, 903 P2d 186, 52 St. Rep. 970 (1995).

Prenuptial Agreement — Recitation of Full Disclosure of Assets Held Sufficient: Before Everett and Eleanor were married, they executed a prenuptial agreement containing a statement that each party had disclosed assets to the other. Upon Everett's death, Eleanor attempted to elect against Everett's will and produced evidence that although she had signed the agreement containing the disclosure statement, there in fact had been no disclosure but that she had chosen not to raise the issue at the time that the prenuptial agreement was signed. The Supreme Court held that 72-2-102 (renumbered 72-2-224, now repealed) did not require a written disclosure or listing of the parties' assets, that the statute was complied with in this case by inclusion of the recitation of disclosure, and that the District Court was entitled to determine the credibility of Eleanor's testimony. The Supreme Court also held that the Uniform Prenuptial Agreement Act (Uniform Premarital Agreement Act) did not apply to the case before the court because the Act was not in force at the time that the agreement was entered into. In re Estate of Thies, 273 M 272, 903 P2d 186, 52 St. Rep. 970 (1995).

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Renunciation to Be Clear and Unequivocal: A renunciation of property rights or interests under this section must be clear and unequivocal. Breidenbach v. Wedum, 233 M 478, 760 P2d 1237, 45 St. Rep. 1658 (1988), distinguished in In re Estate of Thies, 273 M 272, 903 P2d 186, 52 St. Rep. 970 (1995).

Will Provisions — Improper Consideration of Waiver of Property Rights in Distribution of Marital Property: It was improper for the District Court to find that wife's signing of a release of claims to husband's property, as part of her will and contingent upon husband's death, constituted a waiver of property rights upon dissolution of marriage. In re Marriage of Dow, 230 M 416, 750 P2d 1064, 45 St. Rep. 317 (1988).

Waiver of Homestead Allowance and Right to Exempt Property by Agreement: An agreement wherein the beneficiaries of a will ambiguously delineated how property was to be divided did not specify that a homestead allowance or exempt property was to go to the decedent's wife. The trial court properly ruled that the wife waived her right to the allowance and property by agreement, despite her contentions that there was no fair disclosure of her rights since she was not aware of the allowance or exempt property. The Supreme Court noted that neither party was aware of the allowance or exempt property and that since the wife was represented by counsel at the time of agreement, the contractual ambiguity should be interpreted against her under 28-3-206. In re Estate of Flasted, 228 M 85, 741 P2d 750, 44 St. Rep. 1362 (1987), distinguished in In re Estate of Thies, 273 M 272, 903 P2d 186, 52 St. Rep. 970 (1995).

Divorce Decree Procured by Fraud — Effect of Death: After the decree in a divorce action, death of one of the parties does not deprive the Trial Court of its power to purge its records of a void or voidable decree procured by fraud. Fraunhofer v. Price, 182 M 7, 594 P2d 324 (1979).

72-2-244. Protection of payors and other third parties.

Compiler's Comments

2019 Amendment: Chapter 313 in (1) in first sentence near beginning substituted "72-2-235" for "72-2-222" and near middle after "taken any other action in" inserted "good faith"; and in (2) near middle of first sentence inserted "registered or". Amendment effective October 1, 2019.

Part 3

Spouse and Children Unprovided for in Wills

72-2-331. Entitlement of spouse — premarital will.

Official Comments

Purpose and Scope of the Revisions. This section applies only to a premarital will, a will executed prior to the testator's marriage to his or her surviving spouse. If the decedent and the surviving spouse were married to each other more than once, a premarital will is a will executed by the decedent at any time when they were not married to each other but not a will executed during a prior marriage. This section reflects the view that the intestate share of the spouse in that portion of the testator's estate not devised to certain of the testator's children, under trust or not, (or that is not devised to their descendants, under trust or not, or does not pass to their descendants under the antilapse statute) is what the testator would want the spouse to have if he or she had thought about the relationship of his or her old will to the new situation.

Under this section, a surviving spouse who married the testator after the testator executed his or her will may be entitled to a certain minimum amount of the testator's estate. The surviving spouse's entitlement under this section, if any, is granted automatically; it need not be elected. If the surviving spouse exercises his or her right to take an elective share, amounts provided under this section count toward making up the elective-share amount by virtue of the language in subsection (a) [72-2-331(1)] stating that the amount provided by this section is treated as "an intestate share." Under Section 2-207(a)(1) [72-2-227(1)(a), now repealed], amounts passing to the surviving spouse by intestate succession count first toward making up the spouse's elective-share amount.

Subsection (a) [72-2-331(1)]. Subsection (a) [72-2-331(1)] is revised to make it clear that a surviving spouse who, by a premarital will, is devised, under trust or not, less than the share of the testator's estate he or she would have received had the testator died intestate as to that part of the estate, if any, not devised to certain of the testator's children, under trust or not, (or that is not devised to their descendants, under trust or not, or does not pass to their descendants under the antilapse statute) is entitled to be brought up to that share. The pre-1990 version of Section 2-301 [72-2-331] was titled "*Omitted* Spouse," and the section used phrases such as "*fails* to provide" and "*omitted* spouse." The implication of the title and these phrases was that the section was inapplicable if the person the decedent later married was a devisee in his or her premarital will. It was clear, however, from the underlying purpose of the section that this was not intended. The courts recognized this and refused to interpret the section that way, but in doing so they have been forced to say that a premarital will containing a devise to the person to whom the testator was married at death could still be found to "fail to provide" for the survivor *in the survivor's capacity as spouse.* See *Estate of Christensen,* 665 P.2d 646 (Utah 1982); *Estate of Ganier,* 418 So.2d 256 (Fla. 1982); Note, "The Problem of the 'Un-omitted' Spouse Under Section 2-301 of the [Pre-1990] Uniform Probate Code," 52 U. Chi. L. Rev. 481 (1985). By making the existence and amount of a premarital devise to the spouse irrelevant, the revisions of subsection (a) [72-2-331(1)] make the operation of the statute more purposive.

Subsection (a)(1), (2), and (3) Exceptions [72-2-331(1)(a), (1)(b), and (1)(c)]. The moving party has the burden of proof on the exceptions contained in subsections (a)(1), (2), and (3) [72-2-331(1)(a), (1)(b), and (1)(c)]. For a case interpreting the language of subsection (a)(3) [72-2-331(1)(c)], see *Estate of Bartell,* 776 P.2d 885 (Utah 1989). This section can be barred by a premarital agreement, marital agreement, or waiver as provided in Section 2-204 [72-2-224, now repealed].

Subsection (b) [72-2-331(2)]. Subsection (b) [72-2-331(2)] is also revised to provide that the value of any premarital devise to the surviving spouse, equitable or legal, is used first to satisfy the spouse's entitlement under this section, before any other devises suffer abatement. This revision is made necessary by the revision of subsection (a) [72-2-331(1)]: If the existence or amount of a premarital devise to the surviving spouse is irrelevant, any such devise must be counted toward and not be in addition to the ultimate share to which the spouse is entitled. Normally, a devise in favor of the person whom the testator *later* marries will be a specific or general devise, not a residuary devise. The effect under the pre-1990 version of subsection (b) [72-2-331(2)] was that the surviving spouse could take the intestate share under Section 2-301 [72-2-331], which in the pre-1990 version was satisfied out of the residue (under the rules of abatement in Section 3-902 [72-3-901]), *plus* the devise in his or her favor. The revision of subsection (b) [72-2-331(2)] prevents this "double dipping," so to speak.

Reference. The theory of this section is discussed in Waggoner, "The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code," 76 Iowa L. Rev. 223, 253-55 (1991).

Compiler's Comments

1995 Amendment: Chapter 592 in (1), near end after "devised", inserted "to the descendant of such a child" and after "72-2-614 to" inserted "such a child or to".

1993 Amendment: Chapter 494 substituted current text concerning the entitlement of a spouse who marries testator after the execution of a will for former text that read: "(1) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(2) In satisfying a share provided by this section, the devises made by the will abate as provided in 72-3-901."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-301.

72-2-332. Omitted children.

Official Comments

This section provides for both the case where a child was born or adopted after the execution of the will and not foreseen at the time and thus not provided for in the will, and the rare case where a testator omits one of his or her children because of the mistaken belief that the child is dead.

Basic Purposes and Scope of Revisions. This section is substantially revised. The revisions have two basic objectives. The first basic objective is to provide that a will that devised, under trust or not, all or substantially all of the testator's estate to the other parent of the omitted child prevents an after-born or after-adopted child from taking an intestate share if none of the testator's children was living when he or she executed the will. (Under this rule, the other parent must survive the testator and be entitled to take under the will.)

Under the pre-1990 Code [1990 Code adopted in Montana in 1993], such a will prevented the omitted child's entitlement only if the testator had one or more children living when he or she executed the will. The rationale for the revised rule is found in the empirical evidence (cited in the Comment to Section 2-102 [72-2-112]) that suggests that even testators with children tend to devise their entire estates to their surviving spouses, especially in smaller estates. The testator's purpose is not to disinherit the children; rather, such a will evidences a purpose to trust the surviving parent to use the property for the benefit of the children, as appropriate. This attitude of trust of the surviving parent carries over to the case where none of the children have been born when the will is executed.

The second basic objective of the revisions is to provide that if the testator had children when he or she executed the will, and if the will made provision for one or more of the then-living children, an omitted after-born or after-adopted child does not take a full intestate share (which might be substantially larger or substantially smaller than given to the living children). Rather, the omitted after-born or after-adopted child participates on a pro rata basis in the property devised, under trust or not, to the then-living children.

A more detailed description of the revised rules follows.

No Child Living When Will Executed. If the testator had no child living when he or she executed the will, subsection (a)(1) [72-2-332(1)(a)] provides that an omitted after-born or after-adopted child receives the share he or she would have received had the testator died intestate, unless the will devised, under trust or not, all or substantially all of the estate to the other parent of the omitted child. If the will did devise, under trust or not, all or substantially all of the estate to the other parent of the omitted child, and if that other parent survives the testator and is entitled to take under the will, the omitted after-born or after-adopted child receives no share of the estate. In the case of an after-adopted child, the term "other parent" refers to the other adopting parent. (The other parent of the omitted child might survive the testator, but not be entitled to take under the will because, for example, that devise, under trust or not, to the other parent was revoked under Section 2-803 [72-2-813] or 2-804 [72-2-814].)

One or More Children Living When Will Executed. If the testator had one or more children living when the will was executed, subsection (a)(2) [72-2-332(1)(b)], which implements the second basic objective stated above, provides that an omitted after-born or after-adopted child only receives a share of the testator's estate if the testator's will devised property or an equitable or legal interest in property to one or more of the children living at the time the will was executed; if not, the omitted after-born or after-adopted child receives nothing.

Subsection (a)(2) [72-2-332(1)(b)] is modelled on N.Y. Est. Powers & Trusts Law § 5-3.2. Subsection (a)(2) [72-2-332(1)(b)] is illustrated by the following example.

Example. When G executed her will, she had two living children, A and B. Her will devised $7,500 to each child. After G executed her will, she had another child, C.

C is entitled to $5,000. $2,500 (1/3 of $7,500) of C's entitlement comes from A's $7,500 devise (reducing it to $5,000); and $2,500 (1/3 of $7,500) comes from B's $7,500 devise (reducing it to $5,000).

Variation. If G's will had devised $10,000 to A and $5,000 to B, C would be entitled to $5,000. $3,333 (1/3 of $10,000) of C's entitlement comes from A's $10,000 devise (reducing it to $6,667); and $1,667 (1/3 of $5,000) comes from B's $5,000 devise (reducing it to $3,333).

Subsection (b) Exceptions [72-2-332(2)]. To preclude operation of subsection (a)(1) or (a)(2) [72-2-332(1)(a) or (1)(b)], the testator's will need not make any provision, even nominal in amount, for a testator's present or future children; under subsection (b)(1) [72-2-332(2)(a)], except for a child omitted solely because believed dead (see Comment to subsection (c) [72-2-332(3)]), a simple recital in the will that the testator intends to make no provision for then living children or any the testator thereafter may have would be sufficient.

For a case applying the language of subsection (b)(2) [72-2-332(2)(b)], in the context of the omitted spouse provision, see *Estate of Bartell*, 776 P.2d 885 (Utah 1989).

The moving party has the burden of proof on the elements of subsections (b)(1) and (b)(2) [72-2-332(2)(a) and (2)(b)].

Subsection (c) [72-2-332(3)]. Subsection (c) [72-2-332(3)] addresses the problem that arises if at the time of execution of the will the testator fails to provide in his or her will for a living child solely because he or she believes the child to be dead. Extrinsic evidence is admissible to determine whether the testator omitted the living child solely because he or she believed the child to be dead. Cf. Section 2-601 [72-2-611], Comment. If the child was omitted solely because of that belief, the child is entitled to share in the estate as if the child were an omitted after-born or after-adopted child. Under subsection (b) [72-2-332(2)], however, subsection (c) [72-2-332(3)] does not apply: (1) if it appears from the will that the omission was intentional, i.e., if it appears from the will that the testator would not have provided for the child had the child been alive; or (2) if the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence. Under subsection (b)(1) [72-2-332(2)(a)], a simple recital in the will that the testator intends to make no provision for then living children or for a specific child is insufficient to render subsection (c) [72-2-332(3)] inapplicable to a child the testator then believed to be dead because the intention to omit would be based on a false premise. Extrinsic evidence would be admissible because the language in such a case would be rendered ambiguous by the circumstance that the testator then believed the child to be dead. Cf. Section 2-601 [72-2-611], Comment. Subsection (c) [72-2-332(3)], however, would be inapplicable if the will itself stated or if extrinsic evidence establishes that the testator would not have provided for the child had the child been alive.

Abatement Under Subsection (d) [72-2-332(4)]. Under subsection (d) [72-2-332(4)] and Section 3-902 [72-3-901], any intestate estate would first be applied to satisfy the intestate share of an omitted after-born or after-adopted child under subsection (a)(1) [72-2-332(1)(a)].

Compiler's Comments

1995 Amendment: Chapter 592 in (2) deleted reference to subsection (3); in (3), at beginning, deleted "Except as provided in subsection (2)"; and made minor changes in style.

1993 Amendment: Chapter 494 substituted current text concerning failure of testator to provide for certain of testator's children for former text that read: "(1) If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:

(a) it appears from the will that the omission was intentional;

(b) when the will was executed the testator had one or more children and devised substantially all his estate to the other parent of the omitted child; or

(c) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(2) If at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes the child to be dead, the child receives a share in the estate equal in value to that which he would have received if the testator had died intestate.

(3) In satisfying a share provided by this section, the devises made by the will abate as provided in 72-3-901."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-302.

Case Notes

Determination That Decedent Died Intestate Not Erroneous: Bradshaw's mother contended that Bradshaw executed a valid holographic will in 1988 and introduced the document into evidence. Pursuant to the document, Bradshaw left his vehicle to a nephew and the rest of his estate to be equally divided among his mother, father, brother, and sister. The District Court held that the document was not submitted into evidence as a holographic will and that Bradshaw died intestate. Bradshaw's two sons were born in 1992 and 1995. Under this section, children born after the making of a will who are not provided for in the will take as if the decedent died intestate. Therefore, even if the document had been properly submitted as a holographic will, the children, in the absence of a surviving spouse, were entitled to Bradshaw's estate. In re Estate of Bradshaw, 2001 MT 92, 305 M 178, 24 P3d 211 (2001).

Claim of Omitted Child Summarily Dismissed — Failure to Present Evidence of Mistaken Belief of Death of Child: Scotty Prescott married Howard Putman in 1946, and they had a son, William, in 1949. Scotty later found out that Howard's previous marriage had not been dissolved when they married, and Scotty was granted an annulment in 1954. She remained in Montana, attending Montana State College, and Howard moved to California with William. Aside from two letters in 1954, there was no evidence of any contact among Scotty, Howard, and William. William had no independent recollection of his mother and never attempted to contact her during the remaining 42 years of her life. Scotty executed a will in 1985, bequeathing the profits from the sale of her ranch to the college, the remainder of her estate to the Museum of the Rockies, and nothing to William, who later asserted that he was entitled to a share of the estate pursuant to this section because Scotty mistakenly believed that he was dead. In a nonsubstantial revision of the will in 1991, Scotty had stated that "the line of succession for this branch of the Prescott family ends with me", which William contended raised a question of material fact as to whether his mother believed him to be dead. However, the statement was not made until 6 years after the will was executed and was consistent with the separate way that they lived their lives. Further, the record was replete with uncontroverted proof that the disposition of Scotty's estate was consistent with her intention stated as early as 1964 to endow the college and did not indicate that William was omitted from the will solely because Scotty believed him to be dead. In the absence of sufficient evidence required by subsection (3) of this section proving that William was an omitted child, the District Court correctly dismissed William's claim by summary judgment. In re Estate of Prescott, 2000 MT 200, 300 M 469, 8 P3d 88, 57 St. Rep. 779 (2000).

Part 4
Exempt Property and Allowances

Part Official Comments

GENERAL COMMENT

For decedents who die domiciled in this State, this part grants various allowances to the decedent's surviving spouse and certain children. The allowances have priority over unsecured creditors of the estate and persons to whom the estate may be devised by will. If there is a surviving spouse, all of the allowances described in this Part [Title 72, chapter 2, part 4], which (as revised to adjust for inflation) total $25,000, plus whatever is allowed to the spouse for support during administration, normally pass to the spouse. If the surviving spouse and minor or dependent children live apart from one another, the minor or dependent children may receive some of the support allowance. If there is no surviving spouse, minor or dependent children become entitled to the homestead exemption of $15,000 and to support allowances. The exempt property section confers rights on the spouse, if any, or on all children, to $10,000 in certain chattels, or funds if the unencumbered value of chattels is below the $10,000 level. This provision is designed in part to relieve a personal representative of the duty to sell household chattels when there are children who will have them.

These family protection provisions supply the basis for the important small estate provisions of Article III, Part 12 [Title 72, chapter 3, part 11].

States adopting the Code may see fit to alter the dollar amounts suggested in these sections, or to vary the terms and conditions in other ways so as to accommodate existing traditions. Although creditors of estates would be aided somewhat if all family exemption provisions relating to probate estates were the same throughout the country, there is probably less need for uniformity of law regarding these provisions than for any of the other parts of this article. Still, it is quite important for all states to limit their homestead, support allowance and exempt property provisions, if any, so that they apply only to estates of decedents who were domiciliaries of the state.

Cross Reference. Notice that under Section 2-104 [72-2-114] a spouse or child claiming under this Part must survive the decedent by 120 hours.

Part Case Notes

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

State Probate Jurisdiction of Federal Claim — Homestead Exemption — Priority of Liens: Creditor obtained a default judgment in the U.S. District Court for the Southern District of New York against an Alaska resident and attempted to execute on property in Montana that had subsequently come under Montana's exclusive probate jurisdiction. While the federal court retained jurisdiction over claims impacting the estate, the court could not seize and control property in the possession of the state probate court. It was within the jurisdiction of the state court to determine that the real property was subject to family protection allowances and exempt from execution. Although the lien was attached prior to debtor's death, the lien was extinguished upon the exercise of the family protection allowances, and the homestead allowance was exempt from and had priority over all other claims against the estate. In re Estate of Wilhelm, 233 M 255, 760 P2d 718, 45 St. Rep. 1468 (1988).

No Statutory Claim-Filing Requirement for Homestead Allowance to Vest: The homestead allowance vests as a matter of law in the surviving spouse upon his outliving the deceased by 120 hours. The filing of a claim for the homestead allowance is not a condition of its vesting. In re the Estate of Heiser, 207 M 126, 672 P2d 1124, 40 St. Rep. 1941 (1983).

72-2-411. Applicable law.

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is 2-401.

72-2-412. Homestead allowance.

Official Comments

As originally adopted in 1969, the bracketed dollar amount was $5,000. To adjust for inflation, the bracketed amount was increased to $15,000 in 1990.

See Section 2-802 [72-2-812] for the definition of "spouse," which controls in this Part. Also, see Section 2-104. Waiver of homestead is covered by Section 2-204 [72-2-224, now repealed]. "Election" between a provision of a will and homestead is not required unless the will so provides.

A set dollar amount for homestead allowance was dictated by the desirability of having a certain level below which administration may be dispensed with or be handled summarily, without regard to the size of allowances under Section 2-404 [72-2-414]. The "small estate" line is controlled largely, though not entirely, by the size of the homestead allowance. This is because Part 12 of Article III [Title 72, chapter 3, part 11] dealing with small estates rests on the assumption that the only justification for keeping a decedent's assets from his creditors is to benefit the decedent's spouse and children.

Another reason for a set amount is related to the fact that homestead allowance may prefer a decedent's minor or dependent children over his or her other children. It was felt desirable to minimize the consequence of application of an arbitrary age line among children of the decedent.

Compiler's Comments

2019 Amendment: Chapter 313 in two places increased allowance from $20,000 to $22,500. Amendment effective October 1, 2019.

1993 Amendment: Chapter 494 at beginning substituted "decedent's surviving spouse" for "surviving spouse of a decedent who was domiciled in this state".

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-402.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Right of Surviving Spouse to Homestead Allowance as Matter of Law: The primary purpose of the homestead allowance is to protect a decedent's family and ensure that the surviving spouse is not left penniless and abandoned by the death of a spouse. The plain statutory language creates an absolute benefit to the surviving spouse, and a District Court has no discretion to disallow or limit the homestead allowance. The only statutory condition for receipt of the homestead allowance by the surviving spouse is that the spouse survive the decedent by 120 hours, as provided in 72-2-712. There is no other requirement, qualification, or condition to receipt of the allowance by the surviving spouse, such as a showing of financial need. The definition of the homestead exception in Montana property law, 70-32-101, is unrelated to the homestead allowance under the Uniform Probate Code in this section, so the definition in 70-32-101 does not override otherwise inconsistent language in this section. Because the homestead allowance is an interest that may be satisfied in any type of property, it may be claimed from assets other than the dwelling house or land. It is an allowance off the top, which grants the decedent's family a vested interest apart from and in addition to any other rights flowing from the estate. In re Estate of Martelle, 2001 MT 194, 306 M 253, 32 P3d 758 (2001).

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Purpose of Allowances — Certain Defenses Not Allowed: Estate of Lawson appealed from District Court order to pay homestead allowance of $20,000 and family allowance of $500 a month to Karen Lawson, contending that defenses of setoff, satisfaction, payment, and abandonment should be available against statutory claims under 72-2-801 through 72-2-803 (renumbered 72-2-412 through 72-2-414). The Supreme Court stated that the purpose of allowances was to ensure that surviving spouse was not left penniless and abandoned by death of spouse. Allowances were not designed to support family members until they shared in the estate, regardless of whether they did or did not share in the estate. Accordingly, defenses asserted by the estate, if they could be proved, should not be allowed as matter of policy. Additionally, the District Court correctly refused to determine if the estate was legally entitled to setoff until after ownership of property had been determined and property had been valued by appraiser. In re Estate of Lawson, 222 M 276, 721 P2d 760, 43 St. Rep 1261 (1986).

No Statutory Claim-Filing Requirement for Homestead Allowance to Vest: The homestead allowance vests as a matter of law in the surviving spouse upon his outliving the deceased by 120 hours. The filing of a claim for the homestead allowance is not a condition of its vesting. In re the Estate of Heiser, 207 M 126, 672 P2d 1124, 40 St. Rep. 1941 (1983).

Homestead Allowance — Exempt Property — Fee Interest: Sections 72-2-801 (renumbered 72-2-412) and 72-2-802 (renumbered 72-2-413), giving a homestead allowance and exempt property rights to a surviving spouse, contemplate an interest that does not terminate at the surviving spouse's death so long as the spouse survives the decedent for the required 120 hours under 72-2-205 (renumbered 72-2-114). In re Estate of Merkel, 190 M 78, 618 P2d 872, 37 St. Rep. 1782 (1980).

72-2-413. Exempt property.

Official Comments

As originally adopted in 1969, the dollar amount exempted was set at $3,500. To adjust for inflation, the amount was increased to $10,000 in 1990.

Unlike the exempt amount described in Sections 2-402 [72-2-412] and 2-404 [72-2-414], the exempt amount described in this section is available in a case in which the decedent left no spouse but left only adult children. The provision in this section that establishes priorities is required because of possible difference between beneficiaries of the exemptions described in this section and those described in Sections 2-402 [72-2-412] and 2-404 [72-2-414].

Section 2-204 [72-2-224, now repealed] covers waiver of exempt property rights. This section indicates that a decedent's will may put a spouse to an election with reference to exemptions, but that no election is presumed to be required.

Compiler's Comments

2019 Amendment: Chapter 313 in four places increased allowable estate value from $10,000 to $15,000. Amendment effective October 1, 2019.

1993 Amendment: Chapter 494 throughout section increased amount of exempt property to $10,000 from $3,500; in first sentence substituted "decedent's surviving spouse" for "surviving spouse of a decedent who was domiciled in this state"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-403.

Case Notes

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Purpose of Allowances — Certain Defenses Not Allowed: Estate of Lawson appealed from District Court order to pay homestead allowance of $20,000 and family allowance of $500 a month to Karen Lawson, contending that defenses of setoff, satisfaction, payment, and abandonment should be available against statutory claims under 72-2-801 through 72-2-803 (renumbered 72-2-412 through 72-2-414). The Supreme Court stated that the purpose of allowances was to ensure that surviving spouse was not left penniless and abandoned by death of spouse. Allowances were not designed to support family members until they shared in the estate, regardless of whether they did or did not share in the estate. Accordingly, defenses asserted by the estate, if they could be proved, should not be allowed as matter of policy. Additionally, the District Court correctly refused to determine if the estate was legally entitled to setoff until after ownership of property had been determined and property had been valued by appraiser. In re Estate of Lawson, 222 M 276, 721 P2d 760, 43 St. Rep 1261 (1986).

Right of Disinherited Child to Exempt Property Allowance: The decedent died testate and specifically left nothing to her son. The decedent's husband predeceased her. The son argued that he was entitled to $3,500 exempt property under this section. The court held that the will of the decedent merely disinherited her son. It did nothing to his statutory right to exempt property. In re Estate of Dunlap, 199 M 488, 649 P2d 1303, 39 St. Rep. 1550 (1982).

Homestead Allowance — Exempt Property — Fee Interest: Sections 72-2-801 (renumbered 72-2-412) and 72-2-802 (renumbered 72-2-413), giving a homestead allowance and exempt property rights to a surviving spouse, contemplate an interest that does not terminate at the surviving spouse's death so long as the spouse survives the decedent for the required 120 hours under 72-2-205 (renumbered 72-2-114). In re Estate of Merkel, 190 M 78, 618 P2d 872, 37 St. Rep. 1782 (1980).

72-2-414. Family allowance.

Official Comments

The allowance provided by this section does not qualify for the marital deduction under the federal estate tax because the interest is a non-deductible terminable interest. A broad code must be drafted to provide the best possible protection for the family in all cases, even though this may not provide desired tax advantages for certain larger estates. In the estates falling in the federal estate tax bracket where careful planning may be expected, it is important to the operation of formula clauses that the family allowance be clearly deductible or clearly non-deductible. With the section clearly creating a non-deductible interest, estate planners can create a plan that will operate with certainty. Finally, in order to facilitate administration of this allowance without court supervision it is necessary to provide a fairly simple and definite framework.

In determining the amount of the family allowance, account should be taken of both the previous standard of living and the nature of other resources available to the family to meet current living expenses until the estate can be administered and assets distributed. While the death of the principal income producer may necessitate some change in the standard of living, there must also be a period of adjustment. If the surviving spouse has a substantial income, this may be taken into account. Whether life insurance proceeds payable in a lump sum or periodic installments were intended by the decedent to be used for the period of adjustment or to be conserved as capital may be considered. A living trust may provide the needed income without resorting to the probate estate.

Obviously, need is relative to the circumstances, and what is reasonable must be decided on the basis of the facts of each individual case. Note, however, that under the next section the personal representative may not determine an allowance of more than $1500 per month for one year; a Court order would be necessary if a greater allowance is reasonably necessary.

Compiler's Comments

1993 Amendment: Chapter 494 in first sentence, after "exempt property", deleted "if the decedent was domiciled in this state"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-404.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

No Estate Inventory and Inventory Discovery Required Prior to Grant of Statutory Homestead, Exempt Property, and Family Allowances to Surviving Spouse: No estate inventory or scheduling order was filed prior to the District Court award of a homestead allowance, an exempt property allowance, and a family allowance to the surviving spouse. The decedent's son and sister contested the award, relying on former Rule 16(b), M.R.Civ.P. (now superseded), for the proposition that they were entitled to an inventory and related discovery before the allowances were granted. The Supreme Court found that application of the rule to probate proceedings would be administratively inefficient and contrary to the purposes of the rule. The District Court properly found that the surviving spouse was entitled to the allowances as a matter of law, and because these were legal issues, it was within the court's discretion to decide them prior to a scheduling order or estate inventory. In re Estate of Martelle, 2001 MT 194, 306 M 253, 32 P3d 758 (2001).

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Decrease in Standard of Living of Surviving Spouse — Award of $6,000 Family Allowance Proper: When a surviving spouse's standard of living decreased during the administration of the estate because he lived on only one-half of the proceeds received from a contract for deed while the other half was placed in an escrow account, it was not an abuse of discretion for the District Court to award a $6,000 family allowance. In re Estate of Lettengarver, 249 M 92, 813 P2d 468, 48 St. Rep. 593 (1991).

Purpose of Allowances — Certain Defenses Not Allowed: Estate of Lawson appealed from District Court order to pay homestead allowance of $20,000 and family allowance of $500 a month to Karen Lawson, contending that defenses of setoff, satisfaction, payment, and abandonment should be available against statutory claims under 72-2-801 through 72-2-803 (renumbered 72-2-412 through 72-2-414). The Supreme Court stated that the purpose of allowances was to ensure that surviving spouse was not left penniless and abandoned by death of spouse. Allowances were not designed to support family members until they shared in the estate, regardless of whether they did or did not share in the estate. Accordingly, defenses asserted by the estate, if they could be proved, should not be allowed as matter of policy. Additionally, the District Court correctly refused to determine if the estate was legally entitled to setoff until after ownership of property had been determined and property had been valued by appraiser. In re Estate of Lawson, 222 M 276, 721 P2d 760, 43 St. Rep 1261 (1986).

DECISIONS UNDER FORMER LAW

Discretion of Court — Family Allowance Denied: Probate Court did not abuse its discretion in denying widow's petition for family allowance where she received from $2,800 to $6,400 per year as income from the assets of the estate and in addition received the monthly income of $154 from Social Security and $75 from the rental of her home, all of which income was sufficient for her care in the nursing home where she resided. In re Estate of Glein, 162 M 464, 512 P2d 1151 (1973).

72-2-415. Source, determination, and documentation.

Official Comments

Scope and Purpose of Revision. As originally adopted in 1969, the maximum family allowance the personal representative was authorized to determine without court order was a lump sum of $6,000 or periodic installments of $500 per month for one year. To adjust for inflation, the amounts are increased to $18,000 and $1,500 respectively.

A new subsection (b) [72-2-415(2)] is added to provide for the case where the right to an elective share is exercised on behalf of a surviving spouse who is an incapacitated person. In that case, the personal representative is authorized to add any unexpended portions under the homestead allowance, exempt property, and family allowance to the custodial trust established by Section 2-203(b) [Montana adopted alternative subsection (b) as 72-2-223(2) (renumbered 72-2-242(2))].

If Domiciliary Assets Insufficient. Note that a domiciliary personal representative can collect against out of state assets if domiciliary assets are insufficient.

Cross References. See Sections 3-902 [72-3-901], 3-906 [72-3-902 and 72-3-903], and 3-907 [72-3-904].

Compiler's Comments

2019 Amendment: Chapter 313 in (1) near middle increased the family allowance lump sum amount from $18,000 to $27,000 and the family allowance periodic installment amount from $1,500 to $2,250 per month. Amendment effective October 1, 2019.

1993 Amendment: Chapter 494 in (1), in first sentence after "homestead", substituted "allowance or exempt property" for "and exempt property" and in fifth sentence increased lump-sum amount to $18,000 from $6,000 and increased periodic installment amount to $1,500 from $500; inserted (2) concerning surviving spouse who is incapacitated; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-405.

Case Notes

No Estate Inventory and Inventory Discovery Required Prior to Grant of Statutory Homestead, Exempt Property, and Family Allowances to Surviving Spouse: No estate inventory or scheduling order was filed prior to the District Court award of a homestead allowance, an exempt property allowance, and a family allowance to the surviving spouse. The decedent's son and sister contested the award, relying on former Rule 16(b), M.R.Civ.P. (now superseded), for the proposition that they were entitled to an inventory and related discovery before the allowances were granted. The Supreme Court found that application of the rule to probate proceedings would be administratively inefficient and contrary to the purposes of the rule. The District Court properly found that the surviving spouse was entitled to the allowances as a matter of law, and because these were legal issues, it was within the court's discretion to decide them prior to a scheduling order or estate inventory. In re Estate of Martelle, 2001 MT 194, 306 M 253, 32 P3d 758 (2001).

Part 5

Wills, Will Contracts, and Custody and Deposit of Wills

Part Official Comments

GENERAL COMMENT

Part 5 of Article II [Title 72, chapter 2, part 5] is retitled to reflect the fact that it now includes the provisions on will contracts (pre-1990 Section 2-701 [72-2-711]) and on custody and deposit of wills (pre-1990 Sections 2-901 [former 72-2-402, renumbered 72-2-535] and 2-902 [former 72-2-401, renumbered 72-2-536]).

Part 5 [Title 72, chapter 2, part 5] deals with capacity and formalities for execution and revocation of wills. The basic intent of the pre-1990 sections was to validate wills whenever possible. To that end, the minimum age for making wills was lowered to eighteen, formalities for a written and attested will were reduced, holographic wills written and signed by the testator were authorized, choice of law as to validity of execution was broadened, and revocation by operation of law was limited to divorce or annulment. In addition, the statute also provided for an optional method of execution with acknowledgment before a public officer (the self-proved will).

These measures have been retained, and the purpose of validating wills whenever possible has been strengthened by the addition of a new section, Section 2-503 [72-2-523], which allows a will to be upheld despite a harmless error in its execution.

Part Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Contractual Directive From Joint Will Concerning Estate Residue Not Dispositive of Validity of Alternate Living Trust Inheritance Scheme: Spouses agreed in a joint will that the residue of the surviving spouse's estate was to be divided among six children. The surviving wife transferred most of her property into a living trust and named only four children as the beneficiaries. Because the will did not restrict the wife from transferring assets into a trust, the issue of whether the wife retained ownership of trust property as "residue" subject to the will's provisions related to the validity of the trust rather than to the interpretation of the will. In re Estate of Hedrick, 2014 MT 118, 375 Mont. 74, 324 P.3d 1202.

No Finding of Undue Influence Under Bradshaw Criteria: Contestants to their father's will asserted that their father was unduly influenced by one of his sons. The District Court found no undue influence, and on appeal, the Supreme Court examined each of the criteria in In re Estate of Bradshaw, 2001 MT 92, 305 M 178, 24 P3d 211 (2001), and affirmed. All of the children had confidential relationships with their father at certain points in their lives, but the mere opportunity to exercise influence on a testator is not sufficient to prove undue influence. Although the contestants may have suspected that the father was unduly influenced, they did not meet their burden of proving that fact. Also, the District Court made the requisite findings regarding the father's physical and mental capacity and condition, the possibility of unnaturalness of the disposition, and the timing and circumstances surrounding the demands and importunities that may have affected the father's ability to withstand any possible influence, and the findings were supported by credible evidence. In re Estate of Harms, 2006 MT 320, 335 M 66, 149 P3d 557 (2006).

Presumption That Services Provided by Relative Rendered Gratuitously — Compensation for Personal Care Services Provided by Decedent's Daughters Properly Denied: Following their father's death, three daughters presented a claim against the estate for personal care services that they provided to their father. Their claims were disallowed, and the daughters appealed. The Supreme Court affirmed. Generally, when services are provided to one person by another and the services are knowingly and voluntarily accepted, the law presumes that the services were provided in expectation of payment. However, a generally acknowledged exception applies when a relative seeks payment for services, and the presumption in those cases is that the services were rendered gratuitously unless there was an express agreement for payment or unless such an agreement can be inferred. In this case, the decedent determined prior to death how he wished his assets to be distributed and, despite several opportunities to do so, made no provision for compensation for the personal services that his daughters provided. The daughters were unable to rebut the general presumption of gratuity, and the Supreme Court declined to disturb the District Court's denial of their claims for services. In re Estate of Orr, 2002 MT 325, 313 M 179, 60 P3d 962 (2002). See also San Antonio v. Spencer, 82 M 9, 264 P 944 (1928), Ziegler v. Kramer, 175 M 236, 573 P2d 644 (1978), Donnes v. Orlando, 221 M 356, 720 P2d 233 (1986), and Neumann v. Rogstad, 232 M 24, 757 P2d 761 (1988).

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Undue Influence on Testator Making Will: Undue influence was present when testator made 1980 wills at urging of three of his four children when at time of making the wills testator was 91 years old, confined to a rest home, hard of hearing, and suffering from a brain disorder, and the wills disinherited the fourth child, whose interests testator's actions since 1948 had been directed toward protecting. The Supreme Court held there was substantial credible evidence to support the District Court's determination that there was undue influence and dismissal of petition for probate of the 1980 wills. In re Estate of Aageson, 217 M 78, 702 P2d 338, 42 St. Rep. 1038 (1985).

Apparently Executed Subsequent Will — Evidence Necessary to Support: The deceased and her husband executed a joint will in 1954. The will left all the property to the surviving spouse and provided that at the survivor's death their son would receive $5 because he was already provided for and that the daughter would receive the remainder of the property. The husband died in 1957. The wife died in 1980, and the daughter sought to probate the 1954 will. The son petitioned for a formal determination of intestacy. He produced an unexecuted copy of a second will, the original of which was purportedly executed in 1965 by the decedent. The 1965 will contained a standard revocation clause. The trial court found that the 1965 will was apparently executed but also found that the 1954 will was both a will and a contract and therefore irrevocable. The son appealed. The Supreme Court did not rule on whether the 1954 will was also a contract because it determined that the 1965 will was not duly executed. The drafter of the will could not establish that there was a second witness who had witnessed either the signing by the testator or the testator's acknowledgment of her signature of the will. There was insufficient evidence to support a finding that the 1965 will was fully executed. The 1954 will was properly admitted to probate. In re the Estate of Weidner, 192 M 421, 628 P2d 285, 38 St. Rep. 747 (1981), distinguished in In re Estate of Brooks, 279 M 516, 927 P2d 1024, 53 St. Rep. 1263 (1996).

DECISIONS UNDER FORMER LAW

No Requirement That All Five Statutory Criteria Be Proved to Show Undue Influence — Return to Discretionary Standard and Line of Cases Requiring That All Criteria Must Be Satisfied Overruled: Section 28-2-407 sets forth the statutory definition of undue influence. In 1965, in In re Maricich, 145 M 146, 400 P2d 873 (1965), the Supreme Court set forth five criteria as factors that a court may consider in determining a question of undue influence: (1) any confidential relationship between the person alleged to be exercising undue influence and the donor; (2) the physical condition of the donor as it may affect the donor's ability to withstand influence; (3) the mental condition of the donor as it *may* affect the donor's ability to withstand influence; (4) the unnaturalness of the disposition as it relates to showing an unbalanced mind or a mind easily susceptible to undue influence; and (5) demands and importunities as they may affect the donor, taking into account the time, place, and surrounding circumstances. The court continued this discretionary approach in Cameron v. Cameron, 179 M 219, 587 P2d 939 (1978). Then, beginning with In re Estate of Aageson, 217 M 78, 702 P2d 338 (1985), the court strayed from that approach and held that a court *must* consider the five criteria and set a standard for their consideration in which a proponent of an undue influence theory must satisfy each of the statutory criteria. In the present case, the Supreme Court was asked to consider whether the District Court incorrectly determined that a person's status as a beneficiary was the result of undue influence. The District Court found all five factors to be present, but the presence of four of the five factors was challenged on appeal. The court noted that the standard requiring a finding of all five statutory criteria was not supported by any authority and did not square with the alternative statutory definitions of undue influence in 28-2-407. Therefore, the court returned to the Cameron standard and overruled subsequent cases holding to the contrary, stating that a court *may* consider the five criteria in determining the existence of undue influence but that the five criteria need not all be proved to show undue influence in any given case. The statutory requirements control, and the five criteria are simply nonexclusive considerations available to guide the District Court in its application of the requirements. In the present case, the District Court correctly determined that each of the criterion for establishing a claim of undue influence had been established. In re Estate of Bradshaw, 2001 MT 92, 305 M 178, 24 P3d 211 (2001), overruling Christensen v. Britton, 240 M 393, 784 P2d 908 (1989), In re Estate of Luger, 244 M 301, 797 P2d 229 (1990), Taylor v. Koslosky, 249 M 215, 814 P2d 985 (1991), In re Estate of Jochems, 252 M 24, 826 P2d 534 (1992), Flikkema v. Kimm, 255 M 34, 839 P2d 1239 (1992), In re Estate of Lien, 270 M 295, 892 P2d 530 (1995), In re Estate of DeCock, 278 M 437, 925 P2d 488 (1996), In re Estate of Lande, 1999 MT 162, 295 M 160, 983 P2d 308 (1999), and Luke v. Gager, 2000 MT 377, 303 M 474, 16 P3d 377 (2000), and followed in In re Estate of Wittman, 2001 MT 109, 305 M 290, 27 P3d 35 (2001), and In re Estate of Harms, 2006 MT 320, 335 M 66, 149 P3d 557 (2006).

Conflict Between Statute and Intent of Testator — Intent Controlling: When Winifred died, testate, she left her two sons as her sole heirs and a net estate of approximately $112,000. At the time of her death, her son John was indebted to her for approximately $26,000 and her son Kenneth was indebted to her for approximately $69,000, although approximately $55,000 of that debt had been discharged in bankruptcy. In her will, Winifred stated that if either of her sons owed her money at the time of her death, the debt was to be offset against the share of the estate and the debt forgiven in such a way that each son was to be treated equally. Citing St. v. Keller, 173 M 523, 568 P2d 166 (1977), and In re Estate of Ellison, 243 M 258, 792 P2d 5 (1990), the Supreme Court held that under 72-2-501 (now repealed), the intent of the testator is to control and that that intent takes precedent over a conflicting statute. The Supreme Court held that Kenneth's debt must be offset against his share of the estate, notwithstanding the language of 72-3-912 and the fact that part of the debt was discharged. The Supreme Court also held that there was no basis to offset against Kenneth's share of the estate the value of real property earlier transferred to his mother at an inflated price because there was nothing in the record to show that Winifred objected to the terms of the sale. In re Estate of Firebaugh, 271 M 418, 897 P2d 1088, 52 St. Rep. 571 (1995). See also In re Ward Revocable Trust, 2011 MT 308, 363 Mont. 72, 265 P.3d 1260.

72-2-521. Who may make a will.

Official Comments

This section states a uniform minimum age of eighteen for capacity to execute a will. "Minor" is defined in Section 1-201 [72-1-103], and may involve an age different from that prescribed here.

Compiler's Comments

1993 Amendment: Chapter 494 at beginning substituted "An individual" for "A person".

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-501.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Extrinsic Evidence on Testamentary Intent Raising Genuine Issue of Material Fact — Summary Judgment Improper: Kuralt gifted Shannon with 20 acres along the Big Hole River, disguising the transaction as a sale. Shortly before he died, he sent Shannon a letter, which constituted a holographic will, suggesting that he intended to do the same with another 90 acres. The District Court allowed introduction of the letter as extrinsic evidence regarding testamentary intent, then granted summary judgment to the estate after finding that the letter contemplated a separate testamentary instrument not yet in existence to accomplish the transfer of the Montana property. Nevertheless, the letter raised a fundamental disagreement as to a genuine material fact—namely, whether Kuralt intended that the letter effect a posthumous disposition of the property. Regardless of whether the court admitted the evidence because it considered the letter ambiguous or because it agreed with Shannon that extrinsic evidence may be discretionarily admitted in holographic will disputes, the court nevertheless improperly resolved contested issues by granting summary judgment. The Supreme Court reversed and remanded the case for trial. In re Estate of Kuralt, 1999 MT 111, 294 M 354, 981 P2d 771, 56 St. Rep. 460 (1999).

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

No Capacity of Seriously Ill Person to Revoke Will: A man who suffered multiple heart attacks and complications that included respiratory arrest, who was unable to speak, and who was questionably lucid and coherent was held not to have the cognitive capacity to make a knowing and voluntary destruction of his will or to possess the capacity to direct the revocation of his will. In re Estate of Fogerty, 221 M 336, 719 P2d 425, 43 St. Rep. 873 (1986).

Undue Influence on Testator Making Will: Undue influence was present when testator made 1980 wills at urging of three of his four children when at time of making the wills testator was 91 years old, confined to a rest home, hard of hearing, and suffering from a brain disorder, and the wills disinherited the fourth child, whose interests testator's actions since 1948 had been directed toward protecting. The Supreme Court held there was substantial credible evidence to support the District Court's determination that there was undue influence and dismissal of petition for probate of the 1980 wills. In re Estate of Aageson, 217 M 78, 702 P2d 338, 42 St. Rep. 1038 (1985).

Testamentary Capacity: Testimony of witnesses that the decedent at the time of execution of the will named all her relatives, the nature and extent of her property, and understood how she was disposing of the property and that the contested will was substantially similar to an earlier draft prepared in 1974 when there was no question of competency, indicated that the decedent was not confused or disoriented on the day the will was executed. In re Estate of LaTray, 183 M 141, 598 P2d 619 (1979).

72-2-522. Execution — witnessed wills — holographic wills.

Official Comments

Scope and Purpose of Revision. Section 2-502 [72-2-522] and pre-1990 Section 2-503 [former 72-2-303, now repealed] are combined to make room for new Section 2-503 [72-2-523]. Also, a cross reference to new Section 2-503 [72-2-523] is added, and fairly minor clarifying revisions are made.

Subsection (a) [72-2-522(1)]. Three formalities for execution of a witnessed will are imposed. Subsection (a)(1) [72-2-522(1)(a)] requires the will to be in writing. Any reasonably permanent record is sufficient. A tape-recorded will has been held not to be "in writing." *Estate of Reed*, 672 P.2d 829 (Wyo. 1983).

Under subsection (a)(2) [72-2-522(1)(b)], the testator must sign the will or some other individual must sign the testator's name in the testator's presence and by the testator's direction. If the latter procedure is followed, and someone else signs the testator's name, the so-called "conscious presence" test is codified, under which a signing is sufficient if it was done in the testator's conscious presence, i.e., within the range of the testator's senses such as hearing; the signing need not have occurred within the testator's line of sight. For application of the "conscious-presence" test, see *Cunningham v. Cunningham*, 80 Minn. 180, 83 N.W. 58 (1900) (conscious-presence requirement held satisfied where "the signing was within the sound of the testator's voice; he knew what was being done...."); *Healy v. Bartless*, 73 N.H. 110, 59 A. 617 (1904) (individuals are in the decedent's conscious presence "whenever they are so near at hand that he is conscious of where they are and of what they are doing, through any of his senses, and where he can readily see them if he is so disposed."); Demaris' Estate, 166 Or. 36, 110 P.2d 571 (1941) ("[W]e do not believe that sight is the only test of presence. We are convinced that any of the senses that a testator possesses, which enable him to know whether another is near at hand and what he is doing, may be employed by him in determining whether [an individual is] in his [conscious] presence ....").

Under subsection (a)(3) [72-2-522(1)(c)], at least two individuals must sign the will, each of whom witnessed at least one of the following: the signing of the will; the testator's acknowledgment of the signature; or the testator's acknowledgment of the will.

Signing may be by mark, nickname, or initials, subject to the general rules relating to that which constitutes a "signature." There is no requirement that the testator "publish" the document as his or her will, or that he or she request the witnesses to sign, or that the witnesses sign in the presence of the testator or of each other. The testator may sign the will outside the presence of the witnesses, if he or she later acknowledges to the witnesses that the signature is his or hers (or that his or her name was signed by another) or that the document is his or her will. An acknowledgment need not be expressly stated, but can be inferred from the testator's conduct. *Norton v. Georgia Railroad Bank & Tr. Co.*, 248 Ga. 847, 285 S.E.2d 910 (1982). The witnesses must sign as witnesses (see, e.g., *Mossler v. Johnson*, 565 S.W.2d 952 (Tex. Civ. App. 1978)), and must sign within a reasonable time after having witnessed the signing or acknowledgment. There is, however, no requirement that the witnesses sign before the testator's death; in a given case, the reasonable-time requirement could be satisfied even if the witnesses sign after the testator's death.

There is no requirement that the testator's signature be at the end of the will; thus, if he or she writes his or her name in the body of the will and intends it to be his or her signature, this would satisfy the statute. See *Estate of Siegel*, 214 N.J. Super. 586, 520 A.2d 798 (App. Div. 1987).

A will that does not meet these requirements may be valid under subsection (b) [72-2-522(2)] as a holograph or under Section 2-503 [72-2-523].

Subsection (b) [72-2-522(2)]. This subsection authorizes holographic wills. It enables a testator to write his or her own will in handwriting. There need be no witnesses. The only requirement is that the signature and the material portions of the document be in the testator's handwriting.

By requiring only the "material portions of the document" to be in the testator's handwriting (rather than requiring, as some existing statutes do, that the will be "entirely" in the decedent's handwriting), a holograph may be valid even though immaterial parts such as date or introductory wording are printed, typed, or stamped.

A valid holograph can also be executed on a printed will form if the material portions of the document are handwritten. The fact, for example, that the will form contains printed language such as "I give, devise, and bequeath to __________" does not disqualify the document as a holographic will, as long as the testator fills out the remaining portion of the dispositive provision in his or her own hand.

Under subsection (c) [72-2-522(3)], testamentary intent can be shown by extrinsic evidence, including for holographic wills the printed, typed, or stamped portions of the form or document.

Compiler's Comments

1993 Amendment: Chapter 494 substituted current text concerning execution of holographic and witnessed will for former text that read: "Except as provided for holographic wills, writings within 72-2-312, and wills within 72-2-306, every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will."

Code Commissioner Correction: Chapter 494 inserted a reference to 72-2-303, which was repealed. The reference was intended to be to section 2-503 of the Uniform Probate Code. That section was enacted as 72-2-523. Pursuant to the authority contained in sec. 84, Ch. 10, L. 1993, the Code Commissioner has inserted the corresponding reference.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-502.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Witness to Contested Will Did Not See Testator Sign Will — Later Verified Testator's Signature of Will — Will Enforceable: One of the two witnesses who signed a will did not see the testator sign the document, but prior to signing as a witness verified with the testator that it was the testator's signature on the will. After the testator's death, one of his daughters claimed that the will was not valid because one of the witnesses had not actually witnessed the testator sign it. The District Court concluded that the will was valid and enforceable and the daughter appealed. In affirming the decision, the Supreme Court concluded that the verbal act doctrine applied and that the testator's acknowledgment that he had signed the will was what the witness had in fact borne witness to. In re Estate of Mead, 2014 MT 264, 376 Mont. 386, 336 P.3d 362.

Testator's Printed Name a Valid Signature When Written in Presence of Notary and Two Witnesses — Burden of Proof of Due Execution Met: The decedent's daughter petitioned the District Court to be appointed personal representative to probate the decedent's estate but was opposed by the decedent's sister, who asserted the decedent had previously executed a will in 2002 that named the sister to the position. The District Court concluded that the decedent died intestate, ruling that she had not signed the will because she had printed her name, rather than writing it in a cursive script. On appeal, the Supreme Court reversed the District Court, holding that the decedent's will was validly executed under either 72-2-522 or 72-2-523. The Supreme Court relied on the testimony of the notary and one of the witnesses, who both said the decedent presented the document as her last will and testament when she signed it in block letters in front of them. The decedent had also acknowledged the document as her will in a sworn deposition in 2009. In light of the evidence, the Supreme Court concluded the decedent had validly executed her will and that the decedent's sister had met the burden of presenting a prima facie case of due execution as the proponent of the will. In re Estate of Harless, 2013 MT 283, 372 Mont. 117, 310 P.3d 550.

Lack of Testamentary Capacity Rendering Holographic Will Invalid: A son and a daughter both sought probate of different wills signed by their mother. The District Court found that the decedent lacked testamentary capacity at the time both wills were executed, so probate was denied, resulting in intestacy. The son appealed on grounds that the District Court improperly found that the mother lacked testamentary capacity when signing the second, holographic will, but the Supreme Court affirmed. There was evidence that years before the wills were executed, the mother was confused and uncertain about her assets and was paranoid, often did not know what was happening around her and was delusional, could not remember people or recall what she had done with her property, thought that the sheriff and people of Richland County were all on drugs, thought people were stealing from her, was not aware that through two wills she would be treating her children differently, and did not understand when signing the holographic will that it would govern distribution of her assets and revoke any prior wills. This was substantial evidence to justify the District Court's conclusion that the mother lacked testamentary capacity, rendering the will invalid. In re Estate of Lightfield, 2009 MT 244, 351 M 426, 213 P3d 468 (2009).

General Devise — No Ademption Absent Evidence of Testator's Intent to Adeem: Deisz left a holographic will in which he chose his companion to receive the bulk of his estate, other family members received much more modest sums in life insurance, and the remaining members received only one ring each. Deisz's father submitted an application for informal probate and appointment as personal representative, then amended the filing as an intestate estate on grounds that the will was invalid. The companion filed for formal probate, seeking to have the will declared valid, the estate made testate, and Deisz's distribution wishes followed. The District Court found the will to be a valid holographic will creating specific devises and concluded that the devises were adeemed based on the sale of specific assets to pay for Deisz's medical care. The companion appealed, and the Supreme Court reversed. Based on the distribution of assets and evidence that Deisz intended to make sure that the companion was well taken care of, coupled with the presumption in favor of finding a general devise, the devise to the companion was general rather than specific. By definition, a general devise cannot be adeemed, and the estate failed to meet its burden of establishing any facts and circumstances to indicate that Deisz intended to adeem the devise to the companion or that such a distribution would be consistent with Deisz's plan of distribution. The District Court's conclusion that the companion's willingness to see the estate partially depleted for Deisz's best interests signaled the companion's intention to relinquish her share of the estate was not supported by the record. It was Deisz's intent, not the companion's, that was relevant, and there was no evidence that Deisz intended to revoke the devise to the companion. Absent Deisz's intent or any evidence that Deisz intended to adeem, the provisions of 72-2-616 controlled. The Supreme Court directed that a neutral representative be appointed to dispose of the remainder of the estate. Holtz v. Deisz, 2003 MT 132, 316 M 77, 68 P3d 828 (2003). See also In re Estate of Wales, 223 M 515, 727 P2d 536 (1986).

Public Policy in Favor of Statutory Apportionment Precluded by Specific Provisions in Will — Estate Taxes to Be Paid by Residual Estate: In In re Estate of Kuralt, 2000 MT 359, 303 M 335, 15 P3d 931 (2000), the Supreme Court found that a letter by the decedent was a valid holographic codicil to the decedent's will conveying real property in Montana to the decedent's companion, but a question remained whether the estate or the companion was responsible for the estate taxes on the Montana property. Under the law of New York, where the will was admitted to probate, and similar law in Montana, there is a strong public policy in favor of statutory apportionment unless the will provides otherwise. In this case, the decedent's will specifically provided that estate taxes be paid by the residual estate without apportionment, which included those generated by the bequest of the Montana property by codicil. Because the language of the will was clear and unambiguous, the District Court correctly concluded that estate taxes on the Montana property must be paid by the residual estate. In re Estate of Kuralt, 2003 MT 92, 315 M 177, 68 P3d 662 (2003).

Question Whether Holographic Document Intended as Codicil or List of Property to Be Dispensed — Testamentary Intent Question of Fact to Be Determined by Judge or Jury — Summary Judgment Improper: Johnson executed a formal will and also executed and signed a holographic document consisting of a handwritten list of possessions and names. The District Court concluded that the holographic document was a personal property list made pursuant to 72-2-533, rather than a codicil, and applied 72-2-523 in ordering distribution of the property because there was no intent by Johnson that the holographic document should constitute the complete will. The Supreme Court held that the District Court should have applied this section, which deals with holographic wills, rather than 72-2-523. The three requirements for a valid holographic will are: (1) individuals must be at least 18 years old and of sound mind; (2) the material provisions of the will must be in the handwriting of the testator and signed by the testator; and (3) the individual must have testamentary intent that the document will dispose of the individual's property after death. Here, the first two elements were met, but a question of fact remained concerning Johnson's intent, precluding summary judgment. The case was remanded to give the parties an opportunity to present evidence concerning Johnson's intent so that the trier of fact could decide the issue under the correct standard. In re Estate of Johnson, 2002 MT 341, 313 M 316, 60 P3d 1014 (2002).

Acts of Testator Demonstrating Intent to Revoke Prior Will — Unwitnessed Will Treated as Executed Will: Hall executed his original will in 1984, and in 1997, he and his current wife met with their attorney and drew up a joint will. They signed the joint will, and the attorney notarized it, and although there were no other witnesses, they believed that the joint will would stand as valid until a final version was executed. Hall directed that the 1984 will be destroyed. Hall died before a final version was executed, and his wife sought to informally probate the joint will, but Hall's daughter objected and requested formal probate. The District Court admitted the joint will to probate, and the daughter appealed, but the Supreme Court affirmed. In contested cases, the proponent of a will must establish that the testator duly executed the will. For a will to be valid, typically, two people must witness the testator signing the will, and then sign the will themselves. However, under 72-2-523, a document may still be treated as if it had been executed under certain circumstances, even if it was not properly witnessed, and one such circumstance is if the proponent establishes by clear and convincing evidence that the decedent intended the document to be the decedent's will. Here, Hall clearly intended the joint will to be his final will, as evidenced by superseding language in the joint will revoking the prior will, by Hall's belief that the joint will would stand as valid until a final version was drawn up, and by Hall's destruction of the earlier will. Thus, the District Court did not err in admitting the unwitnessed joint will to probate. In re Estate of Hall, 2002 MT 171, 310 M 486, 51 P3d 1134 (2002).

Determination That Decedent Died Intestate Not Erroneous: Bradshaw's mother contended that Bradshaw executed a valid holographic will in 1988 and introduced the document into evidence. Pursuant to the document, Bradshaw left his vehicle to a nephew and the rest of his estate to be equally divided among his mother, father, brother, and sister. The District Court held that the document was not submitted into evidence as a holographic will and that Bradshaw died intestate. Bradshaw's two sons were born in 1992 and 1995. Under 72-2-332, children born after the making of a will who are not provided for in the will take as if the decedent died intestate. Therefore, even if the document had been properly submitted as a holographic will, the children, in the absence of a surviving spouse, were entitled to Bradshaw's estate. In re Estate of Bradshaw, 2001 MT 92, 305 M 178, 24 P3d 211 (2001).

Letter Stating Writer Would Be Sure Addressee Would Inherit Specified Property Was Valid Codicil to Will: A letter written in 1997 by a hospital patient to his long-term and intimate personal friend, stating "I'll have the lawyer visit the hospital to be sure you *inherit* the rest of the place in MT. if it comes to that", expressed a present testamentary intent to transfer the approximately 90-acre piece of property to her. He had already deeded her an adjoining 20-acre parcel with a cabin on it, for no consideration. He wrote the letter when extremely ill and died two weeks later. He was reluctant to consult a lawyer because he wanted to keep the relationship secret. The use of the underlined word "inherit" in the letter reflected his intent to make a posthumous disposition of the property. Furthermore, the letter constituted a valid codicil to the 1994 formal will that did not specifically mention the Montana property. In re Estate of Kuralt, 2000 MT 359, 303 M 335, 15 P3d 931, 57 St. Rep. 1529 (2000).

Extrinsic Evidence on Testamentary Intent Raising Genuine Issue of Material Fact — Summary Judgment Improper: Kuralt gifted Shannon with 20 acres along the Big Hole River, disguising the transaction as a sale. Shortly before he died, he sent Shannon a letter, which constituted a holographic will, suggesting that he intended to do the same with another 90 acres. The District Court allowed introduction of the letter as extrinsic evidence regarding testamentary intent, then granted summary judgment to the estate after finding that the letter contemplated a separate testamentary instrument not yet in existence to accomplish the transfer of the Montana property. Nevertheless, the letter raised a fundamental disagreement as to a genuine material fact—namely, whether Kuralt intended that the letter effect a posthumous disposition of the property. Regardless of whether the court admitted the evidence because it considered the letter ambiguous or because it agreed with Shannon that extrinsic evidence may be discretionarily admitted in holographic will disputes, the court nevertheless improperly resolved contested issues by granting summary judgment. The Supreme Court reversed and remanded the case for trial. In re Estate of Kuralt, 1999 MT 111, 294 M 354, 981 P2d 771, 56 St. Rep. 460 (1999).

Document Signing Attested to by Only One Witness Not Duly Executed: In contested cases, the proponent of a will must establish that it has been duly executed, which includes the requirement that the document be signed by two individuals acknowledging either the signature or the will. The number of attesting witnesses who must testify in a contested will proceeding pursuant to 72-3-309 (now repealed) is an entirely different question from whether a purported will meets the requirements for a duly executed will under this section. Here, the document was signed by only one person who witnessed the testator signing the purported will. A second signature by a notary public, who was a family friend and recognized the testator's signature but who was not present when the document was signed, did not constitute the signature of a second witness as required under this section. The proponent thus did not meet the statutory burden under 72-3-310 that the document had been duly executed, and the District Court properly denied admission of the document to probate. In re Estate of Brooks, 279 M 516, 927 P2d 1024, 53 St. Rep. 1263 (1996), distinguishing In re Estate of Weidner, 192 M 421, 628 P2d 285 (1981).

Apparently Executed Subsequent Will — Evidence Necessary to Support: The deceased and her husband executed a joint will in 1954. The will left all the property to the surviving spouse and provided that at the survivor's death their son would receive $5 because he was already provided for and that the daughter would receive the remainder of the property. The husband died in 1957. The wife died in 1980, and the daughter sought to probate the 1954 will. The son petitioned for a formal determination of intestacy. He produced an unexecuted copy of a second will, the original of which was purportedly executed in 1965 by the decedent. The 1965 will contained a standard revocation clause. The trial court found that the 1965 will was apparently executed but also found that the 1954 will was both a will and a contract and therefore irrevocable. The son appealed. The Supreme Court did not rule on whether the 1954 will was also a contract because it determined that the 1965 will was not duly executed. The drafter of the will could not establish that there was a second witness who had witnessed either the signing by the testator or the testator's acknowledgment of her signature of the will. There was insufficient evidence to support a finding that the 1965 will was fully executed. The 1954 will was properly admitted to probate. In re the Estate of Weidner, 192 M 421, 628 P2d 285, 38 St. Rep. 747 (1981), distinguished in In re Estate of Brooks, 279 M 516, 927 P2d 1024, 53 St. Rep. 1263 (1996).

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Self-Proving Affidavit — Effect on Execution: Since the execution of a valid will is a condition precedent to the use of a self-proving affidavit to admit a will to probate without testimony of a subscribing witness, such an affidavit will not cure defects in execution requirements of attestation. In re Estate of Sample, 175 M 93, 572 P2d 1232 (1977).

DECISIONS UNDER FORMER LAW

Declaration to Attesting Witness: Evidence that testator did not verbally declare to attesting witnesses that document was his last will and testament but that he merely handed pen to the witness and by motion indicated that he wished the witness to sign the attestation clause did not establish a deficiency in execution since the declarations by the testator were not required to be in exact terms, but could be implied from his conduct and the attendant circumstances. Wallin v. Kinyon Estate, 164 M 160, 519 P2d 1236 (1974).

Attestation Clause — Presumption of Due Execution: Where testator did not sign will in presence of witnesses, had attesting witnesses sign on separate occasions without knowing document was will, and crossed out portions of typewritten document, purported will was not executed and attested in substantial compliance with statute, and there was no presumption of due execution, in spite of presence of attestation clause. In re Birkeland's Estate, 164 M 94, 519 P2d 154 (1974).

Substantial Compliance: In order for will to be validly executed, substantial compliance with former statute on execution of will was required and not merely compliance with substantial portion of statute; there was no substantial compliance where testator procured signatures of attesting witnesses on separate occasions and attempted to conceal nature of document from them, and one witness testified he did not know if testator's signature was on document at time he attested to it. In re Birkeland's Estate, 164 M 94, 519 P2d 154 (1974).

72-2-523. Writings intended as wills.

Official Comments

Purpose of New Section. By way of dispensing power, this new section allows the probate court to excuse a harmless error in complying with the formal requirements for executing or revoking a will. The measure accords with legislation in force in the Canadian province of Manitoba and in several Australian jurisdictions. The Uniform Laws Conference of Canada approved a comparable measure for the Canadian Uniform Wills Act in 1987.

Legislation of this sort was enacted in the state of South Australia in 1975. The experience there has been closely studied by a variety of law reform commissions and in the scholarly literature. See, e.g., Law Reform Commission of British Columbia, Report on the Making and Revocation of Wills (1981); New South Wales Law Reform Commission, Wills: Execution and Revocation (1986); Langbein, Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law, 87 Colum. L. Rev. 1 (1987). A similar measure has been in effect in Israel since 1965 (see British Columbia Report, supra, at 44-46; Langbein, supra, at 48-51).

Consistent with the general trend of the revisions of the UPC, Section 2-503 [72-2-523] unifies the law of probate and nonprobate transfers, extending to will formalities the harmless error principle that has long been applied to defective compliance with the formal requirements for nonprobate transfers. See, e.g., Annot., 19 A.L.R.2d 5 (1951) (life insurance beneficiary designations).

Evidence from South Australia suggests that the dispensing power will be applied mainly in two sorts of cases. See Langbein, supra, at 15-33. When the testator misunderstands the attestation requirements of Section 2-502(a) [72-2-522(1)] and neglects to obtain one or both witnesses, new Section 2-503 [72-2-523] permits the proponents of the will to prove that the defective execution did not result from irresolution or from circumstances suggesting duress or trickery — in other words, that the defect was harmless to the purpose of the formality. The measure reduces the tension between holographic wills and the two-witness requirement for attested wills under Section 2-502(a)[72-2-522(1)]. Ordinarily, the testator who attempts to make an attested will but blunders will still have achieved a level of formality that compares favorably with that permitted for holographic wills under the Code.

The other recurrent class of case in which the dispensing power has been invoked in South Australia entails alterations to a previously executed will. Sometimes the testator adds a clause, that is, the testator attempts to interpolate a defectively executed codicil. More frequently, the amendment has the character of a revision — the testator crosses out former text and inserts replacement terms. Lay persons do not always understand that the execution and revocation requirements of Section 2-502 [72-2-522] call for fresh execution in order to modify a will; rather, lay persons often think that the original execution has continuing effect.

By placing the burden of proof upon the proponent of a defective instrument, and by requiring the proponent to discharge that burden by clear and convincing evidence (which courts at the trial and appellate levels are urged to police with rigor), Section 2-503 [72-2-523] imposes procedural standards appropriate to the seriousness of the issue. Experience in Israel and South Australia strongly supports the view that a dispensing power like Section 2-503 [72-2-523] will not breed litigation. Indeed, as an Israeli judge reported to the British Columbia Law Reform Commission, the dispensing power "actually prevents a great deal of unnecessary litigation," because it "eliminates disputes about technical lapses and limits the zone of dispute to the functional question of whether the instrument correctly expresses the testator's intent. British Columbia Report, supra, at 46.

The larger the departure from Section 2-502 [72-2-522] formality, the harder it will be to satisfy the court that the instrument reflects the testator's intent. Whereas the South Australian and Israeli courts lightly excuse breaches of the attestation requirements, they have never excused noncompliance with the requirement that a will be in writing, and they have been extremely reluctant to excuse noncompliance with the signature requirement. See Langbein, supra, at 23-29, 49-50. The main circumstance in which the South Australian courts have excused signature errors has been in the recurrent class of cases in which two wills are prepared for simultaneous execution by two testators, typically husband and wife, and each mistakenly signs the will prepared for the other. E.g., *Estate of Blakely*, 32 S.A.S.R. 473 (1983). Recently, the New York Court of Appeals remedied such a case without aid of statute, simply on the ground "what has occurred is so obvious, and what was intended so clear." *In re Snide*, 52 N.Y.2d 193, 196, 418 N.E.2d 656, 657, 437 N.Y.S.2d 63, 64 (1981).

Section 2-503 [72-2-523] means to retain the intent-serving benefits of Section 2-502 [72-2-522] formality without inflicting intent-defeating outcomes in cases of harmless error.

Reference. The rule of this section is supported by the Restatement (Second) of Property (Donative Transfers) § 33.1 comment g (as approved by the American Law Institute at the 1990 annual meeting).

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-503.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Precatory Language in Otherwise Valid Codicil Insufficient: The decedent wrote a codicil to her will devising money to great-grandchildren and stating a desire for her son to get control and full ownership of the family company. The District Court found the codicil valid regarding the money bequests but found the language in the codicil was insufficient to devise the company to the decedent's son. The Supreme Court affirmed, stating that the precatory language expressed a desire or wish but not a specific devise. In re Ankrum Trust Administration, 2019 MT 229, 397 Mont. 299, 449 P.3d 822.

Testator's Printed Name a Valid Signature When Written in Presence of Notary and Two Witnesses — Burden of Proof of Due Execution Met: The decedent's daughter petitioned the District Court to be appointed personal representative to probate the decedent's estate but was opposed by the decedent's sister, who asserted the decedent had previously executed a will in 2002 that named the sister to the position. The District Court concluded that the decedent died intestate, ruling that she had not signed the will because she had printed her name, rather than writing it in a cursive script. On appeal, the Supreme Court reversed the District Court, holding that the decedent's will was validly executed under either 72-2-522 or 72-2-523. The Supreme Court relied on the testimony of the notary and one of the witnesses, who both said the decedent presented the document as her last will and testament when she signed it in block letters in front of them. The decedent had also acknowledged the document as her will in a sworn deposition in 2009. In light of the evidence, the Supreme Court concluded the decedent had validly executed her will and that the decedent's sister had met the burden of presenting a prima facie case of due execution as the proponent of the will. In re Estate of Harless, 2013 MT 283, 372 Mont. 117, 310 P.3d 550.

Question Whether Holographic Document Intended as Codicil or List of Property to Be Dispensed — Testamentary Intent Question of Fact to Be Determined by Judge or Jury — Summary Judgment Improper: Johnson executed a formal will and also executed and signed a holographic document consisting of a handwritten list of possessions and names. The District Court concluded that the holographic document was a personal property list made pursuant to 72-2-533, rather than a codicil, and applied this section in ordering distribution of the property because there was no intent by Johnson that the holographic document should constitute the complete will. The Supreme Court held that the District Court should have applied 72-2-522, which deals with holographic wills, rather than this section. The three requirements for a valid holographic will are: (1) individuals must be at least 18 years old and of sound mind; (2) the material provisions of the will must be in the handwriting of the testator and signed by the testator; and (3) the individual must have testamentary intent that the document will dispose of the individual's property after death. Here, the first two elements were met, but a question of fact remained concerning Johnson's intent, precluding summary judgment. The case was remanded to give the parties an opportunity to present evidence concerning Johnson's intent so that the trier of fact could decide the issue under the correct standard. In re Estate of Johnson, 2002 MT 341, 313 M 316, 60 P3d 1014 (2002).

Acts of Testator Demonstrating Intent to Revoke Prior Will — Unwitnessed Will Treated as Executed Will: Hall executed his original will in 1984, and in 1997, he and his current wife met with their attorney and drew up a joint will. They signed the joint will, and the attorney notarized it, and although there were no other witnesses, they believed that the joint will would stand as valid until a final version was executed. Hall directed that the 1984 will be destroyed. Hall died before a final version was executed, and his wife sought to informally probate the joint will, but Hall's daughter objected and requested formal probate. The District Court admitted the joint will to probate, and the daughter appealed, but the Supreme Court affirmed. In contested cases, the proponent of a will must establish that the testator duly executed the will. For a will to be valid, typically, two people must witness the testator signing the will, and then sign the will themselves. However, under this section, a document may still be treated as if it had been executed under certain circumstances, even if it was not properly witnessed, and one such circumstance is if the proponent establishes by clear and convincing evidence that the decedent intended the document to be the decedent's will. Here, Hall clearly intended the joint will to be his final will, as evidenced by superseding language in the joint will revoking the prior will, by Hall's belief that the joint will would stand as valid until a final version was drawn up, and by Hall's destruction of the earlier will. Thus, the District Court did not err in admitting the unwitnessed joint will to probate. In re Estate of Hall, 2002 MT 171, 310 M 486, 51 P3d 1134 (2002).

Letter Stating Writer Would Be Sure Addressee Would Inherit Specified Property Was Valid Codicil to Will: A letter written in 1997 by a hospital patient to his long-term and intimate personal friend, stating "I'll have the lawyer visit the hospital to be sure you *inherit* the rest of the place in MT. if it comes to that", expressed a present testamentary intent to transfer the approximately 90-acre piece of property to her. He had already deeded her an adjoining 20-acre parcel with a cabin on it, for no consideration. He wrote the letter when extremely ill and died two weeks later. He was reluctant to consult a lawyer because he wanted to keep the relationship secret. The use of the underlined word "inherit" in the letter reflected his intent to make a posthumous disposition of the property. Furthermore, the letter constituted a valid codicil to the 1994 formal will that did not specifically mention the Montana property. In re Estate of Kuralt, 2000 MT 359, 303 M 335, 15 P3d 931, 57 St. Rep. 1529 (2000).

Proponent's Burden to Prove Decedent's Intent That Writing Constituted Will: Even absent due execution, a document can still be admitted to probate as a valid will under certain circumstances. Under the express language of this section, the proponent of a document has the burden of proving the decedent's intent that the writing constitutes the decedent's will. Insofar as 72-3-310 imposes a burden on the contestant of a will to prove lack of testamentary intent or capacity, that section does not apply when the document sought to be admitted to probate is not a duly executed will. In this case, the proponent did not meet the statutory burden of proving testator's testamentary capacity, which was error, but because the error did not affect the outcome of the case, it was considered harmless. In re Estate of Brooks, 279 M 516, 927 P2d 1024, 53 St. Rep. 1263 (1996), followed in In re Estate of Hall, 2002 MT 171, 310 M 486, 51 P3d 1134 (2002), and In re Estate of Harless, 2013 MT 283, 372 Mont. 117, 310 P.3d 550.

Holographic Will in Letters of Testator Upheld — Burden on Contestant to Prove Lack of Intent: On two different occasions, from his jail cell, Julian Ramirez wrote letters to his sister saying that if something ever happened to him, their mother should get all of his possessions and take care of his son Nicolas. After Julian's death, the District Court refused to admit the letters to probate as a holographic will, holding that there was insufficient evidence of Julian's testamentary intent. Citing In re Augestad's Estate, 111 M 138, 106 P2d 1087 (1940), In re Van Voast's Estate, 127 M 450, 266 P2d 377 (1954), and Estate of Coleman, 139 M 58, 359 P2d 502 (1961), the Supreme Court held that the letters contained sufficient evidence of testamentary intent. The Supreme Court also noted that the District Court was under the mistaken misapprehension that the burden of proof is upon the person seeking to enter the will to probate. The Supreme Court noted that under 72-3-310, the contestant has the burden of proving a lack of testamentary intent, and that burden was not satisfied in this case. In re Estate of Ramirez, 264 M 33, 869 P2d 263, 51 St. Rep. 133 (1994).

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Will to Contain Testamentary Provisions: A sealed envelope containing four pieces of paper on which were written names and addresses of relatives of decedent and on the outside of which was written "names and addresses of those to be named in my will" could not be probated as a holographic will because there were no testamentary provisions. In re Estate of Unruh, 204 M 524, 665 P2d 782, 40 St. Rep. 1047 (1983).

Blue Penciled Cross-Outs: The District Court properly refused probate of a holographic will because its proponent failed to establish a prima facie case that blue penciled cross-outs were authored by the testator. In re Craddock, 179 M 74, 586 P2d 292 (1978).

Date Required on Holographic Will: Under section 91-108, R.C.M. 1947 (since repealed), regardless of clear testator intent, purported holographic will revealing no date is not valid. In re Gudmunsen, 169 M 53, 545 P2d 146 (1976).

DECISIONS UNDER FORMER LAW

Hearing and Testimony: It was error to deny petition for probate of holographic will without hearing and testimony as to whether will was entirely in testator's handwriting and entitled to probate. In re Craddock's Estate, 166 M 68, 530 P2d 483 (1975).

72-2-524. Self-proved will.

Official Comments

A self-proved will may be admitted to probate as provided in Sections 3-303 [72-3-212 and 72-3-213], 3-405 [72-3-307], and 3-406 [72-3-309, now repealed] without the testimony of any subscribing witness, but otherwise it is treated no differently from a will not self proved. Thus, a self-proved will may be contested (except in regard to signature requirements), revoked, or amended by a codicil in exactly the same fashion as a will not self proved. The procedural advantage of a self-proved will is limited to formal testacy proceedings because Section 3-303 [72-3-212 and 72-3-213], which deals with informal probate, dispenses with the necessity of testimony of witnesses even though the instrument is not self proved under this section.

A new subsection (c) [72-2-524(3)] is added to counteract an unfortunate judicial interpretation of similar self-proving will provisions in a few states, under which a signature on the self-proving affidavit has been held not to constitute a signature on the will, resulting in invalidity of the will in cases where the testator or witnesses got confused and only signed on the self-proving affidavit. See Mann, Self-proving Affidavits and Formalism in Wills Adjudication, 63 Wash. U. L.Q. 39 (1985); Estate of Ricketts, 773 P.2d 93 (Wash. Ct. App. 1989).

Compiler's Comments

1999 Amendment: Chapter 51 in (1) near beginning of second paragraph after "day of ......" substituted "20..." for "19..." and near end of fourth paragraph after "day of ......" inserted "20..."; in (2) near end of third paragraph inserted "20..."; and made minor changes in style. Amendment effective January 1, 2000.

1993 Amendment: Chapter 494 inserted (3) concerning signature affixed to self-proving will; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

1981 Amendment: Inserted (1) setting forth form of acknowledgment of self-proved will; in (2) substituted "at any time subsequent to its execution" for "at the time of its execution or at any subsequent date"; inserted "where the acknowledgment occurs"; made other minor changes.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-504.

Case Notes

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

What Constitutes Undue Influence: In determining the issue of undue influence, the Court may consider the confidential relationship of the person attempting to influence the donor, the physical and mental condition of the donor as it affects his ability to withstand the influence, the unnaturalness of the disposition as it relates to showing an unbalanced mind or a mind easily susceptible to undue influence, and demands and importunities as they may affect the particular donor, taking into consideration the time, place, and all surrounding circumstances. Cameron v. Cameron, 179 M 219, 587 P2d 939 (1978), followed in In re Estate of Bradshaw, 2001 MT 92, 305 M 178, 24 P3d 211 (2001).

Self-Proving Affidavit — Effect on Execution: Since the execution of a valid will is a condition precedent to the use of a self-proving affidavit to admit a will to probate without testimony of a subscribing witness, such an affidavit will not cure defects in execution requirements of attestation. In re Estate of Sample, 175 M 93, 572 P2d 1232 (1977).

DECISIONS UNDER FORMER LAW

Competence to Make Will — Testimony of Attorney: Although testatrix was 85 and had infirmities associated with old age at the time her will was executed, testimony of her attorney that, due to her age and failing eyesight and her desire to make unequal distribution of her property, he had made a special effort to assure himself of her competence before preparing her will and deeds was sufficient to overcome allegations of contestants. Blackmer v. Blackmer, 165 M 69, 525 P2d 559 (1974).

72-2-525. Who may witness.

Official Comments

This section carries forward the position of the pre-1990 Code. The position adopted simplifies the law relating to interested witnesses. Interest no longer disqualifies a person as a witness, nor does it invalidate or forfeit a gift under the will. Of course, the purpose of this change is not to foster use of interested witnesses, and attorneys will continue to use disinterested witnesses in execution of wills. But the rare and innocent use of a member of the testator's family on a home-drawn will is not penalized.

This approach does not increase appreciably the opportunity for fraud or undue influence. A substantial devise by will to a person who is one of the witnesses to the execution of the will is itself a suspicious circumstance, and the devise might be challenged on grounds of undue influence. The requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence; and in most cases of undue influence, the influencer is careful not to sign as a witness, but to procure disinterested witnesses.

Under Section 3-406 [72-3-309, now repealed], an interested witness is competent to testify to prove execution of the will.

Compiler's Comments

1993 Amendment: Chapter 494 in (1), at beginning, substituted "An individual" for "Any person"; and substituted (2) concerning signing by interested witness for former text that read: "A will is not invalid because the will is signed by an interested witness."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

1989 Amendment: Deleted former (3) and (4) that read: "(3) All beneficial devises made in any will to a subscribing witness thereto are void unless there are two other competent subscribing witnesses to the same, but a mere charge on the estate of the testator does not prevent his creditors from being competent witnesses to his will.

(4) If a witness to whom any beneficial devise void under subsection (3) is made would have been entitled to any share of the estate of the testator if the testator had died intestate, such witness succeeds to so much of the share as would be distributed to him under intestate succession, not exceeding the devise or bequest made to him in the will."

1989 Editorial Comment: Former subsections (3) and (4) purged devises to subscribing witnesses to the extent these devises exceeded what the witness-devisee would have received under intestacy. These subsections were not part of the corresponding national Uniform Probate Code section 2-505. As amended, this section returns to the position of the national Uniform Probate Code and eliminates these purging provisions. The purpose of the change is not to foster the use of interested witnesses, but the rare and innocent use of a member of the testator's family or a friend to witness a home-drawn will would no longer be penalized. Attorneys will continue to use disinterested witnesses in the execution of wills.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-505.

72-2-526. Choice of law as to execution.

Official Comments

This section permits probate of wills in this state under certain conditions even if they are not executed in accordance with the formalities of Section 2-502 [72-2-522] or 2-503 [72-2-523]. Such wills must be in writing but otherwise are valid if they meet the requirements for execution of the law of the place where the will is executed (when it is executed in another state or country) or the law of testator's domicile, abode or nationality at either the time of execution or at the time of death. Thus, if testator is domiciled in state 1 and executes a typed will merely by signing it without witnesses in state 2 while on vacation there, the Court of this State would recognize the will as valid if the law of either state 1 or state 2 permits execution by signature alone. Or if a national of Mexico executes a written will in this State which does not meet the requirements of Section 2-502 [72-2-522] but meets the requirements of Mexican law, the will would be recognized as validly executed under this section. The purpose of this section is to provide a wide opportunity for validation of expectations of testators.

Compiler's Comments

1993 Amendment: Chapter 494 substituted reference to 72-2-523 for reference to 72-2-303.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-506.

72-2-527. Revocation by writing or act.

Official Comments

Purpose and Scope of Revisions. Revocation of a will may be by either a subsequent will or an authorized act done to the document. Revocation by subsequent will cannot be effective unless the subsequent will is valid.

Revocation by Inconsistency. As originally promulgated, this section provided no standard by which the courts were to determine whether in a given case a subsequent will with no revocation clause revokes a prior will, wholly or partly, by inconsistency. Some courts seem to have been puzzled about the standard to be applied. New subsections (b) [72-2-527(2)], (c) [72-2-527(3)], and (d) [72-2-527(4)] codify the workable and common-sense standard set forth in the Restatement (Second) of Property (Donative Transfers) § 34.2 comment b (1991). Under these subsections, the question whether the subsequent will was intended to replace rather than supplement the previous will depends upon whether the second will makes a complete disposition of the testator's estate. If the second will does make a complete disposition of the testator's estate, a presumption arises that the second will was intended to replace the previous will. If the second will does not make a complete disposition of the testator's estate, a presumption arises that the second will was intended to supplement rather than replace the previous will. The rationale is that, when the second will does not make a complete disposition of the testator's estate, the second will is more in the nature of a codicil to the first will. This standard has been applied in the cases without the benefit of a statutory provision to this effect. E.g., Gilbert v. Gilbert, 652 S.W.2d 663 (Ky. Ct. App. 1983).

Example. Five years before her death, G executed a will (Will # 1), devising her antique desk to A; $20,000 to B; and the residue of her estate to C. Two years later, A died, and G executed another will (Will # 2), devising her antique desk to A's spouse, X; $10,000 to B; and the residue of her estate to C. Will # 2 neither expressly revoked Will # 1 nor made any other reference to it. G's net probate estate consisted of her antique desk (worth $10,000) and other property (worth $90,000). X, B, and C survived G by 120 hours.

Solution. Will #2 was presumptively intended by G to replace Will #1 because Will #2 made a complete disposition of G's estate. Unless this presumption is rebutted by clear and convincing evidence, Will #1 is wholly revoked; only Will #2 is operative on G's death.

If, however, Will #2 had not contained a residuary clause, and hence had not made a complete disposition of G's estate, "Will #2" is more in the nature of a codicil to Will #1, and the solution would be different. Now, Will #2 would presumptively be treated as having been intended to supplement rather than replace Will #1. In the absence of evidence clearly and convincingly rebutting this presumption, Will # 1 would be revoked only to the extent Will #2 is inconsistent with it; both wills would be operative on G's death, to the extent they are not inconsistent. As to the devise of the antique desk, Will #2 is inconsistent with Will # 1, and the antique desk would go to X. There being no residuary clause in Will #2, there is nothing in Will #2 that is inconsistent with the residuary clause in Will #1, and so the residue would go to C. The more difficult question relates to the cash devises in the two wills. The question whether they are inconsistent with one another is a question of interpretation in the individual case. Section 2-507 [72-2-527] does not establish a presumption one way or the other on that question. If the court finds that the cash devises are inconsistent with one another, i.e., if the court finds that the cash devise in Will #2 was intended to replace rather than supplement the cash devise in Will #1, then B takes $10,000. But, if the court finds that the cash devises are not inconsistent with one another, B would take $30,000.

Revocatory Act. In the case of an act of revocation done to the document, subsection (a)(2) [72-2-527(1)(b)] is revised to provide that a burning, tearing, or canceling is a sufficient revocatory act even though the act does not touch any of the words on the will. This is consistent with cases on burning or tearing (e.g., White v. Casten, 46 N.C. 197 (1853) (burning); Crampton v. Osburn, 356 Mo. 125, 201 S.W.2d 336 (1947) (tearing)), but inconsistent with most, but not all, cases on cancellation (e.g., Yont v. Eads, 317 Mass. 232, 57 N.E.2d 531 (1944); Kronauge v. Stoecklein, 33 Ohio App. 2d 229, 293 N.E.2d 320 (1972); Thompson v. Royall, 163 Va. 492, 175 S.E. 748 (1934); contra, Warner v. Warner's Estate, 37 Vt. 356 (1864)). By substantial authority, it is held that removal of the testator's signature — by, for example, lining it through, erasing or obliterating it, tearing or cutting it out of the document, or removing the entire signature page — constitutes a sufficient revocatory act to revoke the entire will. Board of Trustees of the University of Alabama v. Calhoun, 514 So.2d 895 (Ala. 1987) and cases cited therein.

Subsection (a)(2) [72-2-527(1)(b)] is also revised to codify the "conscious-presence" test. As revised, subsection (a)(2) [72-2-527(1)(b)] provides that, if the testator does not perform the revocatory act, but directs another to perform the act, the act is a sufficient revocatory act if the other individual performs it in the testator's conscious presence. The act need not be performed in the testator's line of sight. See the Comment to Section 2-502 [72-2-522] for a discussion of the "conscious-presence" test.

Revocatory Intent. To effect a revocation, a revocatory act must be accompanied by revocatory intent. Determining whether a revocatory act was accompanied by revocatory intent may involve exploration of extrinsic evidence, including the testator's statements as to intent.

Partial Revocation. This section specifically permits partial revocation.

Dependent Relative Revocation. Each court is free to apply its own doctrine of dependent relative revocation. See generally Palmer, "Dependent Relative Revocation and Its Relation to Relief for Mistake," 69 Mich. L. Rev. 989 (1971). Note, however, that dependent relative revocation should less often be necessary under the revised provisions of the Code. Dependent relative revocation is the law of second best, i.e., its application does not produce the result the testator actually intended, but is designed to come as close as possible to that intent. A precondition to the application of dependent relative revocation is, or should be, good evidence of the testator's actual intention; without that, the court has no basis for determining which of several outcomes comes the closest to that actual intention.

When there is good evidence of the testator's actual intention, however, the revised provisions of the Code would usually facilitate the effectuation of the result the testator actually intended. If, for example, the testator by revocatory act revokes a second will for the purpose of reviving a former will, the evidence necessary to establish the testator's intent to revive the former will should be sufficient under Section 2-509 [72-2-529] to effect a revival of the former will, making the application of dependent relative revocation as to the second will unnecessary. If, by revocatory act, the testator revokes a will in conjunction with an effort to execute a new will, the evidence necessary to establish the testator's intention that the new will be valid should, in most cases, be sufficient under Section 2-503 [72-2-523] to give effect to the new will, making the application of dependent relative revocation as to the old will unnecessary. If the testator lines out parts of a will or dispositive provision in conjunction with an effort to alter the will's terms, the evidence necessary to establish the testator's intention that the altered terms be valid should be sufficient under Section 2-503 [72-2-523] to give effect to the will as altered, making dependent relative revocation as to the lined-out parts unnecessary.

Compiler's Comments

1993 Amendment: Chapter 494 substituted current text concerning revocation of a will for former text that read: "A will or any part thereof is revoked:

(1) by a subsequent will which revokes the prior will or part expressly or by inconsistency; or

(2) by being burned, torn, canceled, obliterated, or destroyed with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-507.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Sole Means of Revocation Provided in Statute — Any Other Actions Taken by Testator Insufficient to Revoke Will: The decedent's daughter petitioned to be appointed as personal representative to probate the decedent's estate, arguing that the decedent had revoked her 2002 will naming her sister to the position. The District Court concluded the decedent had revoked the will by writing a letter to denounce her relationship with the devisees, by suing one of the devisees, and by stating in a deposition in the suit that the will was not valid and was a joke. The Supreme Court reversed, holding that this section outlines the only acceptable methods to revoke a will and that none of the actions taken by the decedent satisfied the terms of this section. In re Estate of Harless, 2013 MT 283, 372 Mont. 117, 310 P.3d 550.

Acts of Testator Demonstrating Intent to Revoke Prior Will — Unwitnessed Will Treated as Executed Will: Hall executed his original will in 1984, and in 1997, he and his current wife met with their attorney and drew up a joint will. They signed the joint will, and the attorney notarized it, and although there were no other witnesses, they believed that the joint will would stand as valid until a final version was executed. Hall directed that the 1984 will be destroyed. Hall died before a final version was executed, and his wife sought to informally probate the joint will, but Hall's daughter objected and requested formal probate. The District Court admitted the joint will to probate, and the daughter appealed, but the Supreme Court affirmed. In contested cases, the proponent of a will must establish that the testator duly executed the will. For a will to be valid, typically, two people must witness the testator signing the will, and then sign the will themselves. However, under 72-2-523, a document may still be treated as if it had been executed under certain circumstances, even if it was not properly witnessed, and one such circumstance is if the proponent establishes by clear and convincing evidence that the decedent intended the document to be the decedent's will. Here, Hall clearly intended the joint will to be his final will, as evidenced by superseding language in the joint will revoking the prior will, by Hall's belief that the joint will would stand as valid until a final version was drawn up, and by Hall's destruction of the earlier will. Thus, the District Court did not err in admitting the unwitnessed joint will to probate. In re Estate of Hall, 2002 MT 171, 310 M 486, 51 P3d 1134 (2002).

Letter Stating Writer Would Be Sure Addressee Would Inherit Specified Property Was Valid Codicil to Will: A letter written in 1997 by a hospital patient to his long-term and intimate personal friend, stating "I'll have the lawyer visit the hospital to be sure you *inherit* the rest of the place in MT. if it comes to that", expressed a present testamentary intent to transfer the approximately 90-acre piece of property to her. He had already deeded her an adjoining 20-acre parcel with a cabin on it, for no consideration. He wrote the letter when extremely ill and died two weeks later. He was reluctant to consult a lawyer because he wanted to keep the relationship secret. The use of the underlined word "inherit" in the letter reflected his intent to make a posthumous disposition of the property. Furthermore, the letter constituted a valid codicil to the 1994 formal will that did not specifically mention the Montana property. In re Estate of Kuralt, 2000 MT 359, 303 M 335, 15 P3d 931, 57 St. Rep. 1529 (2000).

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Will Revoked — Jury Verdict: In an action to contest decedent's will that would have left a substantial portion of decedent's estate to the plaintiffs, defendant testified that she accompanied decedent to the hospital before he died and that before leaving for the hospital the decedent burned the will. Plaintiffs' key witness testified that she drove the decedent to the hospital and that the defendant could not have seen the decedent burn his will. The jury found that the decedent had revoked his will by destroying it. On appeal, the Supreme Court affirmed on the grounds that there was sufficient evidence to support the jury verdict and to deny a request for a new trial. Tope v. Taylor, 235 M 124, 768 P2d 845, 45 St. Rep. 2242 (1988).

Promissory Estoppel Requiring Reversal of Summary Judgment — No Will Produced: The Supreme Court reversed summary judgment, finding that genuine issues of material fact existed regarding testimony that an original will had been altered, yet no changed will was ever produced, and that all parties agreed to abide by deceased's wishes, but there was some disagreement as to what those wishes were. Further, appellant's reliance on the promise to abide resulted in potential injury and invoked the doctrine of promissory estoppel, precluding summary judgment. Tope v. Taylor, 224 M 131, 728 P2d 789, 43 St. Rep. 2074 (1986).

No Capacity of Seriously Ill Person to Revoke Will: A man who suffered multiple heart attacks and complications that included respiratory arrest, who was unable to speak, and who was questionably lucid and coherent was held not to have the cognitive capacity to make a knowing and voluntary destruction of his will or to possess the capacity to direct the revocation of his will. In re Estate of Fogerty, 221 M 336, 719 P2d 425, 43 St. Rep. 873 (1986).

Presumption of Intent to Revoke Holographic Will by Cancellation: Where appellant's wife died leaving a holographic will in her bedroom nightstand and the will contained unexplained X's drawn on the single page of the will such that all of the paragraphs except one had the markings through them, the court erred in admitting the will to formal probate because the will was revoked by its maker. By the existence of the unexplained X's over the will, it is presumed that the maker intended to revoke the will by cancellation, and the opponents of the will have thereby satisfied their burden of proof under 72-3-310. As the appellant failed to explain the markings, the presumed revocation controls. In re Estate of Cox, 190 M 436, 621 P2d 1057, 37 St. Rep. 2018 (1980).

DECISIONS UNDER FORMER LAW

Revocation by Subsequent Will: Subsequent will, containing provisions wholly inconsistent with the terms of former will, was not a valid revocation of former will where husband and wife had drawn mutual wills in favor of each other pursuant to oral contract conveying their assets to provide financing for their corporate business. Conitz v. Walker, 168 M 238, 541 P2d 1028 (1975).

72-2-528. Revocation by change of circumstances.

Compiler's Comments

1993 Amendment: Chapter 494 substituted current text concerning revocation by change of circumstances for former text that read: "(1) If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise.

(2) Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent.

(3) If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse.

(4) For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse within the meaning of 72-2-103(2). A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section.

(5) No change of circumstances other than as described in this section revokes a will."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-508.

72-2-529. Revival of revoked will.

Official Comments

Purpose and Scope of Revisions. Although a will takes effect as a revoking instrument when it is executed, it takes effect as a dispositive instrument at death. Once revoked, therefore, a will is ineffective as a dispositive instrument unless it has been revived. This section covers the standards to be applied in determining whether a will (Will # 1) that was revoked by a subsequent will (Will # 2), either expressly or by inconsistency, has been revived by the revocation of the subsequent will, i.e., whether the revocation of Will # 2 (the revoking will) revives Will # 1 (the will that Will # 2 revoked).

As revised, this section is divided into three subsections. Subsections (a) [72-2-529(1)] and (b) [72-2-529(2)] cover the effect of revoking Will # 2 (the revoking will) by a revocatory act under Section 2-507(a)(2) [72-2-527(1)(b)]. Under subsection (a) [72-2-529(1)], if Will # 2 (the revoking will) wholly revoked Will # 1, the revocation of Will # 2 does not revive Will # 1 unless "it is evident from the circumstances of the revocation of [Will # 2] or from the testator's contemporary or subsequent declarations that the testator intended [Will # 1] to take effect as executed." This standard places the burden of persuasion on the proponent of Will # 1 to establish that the decedent's intention was that Will # 1 is to be his or her valid will. Testimony as to the testator's statements at the time he or she revokes Will # 2 or at a later date can be admitted. Indeed, all relevant evidence of intention is to be considered by the court on this question; the open-ended statutory language is not to be undermined by translating it into discrete subsidiary elements, all of which must be met, as the court did in *Estate of Boysen,* 309 N.W.2d 45 (Minn. 1981).

The pre-1990 version of this section did not distinguish between complete and partial revocation. Regardless of whether Will # 2 wholly or partly revoked Will # 1, the pre-1990 version presumed against revival of Will # 1 when Will # 2 was revoked by act.

As revised, this section properly treats the two situations as distinguishable. The presumption against revival imposed by subsection (a) [72-2-529(1)] is justified because where Will # 2 *wholly* revoked Will No. 1, the testator understood or should have understood that Will # 1 had no continuing effect. Consequently, subsection (a) [72-2-529(1)] properly presumes that the testator's act of revoking Will # 2 was not accompanied by an intent to revive Will # 1.

Subsection (b) [72-2-529(2)] establishes the opposite presumption where Will # 2 (the revoking will) revoked Will # 1 only in part. In this case, the revocation of Will # 2 revives the revoked part or parts of Will # 1 unless "it is evident from the circumstances of the revocation of [Will # 2] or from the testator's contemporary or subsequent declarations that the testator did not intend the revoked part to take effect as executed." This standard places the burden of persuasion on the party arguing that the revoked part or parts of Will # 1 were not revived. The justification is that where Will # 2 only partly revoked Will # 1, Will # 2 is only a codicil to Will # 1, and the testator knows (or should know) that Will # 1 does have continuing effect. Consequently, subsection (b) [72-2-529(2)] properly presumes that the testator's act of revoking Will # 2 (the codicil) was accompanied by an intent to revive or reinstate the revoked parts of Will # 1.

Subsection (c) [72-2-529(3)] covers the effect on Will # 1 of revoking Will # 2 (the revoking will) by another, later, will (Will # 3). Will # 1 remains revoked except to the extent that Will # 3 shows an intent to have Will # 1 effective.

Compiler's Comments

1993 Amendment: Chapter 494 substituted current text concerning revival of revoked will for former text that read: "(1) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part is thereafter revoked by acts under 72-2-321, the first will is revoked in whole or in part unless it is evident from the circumstances of the revocation of the second will or from testator's contemporary or subsequent declarations that he intended the first will to take effect as executed.

(2) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part is thereafter revoked by a third will, the first will is revoked in whole or in part, except to the extent it appears from the terms of the third will that the testator intended the first will to take effect."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-509.

Case Notes

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Doctrine of Dependent Relative Revocation: Although the doctrine of dependent relative revocation can be applied under Montana law, it will not be applied in a case in which there is no evidence that the revocation of the prior will depended upon the validity of the new will. The testator's intent is the controlling factor. In re Estate of Patten, 179 M 299, 587 P2d 1307 (1978), followed in Hauck v. Seright, 1998 MT 198, 290 M 309, 964 P2d 749, 55 St. Rep. 838 (1998).

72-2-530. Incorporation by reference.

Official Comments

This section codifies the common-law doctrine of incorporation by reference, except that the sometimes troublesome requirement that the will refer to the document as being in existence when the will was executed has been eliminated.

Compiler's Comments

1993 Amendment: Chapter 494 at beginning substituted "A" for "Any".

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-510.

Case Notes

DECISIONS UNDER FORMER LAW

Incorporating of Antenuptial Agreement by Reference: Prior to enactment of this section, the Supreme Court, in construing testator's will in accordance with an existing antenuptial agreement, adopted the common law principal of incorporation by reference of an extrinsic writing into a will, where: (1) the extrinsic document was in existence at the time the will was written; (2) the will sufficiently identified the document; and (3) it appeared in the will that testator intended to incorporate the document for the purpose of carrying out his testamentary desires. In re Herzog's Estate, 162 M 410, 513 P2d 9 (1973).

72-2-531. Testamentary additions to trusts.

Official Comments

Purpose and Scope of Revisions. In addition to making a few stylistic changes, several substantive changes in this section are made.

As revised, it has been made clear that the "trust" need not have been established (funded with a trust res) during the decedent's lifetime, but can be established (funded with a res) by the devise itself. The pre-1990 version probably contemplated this result and reasonably could be so interpreted (because of the phrase "regardless of the *existence* ... of the corpus of the trust"). Indeed, a few cases have expressly stated that statutory language like the pre-1990 version of this section authorizes pour-over devises to unfunded trusts. E.g., *Clymer v. Mayo*, 473 N.E.2d 1084 (Mass. 1985); *Trosch v. Maryland Nat'l Bank*, 32 Md. App. 249, 359 A.2d 564 (1976). The authority of these pronouncements is problematic, however, because the trusts in these cases were so-called "unfunded" life-insurance trusts. An unfunded life-insurance trust is not a trust without a trust res; the trust res in an unfunded life-insurance trust is the contract right to the proceeds of the life-insurance policy conferred on the trustee by virtue of naming the trustee the beneficiary of the policy. See *Gordon v. Portland Trust Bank*, 201 Or. 648, 271 P.2d 653 (1954) ("[T]he [trustee as the] beneficiary [of the policy] is the owner of a promise to pay the proceeds at the death of the insured ...."); *Gurnett v. Mutual Life Ins. Co.*, 356 Ill. 612, 191 N.E. 250 (1934). Thus, the term "unfunded life-insurance trust" does not refer to an unfunded trust, but to a funded trust that has not received *additional* funding. For further indication of the problematic nature of the idea that the pre-1990 version of this section permits pour-over devises to unfunded trusts, see *Estate of Daniels*, 665 P.2d 594 (Colo. 1983) (pour-over devise failed; before signing the trust instrument, the decedent was advised by counsel that the "mere signing of the trust agreement would not activate it and that, before the trust could come into being, [the decedent] would have to fund it;" decedent then signed the trust agreement and returned it to counsel "to wait for further directions on it;" no further action was taken by the decedent prior to death; the decedent's will devised the residue of her estate to the trustee of the trust, but added that the residue should go elsewhere "if the trust created by said agreement is not in effect at my death.")

Additional revisions of this section are designed to remove obstacles to carrying out the decedent's intention that were contained in the pre-1990 version. These revisions allow the trust terms to be set forth in a written instrument executed after as well as before or concurrently with the execution of the will; require the devised property to be administered in accordance with the terms of the trust as amended after as well as before the decedent's death, even though the decedent's will does not so provide; and allow the decedent's will to provide that the devise is not to lapse even if the trust is revoked or terminated before the decedent's death.

Revision of Uniform Testamentary Additions to Trusts Act. The freestanding Uniform Testamentary Additions to Trusts Act (UTATA) was revised in 1991 in accordance with the revisions to UPC § 2-511 [72-2-531]. States that enact Section 2-511 [72-2-531] need not enact the UTATA as revised in 1991 and should repeal the original version of the UTATA if previously enacted in the state.

Compiler's Comments

1993 Amendment: Chapter 494 in (1)(a), at beginning, substituted "A will may validly devise property" for "A devise or bequest, the validity of which is determinable by the law of this state, may be made by a will"; at beginning of (1)(a)(i) inserted "during the testator's lifetime" and near end substituted "settlor" for "trustor"; at beginning of (1)(a)(ii) inserted "at the testator's death by the testator's devise to the trustee", near middle after "concurrently with", inserted "or after", and after "testator's will or in" substituted "another individual's will if that other individual" for "the valid last will of a person who"; in (2), near beginning after "devised", inserted "to a trust described in subsection (1)", near middle, after "trust to which it is", substituted "devised" for "given", after "provisions of the" substituted "governing instrument" for "instrument or will", and at end deleted "(regardless of whether made before or after the execution of the testator's will) and if the testator's will so provides, including any amendments to the trust made after the death of the testator"; at beginning of (3) inserted "Unless the testator's will provides otherwise"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-511.

72-2-532. Events of independent significance.

Compiler's Comments

1993 Amendment: Chapter 494 in first sentence, after "events", substituted "that" for "which".

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-512.

72-2-533. Separate writing identifying disposition of tangible personal property.

Official Comments

Purpose and Scope of Revision. As part of the broader policy of effectuating a testator's intent and of relaxing formalities of execution, this section permits a testator to refer in his or her will to a separate document disposing of tangible personalty other than money. The pre-1990 version precluded the disposition of "evidences of indebtedness, documents of title, and securities, and property used in a trade or business." These limitations are deleted in the revised version, partly to remove a source of confusion in the pre-1990 version, which arose because evidences of indebtedness, documents of title, and securities are not items of tangible personal property to begin with, and partly to permit the disposition of a broader range of items of tangible personal property.

The language "items of tangible personal property" does not require that the separate document specifically itemize each item of tangible personal property covered. The only requirement is that the document describe the items covered "with reasonable certainty." Consequently, a document referring to "all my tangible personal property other than money" or to "all my tangible personal property located in my office" or using similar catch-all type of language would normally be sufficient.

The separate document disposing of an item or items of tangible personal property may be prepared after execution of the will, so would not come within Section 2-510 [72-2-530] on incorporation by reference. It may even be altered from time to time. The only requirement is that the document be signed by the testator. The pre-1990 version of this section gave effect to an unsigned document if it was in the testator's handwriting. The revisions remove the language giving effect to such an unsigned document. The purpose is to prevent a mere handwritten draft from becoming effective without sufficient indication that the testator intended it to be effective. The signature requirement is designed to prevent mere drafts from becoming effective against the testator's wishes. An unsigned document could still be given effect under Section 2-503 [72-2-523], however, if the proponent could carry the burden of proving by clear and convincing evidence that the testator intended the document to be effective.

The typical case covered by this section would be a list of personal effects and the persons whom the decedent desired to take specified items.

Sample Clause. Section 2-513 [72-2-533] might be utilized by a clause in the decedent's will such as the following:

I might leave a written statement or list disposing of items of tangible personal property. If I do and if my written statement or list is found and is identified as such by my Personal Representative no later than 30 days after the probate of this will, then my written statement or list is to be given effect to the extent authorized by law and is to take precedence over any contrary devise or devises of the same item or items of property in this will.

Section 2-513 [72-2-533] only authorizes disposition of tangible personal property "not otherwise specifically disposed of by the will." The sample clause above is consistent with this restriction. By providing that the written statement or list takes precedence over any contrary devise in the will, a contrary devise is made conditional upon the written statement or list not contradicting it; if the written statement or list does contradict a devise in the will, the will does not otherwise specifically dispose of the property.

If, however, the clause in the testator's will does not provide that the written statement or list is to take precedence over any contrary devise in the will (or contain a provision having similar effect), then the written statement or list is ineffective to the extent it purports to dispose of items of property that were otherwise specifically disposed of by the will.

Compiler's Comments

1993 Amendment: Chapter 494 at end of (1), after "money", deleted "evidences of indebtedness, documents of title, and securities and property used in trade or business"; in (2), near middle, substituted "signed by the testator" for "either be in the handwriting of the testator or be signed by him"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-513.

Case Notes

Invested Money Not Considered Article of Personal Property in Probate: In his will, Bjerke listed items of personal property and the persons to whom they were bequeathed and provided that any item of personal property not listed was determined to be a household item bequeathed to plaintiff. Plaintiff maintained that money was personal property and that because Bjerke's money was not on the list, all money should go to plaintiff as contents of the house. The District Court found that the ordinary words of the will indicated that Bjerke did not intend to include money invested outside the home as personal property and that plaintiff was thus entitled only to cash found in the home. Plaintiff appealed. The Supreme Court noted that under 1-1-205, personal property includes money, but that the doctrine of ejusdem generis should be applied in interpreting the will. Under the doctrine, general words may be limited in their application to items of a similar class, as exemplified by the more specific and particular words preceding in the general phrase, focusing on what is specifically listed and not on what is omitted. In reading Bjerke's will as a whole, it was clear that he was contemplating that only tangible goods pass to plaintiff. The District Court correctly determined that cash was an item of personal property, but that invested money was not. Hanson v. Estate of Bjerke, 2004 MT 200, 322 M 280, 95 P3d 704 (2004). See also In re Estate of Donovan, 169 M 278, 546 P2d 512 (1976).

Question Whether Holographic Document Intended as Codicil or List of Property to Be Dispensed — Testamentary Intent Question of Fact to Be Determined by Judge or Jury — Summary Judgment Improper: Johnson executed a formal will and also executed and signed a holographic document consisting of a handwritten list of possessions and names. The District Court concluded that the holographic document was a personal property list made pursuant to this section, rather than a codicil, and applied 72-2-523 in ordering distribution of the property because there was no intent by Johnson that the holographic document should constitute the complete will. The Supreme Court held that the District Court should have applied 72-2-522, which deals with holographic wills, rather than 72-2-523. The three requirements for a valid holographic will are: (1) individuals must be at least 18 years old and of sound mind; (2) the material provisions of the will must be in the handwriting of the testator and signed by the testator; and (3) the individual must have testamentary intent that the document will dispose of the individual's property after death. Here, the first two elements were met, but a question of fact remained concerning Johnson's intent, precluding summary judgment. The case was remanded to give the parties an opportunity to present evidence concerning Johnson's intent so that the trier of fact could decide the issue under the correct standard. In re Estate of Johnson, 2002 MT 341, 313 M 316, 60 P3d 1014 (2002).

72-2-534. Contracts concerning succession.

Official Comments

Section Relocated. No substantive revision of this section is made, but the section is relocated and renumbered to make room for new Part 7 [Title 72, chapter 2, part 7].

The purpose of this section is to tighten the methods by which contracts concerning succession may be proved. Oral contracts not to revoke wills have given rise to much litigation in a number of states; and in many states if two persons execute a single document as their joint will, this gives rise to a presumption that the parties had contracted not to revoke the will except by consent of both.

This section requires that either the will must set forth the material provisions of the contract, or the will must make express reference to the contract and extrinsic evidence prove the terms of the contract, or there must be a separate writing signed by the decedent evidencing the contract. Oral testimony regarding the contract is permitted if the will makes reference to the contract, but this provision of the statute is not intended to affect normal rules regarding admissibility of evidence.

This section does not preclude recovery in quantum meruit for the value of services rendered the testator.

Compiler's Comments

1993 Amendment: Chapter 494 in (1), after "1975,", substituted "may" for "can".

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-514.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Oral Contract to Devise House Barred: Braaten's stepson cared for Braaten for about 12 years prior to Braaten's death, later claiming that Braaten had orally promised to leave the stepson a house upon Braaten's death. Although the house was subsequently sold, the District Court awarded the stepson $44,100 for the value of his services after determining that Braaten falsely induced the stepson to serve him by promising to devise the house to the stepson. However, no writing of any kind verified Braaten's promises, and under this section, a purely oral contract to make a devise is barred. Thus, because the stepson did not have an enforceable contract, the District Court erred by granting the stepson's claim, and the Supreme Court reversed. In re Estate of Braaten, 2004 MT 213, 322 M 364, 96 P3d 1125 (2004), following Orlando v. Prewett, 218 M 5, 705 P2d 593 (1985).

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Contract to Make Will Denied — No Part Performance Exception: An oral agreement whereby respondents agreed to move to decedent's ranch and lease it from decedent for remainder of his lifetime and decedent agreed to give an undivided one-half interest in the ranch to them at his death and provide them with the right to buy the other one-half interest at the appraised value as of the date of his death was an oral agreement for disposition of decedent's property at death. The District Court committed error and contradicted its own findings of fact when it concluded that the oral agreement was for the leasing, sale, and purchase of real property. The agreement does not conform to a single particular of the requirements provided by statute for the enforcement of such an agreement. The language of this section is unambiguous and does not provide for a part performance exception to the Statute of Frauds. Orlando v. Prewett, 218 M 5, 705 P2d 593, 42 St. Rep. 1328 (1985), followed, with regard to the holding that oral contracts to make a devise are barred, in In re Estate of Braaten, 2004 MT 213, 322 M 364, 96 P3d 1125 (2004). A mechanics' lien filed against real property that was the subject of the 1985 quiet title action against the same parties who filed the lien was held void under the doctrine of res judicata in Orlando v. Prewett, 236 M 478, 771 P2d 111, 46 St. Rep. 520 (1989).

Valid Agreement Not to Revoke — 1966 Will: Testimony regarding its execution and the wording of a 1966 will provided sufficient credible evidence to support the trial court's conclusion that there was a valid oral agreement not to revoke the provisions of the will disposing of family corporation stock. Lazetich v. Miller, 206 M 247, 671 P2d 15, 40 St. Rep. 1626 (1983).

Contract to Make Will Denied — Public Policy: In 1954 the plaintiff moved to his ailing brother's ranch to care for his brother and the ranch. After his brother's death in 1969, the plaintiff asserted the existence of an oral contract whereby his brother agreed to will the ranch to him in consideration of his caretaking. The trial court determined that the plaintiff's services were rendered gratuitously and denied specific performance of the alleged oral contract. Sanger v. Huguenel, 65 M 236, 221 P 349 (1922), enunciated the sound public policy that contracts to make wills are looked upon with disfavor, thereby requiring clear and convincing evidence of their existence. This section is an extension of that public policy. Therefore, the judgment of the trial court was upheld. Craddock v. Berryman, 198 M 155, 645 P2d 399, 39 St. Rep. 835 (1982).

DECISIONS UNDER FORMER LAW

Oral Contract Not to Revoke Mutual Wills: Where husband made inter vivos and causa mortis gifts to female companion, while wife was in a hospital sick from a crippling disorder, of all property which wife had worked all her life next to her husband to accumulate, Court found an oral contract not to revoke mutual wills by clear, cogent, and convincing testimony of two disinterested witnesses so as to set aside gifts for benefit of wife. Conitz v. Walker, 168 M 238, 541 P2d 1028 (1975).

Oral Contract to Bequeath Property: Proof of an oral contract by a deceased to leave property by will must be clear, cogent, and convincing, and the making of such an oral contract or agreement must be established by disinterested witnesses. Cox v. Williamson, 124 M 512, 227 P2d 614 (1951).

72-2-535. Deposit of will with court in testator's lifetime.

Official Comments

Many states already have statutes permitting deposit of wills during a testator's lifetime. Most of these statutes have elaborate provisions governing purely administrative matters: how the will is to be enclosed in a sealed wrapper, what is to be endorsed on the wrapper, the form of receipt or certificate given to the testator, the fee to be charged, how the will is to be opened after testator's death and who is to be notified. Under this section, details have been left to Court rule, except as other relevant statutes such as one governing fees may apply.

It is, of course, vital to maintain the confidential nature of deposited wills. However, this obviously does not prevent the opening of the will after the death of the testator if necessary in order to determine the executor or other interested persons to be notified. Nor should it prevent opening the will to microfilm for confidential record storage, for example. These matters could again be regulated by Court rule.

The provision permitting examination of a will of a protected person by the conservator supplements Section 5-427 [72-5-433].

Compiler's Comments

1993 Amendment: Chapter 494 in second sentence, before "kept confidential", inserted "sealed and"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-515.

72-2-536. Duty of custodian of will — liability.

Official Comments

In addition to a registrar or clerk, a person authorized to accept delivery of a will from a custodian may be a universal successor or other person authorized under the law of another nation to carry out the terms of a will.

Compiler's Comments

1993 Amendment: Chapter 494 near middle of second sentence, after "aggrieved for", substituted "any damages that" for "the damages which"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-516.

72-2-537. Penalty clause for contest.

Official Comments

This section replicates Section 3-905 [the former source of this section in Montana].

Compiler's Comments

1993 Amendment: Chapter 494 near beginning, after "penalize", substituted "an" for "any".

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-517.

Part 6

Rules of Construction Applicable Only to Wills

Part Official Comments

Parts 6 [Title 72, chapter 2, part 6] and 7 [Title 72, chapter 2, part 7] address a variety of construction problems that commonly occur in wills, trusts, and other types of governing instruments. All of the "rules" set forth in these parts yield to a finding of a contrary intention and are therefore rebuttable presumptions.

The rules of construction set forth in Part 6 [Title 72, chapter 2, part 6] apply only to wills. The rules of construction set forth in Part 7 [Title 72, chapter 2, part 7] apply to wills and other governing instruments.

The sections in Part 6 [Title 72, chapter 2, part 6] deal with such problems as death before the testator (lapse), the inclusiveness of the will as to property of the testator, effect of failure of a gift in the will, change in form of securities specifically devised, ademption by reason of fire, sale and the like, exoneration, and exercise of a power of appointment by general language in the will.

Part Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Establishment of Museum From Charitable Trust Proceeds Not Considered Precatory Language Secondary to General Philanthropic Trust Purposes: Alberta Bair's will established a charitable trust and directed the board overseeing the trust proceeds to establish, improve, and maintain a museum to display the family's historical artifacts. The District Court concluded that the will language directing establishment of a museum was authorized in a precatory clause and that the board had the discretion whether to create a museum. The Supreme Court disagreed. The clear language of the trust agreement established that although the trust was created for general philanthropic purposes, the creation of a museum was the primary purpose of the trust, and the District Court committed reversible error in holding that the trust agreement did not require establishment of a museum. In re Bair Family Trust, 2008 MT 144, 343 M 138, 183 P3d 61 (2008), followed in Lane v. Caler, 2013 MT 108, 370 Mont. 30, 299 P.3d 827. See also In re Estate of Bolinger, 284 M 114, 943 P2d 981 (1997).

Precatory Language Not Sufficient to Create Trust: The children of the testator brought an action to have the District Court declare that the language of the will, which left everything to the testator's father or in the event of his death to the testator's stepmother and which stated that the testator had confidence that his father or stepmother would use the estate in the best interests of his children, in reality created a trust in behalf of the testator's children. The Supreme Court, stating that the principles of trust law existing before the adoption of the new trust code were still applicable, held that the language used by the decedent clearly and unambiguously made an outright gift to his father and in default to his stepmother and specifically excluded his children and that therefore the statement of the reasons for doing so by the decedent did not limit the testamentary gift and a trust was not created. In re Estate of Bolinger, 284 M 114, 943 P2d 981, 54 St. Rep. 799 (1997).

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Gift of Tax-Free Municipal Bonds — Testator's Intent: The deceased left half of his tax-free municipal bonds to his five children. The rest of his property passed by the residual clause to his widow. The children argued that they should have received half of the remaining municipal bonds. The Supreme Court ruled that the rest of the bonds were only exempt from federal tax and not state tax and therefore were not tax-free. The court stated that the deceased was a knowledgeable investor and would have used the proper wording if he had wanted to leave a portion of the remaining bonds to his children. In re Estate of Ellison, 243 M 258, 792 P2d 5, 47 St. Rep. 910 (1990).

Intent Construed From Four Corners of Will: The testatrix, on a form will, crossed out the "and" in a bequest to two heirs and substituted the word "or". The Supreme Court held that in examining the entire will and interpreting the language in its ordinary sense, the court still could not ascertain the intent of the testatrix and therefore the property passed by intestacy. Drabant v. DeLong, 242 M 15, 788 P2d 889, 47 St. Rep. 496 (1990).

Intent of Testator Devising Interest in Land Determined by Law of State Where Land Located: The decedent's husband had predeceased her, and in his will he had created a power of appointment in her that she did not specifically exercise in her will. The appellants argued that Montana law did not control because both parties had died in Minnesota and that the Minnesota court had ruled that the general residuary clause in the wife's will did constitute an exercise of the power granted to her by her husband. The Supreme Court ruled that the mineral royalty interests were an interest in land located in Montana and that the intention of a testator in devising land is controlled by the law of the situs. The court went on to find that Montana's law states that a power of appointment must be specifically exercised and is not exercised by a general residuary clause. In re Estate of Allen, 237 M 114, 772 P2d 297, 46 St. Rep. 665 (1989).

Extrinsic Evidence Unnecessary When Devise Clear: The language of a devise bequeathed property, if any, left in a partnership at the time of testator's demise. The District Court found the partnership to be a conduit through which the partners conducted their tenancy-in-common business and reported income for tax purposes; however, absent any partnership interest in real property, the court determined no property should pass and properly granted summary judgment. Because the testator's intention could be ascertained from the plain language of the devise alone, it was not necessary or proper for the court to receive extrinsic evidence in making its determination. In re Estate of Greenfield, 232 M 357, 757 P2d 1297, 45 St. Rep. 1112 (1988).

Construction of "Cash and Savings" Clause in Will and Subsequent Agreement — Parol Evidence Admissible: In broadly construing a clause in a will leaving "cash and savings" to the wife and when the clause was also used in a subsequent agreement wherein the parties more clearly delineated the division of property, the trial court properly granted to the wife a promissory note, a diamond ring, partnership interests, and corporate shares. A residuary clause bequeathing to a brother the remainder of the estate, "including but not limited to my ranch and any livestock and machinery", properly included all personal property and assets connected with the ranch, including patronage and capital credits in electric, telephone, and farming cooperatives. The "cash and savings" clause as used in the subsequent agreement did not alter the will and was properly construed in the context of the will. Further, it was not error for the lower court to admit parol evidence relative to the parties' intent as to the agreement in interpreting ambiguous language in the agreement. In re Estate of Flasted, 228 M 85, 741 P2d 750, 44 St. Rep. 1362 (1987).

"In Equal Shares, Per Stirpes and Not Per Capita" — Intent of Testator Controls: Testatrix devised residue of her estate to her eight grandchildren "in equal shares, per stirpes and not per capita". Copersonal representative appealed District Court's interpretation of the will, which awarded one-eighth equal shares to the named grandchildren rather than one-half to her two children and one-half to the six children of her sister. The Supreme Court affirmed the District Court and held that taking the will as a whole, the testatrix clearly intended her grandchildren to take in their own right equally and not by right of representation through their living parents. The Supreme Court denied appellant attorney fees and costs on the basis that appellant did not prosecute the action in good faith as a fiduciary of the estate and its successors. In re Estate of Evans, 217 M 89, 704 P2d 35, 42 St. Rep. 1047 (1985).

Undue Influence on Testator Making Will: Undue influence was present when testator made 1980 wills at urging of three of his four children when at time of making the wills testator was 91 years old, confined to a rest home, hard of hearing, and suffering from a brain disorder, and the wills disinherited the fourth child, whose interests testator's actions since 1948 had been directed toward protecting. The Supreme Court held there was substantial credible evidence to support the District Court's determination that there was undue influence and dismissal of petition for probate of the 1980 wills. In re Estate of Aageson, 217 M 78, 702 P2d 338, 42 St. Rep. 1038 (1985).

Will Versus Deed — Test for Undue Influence Different: Plaintiff obtained a power of attorney from his sick and elderly aunt and then brought her to Montana to live with him. The aunt later executed a new will leaving her estate to the plaintiff and deeded a ranch to plaintiff. It was alleged that plaintiff exercised undue influence over his aunt in the execution of the deed, the will, and the power of attorney. The court employed 28-2-407 in concluding that plaintiff had exercised undue influence in the execution of the deed. A different test is employed when establishing undue influence in the execution of a will. A will may not be defeated on grounds of undue influence unless the testator is induced to execute an instrument which is in form and appearance his will but in reality expresses testamentary dispositions which he would not have voluntarily made. In this case the will was drafted by the lawyer the testator had used for many years, and there is no evidence that plaintiff participated in the preparation of the will or that he dictated the will's terms. The will should therefore not have been set aside. Dybvik v. Dybvik, 201 M 389, 654 P2d 989, 39 St. Rep. 2184 (1982).

Failure to Timely Exercise Option "to Take": The Supreme Court affirmed the lower court's holding that appellant failed to exercise an option "to take" contained in the last will and testament of his mother where he used the property but failed to make payment to other heirs within the designated 2-year period. The intention of a testator, as expressed in his will, controls the legal effect of his disposition. The intention of the testator is also to be ascertained from the words of a will, which are to be taken in their ordinary and grammatical sense unless a clear intention to use them in another sense can be collected. The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative. In re Estate of Erdahl, 193 M 103, 630 P2d 230, 38 St. Rep. 978 (1981).

Variation of Terms of Written Contract Held Improper — Evidentiary Rule as Procedural Rule Only: In an action to collect the amount due under a promissory note, the District Court erred in allowing the plaintiff to prove that the terms of a written contract concerning only the terms of sale of a bar also applied to a previous sale of another business. Rule 106, Montana Rules of Evidence, relied on by the District Court to vary the clear terms of the parties' written agreement, is a procedural rule concerning the introduction of only a portion of a whole agreement and cannot be used to affect the substance of the existing law of parol evidence. Spraggins v. Elvidge, 192 M 8, 625 P2d 1151, 38 St. Rep. 493 (1981).

Contention That Residence to Pass Intestate: Where decedent directed in her will that "after the decease of her two sons" her property was to go to two others, the District Court properly dismissed the claims of representatives of her deceased sons who claimed, among other things, that the residue of the estate, after termination of the life estates of the sons, would pass intestate to the estates of the deceased sons, as wills are to be construed to pass all of the estate and a devise of real property passes all of such property. In re Estate of Wallace v. McAlear, 186 M 18, 606 P2d 136 (1980).

Mortmain Statute Impliedly Repealed as Contrary to MUPC: The MUPC clearly requires that the intent of the testator control the passing of his property. The mortmain statute, 72-11-334 (now repealed), restricting charitable devises, prevents implementation of the intent expressed in a will and was impliedly repealed by the adoption of the MUPC. In re Estate of Holmes, 183 M 290, 599 P2d 344 (1979).

Imperfect Description: A description of property is an "imperfect description" within the meaning of 72-11-313 (now repealed) if it is a description of property over which the testator had no power of testamentary disposition and the mistake or omission must be corrected. If incapable of correction without substituting what the Court thought the testator intended, the false description must be discarded, even if it means that nothing can pass. St. Fish & Game Comm'n v. Keller, 173 M 523, 568 P2d 166 (1977).

Expression of One Thing Excludes Another — Enumeration Followed by General Phrase: Where will had left legatee a sum of cash, a sewing table, a color television set, luggage, costume jewelry, a cut glass vase and pitcher, personal effects, and clothes, application of the doctrine of ejusdem generis was appropriate to determine whether "personal effects" included diamond jewelry valued at $8,700; it was also appropriate to apply doctrine to determine whether "costume jewelry" included the diamond jewelry. In re Estate of Donovan, 169 M 278, 546 P2d 512 (1976).

DECISIONS UNDER FORMER LAW

Precatory Language in Devise: Under former law, when the testator's will provided that all his property was to go to his wife as her sole and separate property "with the knowledge that she will be fair and equitable to all of my children", the will was clear on its face and the language regarding the children was precatory and did not create a resulting trust or contract to make a will on behalf of the children of the testator by a former marriage. Stapleton v. DeVries, 167 M 108, 535 P2d 1267 (1975).

Creation of Life Estate: Holographic will stating "I want her to have free use of and administer my estate for life or as long as she cares to" created a life estate. In re Hetland's Estate, 166 M 122, 531 P2d 367 (1975).

Undevised Remainder: Clause in holographic will providing for distribution plan if it became necessary to liquidate the estate was not a testamentary disposition, and upon the death of the surviving spouse the estate was distributed according to intestate succession. In re Hetland's Estate, 166 M 122, 531 P2d 367 (1975).

Establishment of Will: Presumption created by former statute requiring that construction which would prevent total intestacy be preferred over another construction did not aid in making a will out of an instrument which showed no testamentary intent other than use of the word "will", but rather spoke in terms of authorizing present acts with respect to personal property. In re Estate of Gasparovich, 158 M 21, 487 P2d 1148 (1971).

Division of Residue: Holographic will making specific bequests to various persons' children and directing that any residue be divided by percentage "to all of them more or less" was construed to bequeath specific sums to children as classes rather than individually, but with children to participate equally as individuals in residue. In re Estate of Jensen, 152 M 495, 452 P2d 418 (1969).

Real Estate Included in Bequest: Where the deceased in a holographic will bequeathed certain personal property to a Katherine Clauson and "also the residue of my estate after all bequests are taken care of", the word "bequeath" is sufficient to include real estate located in Montana. In re Gift's Estate, 125 M 95, 232 P2d 328 (1951).

Power of Attorney: A power of attorney to a physician to perform all medical services for decedent for which he was to receive $2,000, any unpaid balance thereof to be paid by her executor, contained a conditional disposition. Trenouth v. Mulroney, 124 M 499, 227 P2d 590 (1951).

Compliance With Terms of Will: Where will provided that the Court should appoint "the nominee of the Roman Catholic Bishop" as executor, the Court could not disregard such provision and appoint another as administrator with the will annexed. In re Effertz' Estate, 123 M 45, 207 P2d 1151, 11 ALR 2d 1278 (1949).

Children Not Specifically Mentioned: Where a will contained the provision that the residue of the estate should go to certain named children, and a provision that certain named children were intentionally omitted and another provision that "my heirs at law not elsewhere herein mentioned" shall receive $1, such latter provision will be construed to apply to children of a deceased child not named in the other provisions of the will. In re Benolken's Estate, 122 M 425, 205 P2d 1141 (1949).

"Heirs at Law": "Heirs", "heirs at law", and "legal heirs" are in a legal sense the same. In re Benolken's Estate, 122 M 425, 205 P2d 1141 (1949).

Ambiguous Will — Right to Legacy: In a proceeding to determine beneficiaries under residuary clause of will in which testatrix left the sum of $50 to the estate of a deceased brother "as his share of my estate as heir or otherwise", where the children of the deceased brother who were not mentioned in the will claimed they were entitled to share in the residue, but the residuary clause provided "all the rest and remainder shall be divided between my lawful heirs herein mentioned", the Court, after considering such extrinsic facts as were allowable under 72-11-313 (now repealed) in case of ambiguity, was unable to determine who should have the $50, but affirmed the judgment of the Trial Court that the children of the deceased brother were not entitled to share in the residue. In re Doyle's Estate, 107 M 64, 80 P2d 374 (1938).

Equitable Conversion: Under 72-11-322 (now repealed), when a will directed the conversion of real property into money and turned over to the executor, equitable conversion took place upon the death of the testator and the real estate was treated as personalty. In re Livingston's Estate, 91 M 584, 9 P2d 159, 90 ALR 1036 (1932).

Effects: A will reading: "I hereby give, devise and bequeath all my goods, chattels and effects to my wife", passed all of his property, both real and personal. The use of the word "effects", though generally including only personal property, is broad enough to encompass real estate. (Mr. Justice Stark dissenting.) In re Spriggs' Estate, 70 M 272, 225 P 617 (1924).

Children as Not Including Grandchildren: When a will bequeathed one-half of the testator's estate to his two sisters and the other half to their children if living at the time of his death and both sisters had died before the will was made leaving no children, the word "children" used in the will could not, under the rules of construction of wills laid down by 72-11-302 (now repealed) and 72-11-313 (now repealed), be construed as including grandchildren so as to permit a grandson of one of the sisters to share in the estate. In re Hash's Estate, 64 M 118, 208 P 605 (1922).

Inclusion of Grandchildren by Use of the Word "Children": Where a will bequeathed one-half of the testator's estate to his sisters and the other half to their children if living at the time of his death, and both sisters had died before the will was made leaving no children, the word "children" used in the will could not, under the rules of construction of wills laid down by 72-11-302 (now repealed) and 72-11-313 (now repealed), be construed as including grandchildren so as to permit a grandson of one of the sisters to share in the estate. In re Hash's Estate, 64 M 118, 208 P 605 (1922).

Endowed: In a proceeding to debar decedent's widow, who under the will was "endowed in his estate, real and personal", from nominating an administrator with the will annexed, Trial Court properly found that the testator by the use of the word "endowed" did not intend that she should be limited to her right of dower (a third part of his real property) but did intend that she should have the same portion of his estate, both real and personal, to which she would have been entitled had he died intestate. In re McLure's Estate, 63 M 536, 208 P 900 (1922).

Intention of Testator: That construction of a will must be favored which will reconcile with testator's intention the several provisions thereof. In re McLure's Estate, 63 M 536, 208 P 900 (1922).

Corporate Stock — Action to Recover — Joinder Unnecessary: A suit by a legatee or devisee of stock in a Montana corporation which owned real estate but which had been dissolved by expiration of its term of incorporation, to recover her interest from a third person who claims ownership is not one to recover the stock for the benefit of the estate but one brought as tenant in common of the property under 72-11-319 (now repealed), and could be maintained without joining the other devisees or the executors. Barker v. Edwards, 259 F 484 (1919).

Ordinary Business Transaction: Where a testator had made a bequest of $3,000, "less a note of two thousand dollars", held by him against the beneficiary, the quoted words would, in ordinary business transactions, have reference to the debt as a whole and not to the sum mentioned as principal only and should therefore be assigned their ordinary meaning. In re Beck's Estate, 44 M 561, 121 P 784 (1912).

Character of Instruments — Letter Made Part of Will: A letter not intended to be a will is not a holographic will. However, an instrument not of a testamentary character may be construed with one having that character for the purpose of determining whether the writings, taken together, constitute a will; if the former, by appropriate reference, is clearly referred to and made a part of the latter, it is a part of the will; otherwise, it is not. In re Noyes' Estate, 40 M 231, 106 P 355 (1909), distinguished in In re Augestad's Estate, 111 M 138, 106 P2d 1087 (1940).

Employees: When a will provided for a specified sum to all employees of a firm of which testator was a member, who had been in the employ of the firm for 1 year or more previous to testator's death, only those who were actually in the employ of the firm at the time of testator's death and had been so continuously for 1 year immediately prior to testator's death were entitled to be rewarded under the terms of the will. In re Klein's Estate, 35 M 185, 88 P 798 (1907).

"Firm" Meant in Ordinary Rather Than Legal Sense: Where will provided that each of the employees of a firm, of which testator was a member, "who shall have been in the employ of the said firm one year or more previous to my decease", should be entitled to receive $1,000, the word "firm" was used by the testator in its ordinary rather than its legal sense. In re Klein's Estate, 35 M 185, 88 P 798 (1907).

Reference to Other Provisions: Uncertainty arising on face of will may be resolved by reference to other provisions of the will, taking into consideration the circumstances under which the will was made. In re Peterson's Estate, 49 M 96, 140 P 237 (1914); In re Klein's Estate, 35 M 185, 88 P 798 (1907).

72-2-611. Scope.

Official Comments

Purpose and Scope of Revisions. Common-law rules of construction yield to a finding of a contrary intention. The pre-1990 version of this section provided that the rules of construction in Part 6 [Title 72, chapter 2, part 6] yielded only to a "contrary intention indicated by the will." To align the statutory rules of construction in Part 6 [Title 72, chapter 2, part 6] with those established at common law, this section is revised so that the rules of construction yield to a "finding of a contrary intention." As revised, evidence extrinsic to the will as well as the content of the will itself is admissible for the purpose of rebutting the rules of construction in Part 6 [Title 72, chapter 2, part 6].

As originally promulgated, this section began with the sentence: "The intention of a testator as expressed in his will controls the legal effect of his dispositions." This sentence is removed primarily because it is inappropriate and unnecessary in a part of the Code containing rules of construction. The deletion of this sentence does not signify a retreat from the widely accepted proposition that a testator's intention controls the legal effect of his or her dispositions.

A further reason for deleting this sentence is that a possible, though unintended, reading of this sentence might be that it prevents the judicial adoption of a general reformation doctrine for wills, as approved by the American Law Institute in the Restatement (Second) of Property § 34.7 & comment d, illustration 11, and as advocated in Langbein & Waggoner, "Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?," 130 U.Pa.L.Rev. 521 (1982). The striking of this sentence removes that possible impediment to the judicial adoption of a general reformation doctrine for wills as approved by the American Law Institute and as advocated in the Langbein-Waggoner article.

Cross Reference. See Section 8-101(b) [an effective date provision not codified in Montana] for the application of the rules of construction in this Part [Title 72, chapter 2, part 6] to documents executed prior to the effective date of this Article [Title 72, chapter 2].

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-601.

72-2-612. Will may pass all property and after-acquired property.

Official Comments

Purpose and Scope of Revision. This section is revised to assure that, for example, a residuary clause in a will not only passes property owned at death that is not otherwise devised, even though the property was acquired by the testator after the will was executed, but also passes property acquired by a testator's estate after his or her death. This reverses a case like *Braman*

Estate, 435 Pa. 573, 258 A.2d 492 (1969), where the court held that Mary's residuary devise to her sister Ruth "or her estate," which had passed to Ruth's estate where Ruth predeceased Mary by about a year, could not go to Ruth's residuary legatee. The court held that Ruth's will had no power to control the devolution of property acquired by Ruth's estate after her death; such property passed, instead, by intestate succession from Ruth. This section, applied to the Braman Estate case, would mean that the property acquired by Ruth's estate after her death would pass under her residuary clause.

The added language also makes it clear that items such as bonuses awarded to an employee after his or her death pass under his or her will.

Compiler's Comments

1993 Amendment: Chapter 494 near beginning, after "will", substituted "may provide for the passage of" for "is construed to pass"; near end, after "acquired", substituted "by the estate after the testator's death" for "after the execution of the will"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-602.

Case Notes

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Contention That Residence to Pass Intestate: Where decedent directed in her will that "after the decease of her two sons" her property was to go to two others, the District Court properly dismissed the claims of representatives of her deceased sons who claimed, among other things, that the residue of the estate, after termination of the life estates of the sons, would pass intestate to the estates of the deceased sons, as wills are to be construed to pass all of the estate and a devise of real property passes all of such property. In re Estate of Wallace v. McAlear, 186 M 18, 606 P2d 136 (1980).

72-2-613. Antilapse — deceased devisee — class gifts.

Official Comments

Purpose and Scope of Revised Section. Revised Section 2-603 [72-2-613] is a comprehensive antilapse statute that resolves a variety of interpretive questions that have arisen under standard antilapse statutes, including the antilapse statute of the pre-1990 Code.

Theory of Lapse. A will transfers property at the testator's death, not when the will was executed. The common-law rule of lapse is predicated on this principle and on the notion that property cannot be transferred to a deceased individual. Under the rule of lapse, all devises are automatically and by law conditioned on survivorship of the testator. A devise to a devisee who predeceases the testator fails (lapses); the devised property does not pass to the devisee's estate, to be distributed according to the devisee's will or pass by intestate succession from the devisee. (Section 2-702 [72-2-712] modifies the rule of lapse by presumptively conditioning devises on a 120-hour period of survival.)

"Antilapse" Statutes — Rationale of Section 2-603 [72-2-613]. Statutes such as Section 2-603 [72-2-613] are commonly called "antilapse" statutes. An antilapse statute is remedial in nature, tending to preserve equality of treatment among different lines of succession. Although Section 2-603 [72-2-613] is a rule of construction, and hence under Section 2-601 [72-2-611] yields to a finding of a contrary intention, the remedial character of the statute means that it should be given the widest possible latitude to operate in considering whether in an individual case there is an indication of a contrary intent sufficiently convincing to defeat the statute.

The 120-hour Survivorship Period. In effect, the requirement of survival of the testator's death means survival of the 120-hour period following the testator's death. This is because, under Section 2-702(a) [72-2-712(1)], "an individual who is not established to have survived an event ... by 120 hours is deemed to have predeceased the event." As made clear by subsection (a)(6) [72-2-613(1)(f)], for the purposes of Section 2-707 [72-2-717], the "event" to which Section 2-702(a) [72-2-712(1)] relates is the testator's death.

General Rule of Section 2-603 — Subsection (b) [72-2-613(2)]. Subsection (b) [72-2-613(2)] states the general rule of Section 2-603 [72-2-613]. Subsection (b)(1) [72-2-613(2)(a)] applies to individual devises; subsection (b)(2) [72-2-613(2)(b)] applies to devises in class gift form. Together, they show that the "antilapse" label is somewhat misleading. Strictly speaking, these subsections do not reverse the common-law rule of lapse. They do not abrogate the law-imposed condition of survivorship, so that devised property passes to the estates of predeceasing devisees. Subsections (b)(1) [72-2-613(2)(a)] and (b)(2) [72-2-613(2)(b)] leave the law-imposed condition of survivorship intact, but modify the devolution of lapsed devises by providing a statutory substitute gift in the case of specified relatives. The statutory substitute gift is to the devisee's descendants who survive the testator by 120 hours; they take the property to which the devisee would have been entitled had the devisee survived the testator by 120 hours.

Class Gifts. In line with modern policy, subsection (b)(2) [72-2-613(2)(b)] continues the pre-1990 Code's approach of expressly extending the antilapse protection to class gifts. Class gifts to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," "family," or a class described by language of similar import are excluded, however, because antilapse protection is unnecessary in class gifts of these types. They already contain within themselves the idea of representation, under which a deceased class member's descendants are substituted for him or her. See Sections 2-708 [72-2-718], 2-709 [72-2-719], 2-711 [72-2-721].

"Void" Gifts. By virtue of subsection (a)(4) [72-2-613(1)(d)], subsection (b) [72-2-613(2)] applies to the so-called "void" gift, where the devisee is dead at the time of execution of the will. Though contrary to some decisions, it seems likely that the testator would want the descendants of a person included, for example, in a class term but dead when the will is made to be treated like the descendants of another member of the class who was alive at the time the will was executed but who dies before the testator.

Protected Relatives. The specified relatives whose devises are protected by this section are the testator's grandparents and their descendants and the testator's stepchildren or, in the case of a testamentary exercise of a power of appointment, the testator's (donee's) or donor's grandparents and their descendants and the testator's or donor's stepchildren.

Section 2-603 [72-2-613] extends the "antilapse" protection to devises to the testator's own stepchildren. The term "stepchild" is defined in subsection (a)(5) [72-2-613(1)(e)]. Antilapse protection is not extended to descendants of the testator's stepchildren or to stepchildren of any of the testator's relatives. As to the testator's own stepchildren, note that under Section 2-804 [72-2-814] a devise to a stepchild might be revoked if the testator and the stepchild's adoptive or biological parent become divorced; the antilapse statute does not, of course, apply to a deceased stepchild's devise if it was revoked by Section 2-804 [72-2-814]. Subsections (b)(1) [72-2-613(2)(a)] and (b)(2) [72-2-613(2)(b)] give this result by providing that the substituted descendants take the property to which the deceased devisee or deceased class member would have been entitled if he or she had survived the testator. If a deceased stepchild whose devise was revoked by Section 2-804 [72-2-814] had survived the testator, that stepchild would not have been entitled to his or her devise, and so his or her descendants take nothing, either.

Other than stepchildren, devisees related to the testator by affinity are not protected by this section.

Section 2-603 [72-2-613] Applicable to Testamentary Exercise of a Power of Appointment Where Appointee Fails to Survive the Testator. Subsections (a)(3), (4), (5), (7) [72-2-613(1)(c), (1)(d), (1)(e), (1)(g)], and (b)(5) [72-2-613(2)(e)] extend the protection of this section to appointees under a power of appointment exercised by the testator's will. The extension of the antilapse statute to powers of appointment is a step long overdue. The extension brings the statute into line with the Restatement (Second) of Property (Donative Transfers) § 18.6 (1986).

Substituted Gift. The substitute gifts provided for by subsections (b)(1) [72-2-613(2)(a)] and (b)(2) [72-2-613(2)(b)] are to the deceased devisee's descendants. They include adopted persons and children of unmarried parents to the extent they would inherit from the devisee; see Sections 1-201 [72-1-103] and 2-114 [72-2-124].

The 120-hour survival requirement stated in Section 2-702 [72-2-712] does not require descendants who would be substituted for their parent by this section to survive *their parent* by any set period.

The statutory substitute gift is divided among the devisee's descendants "by representation," a term defined in Section 2-709(b) [72-2-719(2)].

Section 2-603 [72-2-613] Restricted to Wills. Section 2-603 [72-2-613] is applicable only when a devisee of a *will* predeceases the testator. It does not apply to beneficiary designations in life-insurance policies, retirement plans, or transfer-on-death accounts, nor does it apply to inter-vivos trusts, whether revocable or irrevocable. See, however, Sections 2-706 [72-2-716] and 2-707 [72-2-717] for rules of construction applicable when the beneficiary of a life-insurance policy, a retirement plan, or a transfer-on-death account predeceases the decedent or when the beneficiary of a future interest is not living when the interest is to take effect in possession or enjoyment.

Contrary Intention — the Rationale of Subsection (b)(3) [72-2-613(2)(c)]. An antilapse statute is a rule of construction, designed to carry out presumed intention. In effect, Section 2-603

[72-2-613] declares that when a testator devises property "to A (a specified relative)," the testator (if he or she had thought further about it) is presumed to have wanted to add: "but if A is not alive (120 hours after my death), I devise the property in A's stead to A's descendants (who survive me by 120 hours)."

Under Section 2-601 [72-2-611], the rule of Section 2-603 [72-2-613] yields to a finding of a contrary intention. A foolproof means of expressing a contrary intention is to add to a devise the phrase "and not to [the devisee's] descendants." In the case of a power of appointment, the phrase "and not to an appointee's descendants" can be added by the donor of the power in the document creating the power of appointment, if the donor does not want the antilapse statute to apply to an appointment under a power. Another method of expressing a contrary intention as to nonresiduary devises is to add to the residuary clause the phrase "including all lapsed or failed devises." Another foolproof method of expressing a contrary intention is to add a separate clause stating that all lapsed or failed nonresiduary devises are to pass under the residuary clause. See Section 2-603(a)(1) [72-2-613(1)(a)].

A much-litigated question is whether mere words of survivorship — such as in a devise "to my daughter, A, if A survives me" or "to my surviving children" — *automatically* defeat the antilapse statute. Lawyers who believe that the attachment of words of survivorship to a devise is a foolproof method of defeating an antilapse statute are mistaken. The very fact that the question is litigated so frequently is itself proof that the use of mere words of survivorship is far from foolproof. In addition, the results of the litigated cases are divided on the question. To be sure, many cases hold that mere words of survivorship do automatically defeat the antilapse statute. E.g., Estate of Stroble, 6 Kan.App.2d 955, 636 P.2d 236 (1981); Annot., 63 A.L.R.2d 1172, 1186 (1959); Annot., 92 A.L.R. 846, 857 (1934). Other cases, however, reach the opposite conclusion. E.g., Estate of Ulrikson, 290 N.W.2d 757 (Minn. 1980) (residuary devise to testator's brother Melvin and sister Rodine, and "in the event that either one of them shall predecease me, then to the other surviving brother or sister"; Melvin and Rodine predeceased testator, Melvin but not Rodine leaving descendants who survived testator; court held residue passed to Melvin's descendants under antilapse statute); Detzel v. Nieberding, 7 Ohio Misc. 262, 219 N.E.2d 327 (P. Ct. 1966) (devise of $5,000 to sister "provided she be living at the time of my death"; sister predeceased testator; court held $5,000 devise passed under antilapse statute to sister's descendants); Henderson v. Parker, 728 S.W.2d 768 (Tex. 1987) (devise of all of testator's property "unto our surviving children of this marriage"; two of testator's children survived testator, but one child, William, predeceased testator leaving descendants who survived testator; court held that share William would have taken passed to William's descendants under antilapse statute; words of survivorship found ineffective to counteract antilapse statute because court interpreted those words as merely restricting the devisees to those living at the time the will was executed); see also Restatement (Second) of Property (Donative Transfers) § 27.2 comment f, illustration 5; cf. id. § 27.1 comment e, illustration 6.

Subsection (b)(3) [72-2-613(2)(c)] adopts the position that mere words of survivorship do not — by themselves, *in the absence of additional evidence* — lead to *automatic* defeat of the antilapse statute. As noted in French, "Antilapse Statutes Are Blunt Instruments: A Blueprint for Reform," 37 Hastings L. J. 335, 369 (1985), "courts have tended to accord too much significance to survival requirements when deciding whether to apply antilapse statutes."

A formalistic argument sometimes employed by courts adopting the view that words of survivorship automatically defeat the antilapse statute is that, when words of survivorship are used, there is nothing upon which the antilapse statute can operate; the devise itself, it is said, is eliminated by the devisee's having predeceased the testator. The language of subsections (b)(1) [72-2-613(2)(a)] and (b)(2) [72-2-613(2)(b)], however, nullify this formalistic argument by providing that the predeceased devisee's descendants take the property to which the devisee would have been entitled had the devisee survived the testator.

Another objection to applying the antilapse statute is that mere words of survivorship somehow establish a contrary intention. The argument is that attaching words of survivorship indicates that the testator thought about the matter and intentionally did not provide a substitute gift to the devisee's descendants. At best, this is an inference only, which may or may not accurately reflect the testator's actual intention. An equally plausible inference is that the words of survivorship are in the testator's will merely because the testator's lawyer used a will form with words of survivorship. The testator who went to lawyer X and ended up with a will containing devises with a survivorship requirement could by chance have gone to lawyer Y and ended up with a will containing devises with no survivorship requirement — with no different intent on the testator's part from one case to the other.

Even a lawyer's deliberate use of mere words of survivorship to defeat the antilapse statute does not guarantee that the lawyer's intention represents the client's intention. Any linkage between the lawyer's intention and the client's intention is speculative unless the lawyer discussed the matter with the client. Especially in the case of younger-generation devisees, such as the client's children or nieces and nephews, it cannot be assumed that all clients, on their own, have anticipated the possibility that the devisee will predecease the client and will have thought through who should take the devised property in case the never-anticipated event happens.

If, however, evidence establishes that the lawyer did discuss the question with the client, and that the client decided that, for example, if the client's child predeceases the client, the deceased child's children (the client's grandchildren) should not take the devise in place of the deceased child, then the combination of the words of survivorship and the extrinsic evidence of the client's intention would support a finding of a contrary intention under Section 2-601 [72-2-611]. See Example 1, below. For this reason, Sections 2-601 [72-2-611] and 2-603 [72-2-613] will not expose lawyers to malpractice liability for the amount that, in the absence of the finding of the contrary intention, would have passed under the antilapse statute to a deceased devisee's descendants. The success of a malpractice claim depends upon sufficient evidence of a client's intention and the lawyer's failure to carry out that intention. In a case in which there is evidence that the client did not want the antilapse statute to apply, that evidence would support a finding of a contrary intention under Section 2-601 [72-2-611], thus preventing the client's intention from being defeated by Section 2-603 [72-2-613] and protecting the lawyer from liability for the amount that, in the absence of the finding of a contrary intention, would have passed under the antilapse statute to a deceased devisee's descendants.

Any inference about actual intention to be drawn from mere words of survivorship is especially problematic in the case of will substitutes such as life insurance, where it is less likely that the insured had the assistance of a lawyer in drafting the beneficiary designation. Although Section 2-603 [72-2-613] only applies to wills, a companion provision is Section 2-706 [72-2-716], which applies to will substitutes, including life insurance. Section 2-706 [72-2-716] also contains language similar to that in subsection (b)(3) [72-2-613(2)(c)], directing that words of survivorship do not, in the absence of additional evidence, indicate an intent contrary to the application of this section. It would be anomalous to provide one rule for wills and a different rule for will substitutes.

The basic operation of Section 2-603 [72-2-613] is illustrated in the following example:

Example 1. G's will devised "$10,000 to my surviving children." G had two children, A and B. A predeceased G, leaving a child, X, who survived G by 120 hours. B also survived G by 120 hours.

Solution: Under subsection (b)(2) [72-2-613(2)(b)], X takes $5,000 and B takes $5,000. The substitute gift to A's descendant, X, is not defeated by the fact that the devise is a class gift nor, under subsection (b)(3) [72-2-613(2)(c)], is it automatically defeated by the fact that the word "surviving" is used.

Note that subsection (b)(3) [72-2-613(2)(c)] provides that words of survivorship are not by themselves to be taken as expressing a contrary intention for purposes of Section 2-601 [72-2-611]. Under Section 2-601 [72-2-611], a finding of a contrary intention could appropriately be based on affirmative evidence that G deliberately used the words of survivorship to defeat the antilapse statute. In the case of such a finding, B would take the full $10,000 devise. Relevant evidence tending to support such a finding might be a pre-execution letter or memorandum to G from G's attorney stating that G's attorney used the word "surviving" for the purpose of assuring that if one of G's children were to predecease G, that child's descendants would not take the predeceased child's share under any statute or rule of law.

In the absence of persuasive evidence of a contrary intent, however, the antilapse statute, being remedial in nature, and tending to preserve equality among different lines of succession, should be given the widest possible chance to operate and should be defeated only by a finding of intention that *directly contradicts* the substitute gift created by the statute. Mere words of survivorship — by themselves — do not directly contradict the statutory substitute gift to the descendants of a deceased devisee. The common law of lapse already conditions all devises on survivorship (and Section 2-702 [72-2-712] presumptively conditions all devises on survivorship by 120 hours). As noted above, the antilapse statute does not reverse the law-imposed requirement of survivorship in any strict sense; it merely alters the devolution of lapsed devises by substituting the deceased devisee's descendants in place of those who would otherwise take. Thus, mere words of survivorship merely *duplicate* the law-imposed survivorship requirement deriving from the rule of lapse, and do not contradict the statutory substitute gift created by subsection (b)(1) [72-2-613(2)(a)] or (b)(2) [72-2-613(2)(b)].

Subsection (b)(4) [72-2-613(2)(d)]. Under subsection (b)(4) [72-2-613(2)(d)], a statutory substitute gift is superseded if the testator's will expressly provides for its own alternative devisee and if that alternative devisee is otherwise entitled to take under the terms of the will. For example, the statute's substitute gift would be superseded in the case of a devise "to A if A survives me; if not, to B," where B survived the testator but A predeceased the testator leaving descendants who survived the testator. Under subsection (b)(4) [72-2-613(2)(d)], B, not A's descendants, would take. In the same example, however, it should be noted that A's descendants *would* take under the statute if B as well as A predeceased the testator.

Subsection (b)(4) [72-2-613(2)(d)] is illustrated by the following examples:

Example 2. G's will devised "$10,000 to my sister, S" and "the rest, residue, and remainder of my estate to X-Charity." S predeceased G, leaving a child, N, who survived G by 120 hours.

Solution: S's $10,000 devise goes to N, not to X-Charity. The residuary clause does not create an "alternative devise," as defined in subsection (a)(1) [72-2-613(1)(a)], because neither it nor any other language in the will specifically provides that S's $10,000 devise or lapsed or failed devises in general pass under the residuary clause.

Example 3. Same facts as Example 2, except that G's residuary clause devised "the rest, residue, and remainder of my estate, including all failed and lapsed devises, to X-Charity."

Solution: S's $10,000 devise goes to X-Charity, not to N. Under subsection (b)(4) [72-2-613(2)(d)], the substitute gift to N created by subsection (b)(1) [72-2-613(2)(a)] is superseded. The residuary clause expressly creates an "alternative devise," as defined in subsection (a)(1) [72-2-613(1)(a)], in favor of X-Charity and that alternative devisee, X-Charity, is otherwise entitled to take under the terms of the will.

Example 4. G's will devised "$10,000 to my two children, A and B, or to the survivor of them." A predeceased G, leaving a child, X, who survived G by 120 hours. B also survived G by 120 hours.

Solution: B takes the full $10,000. Because the takers of the $10,000 devise are both named and numbered ("my *two* children, *A* and *B*"), the devise is not in the form of a class gift. The substance of the devise is as if it read "half of $10,000 to A, but if A predeceases me, that half to B if B survives me and the other half of $10,000 to B, but if B predeceases me, that other half to A if A survives me." With respect to each half, A and B have alternative devises, one to the other. Subsection (b)(1) [72-2-613(2)(a)] creates a substitute gift to A's descendant, X, with respect to A's alternative devise in each half. Under subsection (b)(4) [72-2-613(2)(d)], however, that substitute gift to X with respect to each half is superseded by the alternative devise to B because the alternative devisee, B, survived G by 120 hours and is otherwise entitled to take under G's will.

Example 5. G's will devised "$10,000 to my two children, A and B, or to the survivor of them." A and B predeceased G. A left a child, X, who survived G by 120 hours; B died childless.

Solution: X takes the full $10,000. Because the devise itself is in the same form as the one in Example 4, the substance of the devise is as if it read "half of $10,000 to A, but if A predeceases me, that half to B if B survives me and the other half of $10,000 to B, but if B predeceases me, that other half to A if A survives me." With respect to each half, A and B have alternative devises, one to the other. As in Example 4, subsection (b)(1) [72-2-613(2)(a)] creates a substitute gift to A's descendant, X, with respect to A's alternative devise in each half. Unlike the situation in Example 4, however, neither substitute gift to X is superseded under subsection (b)(4) [72-2-613(2)(d)] by the alternative devise to B because, in this case, the alternative devisee, B, failed to survive G by 120 hours and is therefore not entitled to take either half under G's will.

Note that the order of deaths as between A and B is irrelevant. The phrase "or to the survivor" does not mean the survivor as between them if they both predecease G; it refers to the one who survives G if one but not the other survives G.

Subsection (c) [72-2-613(3)]. Subsection (c) [72-2-613(3)] is necessary because there can be cases in which subsections (b)(1) [72-2-613(2)(a)] or (b)(2) [72-2-613(2)(b)] create substitute gifts with respect to two or more alternative devises of the same property, and those substitute gifts are not superseded under the terms of subsection (b)(4) [72-2-613(2)(d)]. Subsection (c) [72-2-613(3)] provides the tie-breaking mechanism for such situations.

The initial step is to determine which of the alternative devises would take effect had all the devisees themselves survived the testator (by 120 hours). In subsection (c) [72-2-613(3)], this devise is called the "primary devise." Unless subsection (c)(2) [72-2-613(3)(b)] applies, subsection (c)(1) [72-2-613(3)(a)] provides that the devised property passes under substitute gift created with respect to the primary devise. This substitute gift is called the "primary substitute gift." Thus, the devised property goes to the descendants of the devisee or devisees of the primary devise.

Subsection (c)(2) [72-2-613(3)(b)] provides an exception to this rule. Under subsection (c)(2) [72-2-613(3)(b)], the devised property does not pass under the primary substitute gift if there is a "younger-generation devise" — defined as a devise that (A) is to a descendant of a devisee of the primary devise, (B) is an alternative devise with respect to the primary devise, (C) is a devise for which a substitute gift is created, and (D) would have taken effect had all the deceased devisees who left surviving descendants survived the testator except the deceased devisee or devisees of the primary devise. If there is a younger-generation devise, the devised property passes under the "younger-generation substitute gift" — defined as the substitute gift created with respect to the younger-generation devise.

Subsection (c) [72-2-613(3)] is illustrated by the following examples:

Example 6. G's will devised "$5,000 to my son, A, if he is living at my death; if not, to my daughter, B" and devised "$7,500 to my daughter, B, if she is living at my death; if not, to my son, A." A and B predeceased G, both leaving descendants who survived G by 120 hours.

Solution: A's descendants take the $5,000 devise as substitute takers for A, and B's descendants take the $7,500 devise as substitute takers for B. In the absence of a finding based on affirmative evidence such as described in the solution to Example 1, the mere words of survivorship do not by themselves indicate a contrary intent.

Both devises require application of subsection (c) [72-2-613(3)]. In the case of both devises, the statute produces a substitute gift for the devise to A and for the devise to B, each devise being an alternative devise, one to the other. The question of which of the substitute gifts takes effect is resolved by determining which of the devisees themselves would take the devised property if both A and B had survived G by 120 hours.

With respect to the devise of $5,000, the primary devise is to A because A would have taken the devised property had both A and B survived G by 120 hours. Consequently, the primary substitute gift is to A's descendants and that substitute gift prevails over the substitute gift to B's descendants.

With respect to the devise of $7,500, the primary devise is to B because B would have taken the devised property had both A and B survived G by 120 hours, and so the substitute gift to B's descendants is the primary substitute gift and it prevails over the substitute gift to A's descendants.

Subsection (c)(2) [72-2-613(3)(b)] is inapplicable because there is no younger-generation devise. Neither A nor B is a descendant of the other.

Example 7. G's will devised "$10,000 to my son, A, if he is living at my death; if not, to A's children, X and Y." A and X predeceased G. A's child, Y, and X's children, M and N, survived G by 120 hours.

Solution: Half ($5,000) of the devise goes to Y. The other half ($5,000) goes to M and N. The disposition of the latter half requires application of subsection (c) [72-2-613(3)].

Subsection (b)(1) [72-2-613(2)(a)] produces substitute gifts as to that half for the devise of that half to A and for the devise of that half to X, each of these devises being alternative devises, one to the other. The primary devise is to A. But there is also a younger-generation devise, the alternative devise to X. X is a descendant of A, X would take if X but not A survived G by 120 hours, and the devise is one for which a substitute gift is created by subsection (b)(1) [72-2-613(2)(a)]. So, the younger-generation substitute gift, which is to X's descendants (M and N), prevails over the primary substitute gift, which is to A's descendants (Y, M, and N).

Example 8. Same facts as Example 5, except that both A and B predeceased the testator and both left descendants who survived the testator by 120 hours.

Solution: A's descendants take half ($5,000) and B's descendants take half ($5,000).

As to the half devised to A, subsection (b)(1) [72-2-613(2)(a)] produces a substitute gift to A's descendants and a substitute gift to B's descendants (because the language "or to the survivor of them" created an alternative devise in B of A's half). As to the half devised to B, subsection (b)(1) [72-2-613(2)(a)] produces a substitute gift to B's descendants and a substitute gift to A's descendants (because the language "or to the survivor of them" created an alternative devise in A of B's half). Thus, with respect to each half, resort must be had to subsection (c) [72-2-613(3)] to determine which substitute gift prevails.

Under subsection (c)(1) [72-2-613(3)(a)], each half passes under the primary substitute gift. The primary devise as to A's half is to A and the primary devise as to B's half is to B because, if both A and B had survived G by 120 hours, A would have taken half ($5,000) and B would have taken half ($5,000). Neither A nor B is a descendant of the other, so subsection (c)(2) [72-2-613(3)(b)] does not apply. Only if one were a descendant of the other would the other's descendants take it all, under the rule of subsection (c)(2) [72-2-613(3)(b)].

Compiler's Comments

2019 Amendment: Chapter 313 in (1) inserted definition of descendant of a grandparent and definition of descendants, in (1)(h) substituted current text for former text that read: ""Surviving devisee or "surviving descendant" means a devisee or a descendant who neither predeceased the testator nor is considered to have predeceased the testator under 72-2-712"; in (2)(d) at end of introductory clause substituted "if" for "only if an expressly designated devisee of the alternative devise is entitled to take under the will"; inserted (2)(d)(i) and (2)(d)(ii) regarding conditions for the substitute gift to be superseded by the alternative devise; and made minor changes in style. Amendment effective October 1, 2019.

1995 Amendment: Chapter 592 in (2)(b), at end of first sentence, substituted "surviving descendants of any deceased devisee" for "deceased devisee or devisee's surviving descendants".

1993 Amendment: Chapter 494 substituted current text concerning antilapse, deceased devisee, and class gifts for former text that read: "(1) If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee, they take equally, but if of unequal degree then those of more remote degree take by representation.

(2) One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purposes of this section whether his death occurred before or after the execution of the will."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-603.

Case Notes

Public Policy in Favor of Statutory Apportionment Precluded by Specific Provisions in Will — Estate Taxes to Be Paid by Residual Estate: In In re Estate of Kuralt, 2000 MT 359, 303 M 335, 15 P3d 931 (2000), the Supreme Court found that a letter by the decedent was a valid holographic codicil to the decedent's will conveying real property in Montana to the decedent's companion, but a question remained whether the estate or the companion was responsible for the estate taxes on the Montana property. Under the law of New York, where the will was admitted to probate, and similar law in Montana, there is a strong public policy in favor of statutory apportionment unless the will provides otherwise. In this case, the decedent's will specifically provided that estate taxes be paid by the residual estate without apportionment, which included those generated by the bequest of the Montana property by codicil. Because the language of the will was clear and unambiguous, the District Court correctly concluded that estate taxes on the Montana property must be paid by the residual estate. In re Estate of Kuralt, 2003 MT 92, 315 M 177, 68 P3d 662 (2003).

72-2-614. Failure of testamentary provision.

Official Comments

This section applies only if Section 2-603 [72-2-613] does not produce a substitute taker for a devisee who fails to survive the testator by 120 hours. There is also a special rule for disclaimers contained in Section 2-801 [72-2-811, now repealed]; a disclaimed devise may be governed by either Section 2-603 [72-2-613] or the present section, depending on the circumstances.

Compiler's Comments

1993 Amendment: Chapter 494 in (2), at end, substituted "the interest of each in the remaining part of the residue" for "their interests in the residue"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-604.

72-2-615. Increase in securities — accessions.

Official Comments

Purpose and Scope of Revisions. The rule of subsection (a) [72-2-615(1)], as revised, relates to a devise of securities (such as a devise of 100 shares of XYZ Company), regardless of whether that devise is characterized as a general or specific devise. If the testator executes a will that makes a devise of securities and if the testator then owned securities that meet the description in the will, then the devisee is entitled not only to the described securities to the extent they are owned by the testator at death; the devisee is also entitled to any additional securities owned by the testator at death that were acquired by the testator during his or her lifetime after the will was executed and were acquired as a result of the testator's ownership of the described securities by reason of an action specified in subsections (a)(1) [72-2-615(1)(a)], (a)(2) [72-2-615(1)(b)], or (a)(3) [72-2-615(1)(c)], such as the declaration of stock splits or stock dividends or spinoffs of a subsidiary.

The impetus for these revisions derives from the rule on stock splits enunciated by Bostwick v. Hurstel, 364 Mass. 282, 304 N.E.2d 186 (1973), and now codified in Massachusetts as to actions covered by subsections (a)(1) [72-2-615(1)(a)] and (a)(2) [72-2-615(1)(b)]. Mass. Gen. Laws c. 191, § 1A(4).

Subsection (a) [72-2-615(1)] Not Exclusive. Subsection (a) [72-2-615(1)] is not exclusive, i.e., it is not to be understood as setting forth the only conditions under which additional securities of the types described in paragraphs (1) [72-2-615(1)(a)], (2) [72-2-615(1)(b)], and (3) [72-2-615(1)(c)] are included in the devise. For example, the express terms of subsection (a) [72-2-615(1)] do not apply to a case in which the testator owned the described securities when he or she executed the will, but later sold (or otherwise disposed of) those securities, and then later purchased (or otherwise acquired) securities that meet the description in the will, following which additional securities of the type or types described in paragraphs (1) [72-2-615(1)(a)], (2) [72-2-615(1)(b)], or (3) [72-2-615(1)(c)] are acquired as a result of the testator's ownership of the later-acquired securities. Nor do the express terms of subsection (a) [72-2-615(1)] apply to a similar (but less likely) case in which the testator did not own the described securities when he or she executed the will, but later purchased (or otherwise acquired) such securities. Subsection (a) [72-2-615(1)] does not preclude a court, in an appropriate case, from deciding that additional securities of the type described in paragraphs (1) [72-2-615(1)(a)], (2) [72-2-615(1)(b)], or (3) [72-2-615(1)(c)] acquired as a result of the testator's ownership of the later-acquired securities pass under the devise in either of these two cases, or in other cases if appropriate.

Subsection (b) [72-2-615(2)] codifies existing law that distributions in cash, such as interest, accrued rent, or cash dividends declared and payable as of a record date before the testator's death, do not pass as a part of the devise. It makes no difference whether such cash distributions were paid before or after death. See Section 4 of the Revised Uniform Principal and Income Act.

Cross Reference. The term "organization" is defined in Section 1-201 [72-1-103].

Compiler's Comments

1993 Amendment: Chapter 494 substituted current text concerning increases in securities for former text that read: "(1) If the testator intended a specific devise of certain securities rather than the equivalent value thereof, the specific devisee is entitled only to:

(a) as much of the devised securities as is a part of the estate at time of the testator's death;

(b) any additional or other securities of the same entity owned by the testator by reason of action initiated by the entity, excluding any securities acquired by exercise of purchase options;

(c) securities of another entity owned by the testator as a result of a merger, consolidation, reorganization, or other similar action initiated by the entity; and

(d) any additional securities of the entity owned by the testator as a result of a plan of reinvestment.

(2) Distributions prior to death with respect to a specifically devised security not provided for in subsection (1) are not part of the specific devise."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

1989 Amendment: At end of (1)(b) inserted exclusion clause; and at end of (1)(d), after "reinvestment", deleted "if it is a regulated investment company".

1989 Editorial Comment: This change results from an amendment proposed by the Joint Editorial Board of the national Uniform Probate Code in 1987. Subsection (1)(d) formerly provided that the specific devisee was entitled to additional securities of the entity owned by the testator as the result of a plan of reinvestment in a regulated investment company. This change reflects the fact that many entities other than regulated investment companies offer dividend reinvestment plans.

Additionally, subsection (1)(b) was modified to bring it into conformance with the national Uniform Probate Code in another respect. The specific devisee is entitled to any additional or other securities of the same entity owned by the testator by reason of action initiated by the entity, excluding any securities acquired by exercise of purchase options. This exclusion was not part of former Montana law. It seems wise to distinguish between a testator who acquires additional shares by reason of a corporate reorganization and does not pay any additional consideration and a testator who pays additional consideration through the exercise of a purchase option. See corresponding national Uniform Probate Code section 2-607.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-605.

Case Notes

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Will Not Changed After Gift of Portion of Estate Prior to Death — Distribution of Remaining Shares: In her will, deceased made specific devise of 147 shares of stock to two nephews and a grandnephew. Prior to death, she distributed 44 shares but never changed the will to reflect the reduction in her estate. The Supreme Court held that deceased intended a specific devise of the securities rather than the equivalent value thereof, thus the specific devisees were entitled only to as much of the securities as remained in the estate at the time of death. Under 72-2-515 (renumbered 72-2-619), an inter vivos gift may be deducted from a devise only if such intent is expressed in the will. Absent such intent, the remaining 103 shares must be distributed on a proportional basis consistent with the percentages listed in the will. In re Estate of Wales, 223 M 515, 727 P2d 536, 43 St. Rep. 1958 (1986).

72-2-616. Nonademption of specific devises — unpaid proceeds of sale, condemnation, or insurance — sale by conservator or agent.

Official Comments

Purpose and Scope of Revisions. Under the "identity" theory followed by most courts, the common-law doctrine of ademption by extinction is that a specific devise is adeemed — rendered ineffective — if the specifically devised property is not owned by the testator at death. In applying the "identity" theory, courts do not inquire into the testator's intent to determine whether the testator's objective in disposing of the specifically devised property was to revoke the devise. The only thing that matters is that the property is no longer owned at death. The application of the "identity" theory of ademption has resulted in harsh results in a number of cases, where it was reasonably clear that the testator did not intend to revoke the devise. Notable examples include McGee v. McGee, 122 R.I. 837, 413 A.2d 72 (1980); Estate of Dungan, 31 Del.Ch. 551, 73 A.2d 776 (1950).

Recently, some courts have begun to break away from the "identity" theory and adopt instead the so-called "intent" theory. E.g., Estate of Austin, 113 Cal. App. 3d 167, 169 Cal. Rptr. 648 (1980). The major import of the revisions of this section is to adopt the "intent" theory in subsections (a)(5) [72-2-616(1)(e)] and (a)(6) [72-2-616(1)(f)].

Subsection (a)(5) [72-2-616(1)(e)] does not import a tracing principle into the question of ademption, but rather should be seen as a sensible "mere change in form" principle.

Example. G's will devised to X "my 1984 Ford." After she executed her will, she sold her 1984 Ford and bought a 1988 Buick; later, she sold the 1988 Buick and bought a 1993 Chrysler. She still owned the 1993 Chrysler when she died. Under subsection (a)(5) [72-2-616(1)(e)], X takes the 1993 Chrysler.

Variation. If G had sold her 1984 Ford (or any of the replacement cars) and used the proceeds to buy shares in a mutual fund, which she owned at death, subsection (a)(5) [72-2-616(1)(e)] does not give X the shares in the mutual fund. If G owned an automobile at death as a replacement for her 1984 Ford, however, X would be entitled to that automobile, even though it was bought with funds other than the proceeds of the sale of the 1984 Ford.

Subsection (a)(6) [72-2-616(1)(f)] applies only to the extent the specifically devised property is not in the testator's estate at death and its value or its replacement is not covered by the provisions of paragraphs (1) through (5) [72-2-616(1)(a) through (1)(e)]. In that event, subsection (a)(6) [72-2-616(1)(f)] creates a mild presumption against ademption by extinction, imposing on the party claiming that an ademption has occurred the burden of establishing that the facts and circumstances indicate that ademption of the devise was intended by the testator or that ademption of the devise is consistent with the testator's manifested plan of distribution.

Example. G's will devised to his son, A, "that diamond ring I inherited from grandfather" and devised to his daughter, B, "that diamond broach I inherited from grandmother." After G executed his will, a burglar entered his home and stole the diamond ring (but not the diamond broach, as it was in G's safety deposit box at his bank).

Under subsection (a)(6) [72-2-616(1)(f)], the party claiming that A's devise was adeemed would be unlikely to be able to establish that G intended A's devise to be adeemed or that ademption is consistent with G's manifested plan of distribution. In fact, G's equalizing devise to

B affirmatively indicates that ademption is inconsistent with G's manifested plan of distribution. The likely result is that, under subsection (a)(6) [72-2-616(1)(f)], A would be entitled to the value of the diamond ring.

Compiler's Comments

2019 Amendment: Chapter 313 deleted former (1)(f) that read: "(f) unless the facts and circumstances indicate that ademption of the devise was intended by the testator or ademption of the devise is consistent with the testator's manifested plan of distribution, the value of the specifically devised property to the extent the specifically devised property is not in the testator's estate at death and its value or its replacement is not covered by subsections (1)(a) through (1)(e)"; and inserted (1)(f) regarding a pecuniary devise or other specifically devised property disposed of during the testator's lifetime". Amendment effective October 1, 2019.

1993 Amendment: Chapter 494 in (1), after "property", inserted "in the testator's estate at death"; in (1)(c), after "insurance on", inserted "or other recovery for injury to"; in (1)(d), after "death", inserted "and acquired" and after "security" inserted "interest"; inserted (1)(e) concerning real or tangible personal property; inserted (1)(f) concerning indication of ademption of devise by testator or consistent with plan of distribution; in (2), in first sentence near beginning after "sold", inserted "or mortgaged", in two places substituted "incapacitated principal" for "principal who is under a disability", after "insurance proceeds" inserted "or recovery for an injury to property", after the second "incapacitated principal" deleted "as a result of condemnation, fire, or casualty", after "sale price" inserted "the amount of the unpaid loan", and at end inserted "or the recovery" and deleted second sentence that read: "This subsection does not apply if after the sale, condemnation, or casualty it is adjudicated that the disability of the testator has ceased and the testator survives the adjudication by 1 year"; in (3) substituted "subsection (2)" for "this subsection"; inserted (4) concerning nonapplicability if incapacity ceased and testator survived determination by 1 year; inserted (5) concerning agent acting within authority of a durable power of attorney; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

1989 Amendment: Deleted former (1) that read: "(1) If specifically devised property is sold by a conservator or if a condemnation award or insurance proceeds are paid to a conservator as a result of condemnation, fire, or casualty, the specific devisee has the right to a pecuniary devise equal to so much of the sale price, condemnation award, or insurance proceeds as remains in the estate and is identifiable at the time of the decedent's death. This subsection does not apply if subsequent to the sale, condemnation, or casualty it is adjudicated that the disability of the testator has ceased and the testator survives the adjudication by 1 year. The right of the specific devisee under this subsection is reduced by any right he has under subsection (2)"; in (1), before "specifically devised property", deleted "remaining"; inserted (2) relating to right of specific devisee to sale, condemnation, or insurance proceeds; and made minor change in punctuation.

1989 Editorial Comment: This change results from amendments proposed by the Joint Editorial Board of the national Uniform Probate Code in 1975 and 1987. This change reflects the increased use of durable powers of attorney. Additionally, this change eliminates a requirement of former law, peculiar to Montana, that the sale price, condemnation award, or insurance proceeds remain in the estate and be "identifiable at the time of the decedent's death". That provision mandated some tracing of assets, which was thought to be impractical. See corresponding national Uniform Probate Code section 2-608.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-606.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

No Ademption of Real Estate Lots According to Will's Terms — Ademption of Certificates of Deposit After Prior Disposal: Decedent left a will devising three real estate lots and five certificates of deposit to his granddaughter and the children of a grandson and appointing his other grandson as his personal representative and as the residual beneficiary. The District Court properly found that the personal representative had not established that the testator intended ademption of the lots when he sold them prior to his death because the will specifically discussed the disposition of proceeds from the potential sale of the lots, reinforcing this section's mild presumption against ademption. However, the District Court erred by ordering the personal representative to distribute the value of the certificates to the named beneficiaries, rather than to himself as the residual beneficiary, because the certificates were no longer in existence and the will did not discuss any proceeds from their sale. In re Estate of Schreiber, 2015 MT 282, 381 Mont. 173, 357 P.3d 920.

General Devise — No Ademption Absent Evidence of Testator's Intent to Adeem: Deisz left a holographic will in which he chose his companion to receive the bulk of his estate, other family members received much more modest sums in life insurance, and the remaining members received only one ring each. Deisz's father submitted an application for informal probate and appointment as personal representative, then amended the filing as an intestate estate on grounds that the will was invalid. The companion filed for formal probate, seeking to have the will declared valid, the estate made testate, and Deisz's distribution wishes followed. The District Court found the will to be a valid holographic will creating specific devises and concluded that the devises were adeemed based on the sale of specific assets to pay for Deisz's medical care. The companion appealed, and the Supreme Court reversed. Based on the distribution of assets and evidence that Deisz intended to make sure that the companion was well taken care of, coupled with the presumption in favor of finding a general devise, the devise to the companion was general rather than specific. By definition, a general devise cannot be adeemed, and the estate failed to meet its burden of establishing any facts and circumstances to indicate that Deisz intended to adeem the devise to the companion or that such a distribution would be consistent with Deisz's plan of distribution. The District Court's conclusion that the companion's willingness to see the estate partially depleted for Deisz's best interests signaled the companion's intention to relinquish her share of the estate was not supported by the record. It was Deisz's intent, not the companion's, that was relevant, and there was no evidence that Deisz intended to revoke the devise to the companion. Absent Deisz's intent or any evidence that Deisz intended to adeem, the provisions of this section controlled. The Supreme Court directed that a neutral representative be appointed to dispose of the remainder of the estate. Holtz v. Deisz, 2003 MT 132, 316 M 77, 68 P3d 828 (2003). See also In re Estate of Wales, 223 M 515, 727 P2d 536 (1986).

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Real Property Subject to Contract as Personalty: Wooten, an attorney, made and executed a holographic will which appointed Grafft as personal representative. The will gave Grafft personalty and a life estate in real property with several charities as remaindermen. Wooten died, and Grafft was appointed personal representative. At the time of death, a portion of the land was subject to a contract for deed. After the death, the buyer defaulted and her interest in the contract and the property was terminated. In response to a petition filed by the remaindermen, the District Court held that all of the land was to pass to the remaindermen, thereby holding that the testator held the property subject to the contract as real property rather than personalty at the time of his death. The Supreme Court overruled that decision, saying that applying statutory rules, the right of decedent in the contracted land was that of a seller under contract and so was personalty. The personal property was specifically devised to Grafft. The decedent's security interest (the default provisions of the contract) also passed to Grafft, and the default after decedent's death was a default in a contract vested in Grafft, subject to the administration of the estate. In re the Estate of Wooten, 198 M 132, 643 P2d 1196, 39 St. Rep. 816 (1982).

72-2-617. Nonexoneration.

Official Comments

See Section 3-814 [72-3-812] empowering the personal representative to pay an encumbrance under some circumstances; the last sentence of that section makes it clear that such payment does not increase the right of the specific devisee. The present section governs the substantive rights of the devisee. The common-law rule of exoneration of the specific devise is abolished by this section, and the contrary rule is adopted.

For the rule as to exempt property, see Section 2-403 [72-2-413].

The rule of this section is not inconsistent with Section 2-606(b) [72-2-616(2)]. If a conservator or agent for an incapacitated principal mortgages specifically devised property, Section 2-606(b) [72-2-616(2)] provides that the specific devisee is entitled to a pecuniary devise equal to the amount of the unpaid loan. Section 2-606(b) [72-2-616(2)] does not contradict this section, which provides that the specific devise passes subject to any mortgage interest existing at the date of death, without right of exoneration.

Compiler's Comments

1993 Amendment: Chapter 494 revised the catchline but did not make a change in the statute text.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-607.

Case Notes

Spouse's Claim Against Estate for Contribution on Motor Home Debt Denied: The personal representative of an estate appealed an order of the District Court allowing the surviving spouse's claim against the estate for half of the debt in a motor home the spouse and decedent owned as joint tenants with the right of survivorship. The Supreme Court reversed, concluding that the debt in the motor home passed automatically to the surviving spouse as a joint tenant, that 72-2-617 did not apply, and that if the property had passed through the will, the surviving spouse would not have been entitled to contribution on the debt pursuant to 72-2-617. Estate of Afrank, 2012 MT 289, 367 Mont. 334, 291 P.3d 576.

72-2-619. Ademption by satisfaction.

Official Comments

Scope and Purpose of Revisions. In addition to minor stylistic changes, this section is revised to delete the requirement that the gift in satisfaction of a devise be made to the devisee. The purpose is to allow the testator to satisfy a devise to A by making a gift to B. Consider why this might be desirable. G's will made a $20,000 devise to his child, A. G was a widower. Shortly before his death, G in consultation with his lawyer decided to take advantage of the $10,000 annual gift tax exclusion and sent a check for $10,000 to A and another check for $10,000 to A's spouse, B. The checks were accompanied by a letter from G explaining that the gifts were made for tax purposes and were in lieu of the $20,000 devise to A. The removal of the phrase "to that person" from the statute allows the $20,000 devise to be fully satisfied by the gifts to A and B.

This section parallels Section 2-109 [72-2-119] on advancements and follows the same policy of requiring written evidence that lifetime gifts are to be taken into account in the distribution of an estate, whether testate or intestate. Although courts traditionally call this "ademption by satisfaction" when a will is involved, and "advancement" when the estate is intestate, the difference in terminology is not significant.

Some wills expressly provide for lifetime advances by a hotchpot clause. Where the will contains no such clause, this section requires either the testator to declare in writing that the gift is in satisfaction of the devise or its value is to be deducted from the value of the devise or the devisee to acknowledge the same in writing.

To be a gift in satisfaction, the gift need not be an outright gift; it can be in the form of a will substitute, such as designating the devisee as the beneficiary of the testator's life-insurance policy or the beneficiary of the remainder interest in a revocable inter-vivos trust.

Subsection (b) [72-2-619(2)] on value accords with Section 2-109 [72-2-119] and applies if, for example, property such as stock is given. If the devise is specific, a gift of the specific property to the devisee during lifetime adeems the devise by extinction rather than by satisfaction, and this section would be inapplicable. Unlike the common law of satisfaction, however, specific devises are not excluded from the rule of this section. If, for example, the testator makes a devise of a specific item of property, and subsequently makes a gift of cash or other property to the devisee, accompanied by the requisite written intent that the gift satisfies the devise, the devise is satisfied under this section even if the subject of the specific devise is still in the testator's estate at death (and hence would not be adeemed under the doctrine of ademption by extinction).

Under subsection (c) [72-2-619(3)], if a devisee to whom a gift in satisfaction is made predeceases the testator and his or her descendants take under Section 2-603 [72-2-613] or 2-604 [72-2-614], they take the same devise as their ancestor would have taken had the ancestor survived the testator; if the devise is reduced by reason of this section as to the ancestor, it is automatically reduced as to the devisee's descendants. In this respect, the rule in testacy differs from that in intestacy; see Section 2-109(c) [72-2-119(3)].

Compiler's Comments

1993 Amendment: Chapter 494 inserted (3) concerning the devisee failing to survive testator; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-609.

Case Notes

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Will Not Changed After Gift of Portion of Estate Prior to Death — Distribution of Remaining Shares: In her will, deceased made specific devise of 147 shares of stock to two nephews and a grandnephew. Prior to death, she distributed 44 shares but never changed the will to reflect the reduction in her estate. The Supreme Court held that deceased intended a specific devise of the securities rather than the equivalent value thereof, thus the specific devisees were entitled only to as much of the securities as remained in the estate at the time of death. Under this section, an inter vivos gift may be deducted from a devise only if such intent is expressed in the will. Absent such intent, the remaining 103 shares must be distributed on a proportional basis consistent with the percentages listed in the will. In re Estate of Wales, 223 M 515, 727 P2d 536, 43 St. Rep. 1958 (1986).

Part 7
Rules of Construction Applicable to Wills and Other Governing Instruments

Part Official Comments

GENERAL COMMENT

Part 7 [Title 72, chapter 2, part 7] contains rules of construction applicable to wills, deeds, trusts, appointments, beneficiary designations, and so on. Like the rules of construction in Part 6 [Title 72, chapter 2, part 6] (which apply only to wills), the rules of construction in this Part [Title 72, chapter 2, part 7] yield to a finding of a contrary intention.

Some of the sections in Part 7 [Title 72, chapter 2, part 7] are revisions of sections contained in Part 6 [Title 72, chapter 2, part 6] of the pre-1990 Code. Although these sections originally applied only to wills, their restricted scope was inappropriate.

Some of the sections in Part 7 [Title 72, chapter 2, part 7] are new, having been added to the Code as desirable means of carrying out common intention.

72-2-711. Scope.

Official Comments

The rules of construction in this Part [Title 72, chapter 2, part 7] apply to governing instruments of any type, except as the application of a particular section is limited by its terms to a specific type or types of provision or governing instrument.

The term "governing instrument" is defined in Section 1-201 [72-1-103] as "a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type."

Certain of the sections in this Part [Title 72, chapter 2, part 7] are limited in their application to provisions or governing instruments of a certain type or types. Section 2-704 [72-2-714, now repealed], for example, applies only to a governing instrument creating a power of appointment. Section 2-706 [72-2-716] applies only to governing instruments that are "beneficiary designations," a term defined in Section 1-201 [72-1-103] as referring to "a governing instrument naming a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death." Section 2-707 [72-2-717] applies only to governing instruments creating a future interest under the terms of a trust.

Cross References. See the Comment to Section 2-601 [72-2-611]. See Section 8-101(b) [an effective date provision not codified in Montana] for the application of the rules of construction in this Part [Title 72, chapter 2, part 7] to documents executed prior to the effective date of this Article [Title 72, chapter 2].

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-701.

72-2-712. Requirement of survival by 120 hours.

Official Comments

Scope and Purpose of Revision. This section parallels Section 2-104 [72-2-114], which requires an heir to survive the intestate by 120 hours in order to inherit.

The scope of this section is expanded to cover all provisions of a governing instrument and this Code that relate to an individual surviving an event (including the death of another individual). As expanded, this section imposes the 120-hour requirement of survival in the areas covered by the Uniform Simultaneous Death Act.

In the case of a multiple-party account such as a joint checking account registered in the name of the decedent and his or her spouse with right of survivorship, the 120-hour requirement of survivorship will not, under the facility-of-payment provision of Section 6-222(1) [72-6-222(1)], interfere with the surviving spouse's ability to withdraw funds from the account during the 120-hour period following the decedent's death.

Note that subsection (d)(1) [72-2-712(4)(a)] provides that the 120-hour requirement of survival is inapplicable if the governing instrument "contains some language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case." The application of this provision is illustrated by the following example.

Example. G died leaving a will devising her entire estate to her husband, H, adding that "in the event he dies before I do, at the same time that I do, or under circumstances as to make it doubtful who died first," my estate is to go to my brother Melvin. H died about 38 hours after G's death, both having died as a result of injuries sustained in an automobile accident.

Under subsection (b), G's estate passes under the alternative devise to Melvin because H's failure to survive G by 120 hours means that H is deemed to have predeceased G. The language in the governing instrument does not, under subsection (d)(1) [72-2-712(4)(a)], nullify the provision that causes H, because of his failure to survive G by 120 hours, to be deemed to have predeceased G. Although the governing instrument does contain language dealing with simultaneous deaths, that language is not operable under the facts of the case because H did not die before G, at the same time as G, or under circumstances as to make it doubtful who died first.

Note that subsection (d)(4) [72-2-712(4)(d)] provides that the 120-hour requirement of survival is inapplicable if "the application of this section to multiple governing instruments would result in an unintended failure or duplication of a disposition." The application of this provision is illustrated by the following example.

Example. Pursuant to a common plan, H and W executed mutual wills with reciprocal provisions. Their intention was that a $50,000 charitable devise would be made on the death of the survivor. To that end, H's will devised $50,000 to the charity if W predeceased him. W's will devised $50,000 to the charity if H predeceased her. Subsequently, H and W were involved in a common accident. W survived H by 48 hours.

Were it not for subsection (d)(4) [72-2-712(4)(d)], not only would the charitable devise in W's will be effective, because H in fact predeceased W, but the charitable devise in H's will would also be effective, because W's failure to survive H by 120 hours would result in her being deemed to have predeceased H. Because this would result in an unintended duplication of the $50,000 devise, subsection (d)(4) [72-2-712(4)(d)] provides that the 120-hour requirement of survival is inapplicable. Thus, only the $50,000 charitable devise in W's will is effective.

Subsection (d)(4) [72-2-712(4)(d)] also renders the 120-hour requirement of survival inapplicable had H and W died in circumstances in which it could not be established that either survived the other. In such a case, an appropriate result might be to give effect to the common plan by paying half of the intended $50,000 devise from H's estate and half from W's estate.

ERISA Preemption of State Law. The Employee Retirement Income Security Act of 1974 (ERISA) federalizes pension and employee benefit law. Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides that the provisions of Titles I and IV of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" governed by ERISA. See the Comment to Section 2-804 [72-2-814] for a discussion of the ERISA preemption question.

Revision of Uniform Simultaneous Death Act. The freestanding Uniform Simultaneous Death Act (USDA) was revised in 1991 in accordance with the revisions of this section. States that enact Sections 2-104 [72-2-114] and 2-702 [72-2-712] need not enact the USDA as revised in 1991 and should repeal the original version of the USDA if previously enacted in the state.

Compiler's Comments

2019 Amendment: Chapter 313 in (1) in first sentence and in (2) near end substituted "is deemed" for "is considered"; and in (5)(b) in first sentence near middle inserted "registered or". Amendment effective October 1, 2019.

1995 Amendment: Chapter 592 in (1), near beginning after "5", deleted "except for purposes of Title 72, chapter 6, part 3, and"; in (2), near beginning after "subsection (4)", deleted "and except for a security registered in beneficiary form (TOD) under Title 72, chapter 6, part 3"; substituted (4) concerning survival by 120 hours for "This section does not apply if"; in (4)(b), (4)(c), and (4)(d), at end, inserted language concerning clear and convincing evidence; in (4)(d), near beginning, substituted "a 120-hour requirement of survival" for "this section"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-702.

Case Notes

Right of Surviving Spouse to Homestead Allowance as Matter of Law: The primary purpose of the homestead allowance is to protect a decedent's family and ensure that the surviving spouse is not left penniless and abandoned by the death of a spouse. The plain statutory language creates an absolute benefit to the surviving spouse, and a District Court has no discretion to disallow or limit the homestead allowance. The only statutory condition for receipt of the homestead allowance by the surviving spouse is that the spouse survive the decedent by 120 hours, as provided in this section. There is no other requirement, qualification, or condition to receipt of the allowance by the surviving spouse, such as a showing of financial need. The definition of the homestead exception in Montana property law, 70-32-101, is unrelated to the homestead allowance in the Uniform Probate Code, 72-2-412, so the definition in 70-32-101 does not override otherwise inconsistent language in 72-2-412. Because the homestead allowance is an interest that may be satisfied in any type of property, it may be claimed from assets other than the dwelling house or land. It is an allowance off the top, which grants the decedent's family a vested interest apart from and in addition to any other rights flowing from the estate. In re Estate of Martelle, 2001 MT 194, 306 M 253, 32 P3d 758 (2001).

72-2-713. Choice of law as to meaning and effect of governing instrument.

Official Comments

Purpose and Scope of Revisions. The scope of this section is expanded to cover all governing instruments, not just wills. As revised, this section enables a transferor to select the law of a particular state for purposes of interpreting his will or other governing instrument without regard to the location of property covered thereby. So long as local public policy is accommodated, the section should be accepted as necessary and desirable.

Cross Reference. Choice of law rules regarding formal validity of a will are in Section 2-506 [72-2-526]. See also Sections 3-202 [72-3-114] and 3-408 [72-3-312].

Compiler's Comments

1993 Amendment: Chapter 494 substituted current text concerning meaning and effect of governing instrument for former text that read: "The meaning and legal effect of a disposition in a will shall be determined by the local law of a particular state selected by the testator in his instrument unless the application of that law is contrary to the public policy of this state otherwise applicable to the disposition."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-703.

72-2-715. Class gifts construed to accord with intestate succession.

Official Comments

Purpose and Scope of Revisions. This section facilitates a modern construction of gifts that identify the recipient by reference to a relationship to someone; usually these gifts will be class gifts. The rules set forth in this section are rules of construction, which under Section 2-701 [72-2-711] are controlling in the absence of a finding of a contrary intention. With two exceptions, Section 2-705 [72-2-715] invokes the rules pertaining to intestate succession as rules of construction for interpreting terms of relationship in private instruments.

The pre-1990 version of this section applied only to devises contained in wills. As revised and relocated in Part 7 [Title 72, chapter 2, part 7], this section is freed of that former restriction; it now applies to dispositive provisions of all governing instruments, as prescribed by Section 2-701 [72-2-711].

Subsections (b) and (c) [72-2-715(2) and (3)] are based on Cal. Prob. Code § 6152. These subsections impose requirements for inclusion that are additional to the requirement of subsection (a) [72-2-715(1)]. Put differently, a child must satisfy subsection (a) [72-2-715(1)] in all cases. In addition, if either subsection (b) or (c) [72-2-715(2) or (3)] applies, the child must also satisfy the requirements of that subsection to be included under the class gift or term of relationship.

The general theory of subsection (b) [72-2-715(2)] is that a transferor who is not the natural (biological) parent of a child would want the child to be included in a class gift as a child of the biological parent only if the child lived while a minor as a regular member of the household of that biological parent (or of specified relatives of that biological parent).

Example. G's will created a trust, income to G's son, A, for life, remainder in corpus to A's descendants who survive A, by representation. A fathered a child, X; A and X's mother, D, never married each other, and X never lived while a minor as a regular member of A's household or the household of A's parent, brother, sister, spouse, or surviving spouse. D later married E; D and E raised X as a member of their household.

Solution: Never having lived as a regular member of A's household or of the household of any of A's specified relatives, X would not be included as a member of the class of A's descendants who take the corpus of G's trust on A's death.

If, however, D's parent had created a similar trust, income to D for life, remainder in corpus to D's descendants who survive D, by representation, X would be included as a member of the class of D's descendants who take the corpus of this trust on D's death.

Also, if A executed a will containing a devise to his children or designated his children as beneficiary of his life insurance policy, X would be included in the class. Under Section 2-114 [72-2-124], X would be A's child for purposes of intestate succession. Subsection (b) [72-2-715(2)] is inapplicable because the transferor, A, is the biological parent.

The general theory of subsection (c) [72-2-715(3)] is that a transferor who is not the adopting parent of an adopted child would want the child to be included in a class gift as a child of the adopting parent only if the child lived while a minor, either before or after the adoption, as a regular member of the household of that adopting parent.

Example. G's will created a trust, income to G's daughter, A, for life, remainder in corpus to A's descendants who survive A, by representation. A and A's husband adopted a 47-year old man, X, who never lived *while a minor* as a regular member of A's household.

Solution: Never having lived while a minor as a regular member of A's household, X would not be included as a member of the class of A's descendants who take the corpus of G's trust on A's death.

If, however, A executed a will containing a devise to her children or designated her children as beneficiary of her life insurance policy, X would be included in the class. Under Section 2-114 [72-2-124], X would be A's child for purposes of intestate succession. Subsection (c) [72-2-715(3)] is inapplicable because the transferor, A, is an adopting parent.

Reference. Halbach, "Issues About Issue," 48 Mo. L. Rev. 333 (1983).

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-705.

Case Notes

Adopted Adult Child of Decedent's Child Not Considered Regular Member of Household of Adopting Parent for Intestate Succession Purposes: The decedent was survived by a son who adopted the adult daughter of his wife, whom he later divorced. Upon decedent's death, the son told a trust officer and a close family friend that he adopted the young woman for the purpose of exercising control over the residue of the trust and to prevent other relatives from getting his mother's property upon his death. Ultimately, the young woman was not included in the distribution of the residue of the decedent's estate, and she appealed, but the Supreme Court affirmed. For an adopted person to be eligible to take by intestate succession when the decedent was not the adopting parent, the person must meet the requirements of this section, which provide that when construing a dispositive provision of a transferor who is not the adopting parent, the adopted person is not considered the child of the adopting parent unless the adopted person, while a minor, either before or after the adoption, lived as a regular member of the adopting parent's household. Being a regular household member requires more than simple residence for a time at the adopting parent's home. The underlying policy of subsection (3) of this section is to limit the ability of the adopting parent to circumvent the testamentary intent of another person. In this case, there was substantial evidence in the record to support the District Court's finding that no relationship existed between the son and his adopted daughter during her minority sufficient to indicate that, as a matter of law, she was a regular member of the household. Therefore, the adopted daughter was not considered an heir at law of the decedent and was not entitled to a distribution from the estate. In re Estate of Bovey, 2006 MT 46, 331 M 254, 132 P3d 510 (2006).

72-2-716. Life insurance — retirement plan — account with POD designation — transfer-on-death registration — deceased beneficiary.

Official Comments

Purpose of New Section. This new section provides an antilapse statute for "beneficiary designations," a term defined in Section 1-201 [72-2-103] as "a governing instrument naming a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death."

The terms of this section parallel those of Section 2-603 [72-2-613], except that the provisions relating to payor protection and personal liability of recipients have been added. The Comment to Section 2-603 [72-2-613] contains an elaborate exposition of Section 2-603 [72-2-613], together with the examples illustrating its application. That Comment should aid understanding of Section 2-706 [72-2-716]. For a discussion of the reasons why Section 2-706 [72-2-716] should not be preempted by federal law with respect to retirement plans covered by ERISA, see the Comment to Section 2-804 [72-2-814].

Compiler's Comments

2019 Amendment: Chapter 313 in (1) inserted definition of descendant of a grandparent and definition of descendants; in (1)(h) substituted current text for ""Surviving beneficiary" or "surviving descendant" means a beneficiary or a descendant who neither predeceased the decedent nor is considered to have predeceased the descendant under 72-2-712"; in (2) near end after "the following" deleted "provisions"; in (2)(d) at end of introductory clause substituted "if" for "only if an expressly designated beneficiary of the alternative beneficiary designation is entitled to take"; inserted (2)(d)(i) and (2)(d)(ii) regarding conditions for a substitute gift to be superseded by the alternative devise; and made minor changes in style. Amendment effective October 1, 2019.

1995 Amendment: Chapter 592 in definition of beneficiary, near end of introductory clause, inserted "under which the beneficiary must survive the decedent" and in (ii), at end, inserted clause excluding joint tenant and party to joint and survivorship account; and in (2)(b), at end of first sentence, substituted "surviving descendants of any deceased beneficiary" for "deceased beneficiary or beneficiary's surviving descendants".

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-706.

72-2-717. Survivorship with respect to future interests under terms of trust — substitute takers.

Official Comments

Rationale of New Section. This new section applies only to future interests under the terms of a trust. For shorthand purposes, references in this Comment to the term "future interest" refer to a future interest under the terms of a trust.

The objective of this section is to project the antilapse idea into the area of future interests. The structure of this section substantially parallels the structure of the regular antilapse statute, Section 2-603 [72-2-613], and the antilapse-type statute relating to beneficiary designations, Section 2-706 [72-2-716]. The rationale for restricting this section to future interests under the terms of a trust is that legal life estates in land, followed by indefeasibly vested remainder interests, are still created in some localities, often with respect to farmland. In such cases, the legal life tenant and the person holding the remainder interest can, together, give good title in the sale of the land. If the antilapse idea were injected into this type of situation, the ability of the parties to sell the land would be impaired if not destroyed because the antilapse idea would, in effect, create a contingent substitute remainder interest in the present and future descendants of the person holding the remainder interest.

Background. At common law, conditions of survivorship are not implied with respect to *future* interests (whether in trust or otherwise). For example, in the simple case of a trust, "income to husband, A, for life, remainder to daughter, B," B's interest is not defeated at common law if she predeceases A; B's interest would pass through her estate to her successors in interest (probably either her residuary legatees or heirs), who would become entitled to possession when A died. If any of B's successors in interest died before A, the interest held by that deceased successor in interest would likewise pass through his or her estate to his or her successors in interest; and so on.

The rationale for adopting a statutory provision reversing the common-law rule is to prevent cumbersome and costly distributions to and through the estates of deceased beneficiaries of future interests, who may have died long before the distribution date.

Subsection (b) [72-2-717(2)]: Subsection (b) [72-2-717(2)] imposes a condition of survivorship on future interests to the distribution date — defined as the time when the future interest is to take effect in possession or enjoyment.

The 120-hour Survivorship Period. In effect, the requirement of survival of the distribution date means survival of the 120-hour period following the distribution date. This is because, under Section 2-702(a) [72-2-712(1)], "an individual who is not established to have survived an event . . . by 120 hours is deemed to have predeceased the event." As made clear by subsection (a)(7) [72-2-717(1)(g)], for the purposes of Section 2-707 [72-2-717], the "event" to which Section 2-702(a) [72-2-712(1)] relates is the distribution date.

Note that the "distribution date" need not occur at the beginning or end of a calendar day, but can occur at a time during the course of a day, such as the time of death of an income beneficiary.

References in Section 2-707 [72-2-717] and in this Comment to survival of the distribution date should be understood as referring to survival of the distribution date by 120 hours.

Ambiguous Survivorship Language. Subsection (b) [72-2-717(2)] serves another purpose. It resolves a frequently litigated question arising from ambiguous language of survivorship, such as in a trust, "income to A for life, remainder in corpus to my surviving children." Although some case law interprets the word "surviving" as merely requiring survival of the testator (e.g., Nass' Estate, 320 Pa. 380, 182 A. 401 (1936)), the predominant position at common law interprets "surviving" as requiring survival of the life tenant, A. Hawke v. Lodge, 9 Del. Ch. 146, 77 A. 1090 (1910); Restatement of Property § 251 (1940). The first sentence of subsection (b) [72-2-717(2)], in conjunction with paragraph (3) [72-2-717(2)(c)], codifies the predominant common-law/Restatement position that survival relates to the distribution date.

The first sentence of subsection (b) [72-2-717(2)], in combination with paragraph (3) [72-2-717(2)(c)], imposes a condition of survivorship to the distribution date (the time of possession or enjoyment) even when an express condition of survivorship to an earlier time has been imposed. Thus, in a trust like "income to A for life, remainder in corpus to B, but if B predeceases A, to B's children who survive B," the first sentence of subsection (b) [72-2-717(2)] combined with paragraph (3) [72-2-717(2)(c)] requires B's children to survive (by 120 hours) the death of the income beneficiary, A.

Rule of Construction. Note that Section 2-707 [72-2-717] is a rule of construction. It is qualified by the rule set forth in Section 2-701 [72-2-711], and thus it yields to a finding of a contrary intention. Consequently, in trusts like "income to A for life, remainder in corpus to B whether or not B survives A," or "income to A for life, remainder in corpus to B or B's estate," this section would not apply and, should B predecease A, B's future interest would pass through B's estate to B's successors in interest, who would become entitled to possession or enjoyment at A's death.

Classification. Subsection (b) [72-2-717(2)] renders a future interest "contingent" on the beneficiary's survival of the distribution date. As a result, future interests are "nonvested" and subject to the Rule Against Perpetuities. To prevent an injustice from resulting because of this, the Uniform Statutory Rule Against Perpetuities, which has a wait-and-see element, is incorporated into the Code as Part 9 [Title 72, chapter 2, part 10].

Substitute Gifts. Section 2-707 [72-2-717] not only imposes a condition of survivorship to the distribution date; like its antilapse counterparts, Sections 2-603 [72-2-613] and 2-706 [72-2-716], it provides substitute takers in cases of a beneficiary's failure to survive the distribution date.

The statutory substitute gift is divided among the devisee's descendants "by representation," a term defined in Section 2-709(b) [72-2-719(3)].

Subsection (b)(1) [72-2-717(2)(a)] — Future Interests Not in the Form of a Class Gift: Subsection (b)(1) [72-2-717(2)(a)] applies to non-class gifts, such as the "income to A for life, remainder in corpus to B" trust discussed above. If B predeceases A, subsection (b)(1) [72-2-717(2)(a)] creates a substitute gift with respect to B's future interest; the substitute gift is to B's descendants who survive A.

Subsection (b)(2) [72-2-717(2)(b)] — Class Gift Future Interests. Subsection (b)(2) [72-2-717(2)(b)] applies to class gifts, such as in a trust "income to A for life, remainder in corpus to A's children." Suppose that A had two children, X and Y. X predeceases A; Y survives A. Subsection (b)(2) [72-2-717(2)(b)] creates a substitute gift with respect to any of A's children who predecease A leaving descendants who survive A. Thus, if X left descendants who survived A, X's descendants would take X's share; if X left no descendants living at A's death, Y would take it all.

Subsection (b)(2) [72-2-717(2)(b)] does not apply to future interests to classes such as "issue," "descendants," "heirs of the body," "heirs," "next of kin," "distributees," "relatives," "family," or the like. The reason is that these types of class gifts have their own internal systems of representation, and so the substitute gift provided by subsection (b)(1) [72-2-717(2)(a)] would be out of place with respect to these types of future interests. The first sentence of subsection (a) [72-2-717(1)] and subsection (d) [72-2-717(4)] do apply, however. For example, suppose a nonresiduary devise "to A for life, remainder to A's issue, by representation." If A leaves issue surviving him, they take. But if A leaves no issue surviving him, the testator's residuary devisees are the takers.

Subsection (b)(4) [72-2-717(2)(d)]. Subsection (b)(4) [72-2-717(2)(d)] provides that, if a governing instrument creates an alternative future interest with respect to a future interest for which a substitute gift is created by paragraph (1) [72-2-717(2)(a)] or (2) [72-2-717(2)(b)], the substitute gift is superseded by the alternative future interest only if an expressly designated beneficiary of the alternative future interest is entitled to take in possession or enjoyment. Consider, for example, a trust under the income is to be paid to A for life, remainder in corpus to B if B survives A, but if not to C if C survives A. If B predeceases A, leaving descendants who survive A, subsection (b)(1) [72-2-717(2)(a)] creates a substitute gift to B's descendants. But, if C survives A, the alternative future interest in C supersedes the substitute gift to B's descendants. Upon A's death, the trust corpus passes to C.

Subsection (c) [72-2-717(3)]. Subsection (c) [72-2-717(3)] is necessary because there can be cases in which subsections (b)(1) [72-2-717(2)(a)] or (b)(2) [72-2-717(2)(b)] create substitute gifts with respect to two or more alternative future interests, and those substitute gifts are not superseded under the terms of subsection (b)(4) [72-2-717(2)(d)]. Subsection (c) [72-2-717(3)] provides the tie-breaking mechanism for such situations.

The initial step is to determine which of the alternative future interests would take effect had all the beneficiaries themselves survived the distribution date (by 120 hours). In subsection (c) [72-2-717(3)], this future interest is called the "primary future interest." Unless subsection (c)(2) [72-2-717(3)(b)] applies, subsection (c)(1) [72-2-717(3)(a)] provides that the property passes under substitute gift created with respect to the primary future interest. This substitute gift is called the "primary substitute gift." Thus, the property goes to the descendants of the beneficiary or beneficiaries of the primary future interest.

Subsection (c)(2) [72-2-717(3)(b)] provides an exception to this rule. Under subsection (c)(2) [72-2-717(3)(b)], the property does not pass under the primary substitute gift if there is a "younger-generation future interest" — defined as a future interest that (A) is to a descendant of a beneficiary of the primary future interest, (B) is an alternative future interest with respect to the primary future interest, (C) is a future interest for which a substitute gift is created, and (D) would have taken effect had all the deceased beneficiaries who left surviving descendants survived the distribution date except the deceased beneficiary or beneficiaries of the primary future interest. If there is a younger-generation future interest, the property passes under the "younger-generation substitute gift" — defined as the substitute gift created with respect to the younger-generation future interest.

Subsection (d) [72-2-717(4)]. Since it is possible that, after the application of subsections (b) [72-2-717(2)] and (c) [72-2-717(3)], there are no substitute gifts, a back-stop set of substitute takers is provided in subsection (d) [72-2-717(4)] — the transferor's residuary devisees or heirs. Note that the transferor's residuary clause is treated as creating a future interest and, as such, is subject to this section. Note also that the meaning of the back-stop gift to the transferor's heirs is governed by Section 2-711 [72-2-721], under which the gift is to the transferor's heirs determined as if the transferor died when A died. Thus there will always be a set of substitute takers, even if it turns out to be the state. If the transferor's surviving spouse has remarried after the transferor's death but before A's death, he or she would not be a taker under this provision.

Examples. The application of Section 2-707 [72-2-717] is illustrated by the following examples. Note that, in each example, the "distribution date" is the time of the income beneficiary's death. Assume, in each example, that an individual who is described as having "survived" the income beneficiary's death survived the income beneficiary's death by 120 hours or more.

Example 1. A nonresiduary devise in G's will created a trust, income to A for life, remainder in corpus to B if B survives A. G devised the residue of her estate to a charity. B predeceased A. At A's death, B's child, X, is living.

Solution: On A's death, the trust property goes to X, not to the charity. Because B's future interest is not in the form of a class gift, subsection (b)(1) [72-2-717(2)(a)] applies, not (b)(2) [72-2-717(2)(b)]. Subsection (b)(1) [72-2-717(2)(a)] creates a substitute gift with respect to B's future interest; the substitute gift is to B's child, X. Under subsection (b)(3) [72-2-717(2)(c)], the words of survivorship attached to B's future interest ("to B if B survives A") do not indicate an intent contrary to the creation of that substitute gift. Nor, under subsection (b)(4) [72-2-717(2)(d)], is that substitute gift superseded by an alternative future interest because, as defined in subsection (a)(1)[72-2-717(1)(a)], G's residuary clause does not create an alternative future interest. In the normal lapse situation, a residuary clause does not supersede the substitute gift created by the antilapse statute, and the same analysis applies to this situation as well.

Example 2. Same as Example 1, except that B left no descendants who survived A.

Solution: Subsection (b)(1) [72-2-717(2)(a)] does not create a substitute gift with respect to B's future interest because B left no descendants who survived A. This brings subsection (d) [72-2-717(4)] into operation, under which the trust property passes to the charity under G's residuary clause.

Example 3. G created an irrevocable inter-vivos trust, income to A for life, remainder in corpus to B if B survives A. B predeceased A. At A's death, G and X, B's child, are living.

Solution: X takes the trust property. Because B's future interest is not in the form of a class gift, subsection (b)(1) [72-2-717(2)(a)] applies, not (b)(2) [72-2-717(2)(b)]. Subsection (b)(1) [72-2-717(2)(a)] creates a substitute gift with respect to B's future interest; the substitute gift is to B's child, X. Under subsection (b)(3) [72-2-717(2)(c)], the words of survivorship ("to B if B survives A") do not indicate an intent contrary to the creation of that substitute gift. Nor, under subsection (b)(4) [72-2-717(2)(d)], is the substitute gift superseded by an alternative future interest; G's reversion is not an alternative future interest as defined in subsection (a)(1) [72-2-717(1)(a)] because it was not *expressly* created.

Example 4. G created an irrevocable inter-vivos trust, income to A for life, remainder in corpus to B if B survives A; if not, to C. B predeceased A. At A's death, C and B's child are living.

Solution: C takes the trust property. Because B's future interest is not in the form of a class gift, subsection (b)(1) [72-2-717(2)(a)] applies, not (b)(2) [72-2-717(2)(b)]. Subsection (b)(1) [72-2-717(2)(a)] creates a substitute gift with respect to B's future interest; the substitute gift is to B's child, X. Under subsection (b)(3) [72-2-717(2)(c)], the words of survivorship ("to B if B survives A") do not indicate an intent contrary to the creation of that substitute gift. But, under subsection (b)(4) [72-2-717(2)(d)], the substitute gift to B's child is superseded by the alternative future interest held by C because C, having survived A (by 120 hours), is entitled to take in possession or enjoyment.

Example 5. G created an irrevocable inter-vivos trust, income to A for life, remainder in corpus to B, but if B predeceases A, to the person B appoints by will. B predeceased A. B's will exercised his power of appointment in favor of C. C survives A. B's child, X, also survives A.

Solution: B's appointee, C, takes the trust property, not B's child, X. Because B's future interest is not in the form of a class gift, subsection (b)(1) [72-2-717(2)(a)] applies, not (b)(2) [72-2-717(2)(b)]. Subsection (b)(1) [72-2-717(2)(a)] creates a substitute gift with respect to B's future interest; the substitute gift is to B's child, X. Under subsection (b)(3) [72-2-717(2)(c)], the words of survivorship ("to B if B survives A") do not indicate an intent contrary to the creation of that substitute gift. But, under subsection (b)(4) [72-2-717(2)(d)], the substitute gift to B's child is superseded by the alternative future interest held by C because C, having survived A (by 120 hours), is entitled to take in possession or enjoyment. Because C's future interest was created in "a" governing instrument (B's will), it counts as an "alternative future interest."

Example 6. G creates an irrevocable inter-vivos trust, income to A for life, remainder in corpus to A's children who survive A; if none, to B. A's children predecease A, leaving descendants, X and Y, who survive A. B also survives A.

Solution: On A's death, the trust property goes to B, not to X and Y. Because the future interest in A's children is in the form of a class gift, subsection (b)(2) [72-2-717(2)(b)] applies, not (b)(1) [72-2-717(2)(a)]. Subsection (b)(2) [72-2-717(2)(b)] creates a substitute gift with respect to the future interest in A's children; the substitute gift is to the descendants of A's children, X and Y. Under subsection (b)(3) [72-2-717(2)(c)], the words of survivorship ("to A's children who survive A") do not indicate an intent contrary to the creation of that substitute gift. But, under subsection (b)(4) [72-2-717(2)(d)], the alternative future interest to B supersedes the substitute gift to the descendants of A's children because B survived A.

Alternative Facts: One of A's children, J, survives A; A's other child, K, predeceases A, leaving descendants, X and Y, who survive A. B also survives A.

Solution: J takes half the trust property and X and Y split the other half. Although there is an alternative future interest (in B) and although B did survive A, the alternative future interest was conditioned on none of A's children surviving A. Because that condition was not satisfied, the expressly designated beneficiary of that alternative future interest, B, is not entitled to take in possession or enjoyment. Thus, the alternative future interest in B does not supersede the substitute gift to K's descendants, X and Y.

Example 7. G created an irrevocable inter-vivos trust, income to A for life, remainder in corpus to B if B survives A; if not, to C. B and C predecease A. At A's death, B's child and C's child are living.

Solution: Subsection (b)(1) [72-2-717(2)(a)] produces substitute gifts with respect to B's future interest and with respect to C's future interest. B's future interest and C's future interest are alternative future interests, one to the other. B's future interest is expressly conditioned on B's surviving A. C's future interest is conditioned on B's predeceasing A and C's surviving A. The condition that C survive A does not arise from express language in G's trust but from the first sentence of subsection (b) [72-2-717(2)]; that sentence makes C's future interest contingent on C's surviving A. Thus, because neither B nor C survived A, neither B nor C is entitled to take in possession or enjoyment. So, under subsection (b)(4) [72-2-717(2)(d)], neither substitute gift, created with respect to the future interests in B and C, is superseded by an alternative future interest. Consequently, resort must be had to subsection (c) [72-2-717(3)] to break the tie to determine which substitute gift takes effect.

Under subsection (c) [72-2-717(3)], B is the beneficiary of the "primary future interest" because B would have been entitled to the trust property had both B and C survived A. Unless subsection (c)(2) [72-2-717(3)(b)] applies, the trust property passes to B's child as the taker under the "primary substitute gift."

Subsection (c)(2) [72-2-717(3)(b)] would only apply if C's future interest qualifies as a "younger-generation future interest." This depends upon whether C is a descendant of B, for C's future interest satisfies the other requirements necessary to make it a younger-generation future interest. If C was a descendant of B, the substitute gift to C's child would be a "younger-generation substitute gift" and would become effective instead of the "primary substitute gift" to B's descendants. But if C was not a descendant of B, the property would pass under the "primary substitute gift" to B's descendants.

Example 8. G created an irrevocable inter-vivos trust, income to A for life, remainder in corpus to A's children who survive A; if none, to B. All of A's children predecease A. X and Y, who are descendants of one or more of A's children, survive A. B predeceases A, leaving descendants, M and N, who survive A.

Solution: On A's death, the trust property passes to X and Y under the "primary substitute gift," unless B was a descendant of any of A's children.

Subsection (b)(2) [72-2-717(2)(b)] produces substitute gifts with respect to A's children who predeceased A leaving descendants who survived A. Subsection (b)(1) [72-2-717(2)(a)] creates a substitute gift with respect to B's future interest. A's children's future interest and B's future interest are alternative future interests, one to the other. A's children's future interest is expressly conditioned on surviving A. B's future interest is conditioned on none of A's children surviving A and on B's surviving A. The condition of survivorship as to B's future interest does not arise because of express language in G's trust but because of the first sentence of subsection (b) [72-2-717(2)]; that sentence makes B's future interest contingent on B's surviving A. Thus, because none of A's children survived A, and because B did not survive A, none of A's children nor B is entitled to take in possession or enjoyment. So, under subsection (b)(4) [72-2-717(2)(d)], neither substitute gift — i.e., neither the one created with respect to the future interest in A's children nor the one created with respect to the future interest in B — is superseded by an alternative future interest. Consequently, resort must be had to subsection (c) [72-2-717(3)] to break the tie to determine which substitute gift takes effect.

Under subsection (c) [72-2-717(3)], A's children are the beneficiaries of the "primary future interest" because they would have been entitled to the trust property had all of them and B survived A. Unless subsection (c)(2) [72-2-717(3)(b)] applies, the trust property passes to X and Y as the takers under the "primary substitute gift." Subsection (c)(2) [72-2-717(3)(b)] would only apply if B's future interest qualifies as a "younger-generation future interest." This depends upon whether B is a descendant of any of A's children, for B's future interest satisfies the other requirements necessary to make it a "younger-generation future interest." If B was a descendant of one of A's children, the substitute gift to B's children, M and N, would be a "younger-generation substitute gift" and would become effective instead of the "primary substitute gift" to X and Y. But if B was not a descendant of any of A's children, the property would pass under the "primary substitute gift" to X and Y.

Example 9. G's will devised property in trust, income to niece Lilly for life, corpus on Lilly's death to her children; should Lilly die without leaving children, the corpus shall be equally divided among my nephews and nieces then living, the child or children of nieces who may be deceased to take the share their mother would have been entitled to if living.

Lilly never had any children. G had 3 nephews and 2 nieces in addition to Lilly. All 3 nephews and both nieces predeceased Lilly. A child of one of the nephews survived Lilly. One of the nieces had 8 children, 7 of whom survived Lilly. The other niece had one child, who did not survive Lilly. (This example is based on the facts of Bomberger's Estate, 347 Pa. 465, 32 A.2d 729 (1943).)

Solution: The trust property goes to the 7 children of the nieces who survived Lilly. The substitute gifts created by subsection (b)(2) [72-2-717(2)(b)] to the nephew's son or to the nieces' children are superseded under subsection (b)(4) [72-2-717(2)(d)] because there is an alternative future interest (the "child or children of nieces who may be deceased") and expressly designated beneficiaries of that alternative future interest (the 7 children of the nieces) are living at Lilly's death and are entitled to take in possession or enjoyment.

Example 10. G devised the residue of his estate in trust, income to his wife, W, for life, remainder in corpus to their children, John and Florence; if either John or Florence should predecease W, leaving descendants, such descendants shall take the share their parent would have taken if living.

G's son, John, survived W. G's daughter, Florence, predeceased W. Florence never had any children. Florence's husband survived W. (This example is based on the facts of Matter of Kroos, 302 N.Y. 424, 99 N.E.2d 222 (1951).)

Solution: John, of course, takes his half of the trust property. Because Florence left no descendants who survived W, subsection (b)(1) [72-2-717(2)(a)] does not create a substitute gift with respect to Florence's future interest in her half. Subsection (d)(1) [72-2-717(4)(a)] is inapplicable because G's trust was not created in a nonresiduary devise or in a codicil to G's will. Subsection (d)(2) [72-2-717(4)(b)] therefore becomes applicable, under which Florence's half goes to G's heirs determined as if G died when W died, i.e., John. See Section 2-711 [72-2-721].

Compiler's Comments

2019 Amendment: Chapter 313 in (1) inserted definition of descendants; in (1)(h) substituted current text for former text that read: ""Surviving beneficiary" or "surviving descendant" means a beneficiary or a descendant who neither predeceased the distribution date nor is considered to have predeceased the distribution date under 72-2-712"; in (2)(d) at end of introductory clause substituted "if" for "only if an"; inserted (2)(d)(i) regarding a conditions for a substitute gift to be superseded by the alternative devise if the alternative future interest is in the form of a class gift; in (2)(d)(ii) at beginning inserted "the alternative future interest is not in the form of a class gift and the"; and made minor changes in style. Amendment effective October 1, 2019.

1995 Amendment: Chapter 592 in (2)(b), at end of first sentence, substituted "surviving descendants of any deceased beneficiary" for "deceased beneficiary or beneficiary's surviving descendants"; at beginning of (4) inserted exception clause; and inserted (5) concerning no surviving taker and defining transferor for purposes of subsection (4).

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-707.

Case Notes

Anti-Lapse Statute Not Applicable — Equal Treatment Not Intended in Document: The District Court did not err when it declined to apply this section to a testamentary trust. The trust document clearly provided for a contrary distribution. Moreover, the trustor did not intend for his grandchildren to be treated equally. The trustor specifically listed the order in which he wanted distributions to take place, and the son's heirs were not included in the distribution of the uncle's one-third share of the trust. Tonn v. Estate of Sylvis, 2018 MT 30, 390 Mont. 268, 412 P.3d 1055.

72-2-718. Class gifts to "descendants", "issue", or "heirs of the body" — form of distribution if none specified.

Official Comments

Purpose of New Section. This new section tracks Restatement (1st) of Property § 303(1), and does not accept the position taken in Restatement (Second) of Property, Donative Transfers § 28.2 (1988), under which a per stirpes form of distribution is presumed, regardless of the form of distribution used in the applicable law of intestate succession.

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-708.

72-2-719. Representation — per capita at each generation — per stirpes.

Official Comments

Purpose of New Section. This new section provides statutory definitions of "representation," "per capita at each generation," and "per stirpes." Subsection (b) [72-2-719(2)] applies to both private instruments and to provisions of applicable statutory law (such as Sections 2-603 [72-2-613], 2-706 [72-2-716], and 2-707 [72-2-717]) that call for property to be divided "by representation." The system of representation employed is the same as that which is adopted in Section 2-106 [72-2-116] for intestate succession.

Subsection (c)'s [72-2-719(3)'s] definition of "per stirpes" accords with the predominant understanding of the term.

Compiler's Comments

1995 Amendment: Chapter 592 in (3)(a), at beginning after "If", deleted "an applicable statute or" and after "distributed" deleted ""by representation" or"; in (3)(b), near beginning after "child", inserted "if any"; inserted (4) concerning distribution by representation; and in (5) inserted reference to subsection (4).

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-709.

72-2-720. Worthier title doctrine abolished.

Official Comments

Purpose of New Section. This new section abolishes the doctrine of worthier title as a rule of law and as a rule of construction.

Cross Reference. See Section 2-711 [72-2-721] for a rule of construction concerning the meaning of a disposition to the heirs, etc., of a designated person.

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-710.

72-2-721. Interests in "heirs" and like.

Official Comments

Purpose of New Section. This new section provides a statutory definition of "heirs," etc., when contained in a dispositive provision or a statute (such as Section 2-707(h) [apparently a reference to 72-2-708]).

Cross Reference. See Section 2-710 [72-2-720], abolishing the doctrine of worthier title.

Compiler's Comments

1995 Amendment: Chapter 592 in first sentence, in two places before "future", inserted "present or" and near middle, after "state", deleted "under 72-2-115".

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-711.

Case Notes

Illinois Partnership Agreement Ruled a Controlling Document Under Montana Law — Shares Pass as if Decedent Died Intestate: The decedent was a member of a family limited partnership agreement formed under Illinois law. The decedent, a Montana resident, devised 65% of the residual estate to her nieces and nephews. However, the decedent's will did not mention the interest in the limited partnership. Siblings to the decedent petitioned the District Court to determine whether the interest was included in the residual estate. The District Court held that the partnership agreement was a governing instrument under 72-2-721 and that the interest was a nonprobate asset and not part of the residual estate. The Supreme Court affirmed, holding that 72-2-721 applied instead of Illinois law and that the partnership interest must pass to the heirs in the manner it would had she died intestate. Estate of Kelly, 2014 MT 254, 376 Mont. 361, 334 P.3d 911.

Part 8
General Provisions Concerning Probate and Nonprobate Transfers

Part Official Comments

GENERAL COMMENT

Part 8 [Title 72, chapter 2, part 8] contains four general provisions that cut across probate and nonprobate transfers. Section 2-801 [72-2-811, now repealed] is the Uniform Disclaimer of Property Interests Act; this Act replaces the narrower Uniform Disclaimer of Transfers By Will, Intestacy or Appointment Act, which was incorporated into the pre-1990 Code. The broader disclaimer act is now appropriate, given the broadened scope of Article II [Title 72, chapter 2] in covering nonprobate as well as probate transfers.

Section 2-802 [72-2-812] deals with the effect of divorce and separation on the right to elect against a will, exempt property and allowances, and an intestate share.

Section 2-803 [72-2-813] spells out the legal consequence of intentional and felonious killing on the right of the killer to take as heir and under wills and revocable inter-vivos transfers, such as revocable trusts and life-insurance beneficiary designations.

Section 2-804 [72-2-814] deals with the consequences of a divorce on the right of the former spouse (and relatives of the former spouse) to take under wills and revocable inter-vivos transfers, such as revocable trusts and life-insurance beneficiary designations.

72-2-812. Effect of divorce, annulment, or decree of separation.

Official Comments

Clarifying Revision. The only substantive revision of this section is a clarifying revision of subsection (b)(2) [72-2-812(2)(b)], making it clear that this subsection refers to an *invalid* decree of divorce or annulment.

Rationale. Although some existing statutes bar the surviving spouse for desertion or adultery, the present section requires some definitive legal act to bar the surviving spouse. Normally, this is divorce. Subsection (a) [72-2-812(1)] states an obvious proposition, but subsection (b) [72-2-812(2)] deals with the difficult problem of invalid divorce or annulment, which is particularly frequent as to foreign divorce decrees but may arise as to a local decree where there is some defect in jurisdiction; the basic principle underlying these provisions is estoppel against the surviving spouse. Where there is only a legal separation, rather than a divorce, succession patterns are not affected; but if the separation is accompanied by a complete property settlement, this may operate under Section 2-204 [72-2-224, now repealed] as a waiver or renunciation of benefits under a prior will and by intestate succession.

Cross Reference. See Section 2-804 [72-2-814] for similar provisions relating to the effect of divorce to revoke devises and other revocable provisions to a former spouse.

Compiler's Comments

1993 Amendment: Chapter 494 throughout section substituted "individual" for "person"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-802.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Absence of Final Divorce Order — Oral Settlement Agreement Not Binding — Equitable Estoppel Inapplicable: Barbara and Michael orally agreed to settle all marital property rights, but a final decree of dissolution was not issued before Michael died. The trial court was not bound by the oral agreement, and even though both parties had considered themselves divorced, absent a final order of dissolution terminating all marital property rights, Barbara's status as a surviving spouse was not terminated pursuant to this section. Further, equitable estoppel would have required that Barbara's representation that the parties were divorced be made with the intention or expectation that Michael would act on the representation and rely on it to his detriment and that he not be aware that the divorce was not final. Uncontradicted testimony showed that these facts did not apply, so Barbara was not equitably estopped from claiming that she was the surviving spouse. In re Estate of Goick, 275 M 13, 909 P2d 1165, 53 St. Rep. 12 (1996).

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Decrees Obtained Through Fraud: The phrase "which decree or judgment is not recognized as valid in this state", does not contemplate decrees obtained through fraud. Fraunhofer v. Price, 182 M 7, 594 P2d 324 (1979).

72-2-813. Effect of financial exploitation or homicide on intestate succession, wills, trusts, joint assets, life insurance, and beneficiary designations.

Official Comments

Purpose and Scope of Revisions. This section is substantially revised. Although the revised version does make a few substantive changes in certain subsidiary rules (such as the treatment of multiple party accounts, etc.), it does not alter the main thrust of the pre-1990 version. The major change is that the revised version is more comprehensive than the pre-1990 version. The structure of the section is also changed so that it substantially parallels the structure of Section 2-804 [72-2-814], which deals with the effect of divorce on revocable benefits to the former spouse.

The pre-1990 version of this section was bracketed to indicate that it may be omitted by an enacting state without difficulty. The revised version omits the brackets because the Joint Editorial Board/Article II Drafting Committee believes that uniformity is desirable on the question.

As in the pre-1990 version, this section is confined to felonious and intentional killing and excludes the accidental manslaughter killing. Subsection (g) [72-2-813(7)] leaves no doubt that, for purposes of this section, a killing can be "felonious and intentional," whether or not the killer has actually been convicted in a criminal prosecution. Under subsection (g) [72-2-813(7)], after all right to appeal has been exhausted, a judgment of conviction establishing criminal accountability for the felonious and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section. Acquittal, however, does not preclude the acquitted individual from being regarded as the decedent's killer for purposes of this section. This is because different considerations as well as a different burden of proof enter into the finding of criminal accountability in the criminal prosecution. Hence it is possible that the defendant on a murder charge may be found not guilty and acquitted, but if the same person claims as an heir, devisee, or beneficiary of a revocable beneficiary designation, etc. of the decedent, the probate court, upon the petition of an interested person, may find that, under a preponderance of the evidence standard, he or she would be found criminally accountable for the felonious and intentional killing of the decedent and thus be barred under this section from sharing in the affected property. In fact, in many of the cases arising under this section there may be no criminal prosecution because the killer has committed suicide.

It is now well accepted that the matter dealt with is not exclusively criminal in nature but is also a proper matter for probate courts. The concept that a wrongdoer may not profit by his or her own wrong is a civil concept, and the probate court is the proper forum to determine the effect of killing on succession to the decedent's property covered by this section. There are numerous situations where the same conduct gives rise to both criminal and civil consequences. A killing may result in criminal prosecution for murder and civil litigation by the decedent's family under wrongful death statutes. Another analogy exists in the tax field, where a taxpayer may be acquitted of tax fraud in a criminal prosecution but found to have committed the fraud in a civil proceeding.

The phrases "criminal accountability" and "criminally accountable" for the felonious and intentional killing of the decedent not only include criminal accountability as an actor or direct perpetrator, but also as an accomplice or co-conspirator.

Unlike the pre-1990 version, the revised version contains a subsection protecting payors who pay before receiving written notice of a claimed forfeiture or revocation under this section, and imposing personal liability on the recipient or killer.

The pre-1990 version's provision on the severance of joint tenancies and tenancies by the entirety also extended to "joint and multiple party accounts in banks, savings and loan associations, credit unions and other institutions, and any other form of co-ownership with survivorship incidents." Under subsection (c)(2) [72-2-813(3)(b)] of the revised version, the severance applies only to "property held by [the decedent and killer] as joint tenants with the right of survivorship [or as community property with the right of survivorship]." The terms "joint tenants with the right of survivorship" and "community property with the right of survivorship" are defined in Section 1-201 [72-1-103]. That definition includes tenancies by the entirety, but excludes "forms of co-ownership registration in which the underlying ownership of each party is in proportion to that party's contribution." Under subsection (c)(1) [72-2-813(3)(a)], any portion of the decedent's contribution to the co-ownership registration running in favor of the killer would be treated as a revocable and revoked disposition.

ERISA Preemption of State Law. The Employee Retirement Income Security Act of 1974 (ERISA) federalizes pension and employee benefit law. Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides that the provisions of Titles I and IV of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" governed by ERISA. See the Comment to Section 2-804 [72-2-814] for a discussion of the ERISA preemption question.

Cross References. See Section 1-201 [72-1-103] for definitions of "beneficiary designated in a governing instrument," "governing instrument," "joint tenants with the right of survivorship," "community property with the right of survivorship," and "payor."

Compiler's Comments

2019 Amendments — Composite Section: Chapter 312 in (1) inserted definitions of abuser, financial exploitation, and vulnerable adult; throughout section substituted references to "killer" or "killer's" for "abuser or killer's" or "abuser's or killer's"; in (2) near beginning of first sentence inserted "financially exploits or"; in (3) near beginning inserted "financial exploitation or"; in (3)(b) near middle substituted "financial exploitation or killing" for "killing"; in (4) near end substituted "and that are relied on as evidence of ownership" for "which records are relied upon" and at end deleted "as evidence of ownership"; in (7) in two places before "felonious" inserted "financial exploitation or" and near end substituted "the individual" for "that individual"; in (8)(a) near middle of first sentence inserted "financial exploitation or" and inserted current third sentence concerning payor's lack of duty or obligation to determine whether the decedent was a victim of financial exploitation or to seek evidence with respect to financial exploitation; and made minor changes in style. Amendment effective October 1, 2019.

Chapter 313 in (9)(b) near beginning after "federal law" deleted "other than the federal Employee Retirement Income Security Act of 1974, as amended"; and made minor changes in style. Amendment effective October 1, 2019.

1995 Amendment: Chapter 592 in (5), after "instrument", deleted "that are not revoked by this section" and after "all" substituted "provisions revoked by this section" for "revoked provisions"; in (8)(a) inserted second sentence concerning determination of homicide, substituted third sentence concerning liability for actions taken 2 or more business days after notice for "A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed forfeiture or revocation under this section", and inserted last sentence concerning liability for form of service described in subsection (8)(b); in (8)(b) inserted first sentence concerning information in written notice, inserted third sentence concerning notice to sales representative, inserted fifth through seventh sentences concerning other authorized actions, filing with court, and prohibiting filing fee, and inserted ninth sentence authorizing filing fee; in (9)(a), at beginning, substituted "bona fide purchaser who purchases property" for "person who purchases property for value and without notice"; and in (9)(b) inserted second clause concerning ERISA.

1993 Amendment: Chapter 494 substituted current text concerning effect of homicide on intestate succession, wills, trusts, joint assets, life insurance, and beneficiary designation for former text that read: "(1) A surviving spouse, heir, or devisee who feloniously and intentionally kills the decedent is not entitled to any benefits under the will or under this chapter, and the estate of the decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent.

(2) Any joint tenant who feloniously and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as his property and the killer has no rights by survivorship. This provision applies to joint tenancies in real and personal property, joint accounts in banks, savings and loan associations, credit unions, and other institutions, and any other form of co-ownership with survivorship incidents.

(3) A named beneficiary of a bond, life insurance policy, or other contractual arrangement who feloniously and intentionally kills the principal obligee or the person upon whose life the policy is issued is not entitled to any benefit under the bond, policy, or other contractual arrangement, and it becomes payable as though the killer had predeceased the decedent.

(4) Any other acquisition of property or interest by the killer shall be treated in accordance with the principles of this section.

(5) A final judgment of conviction of felonious and intentional killing is conclusive for purposes of this section. In the absence of a conviction of felonious and intentional killing, the

court may determine by a preponderance of evidence whether the killing was felonious and intentional for purposes of this section.

(6) This section does not affect the rights of any person who, before rights under this section have been adjudicated, purchases from the killer for value and without notice property which the killer would have acquired except for this section, but the killer is liable for the amount of the proceeds or the value of the property. Any insurance company, bank, or other obligor making payment according to the terms of its policy or obligation is not liable by reason of this section unless prior to payment it has received at its home office or principal address written notice of a claim under this section.

(7) For the purposes of this section, a felonious and intentional killing includes a deliberate homicide as defined in 45-5-102 and a mitigated deliberate homicide as defined in 45-5-103."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

1989 Amendment: Inserted (7) relating to deliberate homicide and mitigated deliberate homicide.

1989 Editorial Comment: Subsection (1) comes verbatim from the national Uniform Probate Code section 2-803. However, the Montana statutes dealing with homicide refer to a "purposely or knowingly" killing, rather than an "intentional killing". See 45-5-102. The new subsection (7) provides that a felonious and intentional killing includes a deliberate homicide as defined in 45-5-102 and a mitigated deliberate homicide as defined in 45-5-103.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-803.

Case Notes

Order to Pay Public Defender Costs — Meticulous and Scrupulous Findings of Ability to Pay — No Chilling of Constitutional Rights to Jury Trial: The defendant was convicted of murdering her husband and was ordered to pay the costs of her court-appointed public defender. On appeal, the defendant claimed that the District Court had failed to ascertain her ability to pay and to consider her forfeiture of her husband's estate. She also claimed that the award of costs had a chilling effect on her right to a jury trial. The Supreme Court disagreed and affirmed, noting that the District Court had met its burden by "scrupulously and meticulously" considering the defendant's current assets and her future ability to pay. Although she was not entitled to the victim's estate, the District Court correctly presumed that the defendant still owned an undivided interest in the marital property. St. v. Gable, 2015 MT 200, 380 Mont. 101, 354 P.3d 566.

Guilty Plea in Criminal Case Not Conclusive of Defendant's Felonious Intent for Inheritance Purposes: While suffering from a mental disease or defect, Swanson killed her two children. Swanson pleaded guilty and was sentenced to a life term in the state hospital. Swanson's husband served as the personal representative for the children's estates, and he petitioned the District Court to forfeit Swanson's interest in the estates pursuant to this section, which provides that a slayer who feloniously and intentionally kills another may not take from the decedent's estate. The District Court found as a matter of law that Swanson had forfeited her right of inheritance to the children's estates and granted the petition, and the mother appealed. The Supreme Court reversed. The District Court summarily denied Swanson the right to inherit by treating her guilty plea as conclusive evidence that she feloniously and intentionally killed her children, without expressly addressing the issue of collateral estoppel, which effectively precluded Swanson from litigating whether she acted with the requisite intent and whether the killings were felonious. Pursuant to this section, if there has been a judgment of conviction that establishes criminal accountability for the felonious and intentional killing of the decedent, the convicted person is presumed to be the killer, but if a killer's criminal accountability has not yet been established through litigation, as when a defendant pleads guilty, this section explicitly directs the District Court to consider the issues of intent and whether the killing was felonious in a civil proceeding. Without determining whether Swanson was entitled to inherit, the Supreme Court remanded for a District Court determination of whether the killing was done with a mind bent on doing wrong. On remand, the husband had the burden of proving that Swanson acted with the requisite intent, taking into account Swanson's mental condition as required by 46-14-101, and evidence of Swanson's guilty plea was admissible on the independent ground that it was an admission but without giving it conclusive effect. In re Estates of Swanson, 2008 MT 224, 344 M 266, 187 P3d 631 (2008), following Safeco Ins. Co. of America v. Liss, 2000 MT 380, 303 M 519, 16 P3d 399 (2000).

Presumption of Undivided Equal Interests in Property Subject to Rebuttal: The estate of Nina Garland argued that the lower court erred in determining that her husband, who had killed her, owned an undivided equal interest in the proceeds of the sale of the couple's house. The Supreme

Court agreed, reversing the District Court on the grounds that the husband's interest was as a tenant in common and that the estate should have been given the opportunity to prove that Nina's contribution to the purchase and maintenance of the property entitled her estate to more than an equal share of the proceeds. In re Estate of Garland, 279 M 269, 928 P2d 928, 53 St. Rep. 1146 (1996).

Husband and Wife Joint Tenancy — Intentional Killing — Constructive Trust: A husband and wife were owners of real property as joint tenants with rights of survivorship. The intentional killing of the husband by the wife effected a severance of the joint tenancy with a one-half interest being retained by the wife and the remaining one-half interest passing to the estate of the decedent husband. Because the wife's interest vested at the creation of the joint tenancy, her retention of a one-half interest was not a benefit resulting from her killing of her husband. The court was not required to impose a constructive trust on the wife's interest, only upon the decedent husband's interest. With respect to the husband's estate, the wife was not entitled to any portion. In re Estate of Matye, 198 M 371, 645 P2d 955, 39 St. Rep. 1009 (1982), distinguished in In re Estate of Garland, 279 M 269, 928 P2d 928, 53 St. Rep. 1146 (1996). See also St. v. Gable, 2015 MT 200, 380 Mont. 101, 354 P.3d 566.

Law Review Articles

In Re Ests. of Swansons: The Slayer Statute and the Impact of a Guilty Plea on Collateral Estoppel in Montana, Arant, 71 Mont. L. Rev. 217 (2010).

72-2-814. Revocation of probate and nonprobate transfers by divorce — no revocation by other changes of circumstances.

Official Comments

Purpose and Scope of Revision. The revisions of this section, pre-1990 Section 2-508 [former 72-2-322, renumbered 72-2-528], intend to unify the law of probate and nonprobate transfers. As originally promulgated, pre-1990 Section 2-508 [former 72-2-322, renumbered 72-2-528] revoked a predivorce devise to the testator's former spouse. The revisions expand the section to cover "will substitutes" such as revocable inter-vivos trusts, life-insurance and retirement-plan beneficiary designations, transfer-on-death accounts, and other revocable dispositions to the former spouse that the divorced individual established before the divorce (or annulment). As revised, this section also effects a severance of the interests of the former spouses in property that they held at the time of the divorce (or annulment) as joint tenants with the right of survivorship; their co-ownership interests become tenancies in common.

As revised, this section is the most comprehensive provision of its kind, but many states have enacted piecemeal legislation tending in the same direction. For example, Michigan and Ohio have statutes transforming spousal joint tenancies in land into tenancies in common upon the spouses' divorce. Mich. Comp. Laws Ann. § 552.102; Ohio Rev. Code Ann. § 5302.20(c)(5). Ohio, Oklahoma, and Tennessee have recently enacted legislation effecting a revocation of provisions for the settlor's former spouse in revocable inter-vivos trusts. Ohio Rev. Code Ann. § 1339.62; Okla. Stat. Ann. tit. 60, § 175; Tenn. Code Ann. § 35-50-115 (applies to revocable and irrevocable inter-vivos trusts). Statutes in Michigan, Ohio, Oklahoma, and Texas relate to the consequence of divorce on life-insurance and retirement-plan beneficiary designations. Mich. Comp. Laws Ann. § 552.101; Ohio Rev. Code Ann. § 1339.63; Okla. Stat. Ann. tit. 15, § 178; Tex. Fam. Code §§ 3.632-.633.

The courts have also come under increasing pressure to use statutory construction techniques to extend statutes like the pre-1990 version of Section 2-508 [former 72-2-322, renumbered 72-2-528] to various will substitutes. In *Clymer v. Mayo*, 393 Mass. 754, 473 N.E.2d 1084 (1985), the Massachusetts court held the statute applicable to a revocable inter-vivos trust, but restricted its "holding to the particular facts of this case specifically the existence — of a revocable pour-over trust funded entirely at the time of the decedent's death." 473 N.E.2d at 1093. The trust in that case was an unfunded life-insurance trust; the life insurance was employer-paid life insurance. In *Miller v. First Nat'l Bank & Tr. Co.*, 637 P.2d 75 (Okla. 1981), the court also held such a statute to be applicable to an unfunded life-insurance trust. The testator's will devised the residue of his estate to the trustee of the life-insurance trust. Despite the absence of meaningful evidence of intent to incorporate, the court held that the pour-over devise incorporated the life-insurance trust into the will by reference, and thus was able to apply the revocation-upon-divorce statute. In *Equitable Life Assurance Society v. Stitzel,* 1 Pa. Fiduc.2d 316 (C.P. 1981), however, the court held a statute similar to the pre-1990 version of Section 2-508 [former 72-2-322, renumbered 72-2-528] to be inapplicable to effect a revocation of a life-insurance beneficiary designation of the former spouse.

Revoking Benefits of the Former Spouse's Relatives. In several cases, including *Clymer v. Mayo*, 393 Mass. 754, 473 N.E.2d 1084 (1985), and *Estate of Coffed*, 46 N.Y.2d 514, 414 N.Y.S.2d 893, 387 N.E.2d 1209 (1979), the result of treating the former spouse as if he or she predeceased the testator was that a gift in the governing instrument was triggered in favor of relatives of the former spouse who, after the divorce, were no longer relatives of the testator. In the Massachusetts case, the former spouse's nieces and nephews ended up with an interest in the property. In the New York case, the winners included the former spouse's child by a prior marriage. For other cases to the same effect, see *Porter v. Porter*, 286 N.W.2d 649 (Iowa 1979); *Bloom v. Selfon*, 520 Pa. 519, 555 A.2d 75 (1989); *Estate of Graef*, 124 Wis.2d 25, 368 N.W.2d 633 (1985). Given that, during divorce process or in the aftermath of the divorce, the former spouse's relatives are likely to side with the former spouse, breaking down or weakening any former ties that may previously have developed between the transferor and the former spouse's relatives, seldom would the transferor have favored such a result. This section, therefore, also revokes these gifts.

Consequence of Revocation. The effect of revocation by this section is, of course, that the governing instrument is given effect as if the revoked provisions were removed or stricken therefrom at the time of the divorce or annulment. The remaining or unrevoked provisions of the governing instrument take effect as if the divorced individual's former spouse (and relatives of the former spouse) disclaimed the revoked provisions (see Section 2-801(d) [72-2-811(4), now repealed] for the effect of a disclaimer) or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment. If the divorced individual (or relative of the divorced individual) is the donee of an unexercised power of appointment that is revoked by this section, the gift-in-default clause, if any, is to take effect, to the extent that the gift-in-default clause is not itself revoked by this section.

ERISA Preemption of State Law. The Employee Retirement Income Security Act of 1974 (ERISA) federalizes pension and employee benefit law. Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides that the provisions of Titles I and IV of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" governed by ERISA.

ERISA's preemption clause is extraordinarily broad. ERISA Section 514(a) does not merely preempt state laws that conflict with specific provisions in ERISA. Section 514(a) preempts "any and all State laws" insofar as they "relate to" any ERISA-governed employee benefit plan.

A complex case law has arisen concerning the question of whether to apply ERISA Section 514(a) to preempt state law in circumstances in which ERISA supplies no substantive regulation. For example, until 1984, ERISA contained no authorization for the enforcement of state domestic relations decrees against pension accounts, but the federal courts were virtually unanimous in refusing to apply ERISA preemption against such state decrees. See, e.g., *American Telephone & Telegraph Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979). The Retirement Equity Act of 1984 amended ERISA to add Sections 206(d)(3) and 514(b)(7), confirming the judicially created exception for state domestic relations decrees.

The federal courts have been less certain about whether to defer to state probate law. In *Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. H.F. Johnson, Inc.*, 830 F.2d 1009 (9th Cir. 1987), the court held that ERISA preempted the Montana nonclaim statute (which is Section 3-803 of the Uniform Probate Code). On the other hand, in *Mendez-Bellido v. Board of Trustees*, 709 F. Supp. 329 (E.D. N.Y. 1989), the court applied the New York "slayer-rule" against an ERISA preemption claim, reasoning that "state laws prohibiting murderers from receiving death benefits are relatively uniform [and therefore] there is little threat of creating a 'patchwork scheme of regulations'" that ERISA sought to avoid.

It is to be hoped that the federal courts will continue to show sensitivity to the primary role of state law in the field of probate and nonprobate transfers. To the extent that the federal courts think themselves unable to craft exceptions to ERISA's preemption language, it is open to them to apply state law concepts as federal common law. Because the Uniform Probate Code contemplates multistate applicability, it is well suited to be the model for federal common law absorption.

Another avenue of reconciliation between ERISA preemption and the primacy of state law in this field is envisioned in subsection (h)(2) [72-2-814(8)(b)] of this section. It imposes a personal liability for pension payments that pass to a former spouse or relative of a former spouse. This provision respects ERISA's concern that federal law govern the administration of the plan, while still preventing unjust enrichment that would result if an unintended beneficiary were to receive the pension benefits. Federal law has no interest in working a broader disruption of state probate and nonprobate transfer law than is required in the interest of smooth administration of pension and employee benefit plans.

Cross References. See Section 1-201 [72-2-103] for definitions of "beneficiary designated in a governing instrument," "governing instrument," "joint tenants with the right of survivorship," "community property with the right of survivorship," and "payor."

References. The theory of this section is discussed in Waggoner, "The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code," 76 Iowa L. Rev. 223, 226-29 (1991). See also Langbein, "The Nonprobate Revolution and the Future of the Law of Succession," 97 Harv. L. Rev. 1108 (1984).

Compiler's Comments

2019 Amendment: Chapter 313 in (7)(b) near middle of second sentence inserted "registered or"; in (8)(a) near middle of first sentence inserted "for value and without notice"; in (8)(b) near beginning after "federal law" deleted "other than the federal Employee Retirement Income Security Act of 1974, as amended"; and made minor changes in style. Amendment effective October 1, 2019.

2017 Amendment: Chapter 228 inserted (9) regarding testate and intestate estates, a conflict between provisions of law, and designation of a former spouse as personal representative after the divorce. Amendment effective October 1, 2017.

1999 Amendment: Chapter 562 in (2) in exception clause inserted reference to retirement system established in Title 19. Amendment effective July 1, 1999.

Saving Clause: Section 100, Ch. 562, L. 1999, was a saving clause.

1995 Amendment: Chapter 592 in (4), near beginning after "instrument", deleted "that are not revoked by this section" and after "disclaimed" substituted "all provisions revoked by this section" for "the revoked provisions"; in (7)(a) inserted second sentence concerning inquiry into continued marital relationship, substituted third sentence concerning liability for actions taken 2 or more business days after notice for "A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed forfeiture or revocation under this section", and inserted last sentence concerning liability under subsection (7)(b); in (7)(b) inserted first sentence concerning content of notice, inserted fourth through sixth sentences concerning other authorized actions, filing with court, and prohibiting filing fee, and inserted eighth sentence authorizing filing fee; in (8)(a), at beginning, substituted "bona fide purchaser" for "person" and in third clause, after "person", deleted "for value and without notice"; and in (8)(b) inserted second clause concerning ERISA.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-804.

Case Notes

Constructive Trust Created Due to Improper Change of Life Insurance Beneficiary During Dissolution Proceedings — Unjust Enrichment: A man improperly changed his life insurance beneficiary from his wife to his sister during the statutorily mandated restraining period of his dissolution proceedings, which prevented him from making any beneficiary changes. The man died 4 months after the divorce finalized. The District Court erred when it granted summary judgment to the sister, denying the imposition of a constructive trust on life insurance proceeds for the man's child because the change was invalid while the restraining order was in place. The sister, although she had done nothing wrong, was unjustly enriched by the disbursement of the life insurance proceeds to her, and the Supreme Court held that a constructive trust was created for the minor child, who otherwise would have received the insurance proceeds under the application of 72-2-814. Volk v. Goeser, 2016 MT 61, 382 Mont. 382, 367 P.3d 378.

Certified Question — Application of Revocation Upon Divorce Statute: In response to a certified question from the U.S. Court of Appeals for the Ninth Circuit, the Supreme Court held that 72-2-814 operates at the time of the insured's death and applies to any divorce that took place during the insured's lifetime. Although the parties divorced before the statute took effect and the beneficiary designation was never changed, the former spouse's property interest was equivalent to that of a devisee under a will, i.e., ambulatory and nonexistent until death. Thrivent Fin. for Lutherans v. Andronescu, 2013 MT 13, 368 Mont. 256, 300 P.3d 117, distinguishing Eschler v. Eschler, 257 Mont. 360, 849 P.2d 196 (1993).

Revocation of Former Spouse's Children's Benefits: As a matter of law, divorce triggers revocation of appointments of stepchildren as devisees to the decedent's pour-over living trust. In re Estate of Marchwick, 2010 MT 129, 356 Mont. 385, 234 P.3d 879.

72-2-815. Reformation to correct mistakes.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-816. Modification to achieve transferor's tax objectives.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-817. Short title.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-818. Definitions.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-819. Scope.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-820. Sections supplemented by other law.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-821. Power to disclaim — general requirements — when revocable.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-822. Disclaimer of interest in property.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-823. Disclaimer of rights of survivorship in jointly held property.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-824. Disclaimer of interest by trustee.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-825. Disclaimer of power of appointment or other power not held in fiduciary capacity.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-826. Disclaimer by appointee, object, or taker in default of exercise of power of appointment.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-827. Disclaimer of power held in fiduciary capacity.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-828. Delivery or filing.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-829. When disclaimer barred or limited.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Property Settlement Agreement Ineffective as to Renunciation of Beneficiary's Right to IRA: Upon dissolution of her marriage to Glendon, Isabel agreed to a property settlement awarding Glendon sole ownership of an IRA in which she was named as beneficiary. Later, Glendon died without having removed Isabel as the named beneficiary of the IRA and Isabel filed a renunciation of her interest in the IRA. The District Court held that Isabel could not renounce her interest in the IRA because the property settlement agreement deprived her of her interest in the IRA. Therefore, the District Court ruled that the contingent beneficiaries were not entitled to the IRA. Citing Sowell v. Teachers' Retirement Sys., 214 M 200, 693 P2d 1222 (1984), and Eschler v. Eschler, 257 M 360, 849 P2d 196 (1993), the Supreme Court held that under the property settlement agreement, Isabel lost only her marital interest in the IRA but not her interest as a beneficiary. Her renunciation of her interest was therefore operative against her interest as a beneficiary, and Isabel's interest in the IRA as a beneficiary vested in the contingent beneficiaries. In re Estate of Bruce, 265 M 431, 877 P2d 999, 51 St. Rep. 576 (1994).

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Disclaimer of Surviving Spouse's Interest Filed Simultaneously With Instrument Revoking Disclaimer: The surviving spouse entered into an agreement with the decedent's son whereby she disclaimed her interest in the family business. She subsequently changed her mind and filed the disclaimer and an instrument revoking the disclaimer at the same time. The Supreme Court held that this section requires the disclaimer to be filed to take effect and that because it was filed simultaneously with a revoking document it was not valid. In re Estate of Griffin, 248 M 472, 812 P2d 1256, 48 St. Rep. 517 (1991).

72-2-830. Tax qualified disclaimer.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-831. Recording of disclaimer.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-832. Application to existing relationships.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-2-833. Relation to electronic signatures in global and national commerce act.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

Part 9
Uniform International Will Act

Part Official Comments

Introduction

The purpose of the Washington Convention of 1973 concerning international wills is to provide testators with a way of making wills that will be valid as to form in all countries joining the Convention. As proposed by the Convention, the objective would be achieved through uniform local rules of form, rather than through local or international law that makes recognition of foreign wills turn on choice of law rules involving possible application of foreign law. The international will provisions, prepared for the National Conference of Commissioners on Uniform State Laws by the Joint Editorial Board for the Uniform Probate Code which has functioned as a special committee of the Conference for the project, should be enacted by all states, including those that have not accepted the Uniform Probate Code. To that end, this statute is framed both as a free-standing Act and as an added part of the Uniform Probate Code. The bracketed headings and numbers fit the proposal into UPC; the others present the proposal as a free-standing Act.

Uniform state enactment of these provisions will permit the Washington Convention of 1973 to be implemented through state legislation familiar to will draftsmen. Thus, local proof of foreign law and reliance on federal legislation regarding wills can be avoided when foreign wills come into our states to be implemented. Also, the citizens of all states will have a will form available that should greatly reduce perils of proof and risks of invalidity that attend proof of American wills abroad.

History of the International Will

Discussions about possible international accord on an acceptable form of will led the Governing Council of UNIDROIT (International Institute for the Unification of Private Law) in 1960 to appoint a small committee of experts from several countries to develop proposals. Following week-long meetings at the Institute's quarters in Rome in 1963, and on two occasions in 1965, the Institute published and circulated a Draft Convention of December 1966 with an annexed uniform law that would be required to be enacted locally by those countries agreeing to the convention. The package and accompanying explanations were reviewed in this country by the Secretary of State's Advisory Committee on Private International Law. In turn, it referred the proposal to a special committee of American probate specialists drawn from member of NCCUSL's Special Committee on the Uniform Probate Code and its advisers and reporters. The resulting reports and recommendations were affirmative and urged the State Department to cooperate in continuing efforts to develop the 1966 Draft Convention, and to endeavor to interest other countries in the subject.

Encouraged by support for the project from this country and several others, UNIDROIT served as host for a 1971 meeting in Rome of an expanded group that included some of the original panel of experts and others from several countries that were not represented in the early drafting sessions. The result of this meeting was a revised draft of the proposed convention and annexed uniform law and this, in turn, was the subject of study and discussion by many more persons in this country. In mid-1973, the proposal from UNIDROIT was discussed in a joint program of the Real Property Probate and Trust Law Section, and the Section of International Law at the American Bar Association's annual meeting held that year in Washington, D.C. By late 1973, the list of published, scholarly discussions of the International Will proposals included Fratcher, "The Uniform Probate Code and the International Will", 66 Mich.L.Rev. 469 (1968); Wellman, "Recent Unidroit Drafts on the International Will", 6 The International Lawyer 205 (1973); and Wellman, "Proposed International Convention Concerning Wills", 8/4 Real Property, Probate and Trust Journal 622 (1973).

In October 1973, pursuant to a commitment made earlier to UNIDROIT representatives that it would provide leadership for the international will proposal if sufficient interest from other countries became evident, the United States served as host for the diplomatic Conference on Wills which met in Washington from October 10 to 26, 1973. 42 governments were represented by delegations, 6 by observers. The United States delegation of 8 persons plus 2 Congressional advisers and 2 staff advisers, was headed by Ambassador Richard D. Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law who also was selected president of the Conference. The result of the Conference was the Convention of October 26, 1973 Providing a Uniform Law on the Form of an International Will, an appended Annex, Uniform Law on the Form of an International Will, and a Resolution recommending establishment of state assisted systems for the safekeeping and discovery of wills. These three documents are reproduced at the end of these preliminary comments.

A more detailed account of the UNIDROIT project and the 1973 Convention, together with recommendations regarding United States implementation of the Convention, appears in Nadelmann, "The Formal Validity of Wills and the Washington Convention 1973 Providing the Form of an International Will", XXII The American Journal of Comparative Law, 365 (1974).

Description of the Proposal

The 1973 Convention obligates countries becoming parties to make the annexed uniform law a part of their local law. The proposed uniform law contemplates the involvement in will executions under this law of a state recognized expert who is referred to throughout the proposals as the "authorized person". Hence, the local law called for by the Convention must designate authorized persons, and prescribe the formalities for an international will and the role of authorized persons relating thereto. The Convention binds parties to respect the authority of another party's authorized persons and this obligation, coupled with local enactment of the common statute prescribing the role of such persons and according finality to their certificates regarding due execution of wills, assures recognition of international wills under local law in all countries joining the Convention.

The Convention and the annexed uniform law deal only with the formal validity of wills. Thus, the proposal is entirely neutral in relation to local laws dealing with revocation of wills, or those defining the scope of testamentary power, or regulating the probate, interpretation, and construction of wills, and the administration of decedents' estates. The proposal describes a highly formal mode of will execution; one that is sufficiently protective against imposition and mistake to command international approval as being safe enough. However, failure to meet the requirements of an international will does not necessarily result in invalidity, for the mode of execution described for an international will does not pre-empt or exclude other standards of testamentary validity.

The details of the prescribed mode of execution reflect a blend of common and civil law elements. Two attesting witnesses are required in the tradition of the English Statute of Wills of 1837 and its American counterparts. The authorized person whose participation in the ceremony of execution is required, and whose certificate makes the will self-proved, plays a role not unlike that of the civil law notary, though he is not required to retain custody of the will as is customary with European notaries.

The question of who should be given state recognition as authorized persons was resolved by designation of all licensed attorneys. The reasons for this can be seen in the observations about the role of Kurt H. Nadelmann, writing in The American Journal of Comparative Law:

The duties imposed by the Uniform Law upon the person doing the certifying go beyond legalization of signatures, the domain of the notary public. At least paralegal training is a necessity. Abroad, in countries with the law trained notary, the designation is likely to go to this class or at least to include it. Similarly, in countries with a closely supervised class of solicitors, their designation may be expected.

Attorneys are subject to training and licensing requirements everywhere in this country. The degree to which they are supervised after qualification varies considerably from state to state, but the trend is definitely in the direction of more rather than less supervision. Designation of attorneys in the uniform law permits a state to bring the statute into its local law books without undue delay.

Roles for Federal and State Law in Relation to International Will

Several alternatives are available for arranging federal and state laws on the subject of international wills. The 1973 Convention obligates nations becoming parties to introduce the annexed uniform law into their local law, and to recognize the authority, *vis a vis* will executions and certificates relating to wills, of persons designated as authorized by other parties to the Convention. But, the Convention includes a clause for federal states that may be used by the United States as it moves, through the process of Senate Advice and Consent, to accept the international compact. Through it, the federal government may limit the areas in this country to which the Convention will be applicable. Thus, Article XIV of the 1973 Convention provides:

1. If a state has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, it may at the time of signature, ratification, or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.
2. These declarations shall be notified to the Depositary Government and shall state expressly the territorial units to which the Convention applies.

One alternative would be for the federal government to refrain from use of Article XIV and to accept the Convention as applicable to all areas of the country. The obligation to introduce the uniform law into local law then could be met by passage of a federal statute incorporating the uniform law and designating authorized persons who can assist testators desiring to use the international format, possibly leaving it open for state legislatures, if they wish, to designate other or additional groups of authorized persons. As to constitutionality, the federal statute on wills could be rested on the power of the federal government to bind the states by treaty and to implement a treaty obligation to bring agreed upon rules into local law by any appropriate method. Missouri v. Holland, 252 U.S. 416 (1920); Nadelmann, "The Formal Validity of Wills and the Washington Convention 1973 Providing the Form of An International Will", XXII The Am. Jn'l of Comp.L. 365, 375 (1974). Prof. Nadelmann favors this approach, arguing that new risks of invalidity of wills would arise if the treaty were limited so as to be applicable only in designated areas of the country, presumably those where state enactment of the uniform law already had occurred.

One disadvantage of this approach is that it would place a potentially important method for validating wills in federal statutes where probate practitioners, long accustomed to finding the statutes pertinent to their specialty in state compilations, simply would not discover it. Another, of course, relates to more generalized concerns that would attend any move by the federal government into an area of law traditionally reserved to the states.

Alternatively, the federal government might accept the Convention and uniform law as applicable throughout the land, so that international wills executed with the aid of authorized persons of other countries would be good anywhere in this country, but refrain from any designation of authorized persons, other than possibly of some minimum federal cadre, or of those who could function within the District of Columbia, leaving the selection of more useful groups of authorized persons entirely to the states. One result would be to greatly narrow the advantage of international wills to American testators who wanted to execute their instruments at home. In probable consequence, there would be pressure on state legislatures to enact the uniform law so as to make the advantages of the system available to local testators. Assuming some state legislatures respond to the pressure affirmatively and others negatively, a crazyquilt pattern of international will states would develop, leading possibly to some of the confusion and risk of illegality feared by Prof. Nadelmann. On the other hand, since execution of an international will involves use of an authorized person who derives authority from (on this assumption) state legislation, it seem somewhat unlikely that testators in states which have not designated authorized persons will be led to believe that they can make an international will unless they go to a state where authorized persons have been designated. Hence, the confusion may not be as great as if the Convention were inapplicable to portions of the country.

Finally, the federal government might use Article XIV as suggested earlier, and designate some but not all states as areas of the country in which the Convention applied. This seems the least desirable of all alternatives because it subjects international wills from abroad to the risk of non-recognition in some states, and offers the risk of confusion of American testators regarding the areas of the country where they can execute a will that will be received outside this country as an international will.

Under any of the approaches, the desirability of widespread enactment of state statutes embodying the uniform law and designating authorized persons, seems clear, as does the necessity for this project of the National Conference of Commissioners on Uniform State Laws.

Style

In preparing the International Will proposal, the special committee, after considerable discussion and consideration of alternatives, decided to stick as closely as possible to the wording of the Annex to the Convention of October 26, 1973. The Convention and its Annex were written in the English, French, Russian and Spanish languages, each version, as declared by Article XVI of the Convention, being equally authentic. Not surprisingly, the English version of the Annex has a style that is somewhat different than that to which the National Conference is accustomed. Nonetheless, from the view of those using languages other than English who may be reviewing our state statutes on the International Will to see if they adhere to the Annex, it is more important to stick with the agreed formulations than it is to re-style these expressions to suit our traditions. However, some changes from the Annex were made in the interests of clarity, and because some of the language of the Annex is plainly inappropriate in a local enactment. These changes are explained in the Comments.

Will Registration

A bracketed Section 10 [2-1010] [72-2-909], is included in the International Will proposal to aid survivors in locating international and other wills that have been kept secret by testators during their lives. Differing from the Section 2-901 [72-2-1002] of the Uniform Probate Code and the many existing statutes from which Section 2-901 [72-2-1002] was derived which constitute the probate court as an agency for the safekeeping of wills deposited by living testators, the bracketed proposal is for a system of registering certain minimum information about wills, including where the instrument will be kept pending the death of the testator. It can be separated or omitted from the rest of the Act.

This provision for a state will registration system is derived from recommendations by the Council of Europe for common market countries. These recommendations were urged on the group that assembled in Rome in 1971, and were received with interest by representatives of United Kingdom, Canada and United States, where will-making laws and customs have not included any officially sanctioned system for safekeeping of wills or for locating information about wills, other than occasional statutes providing for ante-mortem deposit of wills with probate courts. Interest was expressed also by the notaries from civil law countries who have traditionally aided will-making both by formalizing execution and by being the source thereafter of official certificates about wills, the originals of which are retained with the official records of the notary and carefully protected and regulated by settled customs of the profession. All recognized that acceptance of the international will would tend to increase the frequency with which owners of property in several different countries relied on a single will to control all of their properties. This prospect, plus increasing mobility of persons between countries, indicates that new methods for safekeeping and locating wills after death should be developed. The Resolution adopted as the final act of the 1973 Conference on Wills shows that the problem also attracted the interest and attention of that assembly.

Apart from problems of wills that may have effect in more than one country, Americans are moving from state to state with increasing frequency. As the international will statute becomes enacted in most if not all states, our laws will tend to induce persons to rely on a single will as sufficient even though they may own land in two or more states, and to refrain from making new wills when they change domicile from one state to another. The spread of the Uniform Probate Code, tending as it does to give wills the same meaning and procedural status in all states, will have a similar effect.

General enactment of the will registration section should lead to development of new state and interstate systems to meet the predictable needs of testators and survivors that will follow as the law of wills is detached from provincial restraints. It is offered with the international will provisions because both meet obvious needs of the times.

Documents from 1973 Convention

Three documents representing the work of the 1973 Convention are reproduced here for the convenience of members of the Conference.

CONVENTION PROVIDING A UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

The States signatory to the present Convention,

DESIRING to provide to a greater extent for the respecting of last wills by establishing an additional form of will hereinafter to be called an "international will" which, if employed, would dispense to some extent with the search for the applicable law;

HAVE RESOLVED to conclude a Convention for this purpose and have agreed upon the following provisions:

Article I 1. Each Contracting Party undertakes that not later than six months after the date of entry into force of this Convention in respect of that Party it shall introduce into its law the rules regarding an international will set out in the Annex to this Convention.

2. Each Contracting Party may introduce the provisions of the Annex into its law either by reproducing the actual text, or by translating it into its official language or languages.

3. Each Contracting Party may introduce into its law such further provisions as are necessary to give the provisions of the Annex full effect in its territory.

4. Each Contracting Party shall submit to the Depositary Government the text of the rules introduced into its national law in order to implement the provisions of this Convention.

Article II 1. Each Contracting Party shall implement the provisions of the Annex in its law, within the period provided for in the preceding article, by designating the persons who, in its territory, shall be authorized to act in connection with international wills. It may also designate as a person authorized to act with regard to its nationals its diplomatic or consular agents abroad insofar as the local law does not prohibit it.

2. The Party shall notify such designation, as well as any modifications thereof, to the Depositary Government.

Article III The capacity of the authorized person to act in connection with an international will, if conferred in accordance with the law of a Contracting Party, shall be recognized in the territory of the other Contracting Parties.

Article IV The effectiveness of the certificate provided for in Article 10 of the Annex shall be recognized in the territories of all Contracting Parties.

Article V 1. The conditions requisite to acting as a witness of an international will shall be governed by the law under which the authorized person was designated. The same rule shall apply as regards an interpreter who is called upon to act.

2. Nonetheless no one shall be disqualified to act as a witness of an international will solely because he is an alien.

Article VI 1. The signature of the testator, of the authorized person, and of the witnesses to an international will, whether on the will or on the certificate, shall be exempt from any legalization or like formality.

2. Nonetheless, the competent authorities of any Contracting Party may, if necessary, satisfy themselves as to the authenticity of the signature of the authorized person.

Article VII The safekeeping of an international will shall be governed by the law under which the authorized person was designated.

Article VIII No reservation shall be admitted to this Convention or to its Annex.

Article IX 1. The present Convention shall be open for signature at Washington from October 26, 1973, until December 31, 1974.

2. The Convention shall be subject to ratification.

3. Instruments of ratification shall be deposited with the Government of the United States of America, which shall be the Depositary Government.

Article X 1. The Convention shall be open indefinitely for accession.

2. Instruments of accession shall be deposited with the Depositary Government.

Article XI 1. The present Convention shall enter into force six months after the date of deposit of the fifth instrument of ratification or accession with the Depositary Government.

2. In the case of each State which ratifies this Convention or accedes to it after the fifth instrument of ratification or accession has been deposited, this Convention shall enter into force six months after the deposit of its own instrument of ratification or accession.

Article XII 1. Any Contracting Party may denounce this Convention by written notification to the Depositary Government.

2. Such denunciation shall take effect twelve months from the date on which the Depositary Government has received the notification, but such denunciation shall not affect the validity of any will made during the period that the Convention was in effect for the denouncing State.

Article XIII 1. Any State may, when it deposits its instrument of ratification or accession or at any time thereafter, declare, by a notice addressed to the Depositary Government, that this Convention shall apply to all or part of the territories for the international relations of which it is responsible.

2. Such declaration shall have effect six months after the date on which the Depositary Government shall have received notice thereof or, if at the end of such period the Convention has not yet come into force, from the date of its entry into force.

3. Each Contracting Party which has made a declaration in accordance with paragraph 1 of this Article may, in accordance with Article XII, denounce this Convention in relation to all or part of the territories concerned.

Article XIV 1. If a State has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, it may at the time of signature, ratification, or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

2. These declarations shall be notified to the Depositary Government and shall state expressly the territorial units to which the Convention applies.

Article XV If a Contracting Party has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, any reference to the internal law of the place where the will is made or to the law under which the authorized person has been appointed to act in connection with international wills shall be construed in accordance with the constitutional system of the Party concerned.

Article XVI 1. The original of the present Convention, in the English, French, Russian and Spanish languages, each version being equally authentic, shall be deposited with the Government of the United States of America, which shall transmit certified copies thereof to each of the signatory and acceding States and to the International Institute for the Unification of Private Law.

2. The Depositary Government shall give notice to the signatory and acceding States, and to the International Institute for the Unification of Private Law, of:

(a) any signature;
(b) the deposit of any instrument of ratification or accession;
(c) any date on which this Convention enters into force in accordance with Article XI;
(d) any communication received in accordance with Article I, paragraph 4;
(e) any notice received in accordance with Article II, paragraph 2;
(f) any declaration received in accordance with Article XIII, paragraph 2, and the date on which such declaration takes effect;
(g) any denunciation received in accordance with Article XII, paragraph 1, or Article XIII, paragraph 3, and the date on which the denunciation takes effect;

(h) any declaration received in accordance with Article XIV, paragraph 2, and the date on which the declaration takes effect.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, being duly authorized to that effect, have signed the present Convention.

DONE at Washington this twenty-sixth day of October, one thousand nine hundred and seventy-three.

Annex

UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

Article 1 1. A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out in Articles 2 to 5 hereinafter.

2. The invalidity of the will as an international will shall not affect its formal validity as a will of another kind.

Article 2 This law shall not apply to the form of testamentary dispositions made by two or more persons in one instrument.

Article 3 1. The will shall be made in writing.

2. It need not be written by the testator himself.

3. It may be written in any language, by hand or by any other means.

Article 4 1. The testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof.

2. The testator need not inform the witnesses, or the authorized person, of the contents of the will.

Article 5 1. In the presence of the witnesses and of the authorized person, the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.

2. When the testator is unable to sign, he shall indicate the reason therefor to the authorized person who shall make note of this on the will. Moreover, the testator may be authorized by the law under which the authorized person was designated to direct another person to sign on his behalf.

3. The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

Article 6 1. The signatures shall be placed at the end of the will.

2. If the will consists of several sheets, each sheet shall be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet shall be numbered.

Article 7 1. The date of the will shall be the date of its signature by the authorized person.

2. This date shall be noted at the end of the will by the authorized person.

Article 8 In the absence of any mandatory rule pertaining to the safekeeping of the will, the authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator the place where he intends to have his will kept shall be mentioned in the certificate provided for in Article 9.

Article 9 The authorized person shall attach to the will a certificate in the form prescribed in Article 10 establishing that the obligations of this law have been complied with.

Article 10 The certificate drawn up by the authorized person shall be in the following form or in a substantially similar form:

CERTIFICATE

(Convention of October 26, 1973)

1. I, ____________________ (name, address and capacity), a person authorized to act in connection with international wills
2. Certify that on _________ (date) at __________ (place)
3. (testator) ____________________ (name, address, date and place of birth) in my presence and that of the witnesses
4. (a) ____________________ (name, address, date and place of birth)
   (b) ____________________ (name, address, date and place of birth) has declared that the attached document is his will and that he knows the contents thereof.
5. I furthermore certify that:
6. (a) in my presence and in that of the witnesses

(1) the testator has signed the will or has acknowledged his signature previously affixed.
*(2) following a declaration of the testator stating that he was unable to sign his will for the following reason ________
—I have mentioned this declaration on the will
*—the signature has been affixed by ________ (name, address)
7. (b) the witnesses and I have signed the will;
8. *(c) each page of the will has been signed by ________ and numbered;
9. (d) I have satisfied myself as to the identity of the testator and of the witnesses as designated above;
10. (e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;
11. *(f) the testator has requested me to include the following statement concerning the safekeeping of his will:

____

____

12. PLACE
13. DATE
14. SIGNATURE and, if necessary, SEAL

*To be completed if appropriate

Article 11 The authorized person shall keep a copy of the certificate and deliver another to the testator.

Article 12 In the absence of evidence to the contrary, the certificate of the authorized person shall be conclusive of the formal validity of the instrument as a will under this Law.

Article 13 The absence or irregularity of a certificate shall not affect the formal validity of a will under this Law.

Article 14 The international will shall be subject to the ordinary rules of revocation of wills.

Article 15 In interpreting and applying the provisions of this law, regard shall be had to its international origin and to the need for uniformity in its interpretation.

RESOLUTION

The Conference

Considering the importance of measures to permit the safeguarding of wills and to find them after the death of the testator;

Emphasizing the special interest in such measures with respect to the international will, which is often made by the testator far from his home;

RECOMMENDS to the States that participated in the present Conference

-that they establish an internal system, centralized or not, to facilitate the safekeeping, search and discovery of an international will as well as the accompanying certificate, for example, along the lines of the Convention on the Establishment of a Scheme of Registration of Wills, concluded at Basel on May 16, 1972;

-that they facilitate the international exchange of information in these matters and, to this effect, that they designate in each state an authority or a service to handle such exchanges.

NUMBERING SECTIONS OF ACT

The Uniform International Wills Act may be adopted as a separate Act or as part of the Uniform Probate Code. If adopted as a separate Act, the unbracketed section numbers would govern. If adopted as part of the Probate Code, i.e., as Part 10 of Article 2, the section numbers in brackets would govern. [Montana adopted the Uniform International Wills Act in 1991 and codified the Act as Title 72, chapter 2, part 9. The 1991 codification has been retained.]

72-2-901. Definitions.

Official Comments

The term "international will" connotes only that a will has been executed in conformity with this Act [Title 72, chapter 2, part 9]. It does not indicate that the will was planned for implementation in more than one country, or that it relates to an estate that has or may have international implications. Thus, it will be entirely appropriate to use an "international will" whenever a will is desired.

The reference in subsection (2) [72-2-901(2)] to persons who derive their authority to act from federal law, including Foreign Service Regulations, anticipates that the United States will become a party to the 1973 Convention, and that Congress, pursuant to the obligation of the Convention, will enact the annexed uniform law and include therein some designation, possibly of a cadre only, of authorized persons. See the discussion under "Roles for Federal and State Law in Relation to International Will", in the Prefatory Note, *supra.* If all states enact similar laws and designate all attorneys as authorized persons, the need for testators to resort to those designated by federal law may be minimal. It seems desirable, nonetheless, to associate whoever may be designated by federal law as suitable authorized persons for purposes of implementing state enactments of the Uniform Act. The resulting "borrowing" of those designated federally should minimize any difficulties that might arise from variances in the details of execution of international wills that may develop in the state and federal enactment process.

In the Explanatory Report of the 1973 Convention prepared by Mr. Jean-Pierre Plantard, Deputy Secretary-General of the International Institute for the Unification of Private Law (UNIDROIT) as published by the Institute in 1974, the following paragraphs that are relevant to this section appear:

"The Uniform Law gives no definition of the term will. The preamble of the Convention also uses the expression 'last wills'. The material contents of the document are of little importance as the Uniform Law governs only its form. There is, therefore, nothing to prevent this form being used to register last wishes that do not involve the naming of an heir and which in some legal systems are called by a special name, such as 'Kodizill' in Austrian Law (ABGB § 553).

"Although it is given the qualification 'international', the will dealt with by the Uniform Law can easily be used for a situation without any international element, for example, by a testator disposing in his own country of his assets, all of which are situated in that same country. The adjective 'international', therefore, only indicates what was had in mind at the time when this new will was conceived. Moreover, it would have been practically impossible to define a satisfactory sphere of application, had one intended to restrict its use to certain situations with an international element. Such an element could only be assessed by reference to several factors (nationality, residence, domicile of the testator, place where the will was drawn up, place where the assets are situated) and, moreover, these might vary considerably between when the will was drawn up and the beginning of the inheritance proceedings.

"Use of the international will should, therefore, be open to all testators who decide they want to use it. Nothing should prevent it from competing with the traditional forms if it offers advantages of convenience and simplicity over the other forms and guarantees the necessary certainty."

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-1001.

72-2-902. Validity.

Official Comments

This section combines what appears in Articles 1 and 2 of the Annex [see part official comment] into a single section. Except for the reference to later sections, the first sentence is identical to Article 1, Section 1 of the Annex, the second sentence is identical to Article 1, Section 2, and the third is identical to Article 2.

Mr. Plantard's commentary that is pertinent to this section is as follows:

"The Uniform Law is intended to be introduced into the legal system of each Contracting State. Article 1, therefore, introduces into the internal law of each Contracting State the new, basic principle according to which the international will is valid irrespective of the country in which it was made, the nationality, domicile or residence of the testator and the place where the assets forming the estate are located.

"The scope of the Uniform Law is thus defined in the first sentence. As was mentioned above, the idea behind it was to establish a new type of will, the form of which would be the same in all countries. The Law obviously does not affect the subsistence of all the other forms of will known under each national law . . .

"Some of the provisions relating to form laid down by the Uniform Law are considered essential. Violation of these provisions is sanctioned by the invalidity of the will as an international will. These are: that the will must be made in writing, the presence of two witnesses and of the authorized person, signature by the testator and by the persons involved (witnesses and authorized person) and the prohibition of joint wills. The other formalities, such as the position of the signature and date, the delivery and form of the certificate, are laid down for reasons of convenience and uniformity but do not affect the validity of the international will.

"Lastly, even when the international will is declared invalid because one of the essential provisions contained in Articles 2 to 5 has not been observed, it is not necessarily deprived of all effect. Paragraph 2 of Article 1 specifies that it may still be valid as a will of another kind, if it conforms with the requirements of the applicable national law. Thus, for example, a will written, dated and signed by the testator but handed over to an authorized person in the absence of witnesses or without the signature of the witnesses and the authorized person could quite easily be considered a valid holograph will. Similarly, an international will produced in the presence of a person who is not duly authorized might be valid as a will witnessed in accordance with Common law rules.

"However, in these circumstances, one could no longer speak of an international will and the validity of the document would have to be assessed on the basis of the rules of internal law or of private international law.

"A joint will cannot be drawn up in the form of an international will. This is the meaning of Article 2 of the Uniform Law which does not give an opinion as to whether this prohibition on joint wills, which exists in many legal systems, is connected with its form or its substance.

"A will made in this international form by several people together in the same document would, therefore, be invalid as an international will but could possibly be valid as another kind of will, in accordance with Article 1, paragraph 2 of the Uniform Law.

"The terminology used in Article 2 is in harmony with that used in Article 4 of The Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions."

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-1002.

72-2-903. Requirements.

Official Comments

The five subsections of this section correspond in content to Articles 3 through 5 of the Annex to the 1973 Convention [see part official comment]. Article 1, Section 1 makes it clear that compliance with all requirements listed in Articles 3 through 5 is necessary in order to achieve an international will. As re-organized for enactment in the United States, all mandatory requirements have been grouped in this section. Except for subsection (d) [72-2-903(4)], each of the sentences in the subsections corresponds exactly with a sentence in the Annex. Subsection (d) [72-2-903(4)], derived from Article 5, Section 2 of the Annex, was re-worded for the sake of clarity.

Mr. Plantard's comments on the requirements are as follows:

"Paragraph 1 of Article 3 lays down an essential condition for a will's validity as an international will: it must be made in writing.

"The Uniform Law does not explain what is meant by 'writing'. This is a word of everyday language which, in the opinion of the Law's authors, does not call for any definition but which covers any form of expression made by signs on a durable substance.

"Paragraphs 2 and 3 show the very liberal approach of the draft.

"Under paragraph 2, the will does not necessarily have to be written by the testator himself. This provision marks a moving away from the holograph will toward the other types of will: the public will or the mystic will and especially the Common law will. The latter, which is often very long, is only in exceptional cases written in the hand of the testator, who is virtually obliged to use a lawyer, in order to use the technical formulae necessary to give effect to his wishes. This is all the more so as wills frequently involve inter vivos family arrangements, and fiscal considerations play a very important part in this matter.

"This provision also allows for the will of illiterate persons, or persons who, for some other reason, cannot write themselves, for example paralysed or blind persons.

"According to paragraph 3 a will may be written in any language. This provision is in contrast with the rules accepted in various countries as regards public wills. It will be noted that the Uniform Law does not even require the will to be written in a language known by the testator. The latter is, therefore, quite free to choose according to whichever suits him best: it is to be expected that he will usually choose his own language but, if he thinks it is better, he will sometimes also choose the language of the place where the will is drawn up or that of the place where the will is mainly to be carried out. The important point is that he have full knowledge of the contents of his will, as is guaranteed by Articles 4 and 10.

"Lastly, a will may be written by hand or by any other method. This provision is the corollary of paragraph 2. What is mainly had in mind is a typewriter, especially in the case of a will drawn up by a lawyer advising the testator.

"The liberal nature of the principles set out in Article 3 calls for certain guarantees on the other hand. These are provided by the presence of three persons, already referred to in the context of Articles III and V of the Convention, that is to say, the authorized person and the two witnesses. It is evident that these three persons must all be simultaneously present with the testator during the carrying out of the formalities laid down in Articles 4 and 5.

"Paragraph 1 of Article 4 requires, first of all, that the testator declare, in the presence of these persons, that the document produced by him is his will and that he knows the contents thereof. The word 'declares' covers any unequivocal expression of intention, by way of words as well as by gestures or signs, as, for example, in the case of a testator who is dumb. This declaration must be made on pain of the international will being invalid. This is justified by the fact that the will produced by the testator might have been materially drawn up by a person other than the testator and even, in theory, in a language which is not his own.

"Paragraph 2 of the article specifies that this declaration is sufficient: the testator does not need to 'inform' the witnesses or the authorized person 'of the contents of the will'. This rule makes the international will differ from the public will and brings it closer to the other types of will: the holograph will and especially the mystic will and the Common law will.

"The testator can, of course, always ask for the will to be read, a precaution which can be particularly useful if the testator is unable to read himself. The paragraph under consideration does not in any way prohibit this; it only aims at ensuring respect for secrecy, if the testator should so wish. The international will can therefore be a secret will without being a closed will.

"The declaration made by the testator under Article 4 is not sufficient: under Article 5, paragraph 1, he must also sign his will. However, the authors of the Uniform Law presumed that, in certain cases, the testator might already have signed the document forming his will before producing it. To require a second signature would be evidence of an exaggerated formalism and a will containing two signatures by the testator would be rather strange. That is why the same paragraph provides that, when he has already signed the will, the testator can merely acknowledge it. This acknowledgement is completely informal and is normally done by a simple declaration in the presence of the authorized person and witnesses.

"The Uniform Law does not explain what is meant by 'signature'. This is once more a word drawn from everyday language, the meaning of which is usually the same in the various legal systems. The presence of the authorized person, who will necessarily be a practicing lawyer will certainly guarantee that there is a genuine signature correctly affixed.

"Paragraph 2 was designed to give persons incapable of signing the possibility of making an international will. All they have to do is indicate their incapacity and the reason therefore to the authorized person. The authorized person must then note this declaration on the will which will then be valid, even though it has not been signed by the testator. Indication of the reason for incapacity is an additional guarantee as it can be checked. The certificate drawn up by the authorized person in the form prescribed in Article 10 again reproduces this declaration.

"The authors of the Uniform Law were also conscious of the fact that in some legal systems-for example, English law-persons who are incapable of signing can name someone to sign in their place. Although this procedure is completely unknown to other systems in which a signature is exclusively personal, it was accepted that the testator can ask another person to sign in his name, if this is permitted under the law from which the authorized person derives his authority. This amounts to nothing more than giving satisfaction to the practice of certain legal systems, as the authorized person must, in any case, indicate on the will that the testator declared that he could not sign, and give the reason therefor. This indication is sufficient to make the will valid. There will, therefore simply be a signature affixed by a third person instead of that of the testator. Although there is nothing stipulating this in the Uniform Law, one can expect the authorized person to explain the source of this signature on the document, all the more so as the signature of this substitute for the testator must also appear on the other pages of the will, by virtue of Article 6.

"This method over which there were some differences of opinion at the Diplomatic Conference, should not however interfere in any way with the legal systems which do not admit a signature in the name of someone else. Besides, its use is limited to the legal systems which admit it already and it is now implicitly accepted by the others when they recognize the validity of a foreign document drawn up according to this method. However, this situation can be expected to arise but rarely, as an international will made by a person who is incapable of signing it will certainly be a rare event.

"Lastly, Article 5 requires that the witnesses and authorized person also sign the will there and then in the presence of the testator. By using the words 'attest the will by signing', when only the word 'sign' had been used when referring to the testator, the authors of the Uniform Law intended to make a distinction between the person acknowledging the contents of a document and those who have only to affix their signature in order to certify their participation and presence.

"In conclusion, the international will will normally contain four signatures: that of the testator, that of the authorized person and those of the two witnesses. The signature of the testator might be missing: in this case, the will must contain a note made by the authorized person indicating that the testator was incapable of signing, adding his reason. All these signatures and notes must be made on pain of invalidity. Finally, if the signature of the testator is missing, the will could contain the signature of a person designated by the testator to sign in his name, in addition to the above-mentioned note made by the authorized person."

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-1003.

72-2-904. Other points of form.

Official Comments

Mr. Plantard's commentary about Articles 6, 7 and 8 of the Annex [*supra*] [see part official comment] relate to subsections (a) [72-2-904(1)], (b) [72-2-904(2)] and (c) [72-2-904(3)] respectively of this section. Subsections (a) [72-2-904(1)] and (b) [72-2-904(2)] are identical to Articles 6 and 7; subsection (c) [72-2-904(3)] is the same as Article 8 of the Annex except that the prefatory language "In the absence of any mandatory rule pertaining to the safekeeping of the will . . ." has been deleted because it is inappropriate for inclusion in a local statute designed for enactment by a state that has had no tradition or familiarity with mandatory rules regarding the safekeeping of the wills. Subsection (d) [72-2-904(4)] embodies the sense of Article 1, Section 1 of the Annex which states that compliance with Articles 2 to 5 is necessary and so indicates that compliance with the remaining articles prescribing formal steps is not necessary.

Mr. Plantard's commentary is as follows:

"The provisions of Article 6 and those of the following articles are not imposed on pain of invalidity. They are nevertheless compulsory legal provisions which can involve sanctions, for example, the professional, civil and even criminal liability of the authorized person, according to the provisions of the law from which he derives his authority.

"The first paragraph, to guarantee a uniform presentation for international wills, simply indicates that signatures shall be placed at the end of international wills, that is, at the end of the text.

"Paragraph 2 provides for the frequent case in which the will consists of several sheets. Each sheet has to be signed by the testator, to guarantee its authenticity and to avoid substitutions. The use of the word 'signed' seems to imply that the signature must be in the same form as that at the end of the will. However, in the legal systems which merely require that the individual sheets be paraphed, usually by means of initials, this would certainly have the same value as signature, as a signature itself could simply consist of initials.

"The need for a signature on each sheet, for the purpose of authentifying each such sheet, led to the introduction of a special system for the case when the testator is incapable of signing. In this case it will generally be the authorized person who will sign each sheet in his place, unless, in accordance with Article 5, paragraph 2, the testator has designated another person to sign in his name. In this case, it will of course be this person who will sign each sheet.

"Lastly, it is prescribed that the sheets shall be numbered. Although no further details are given on this subject, it will in practice be up to the authorized person to check if they have already been numbered and, if not, to number them or ask the testator to do so.

"The aim of this provision is obviously to guarantee the orderliness of the document and to avoid losses, subtractions or substitutions.

"The date is an essential element of the will and its importance is quite clear in the case of successive wills. Paragraph 1 of Article 7 indicates that the date of the will in the case of an international will is the date on which it was signed by the authorized person, this being the last of the formalities prescribed by the Uniform Law on pain of invalidity (Article 5, paragraph 3). It is therefore, from the moment of this signature that the international will is valid.

"Paragraph 2 stipulates that the date shall be noted at the end of the will by the authorized person. Although this is compulsory for the authorized person, this formality is not sanctioned by the invalidity of the will which, as is the case in many legal systems such as English, German and Austrian law, remains fully valid even if it is not dated or is wrongly dated. The date will then have to be proved by some other means. It can happen that the will has two dates, that of its drawing up and the date on which it was signed by the authorized person as a result of which it became an international will. Evidently only this last date is to be taken into consideration.

"During the preparatory work it had been intended to organize the safekeeping of the international will and to entrust its care to the authorized person. This plan caused serious difficulties both for the countries which do not have the notary as he is known in Civil law systems and for the countries in which wills must be deposited with a public authority, as is the case, for example, in the Federal Republic of Germany, where wills must be deposited with a court.

"The authors of the Uniform Law therefore abandoned the idea of introducing a unified system for the safekeeping of international wills. However, where a legal system already has rules on this subject, these rules of course also apply to the international will as well as to other types of will. Finally, the Washington Conference adopted, at the same time as the Convention, a resolution recommending States, in particular, to organize a system facilitating the safekeeping of international wills (see the commentary on this resolution, at the end of this Report). It should lastly be underlined that States desiring to give testators an additional guarantee as regards the international will will organize its safekeeping by providing, for example, that it shall be deposited with the authorized person or with a public officer. Complementary legislation of this kind could be admitted within the framework of paragraph 3 of Article 1 of the Convention, as was mentioned in our commentary on that article.

"These considerations explain why Article 8 starts by stipulating that it only applies 'in the absence of any mandatory rule pertaining to the safekeeping of the will'. If there happens to be such a rule in the national law from which the authorized person derives his authority this rule shall govern the safekeeping of the will. If there is no such rule, Article 8 requires the authorized person to ask the testator whether he wishes to make a declaration in this regard. In this way, the authors of the Uniform Law sought to reconcile the advantage of exact information so as to facilitate the discovery of the will after the death of the testator, on the one hand, and respect for the secrecy which the testator may want as regards the place where his will is kept, on the other hand. The testator is therefore quite free to make or not to make a declaration in this regard, but his attention is nevertheless drawn to the possibility left open to him, and particular to the opportunity he has, if he expressly asks for it, to have the details he thinks appropriate in this regard mentioned on the certificate provided for in Article 9. It will thus be easier to find the will again at the proper time, by means of the certificate made out in three copies, one of which remains in the hands of the authorized person."

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-1004.

72-2-905. Certificate.

Official Comments

This section embodies the content of Articles 9, 10 and 11 of the Annex [see part official comment] with only minor, clarifying changes. Those familiar with the pre-proved will authorized by Uniform Probate Code § 2-504 [72-2-524] should be comfortable with Sections 5 [72-2-905] and 6 [72-2-906] of this Act. Indeed, inclusion of these provisions in the Annex was the result of a concession by those familiar with civil law approaches to problems of execution and proof of wills, to the English speaking countries where will ceremonies are divided between those occurring as testator acts, and those occurring later when the will is probated. Further, since English and Canadian practices reduce post-mortem probate procedures down to little more than the presentation of the will to an appropriate registry and so, approach civil law customs, the concession was largely to accommodate American states where post-mortem probate procedures are very involved. Thus, the primary purpose of the certificate, which provides conclusive proof of the formal validity of the will, is to put wills executed before a civil law notary and wills executed in the American tradition on a par; with the certificate, both are good without question insofar as formal requirements are concerned.

It should be noted that Article III of the Convention binds countries becoming parties to recognize the capacity of an authorized person to act in relation to an international will, as conferred by the law of another country that is a party. This means that an international will coming into one of our states that has enacted the uniform law will be entirely good under local law, and that the certificate from abroad will provide conclusive proof of its validity.

May an international will be contested? The answer is clearly affirmative as to contests based on lack of capacity, fraud, undue influence, revocation or ineffectiveness based on the contents of the will or substantive restraints on testamentary power. Contests based on failure to follow mandatory requirements of execution are not precluded because the next section provides that the certificate is conclusive only "in the absence of evidence to the contrary". However, the Convention becomes relevant when one asks whether a probate court may require additional proof of the genuineness of signatures by testators and witnesses. It provides:

Article VI 1. The signature of the testator, of the authorized person, and of the witnesses to an international will, whether on the will or on the certificate, shall be exempt from any legalization or like formality.

2. Nonetheless, the competent authorities of any Contracting Party may, if necessary, satisfy themselves as to the authenticity of the signature of the authorized person.

Presumably, the prohibition against legalization would not preclude additional proof of genuineness if evidence tending to show forgery is introduced, but without contrary proof, the certificate proves the will.

The authorized person is directed to attach the certificate to the will, and to keep a copy. The sense of "keep" intended by the draftsman is "continuously keep," or "preserve."

If the will with attached certificate is to be retained by the authorized person or otherwise placed for safekeeping out of the possession of the testator, good practice would involve an unexecuted copy of the will that could be given to the testator for disposition or retention as he saw fit. It would seem that good practice in these cases also would involve attachment of the testator's copy of the certificate to testator's copy of the will. The statute is silent on this point, however.

Mr. Plantard's commentary on the articles of the Annex that are pertinent to Section 5 [72-2-905], are as follows:

"This provision specifies that the authorized person must attach to the international will a certificate drawn up in accordance with the form set out in Article 10, establishing that the Uniform Law's provisions have been complied with. The term 'joint au testament' means that the certificate must be added to the will, that is, fixed thereto. The English text which uses the work 'attach' is perfectly clear on this point. Furthermore, it results from Article 11 that the certificate must be made out in three copies. This document, the contents of which are detailed in Article 10, is proof that the formalities required for the validity of the international will have been complied with. It also reveals the identity of the persons who participated in drawing up the document and may, in addition, contain a declaration by the testator as to the place where he intends his will to be kept. It should be stressed that the certificate is drawn up under the entire responsibility of the authorized person who is the only person to sign it.

"Article 10 sets out the form for the certificate. The authorized person must abide by it, in accordance with the provisions of Article 10 itself, laying down this or a substantially similar form. This last phrase could not be taken as authorizing him to depart from this form: it only serves to allow for small changes of detail which might be useful in the interests of improving its comprehensibility or presentation, for example, the omission of the particulars marked with an asterisk indicating that they are to be completed where appropriate when in fact they do not need to be completed and thus become useless.

"Including the form of a certificate in one of the articles of a Uniform Law is unusual. Normally these appear in the annexes to Conventions. However, in this way, the authors of the Uniform Law underlined the importance of the certificate and its contents. Moreover, the Uniform Law already forms the Annex to the Convention itself.

"The 14 particulars indicated on the certificate are numbered. These numbers must be reproduced on each certificate, so as to facilitate its reading, especially when the reader speaks a foreign language, as they will help him to find the relevant details more easily: the name of the authorized person and the testator, addresses, etc.

"The certificate contains all the elements necessary for the identification of the authorized person, testator and witnesses. It expressly mentions all the formalities which have to be carried out in accordance with the provisions of the Uniform Law. Furthermore, the certificate contains all the information required for the will's registration according to the system introduced by the Council of Europe Convention on the Establishment of a Scheme of Registration of Wills, signed at Basle on 16 May 1972.

"The authorized person must keep a copy of the certificate and deliver one to the testator. Seeing that another copy has to be attached to the will in accordance with Article 9, it may be deduced that the authorized person must make out altogether three copies of the certificate. These cannot be simple copies but have to be three signed originals. This provision is useful for a number of reasons. The fact that the testator keeps a copy of the certificate is a useful reminder for him, especially when his will is being kept by the authorized person or deposited with someone designated by national law. Moreover, discovery of the certificate among the testators' papers will inform his heirs of the existence of a will and will enable them to find it more easily. The fact that the authorized person keeps a copy of the certificate enables him to inform the heirs as well, if necessary. Lastly, the fact that there are several copies of the certificate is a guarantee against changes being made to one of them and even, to a certain extent, against certain changes to the will itself, for example as regards its date."

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-1005.

72-2-906. Effect of certificate.

Official Comments

This section, which corresponds to Articles 11 and 12 of the Annex [see part official comment], must be read with the definition of "authorized person" in Section 1 [72-2-901], and Articles III and IV of the 1973 Convention which will become binding on all states if and when the United States joins that treaty. Articles III and IV of the Convention provide:

Article III The capacity of the authorized person to act in connection with an international will, if conferred in accordance with the law of a Contracting Party, shall be recognized in the territory of the other Contracting Parties.

Article IV The effectiveness of the certificate provided for in Article 10 of the Annex shall be recognized in the territories of all Contracting Parties.

In effect, the state enacting this law will be recognizing certificates by authorized persons designated, not only by this State, but by the United States and other parties to the 1973 Convention. Once the identity of one making a certificate on an international will is established, the will may be proved without more, assuming the presence of the recommended form of certificate. Article IX (3) of the 1973 Convention constitutes the United States as the Depositary under the Convention, and Article II obligates each country joining the Convention to notify the Depositary Government of the persons designated by its law as authorized to act in connection with international wills. Hence, persons interested in local probate of an international will from another country will be enabled to determine from the Department of State whether the official making the certificate in which they are interested had the requisite authority.

In this connection, it should be noted that under Article II of the Convention, each contracting country may designate its diplomatic or consular representatives abroad as authorized persons insofar as the local law does not prohibit it. Since the Uniform Act will be the law locally, and since it does not prohibit persons designated by foreign states that are parties to the Convention from acting locally in respect to international wills, there should be a considerable amount of latitude in selecting authorized persons to assist with wills and a correlative reduction in the chances of local non-recognition of an authorized person from abroad. Also, it should be noted that the Uniform Act does not restrict the persons which it constitutes as authorized persons in relation to the places where they can so function. This supports the view that local law as embodied in this statute should not be construed as restrictive in relation to local activities concerning international wills of foreign diplomatic and consular representatives who are resident here.

The certificate requires the authorized person to state that the witnesses had the requisite capacity. If the authorized person derives his authority from the law of a state other than that where he is acting, it would be advisable to have the certificate identify the applicable law.

The Uniform Act is silent in regard to methods of meeting local probate requirements contemplating deposit of the original will with the court. Section 3-409 [72-3-313, 72-3-316] of the Uniform Probate Code, or its counterpart in a state that has not adopted the uniform law on the point, becomes pertinent. The last sentence of UPC 3-409 [72-2-316] provides:

A will from a place which does not provide for probate of a will after death, may be proved for probate in this State by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has become effective under the law of the other place.

One final matter warrants mention. Implicit in local proof of an instrument by means of authentication provided by a foreign official, is the problem of proving the authority of the official. The traditional, exceedingly formalistic, method of accomplishing this has been through what has been known as "legalization", a process that involves a number of certificates. The capacity of the official who authenticates the signature of the party to the document, if derived from his status as a county official, is proved by the certificate of a high county official. In turn, the county official's status is proved by the certificate of the area's secretary of state, whose status is established by another and so on until, ultimately, the Department of State certifies to the identity of the highest state official in a format that will be persuasive to the receiving country's foreign relations representative.

Article VI of the 1973 Convention forbids legalization of the signature of testators and witnesses. It provides:

1. The signature of the testator, of the authorized person, and of the witnesses to an international will, whether on the will or on the certificate, shall be exempt from any legalization or like formality.
2. Nonetheless, the competent authorities of any Contracting Party may, if necessary, satisfy themselves as to the authenticity of the signature of the authorized person.

Thus, it would appear that if the United States, as contracting party, satisfies itself that the signature of a foreign authorized person is authentic, and so indicates to those interested in local probate of the document, the local court, though presumably able to receive and to act upon evidence to the contrary, cannot reject an international will for lack of proof. This is not to say, of course, that the authenticity of the signature of the foreign authorized person must be shown through the aid of the State Department; plainly, the point may be implied from the face of the document unless and until challenged.

Mr. Plantard's commentary on this portion of the uniform law is as follows:

"Article 12 states that the certificate is conclusive of the formal validity of the international will. It is therefore a kind of proof supplied in advance.

"This provision is only really understandable in those legal systems, like the United States, where a will can only take effect after it has been subjected to a preliminary procedure of verification ('Probate') designed to check on its validity. The mere presentation of the certificate should suffice to satisfy the requirements of this procedure.

"However, the certificate is not always irrefutable as proof, as is indicated by the words 'in the absence of evidence to the contrary'. If it is challenged, then the ensuing litigation will be solved in accordance with the legal procedure applicable in the Contracting State where the will and certificate are presented.

"The principle set out in Article 13 is already implied by Article 1, as only the provisions of Articles 2 to 5 are prescribed on pain of invalidity. Besides, it is perfectly logical that the absence of or irregularities in a certificate should not affect the formal validity of the will, as the certificate is a document serving essentially for purposes of proof drawn up by the authorized person, without the testator taking any part either in drawing it up or in checking it. This provision is in perfect harmony with Article 12 which by the terms 'in the absence of evidence to the contrary' means that one can challenge what is stated in the certificate.

"In consideration of the fact that the authorized person will be a practicing lawyer officially designated by each Contracting State, it is difficult to imagine him omitting or neglecting to draw up the certificate provided for by the national law to which he is subject. Besides, he would lay himself open to an action based on his professional and civil liability. He could even expose himself to sanctions laid down by his national law.

"However, the international will subsists, even if, by some quirk, the certificate which is a means of proof but not necessarily the only one, should be missing, be incomplete or contain particulars which are manifestly erroneous. In these undoubtedly very rare circumstances, proof that the formalities prescribed on pain of invalidity have been carried out will have to be produced in accordance with the legal procedures applicable in each State which has adopted the Uniform Law."

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-1006.

72-2-907. Revocation.

Official Comments

Mr. Plantard's commentary on this portion of the uniform law is as follows:

"The authors of the Uniform Law did not intend to deal with the subject of the revocation of wills. There is indeed no reason why the international will should be submitted to a regime different from that of other kinds of wills. Article 14 [see part official comment] therefore merely gives expression to this idea. Whether or not there has been revocation-for example, by a subsequent will-is to be assessed in accordance with the law of each State which has adopted the Uniform Law, by virtue of Article 14. Besides, this is a question mainly concerning rules of substance which would thus overstep the scope of the Uniform Law."

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-1007.

72-2-908. Persons authorized to act in relation to international will — eligibility — recognition by authorizing agency.

Official Comments

The subject of who should be designated to be authorized persons under the Uniform Law is discussed under the heading "Description of the Proposal" in the Prefatory Note [see part official comment].

The first draft of the Uniform Law presented to the National Conference at its 1975 meeting in Quebec City included provision for a special new licensing procedure through which others than attorneys might become qualified. The ensuing discussion resulted in rejection of this approach in favor of the simpler approach of Section 9 [72-2-908]. Among other difficulties with the special licensee approach, representatives of the State Department expressed concern about the attendant burden on the U.S. as Depositary Government, of receiving, keeping up to date, and interpreting to foreign governments the results of fifty different state licensing systems.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-1009.

72-2-909. International will information registration.

Official Comments

The relevance of this optional, bracketed section to the other sections constituting the uniform law concerning international wills is explained in the Prefatory Note [see part official comment]. Also, Mr. Plantard's observations regarding the Resolution attached to the 1973 Convention are pertinent. He writes:

"The Resolution adopted by the Washington Conference and annexed to its Final Act encourages States which adopt the Uniform Law to make additional provisions for the registering and safekeeping of the international will. The authors of the Uniform Law considered that it was not possible to lay down uniform rules on this subject on account of the differences in tradition and outlook, but several times, both during the preparatory work and during the final diplomatic phase, they underlined the importance of States making such provisions.

"The Resolution recommends organizing a system enabling . . . 'the safekeeping, search and discovery of an international will as well as the accompanying certificate' . . .

"Indeed lawyers know that many wills are never carried out because the very existence of the will itself remains unknown or because the will is never found or is never produced. It would be quite possible to organize a register or index which would enable one to know after the death of a person whether he had drawn up a will. Some countries have already done something in this field, for example, Quebec, Spain, the Federal Republic of Germany, where this service is connected with the Registry of Births, Marriages and Deaths. Such a system could perfectly well be fashioned so as to ensure respect for the legitimate wish of testators to keep the very existence of their will secret.

"The Washington Conference also underlined that there is already an International Convention on this subject, namely the Council of Europe Convention on the Establishment of a Scheme of

Registration of Wills, concluded at Basle on 16 May 1972, to which States which are not members of the Council of Europe may accede.

"In this Convention the Contracting States simply undertake to create an internal system for registering wills. The Convention stipulates the categories of will which should be registered, in terms which include the international will. Apart from national bodies in charge of registration, the Convention also provides for the designation by each Contracting State of a national body which must remain in contact with the national bodies of other States and communicate registrations and any information asked for. The Convention specifies that registration must remain secret during the life of the testator. This system, which will come into force between a number of European States in the near future, interested the authors of the Convention, even if they do not accede to it. The last paragraph of the Resolution follows the pattern of the Basle Convention by recommending, in the interests of facilitating an international exchange of information on this matter, the designation in each State of authorities or services to handle such exchanges.

"As for the organization of the safekeeping of international wills, the resolution merely underlies the importance of this, without making any specific suggestions in this regard. This problem has already been discussed in connection with Article 8 of the Uniform Law.

"The Council of Europe Convention on the Establishment of a Scheme of Registration of Wills of May 16, 1972 and related documents were available to the reporter and provided the guidelines for Section 10 [72-2-909] of this Act."

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-1010.

72-2-910. Source and construction.

Official Comments

Mr. Plantard's commentary on this portion of the uniform law is as follows:

"This Article [see part official comment] contains a provision which is to be found in a similar form in several conventions or draft Uniform Laws. It seeks to avoid practicing lawyers interpreting the Uniform Law solely in terms of the principles of their respective internal law, as this would prejudice the international unification being sought after. It requests judges to take the international character of the Uniform Law into consideration and to work towards elaborating a sort of common caselaw, taking account of the foreign legal systems which provided the foundation for the Uniform Law and the decisions handed down on the same text by the courts of other countries. The effort toward unification must not be limited to just bringing about the Law's adoption, but should be carried on into the process of putting it into operation."

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-1008.

Part 10

Uniform Statutory Rule Against Perpetuities — Honorary Trusts

Part Official Comments

GENERAL COMMENT

Simplified Wait-and-See/Deferred-Reformation Approach Adopted. The Uniform Statutory Rule reforms the common-law Rule Against Perpetuities (common-law Rule) by adding a simplified wait-and-see element and a deferred-reformation element.

Wait-and-see is a two-step strategy. Step One (Section 2-901(a)(1)) [72-2-1002(1)(a)] preserves the validating side of the common-law Rule. By satisfying the common-law Rule, a nonvested future interest in property is valid at the moment of its creation. Step Two (Section 2-901(a)(2)) [72-2-1002(1)(b)] is a salvage strategy for future interests that would have been invalid at common law. Rather than invalidating such interests at creation, wait-and-see allows a period of time, called the permissible vesting period, during which the nonvested interests are permitted to vest according to the trust's terms.

The traditional method of measuring the permissible vesting period has been by reference to lives in being at the creation of the interest (the measuring lives) plus 21 years. There are, however, various difficulties and costs associated with identifying and tracing a set of actual measuring lives to see which one is the survivor and when he or she dies. In addition, it has been documented that the use of actual measuring lives plus 21 years does not produce a period of time that self-adjusts to each disposition, extending dead-hand control no further than necessary in each case; rather, the use of actual measuring lives (plus 21 years) generates a permissible vesting period whose length almost always exceeds by some arbitrary margin the point of actual vesting in cases traditionally validated by the wait-and-see strategy. The actual-measuring-lives approach, therefore, performs a margin-of-safety function. Given this fact, and given the costs and difficulties associated with the actual-measuring-lives approach, the Uniform Statutory Rule forgoes the use of actual measuring lives and uses instead a permissible vesting period of a flat 90 years.

The philosophy behind the 90-year period is to fix a period of time that approximates the average period of time that would traditionally be allowed by the wait-and-see doctrine. The flat-period-of-years method was not used as a means of increasing permissible dead-hand control by lengthening the permissible vesting period beyond its traditional boundaries. In fact, the 90-year period falls substantially short of the absolute maximum period of time that could theoretically be achieved under the common-law Rule itself, by the so-called "twelve-healthy-babies ploy" — a ploy that would average out to a period of about 115 years,[1] 25 years or 27.8% longer than the 90 years allowed by USRAP. The fact that the traditional period roughly averages out to a longish-sounding 90 years is a reflection of a quite different phenomenon: the dramatic increase in longevity that society as a whole has experienced in the course of the twentieth century.

The framers of the Uniform Statutory Rule derived the 90-year period as follows. The first point recognized was that if actual measuring lives were to have been used, the length of the permissible vesting period would, in the normal course of events, be governed by the life of the youngest measuring life. The second point recognized was that no matter what method is used to identify the measuring lives, the youngest measuring life, in standard trusts, is likely to be the transferor's youngest descendant living when the trust was created.[2] The 90-year period was premised on these propositions. Using four hypothetical families deemed to be representative of actual families, the framers of the Uniform Statutory Rule determined that, on average, the transferor's youngest descendant in being at the transferor's death — assuming the transferor's death to occur between ages 60 and 90, which is when 73 percent of the population die — is about 6 years old. See Waggoner, "Perpetuities: A Progress Report on the Draft Uniform Statutory Rule Against Perpetuities," 20 U. Miami Inst. on Est. Plan. Ch. 7 at 7-17 (1986). The remaining life expectancy of a 6-year-old is about 69 years. The 69 years, plus the 21-year tack-on period, gives a permissible vesting period of 90 years.

Acceptance of the 90-year-period Approach under the Federal Generation-skipping Transfer Tax. Federal regulations, to be promulgated by the U.S. Treasury Department under the generation-skipping transfer tax, will accept the Uniform Statutory Rule's 90-year period as a valid approximation of the period that, on average, would be produced by lives in being plus 21 years. See Temp. Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2) (as to be revised). When originally promulgated in 1988, this regulation was prepared without knowledge of the Uniform Statutory Rule Against Perpetuities, which had been promulgated in 1986; as first promulgated, the regulation only recognized a period measured by actual lives in being plus 21 years. After the 90-year approach of the Uniform Statutory Rule was brought to the attention of the U.S. Treasury Department, the Department issued a letter of intent to amend the regulation to treat the 90-year period as the equivalent of a lives-in-being-plus-21-years period. Letter from Michael J. Graetz, Deputy Assistant Secretary of the Treasury (Tax Policy), to Lawrence J. Bugge, President, National Conference of Commissioners on Uniform State Laws (Nov. 16, 1990). For further discussion of the coordination of the federal generation-skipping transfer tax with the Uniform Statutory Rule, see the Comment to Section 2-901(e) [72-2-1002(5)], infra, and the Comment to Section 1(e) [72-2-1002(5)] of the Uniform Statutory Rule Against Perpetuities.

The 90-year Period Will Seldom be Used Up. Nearly all trusts (or other property arrangements) will terminate by their own terms long before the 90-year permissible vesting period expires, leaving the permissible vesting period to extend unused (and ignored) into the future long after the contingencies have been resolved and the property distributed. In the unlikely event that the contingencies have not been resolved by the expiration of the permissible vesting period, Section 2-903 [72-2-1004] requires the disposition to be reformed by the court so that all contingencies are resolved within the permissible period.

In effect, wait-and-see with deferred reformation operates similarly to a traditional perpetuity saving clause, which grants a margin-of-safety period measured by the lives of the transferor's descendants in being at the creation of the trust or other property arrangement (plus 21 years).

No New Learning Required. The Uniform Statutory Rule does not require the practicing bar to learn a new and unfamiliar set of perpetuity principles. The effect of the Uniform Statutory Rule on the planning and drafting of documents for clients should be distinguished from the effect on the resolution of actual or potential perpetuity-violation cases. The former affects many more practicing lawyers than the latter.

With respect to the planning and drafting end of the practice, the Uniform Statutory Rule requires no modification of current practice and no new learning. *Lawyers can and should continue to use the same traditional perpetuity-saving/termination clause, using specified lives in being plus 21 years, they used before enactment.* Lawyers should not shift to a "later of" type clause that purports to operate upon the *later of* (A) 21 years after the death of the survivor of specified lives in being or (B) 90 years. As explained in more detail in the Comment to Section 2-901 [72-2-1002], such a clause is not effective. If such a "later of" clause is used in a trust that contains a violation of the common-law rule against perpetuities, Section 2-901(a) [72-2-1002(1)], by itself, would render the clause ineffective, limit the maximum permissible vesting period to 90 years, and render the trust vulnerable to a reformation suit under Section 2-903 [72-2-1004]. Section 2-901(e) [72-2-1002(5)], however, saves documents using this type of clause from this fate. By limiting the effect of such clauses to the 21-year period following the death of the survivor of the specified lives, subsection (e) [72-2-1002(5)] in effect transforms this type of clause into a traditional perpetuity-saving/termination clause, bringing the trust into compliance with the common-law rule against perpetuities and rendering it invulnerable to a reformation suit under Section 2-903 [72-2-1004].

Far fewer in number are those lawyers (and judges) who have an actual or potential perpetuity-violation case. An actual or potential perpetuity-violation case will arise very infrequently under the Uniform Statutory Rule. When such a case does arise, however, lawyers (or judges) involved in the case will find considerable guidance for its resolution in the detailed analysis contained in the commentary accompanying the Uniform Statutory Rule itself. In short, the detailed analysis in the commentary accompanying the Uniform Statutory Rule need not be part of the general learning required of lawyers in the drafting and planning of dispositive documents for their clients. The detailed analysis is supplied in the commentary for the assistance in the resolution of an actual violation. Only then need that detailed analysis be consulted and, in such a case, it will prove extremely helpful.

General References. Fellows, "Testing Perpetuity Reforms: A Study of Perpetuity Cases 1984-89," 25 Real Prop. Prob. & Tr. J. 597 (1991) (testing the various types of perpetuity reform measures and concluding, on the basis of empirical evidence, that the Uniform Statutory Rule is the best opportunity offered to date for a uniform perpetuity law that efficiently and effectively achieves a fair balance between present and future property owners); Waggoner, "The Uniform Statutory Rule Against Perpetuities: Oregon Joins Up," 26 Willamette L. Rev. 259 (1990) (explaining the operation of the Uniform Statutory Rule); Waggoner, "The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period," 73 Cornell L. Rev. 157 (1988) (explaining the derivation of the 90-year period); Waggoner, "The Uniform Statutory Rule Against Perpetuities," 21 Real Prop., Prob. & Tr. J. 569 (1986) (explaining the theory and operation of the Uniform Statutory Rule).

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[1] Actuarially, the life expectancy of the longest living member of a group of twelve new-born babies is about 94 years; with the 21-year tack-on period, the "twelve-healthy-babies ploy" would produce, on average, a period of about 115 years (94 + 21).

[2] Under Section 2-707 [72-2-717], the descendants of a beneficiary of a future interest are presumptively made substitute beneficiaries, almost certainly making those descendants in being at the creation of the interest measuring lives, were measuring lives to have been used.

Part Compiler's Comments

Source: Title 72, ch. 2, part 10, is based on the Uniform Statutory Rule Against Perpetuities promulgated by the National Conference of Commissioners on Uniform State Laws.

Annotator's Note: The following case law reflects decisions made prior to the 1989 enactment of the Uniform Statutory Rule Against Perpetuities and may not apply to the specifics of the Uniform Rule.

Part Case Notes

DECISIONS UNDER FORMER LAW

Justiciable Controversy Required: When a declaratory judgment had been sought on the issue of whether a right of first refusal of real property was invalid under the rule against perpetuities, it should have been dismissed by the District Court because no justiciable controversy existed. Relying on Hardy v. Krutzfeldt, 206 M 521, 672 P2d 274, 40 St. Rep. 1823 (1983), the Supreme Court noted that in this case there was no pending sale or offer for sale or purchase or offer to purchase the affected property. Neither had a third party challenged the clause's application to him. Parker v. Weed, 220 M 49, 713 P2d 535, 43 St. Rep. 162 (1986).

Operating Agreement Not Violation of Rule Against Perpetuities: Where the plaintiffs and defendants entered into an agreement for the operation of a mine that provided for two extensions of the 5-year primary term of the agreement only if the defendants were "engaged in commercial production of minerals" and only if "active mining operations" were in progress, the District Court did not err in granting summary judgment for the defendants and holding that the agreement did not violate the rule against perpetuities. Under the rationale of Consol. Mines Corp. v. O'Connell, 107 M 273, 85 P2d 345 (1938), the lease could be perpetually renewed but was limited by the required facts being found to exist at time of renewal. This is not a perpetuity. Lewis v. St., 207 M 361, 675 P2d 107, 41 St. Rep. 9 (1984).

Subdivision of Land Benefiting by Reversionary Clause — Effect Upon Rule: The reversionary clause here created a shifting executory grant because a possibility of reverter exists only in the creator of the interest or his heirs and the creator here subdivided the land into tracts. Klawitter v. U.S., 423 F. Supp. 1349, 33 St. Rep. 1369 (D.C. Mont. 1976).

Lives in Being: Under former section allowing suspension of absolute power of alienation for period during continuance of lives of persons in being at creation of limitation or condition and no longer, duration of lives in being and not merely time alone was ultimate measure of period of suspension. In re Hartwig's Estate, 119 M 359, 175 P2d 178 (1946).

Declaration of Trust Held Not Invalid: Where under terms of declaration of a common-law trust trustees had absolute power of alienation of the property of the trust at any time in their discretion, the trust may not be declared invalid as in violation of statutes prohibiting restraints on power of alienation. Hodgkiss v. Northland Petroleum Consol., 104 M 328, 67 P2d 811 (1937).

Minority of Children: Mere minority of children, which under the provisions of a will prevents a postponement of the vesting of title to property bequeathed or devised to them until reaching majority, does not work a suspension of the power of alienation for the period prescribed in the statutes; nor does postponement of possession or enjoyment thereof prevent the interest of the heir from vesting or from being conveyed or transferred. In re Murphy's Estate, 99 M 114, 43 P2d 233 (1935).

Rule Against Perpetuities: The rule against perpetuities is directed toward the prevention of the vesting of estates at remote periods of time and is distinguished from statutes prohibiting the suspension of the power of alienation for a prescribed period, such statutes not insisting upon the vesting of estates but only upon their alienability. In re Murphy's Estate, 99 M 114, 43 P2d 233 (1935).

72-2-1002. Statutory rule against perpetuities.

Official Comments

Section 2-901 [72-2-1002] codifies the validating side of the common-law Rule and implements the wait-and-see feature of the Uniform Statutory Rule Against Perpetuities. As provided in Section 2-906 [not adopted in Montana, but see 1-1-108], this section and the other sections in Subpart 1 of Part 9 [72-2-1001 through 72-2-1007] supersede the common-law Rule Against Perpetuities (common-law Rule) in jurisdictions previously adhering to it (or repeals any statutory version or variation thereof previously in effect in the jurisdiction). The common-law Rule (or the statutory version or variation thereof) is replaced by the Statutory Rule in Section 2-901 [72-2-1002] and by the other provisions of Subpart 1 of Part 9 [72-2-1001 through 72-2-1007].

Section 2-901(a) [72-2-1002(1)] covers nonvested property interests, and will be the subsection most often applicable. Subsections (b) [72-2-1002(2)] and (c) [72-2-1002(3)] cover powers of appointment.

Paragraph (1) of subsections (a) [72-2-1002(1)(a)], (b) [72-2-1002(2)(a)], and (c) [72-2-1002(3)(a)] is a codified version of the validating side of the common-law Rule. In effect, paragraph (1) of these subsections provides that nonvested property interests and powers of appointment that are valid under the common-law Rule Against Perpetuities, including those that are rendered valid because of a perpetuity saving clause, continue to be valid under the Statutory Rule and can be declared so at their inceptions. This means that no new learning is required of competent estate planners: The practice of lawyers who competently draft trusts and other property arrangements for their clients is undisturbed.

Paragraph (2) of subsections (a) [72-2-1002(1)(b)], (b) [72-2-1002(2)(b)], and (c) [72-2-1002(3)(b)] establishes the wait-and-see rule. Paragraph (2) provides that an interest or a power of appointment that is not validated by paragraph (1), and hence would have been invalid under the common-law Rule, is given a second chance: Such an interest is valid if it does not actually remain in existence and nonvested when the 90-year permissible vesting period expires; such a power of appointment is valid if it ceases to be subject to a condition precedent or is no longer exercisable when the permissible 90-year period expires.

Subsection (d) [72-2-1002(4)]. The rule established in subsection (d) [72-2-1002(4)] deserves a special comment. Subsection (d) [72-2-1002(4)] declares that the possibility that a child will be born to an individual after the individual's death is to be disregarded. It is important to note that this rule applies only for the purpose of determining the validity of an interest (or a power of appointment) under paragraph (1) of subsection (a) [72-2-1002(1)(a)], (b) [72-2-1002(2)(a)], or (c) [72-2-1002(3)(a)]. The rule of subsection (d) [72-2-1002(4)] does not apply, for example, to questions such as whether a child who is born to an individual after the individual's death qualifies as a taker of a beneficial interest — as a member of a class or otherwise. Neither subsection (d) [72-2-1002(4)], nor any other provision of Part 9 [Title 72, chapter 2, part 10], supersedes the widely accepted common-law principle, codified in Section 2-109 [72-2-119], that a child in gestation (a child sometimes described as a child en ventre sa mere) who is later born alive (and, under Section 2-109 [72-2-119], lives for 120 hours or more after birth) is regarded as alive during gestation.

The limited purpose of subsection (d) [72-2-1002(4)] is to solve a perpetuity problem created by advances in medical science. The problem is illustrated by a case such as "to A for life, remainder to A's children who reach 21." When the common-law Rule was developing, the possibility was recognized, strictly speaking, that one or more of A's children might reach 21 more than 21 years after A's death. The possibility existed because A's wife (who might not be a life in being) might be pregnant when A died. If she was, and if the child was born viable a few months after A's death, the child could not reach his or her 21st birthday within 21 years after A's death. The device then invented to validate the interest of A's children was to "extend" the allowable perpetuity period by tacking on a period of gestation, if needed. As a result, the common-law perpetuity period was comprised of three components: (1) a life in being (2) plus 21 years (3) plus a period of gestation, when needed. Today, thanks to sperm banks, frozen embryos, and even the possibility of artificially maintaining the body functions of a deceased pregnant woman long enough to develop the fetus to viability — advances in medical science unanticipated when the common-law Rule was in its developmental stages — having a pregnant wife at death is no longer the only way of having children after death. These medical developments, and undoubtedly others to come, make the mere addition of a period of gestation inadequate as a device to confer initial validity under Section 2-901(a)(1) [72-2-1002(1)(a)] on the interest of A's children in the above example. The rule of subsection (d) [72-2-1002(4)], however, does insure the initial validity of the children's interest. Disregarding the possibility that children of A will be born after his death allows A to be the validating life. None of his children, under this assumption, can reach 21 more than 21 years after his death.

Note that subsection (d) [72-2-1002(4)] subsumes not only the case of children conceived after death, but also the more conventional case of children in gestation at death. With subsection (d) [72-2-1002(4)] in place, the third component of the common-law perpetuity period is unnecessary and has been jettisoned. The perpetuity period recognized in paragraph (1) of subsections (a) [72-2-1002(1)(a)], (b) [72-2-1002(2)(a)], and (c) [72-2-1002(3)(a)] has only two components: (1) a life in being (2) plus 21 years.

As to the legal status of conceived-after-death children, that question has not yet been resolved. For example, if in the above example A leaves sperm on deposit at a sperm bank and after A's death a woman (A's widow or another) becomes pregnant as a result of artificial insemination, the child or children produced thereby might not be included at all in the class gift. Cf. Restatement (Second) of Property (Donative Transfers) Introductory Note to Ch. 26 (1988). Without trying to predict how that question will be resolved in the future, the best way to handle the problem from the perpetuity perspective is the rule in subsection (d) [72-2-1002(4)] requiring the possibility of post-death children to be disregarded.

Subsection (e) [72-2-1002(5)] —Effect of Certain "Later-of" Type Language. Subsection (e) [72-2-1002(5)] was added to the Uniform Statutory Rule in 1990. It primarily applies to a non-traditional type of "later of" clause (described below). Use of that type of clause might have produced unintended consequences, which are now rectified by the addition of subsection (e) [72-2-1002(5)].

In general, perpetuity saving or termination clauses can be used in either of two ways. The predominant use of such clauses is as an override clause. That is, the clause is not an integral part of the dispositive terms of the trust, but operates independently of the dispositive terms; the clause provides that all interests must vest no later than at a specified time in the future, and sometimes also provides that the trust must then terminate, but only if any interest has not previously vested or if the trust has not previously terminated. The other use of such a clause is as an integral part of the dispositive terms of the trust; that is, the clause is the provision that directly regulates the duration of the trust. Traditional perpetuity saving or termination clauses do not use a "later of" approach; they mark off the maximum time of vesting or termination only by reference to a 21-year period following the death of the survivor of specified lives in being at the creation of the trust.

Subsection (e) [72-2-1002(5)] applies to a non-traditional clause called a "later of" (or "longer of") clause. Such a clause might provide that the maximum time of vesting or termination of any interest or trust must occur no later than the later of (A) 21 years after the death of the survivor of specified lives in being at the creation of the trust or (B) 90 years after the creation of the trust.

Under the Uniform Statutory Rule as originally promulgated, this type of "later of" clause would not achieve a "later of" result. If used as an override clause in conjunction with a trust whose terms were, by themselves, valid under the common-law rule against perpetuities (common-law Rule), the "later of" clause did no harm. The trust would be valid under the common-law Rule as codified in subsection (a)(1) [72-2-1002(1)(a)] because the clause itself would neither postpone the vesting of any interest nor extend the duration of the trust. But, if used either (1) as an override clause in conjunction with a trust whose terms were not valid under the common-law Rule or (2) as the provision that directly regulated the duration of the trust, the "later of" clause would not cure the perpetuity violation in case (1) and would create a perpetuity violation in case (2). In neither case would the clause qualify the trust for validity at common law under subsection (a)(1) [72-2-1002(1)(a)] because the clause would not guarantee that all interests will be certain to vest or terminate no later than 21 years after the death of an individual then alive.[1] In any given case, 90 years can turn out to be longer than the period produced by the specified-lives-in-being-plus-21-years language.

Because the clause would fail to qualify the trust for validity under the common-law Rule of subsection (a)(1) [72-2-1002(1)(a)], the nonvested interests in the trust would be subject to the wait-and-see element of subsection (a)(2) [72-2-1002(1)(b)] and vulnerable to a reformation suit under Section 2-903 [72-2-1004]. Under subsection (a)(2) [72-2-1002(1)(b)], an interest that is not valid at common law is invalid unless it actually vests or terminates within 90 years after its creation. Subsection (a)(2) [72-2-1002(1)(b)] does not grant such nonvested interests a permissible vesting period of either 90 years or a period of 21 years after the death of the survivor of specified lives in being. Subsection (a)(2) [72-2-1002(1)(b)] only grants such interests a period of 90 years in which to vest.

The operation of subsection (a) [72-2-1002(1)], as outlined above, is also supported by perpetuity policy. If subsection (a) [72-2-1002(1)] allowed a "later of" clause to achieve a "later of" result, it would authorize an improper use of the 90-year permissible vesting period of subsection (a)(2) [72-2-1002(1)(b)]. The 90-year period of subsection (a)(2) [72-2-1002(1)(b)] is designed to approximate the period that, *on average*, would be produced by using actual lives in being plus 21 years. Because in any given case the period actually produced by lives in being plus 21 years can be shorter or longer than 90 years, an attempt to utilize a 90-year period in a "later of" clause improperly seeks to turn the 90-year *average* into a *minimum*.

Set against this background, the addition of subsection (e) [72-2-1002(5)] is quite beneficial. Subsection (e) [72-2-1002(5)] limits the effect of this type of "later of" language to 21 years after the death of the survivor of the specified lives, in effect transforming the clause into a traditional perpetuity saving/termination clause. By doing so, subsection (e) [72-2-1002(5)] grants initial validity to the trust under the common-law Rule as codified in subsection (a)(1) [72-2-1002(1)(a)] and precludes a reformation suit under Section 2-903 [72-2-1004].

Note that subsection (e) [72-2-1002(5)] covers variations of the "later of" clause described above, such as a clause that postpones vesting until the later of (A) *20* years after the death of the survivor of specified lives in being or (B) *89* years. Subsection (e) [72-2-1002(5)] does not, however, apply to all dispositions that incorporate a "later of" approach. To come under subsection (e) [72-2-1002(5)], the specified-lives prong must include a tack-on period of up to 21 years. Without a tack-on period, a "later of" disposition, unless valid at common law, comes under subsection (a)(2) [72-2-1002(1)(b)] and is given 90 years in which to vest. An example would be a disposition that creates an interest that is to vest upon "the later of the death of my widow or 30 years after my death."

Coordination of the Federal Generation-skipping Transfer Tax with the Uniform Statutory Rule. In 1990, the Treasury Department announced a decision to coordinate the tax regulations under the "grandfathering" provisions of the federal generation-skipping transfer tax with the Uniform Statutory Rule. Letter from Michael J. Graetz, Deputy Assistant Secretary of the Treasury (Tax Policy), to Lawrence J. Bugge, President, National Conference of Commissioners on Uniform State Laws (Nov. 16, 1990) (hereinafter *Treasury Letter*).

Section 1433(b)(2) of the Tax Reform Act of 1986 generally exempts ("grandfathers") trusts from the federal generation-skipping transfer tax that were irrevocable on September 25, 1985. This section adds, however, that the exemption shall apply "only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985." The provisions of Section 1433(b)(2) were first implemented by Temp. Treas. Reg. § 26.2601-1, promulgated by T.D. 8187 on March 14, 1988. Insofar as the Uniform Statutory Rule is concerned, a key feature of that temporary regulation is the concept that the statutory reference to "corpus added to the trust after September 25, 1985" not only covers actual post-9/25/85 transfers of new property or corpus to a grandfathered trust but "constructive" additions as well. Under the temporary regulation as first promulgated, a "constructive" addition occurs if, after 9/25/85, the donee of a nongeneral power of appointment exercises that power "in a manner that may postpone or suspend the vesting, absolute ownership or power of alienation of an interest in property for a period, measured from the date of creation of the trust, extending beyond any life in being at the date of creation of the trust plus a period of 21 years. If a power is exercised by creating another power it will be deemed to be exercised to whatever extent the second power may be exercised." Temp. Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2) (1988).

Because the Uniform Statutory Rule was promulgated in 1986 and applies only prospectively, any "grandfathered" trust would have become irrevocable prior to the enactment of USRAP in any state. Nevertheless, the second sentence of Section 2-905(a) [72-2-1006(1)] extends USRAP's wait-and-see approach to post-effective-date exercises of nongeneral powers even if the power itself was created prior to USRAP's effective date. Consequently, a post-USRAP-effective-date exercise of a nongeneral power of appointment created in a "grandfathered" trust could come under the provisions of the Uniform Statutory Rule.

The literal wording, then, of Temp. Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2) (1988), as first promulgated, could have jeopardized the grandfathered status of an exempt trust if (1) the trust created a nongeneral power of appointment, (2) the donee exercised that nongeneral power, and (3) USRAP is the perpetuity law applicable to the donee's exercise. This possibility arose not only because the donee's exercise itself might come under the 90-year permissible vesting period of subsection (a)(2) [72-2-1002(1)(b)] if it otherwise violated the common-law Rule and hence was not validated under subsection (a)(1) [72-2-1002(1)(a)]. The possibility also arose in a less obvious way if the donee's exercise created another nongeneral power. The last sentence of the temporary regulation states that "if a power is exercised by creating another power it will be deemed to be exercised to whatever extent the second power may be exercised."

In late March 1990, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the Joint Editorial Board for the Uniform Probate Code (JEB-UPC) filed a formal request with the Treasury Department asking that measures be taken to coordinate the regulation with USRAP. By the Treasury Letter referred to above, the Treasury Department responded by stating that it "will amend the temporary regulations to accommodate the 90-year period under USRAP as originally promulgated [in 1986] or as amended [in 1990 by the addition of subsection (e)] [72-2-1002(5)]." This should effectively remove the possibility of loss of grandfathered status under the Uniform Statutory Rule merely because the donee of a nongeneral power created in a grandfathered trust inadvertently exercises that power in violation of the common-law Rule or merely because the donee exercises that power by creating a second nongeneral power that might, in the future, be inadvertently exercised in violation of the common-law Rule.

The Treasury Letter states, however, that any effort by the donee of a nongeneral power in a grandfathered trust to obtain a "later of" specified-lives-in-being-plus-21-years or 90-years approach will be treated as a constructive addition, unless that effort is nullified by state law. As explained above, the Uniform Statutory Rule, as originally promulgated in 1986 or as amended in 1990 by the addition of subsection (e) [72-2-1002(5)], nullifies any direct effort to obtain a "later of" approach by the use of a "later of" clause.

The Treasury Letter states that an indirect effort to obtain a "later of" approach would also be treated as a constructive addition that would bring grandfathered status to an end, unless the attempt to obtain the later-of approach is nullified by state law. The Treasury Letter indicates that an indirect effort to obtain a "later of" approach could arise if the donee of a nongeneral power successfully attempts to prolong the duration of a grandfathered trust by switching from a specified-lives-in-being-plus-21-years perpetuity period to a 90-year perpetuity period, or vice versa. Donees of nongeneral powers in grandfathered trusts would therefore be well advised to resist any temptation to wait until it becomes clear or reasonably predictable which perpetuity period will be longer and then make a switch to the longer period if the governing instrument creating the power utilized the shorter period. No such attempted switch and no constructive addition will occur if in each instance a traditional specified-lives-in-being-plus-21-years perpetuity saving clause is used.

Any such attempted switch is likely in any event to be nullified by state law and, if so, the attempted switch will not be treated as a constructive addition. For example, suppose that the original grandfathered trust contained a standard perpetuity saving clause declaring that all interests in the trust must vest no later than 21 years after the death of the survivor of specified lives in being. In exercising a nongeneral power created in that trust, any indirect effort by the donee to obtain a "later of" approach by adopting a 90-year perpetuity saving clause will likely be nullified by subsection (e) [72-2-1002(5)]. If that exercise occurs at a time when it has become clear or reasonably predictable that the 90-year period will prove longer, the donee's exercise would constitute language in a governing instrument that seeks to operate in effect to postpone the vesting of any interest until the later of the specified-lives-in-being-plus-21-years period or 90 years. Under subsection (e) [72-2-1002(5)], "that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives."

Quite apart from subsection (e) [72-2-1002(5)], the relation-back doctrine generally recognized in the exercise of nongeneral powers stands as a doctrine that could potentially be invoked to nullify an attempted switch from one perpetuity period to the other perpetuity period. Under that doctrine, interests created by the exercise of a nongeneral power are considered created by the donor of that power. See, e.g., Restatement (Second) of Property, Donative Transfers § 11.1 comment b (1986). As such, the maximum vesting period applicable to interests created by the exercise of a nongeneral power would apparently be covered by the perpetuity saving clause in the document that created the power, notwithstanding any different period the donee purports to adopt.

Reference. Section 2-901 [72-2-1002] is Section 1 of the Uniform Statutory Rule Against Perpetuities (Uniform Act). For further discussion of this section, with numerous examples illustrating its application, see the Official Comment to Section 1 of the Uniform Act.

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[1] By substantial analogous authority, the specified-lives-in-being-plus-21-years prong of the "later of" clause under discussion is not sustained by the separability doctrine (described in Part H of the Comment to § 1 of the Uniform Statutory Rule Against Perpetuities). See, e.g., Restatement of Property § 376 comments e & f & illustration 3 (1944); Easton v. Hall, 323 Ill. 397, 154 N.E. 216 (1926); Thorne v. Continental Nat'l Bank & Trust Co., 305 Ill. App. 222, 27 N.E.2d 302 (1940). The inapplicability of the separability doctrine is also supported by perpetuity policy, as described in the text above.

Compiler's Comments

1991 Amendment: Inserted (5) specifying that a clause pertaining to a period of time that exceeds 21 years or that might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or property arrangement must be disregarded.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-901.

Case Notes

Nondonative Transfer — Rule Against Perpetuities Not Violated by Conservation Restrictions Enforced by Trust: The District Court did not err by deciding that certain nonvested conservation restrictions that were enforced by a trust were not void as violations of 72-2-1002 regarding the rule against perpetuities. The Supreme Court reasoned that 72-2-1002 does not apply to all nonvested property interests, including a nondonative transfer as provided in 72-2-1005. The fact that the transfer of the property was for valuable consideration placed the restrictions outside the reach of the rule against perpetuities. Scott v. Lee and Donna Metcalf Charitable Trust, 2015 MT 265, 381 Mont. 64, 358 P.3d 879.

72-2-1003. When nonvested property interest or power of appointment created.

Official Comments

Section 2-902 [72-2-1003] defines the time when, for purposes of Subpart 1 of Part 9 [72-2-1001 through 72-10-1007], a nonvested property interest or a power of appointment is created. The period of time allowed by Section 2-901 [72-2-1002] is measured from the time of creation of the nonvested property interest or power of appointment in question. Section 2-905 [72-2-1006], with certain exceptions, provides that Subpart 1 of Part 9 [72-2-1001 through 72-10-1007] applies only to nonvested property interests and powers of appointment created on or after the effective date of Subpart 1 of Part 9 [72-2-1001 through 72-10-1007].

Subsection (a) [72-2-1003(1)]. Subsection (a) [72-2-1003(1)] provides that, with certain exceptions, the time of creation of nonvested property interests and powers of appointment is determined under general principles of property law. Because a will becomes effective as a dispositive instrument upon the decedent's death, not upon the execution of the will, general principles of property law determine that a nonvested property interest or a power of appointment created by will is created at the decedent's death. With respect to an inter-vivos transfer, an interest or power is created on the date the transfer becomes effective for purposes of property law generally, normally the date of delivery of the deed or the funding of the trust.

Nonvested Property Interests and Powers of Appointment Created by the Exercise of a Power of Appointment. If a nonvested property interest or a power of appointment was created by the testamentary or inter-vivos exercise of a power of appointment, general principles of property law adopt the "relation-back" doctrine. Under that doctrine, the appointed interests or powers are created when the power was created, not when it was exercised, if the exercised power was a nongeneral power or a general testamentary power. If the nonvested property interest or power of appointment was created by the exercise of a nongeneral or a testamentary power of appointment that was itself created by the exercise of a nongeneral or a testamentary power of appointment, the relation-back doctrine is applied twice and the nonvested property interest or power of appointment was created when the first power of appointment was created, not when the second power was created or exercised.

Example 1. G's will created a trust that provided for the income to go to G's son, A, for life, remainder to such of A's descendants as A shall by will appoint.

A died leaving a will that exercised his nongeneral power of appointment, providing that the trust is to continue beyond A's death, paying the income to A's daughter, X, for her lifetime, remainder in corpus to such of X's descendants as X shall by will appoint; in default of appointment, to X's descendants who survive X, by representation.

A's exercise of his nongeneral power of appointment gave a nongeneral power of appointment to X and a nonvested property interest to X's descendants. For purposes of Section 2-901 [72-2-1002], X's power of appointment and the nonvested property interest in X's descendants is deemed to have been "created" at G's death when A's nongeneral power of appointment was created, not at A's death when he exercised his power of appointment.

Suppose that X subsequently dies leaving a will that exercises her nongeneral power of appointment. For purposes of Section 2-901 [72-2-1002], any nonvested property interest or power of appointment created by an exercise of X's nongeneral power of appointment is deemed to have been "created" at G's death, not at A's death or at X's death.

If the exercised power was a presently exercisable general power, the relation-back doctrine is not followed; the time of creation of the appointed property interests or appointed powers is regarded as the time when the power was irrevocably exercised, not when the power was created.

Example 2. The same facts as Example 1, except that A's will exercised his nongeneral power of appointment by providing that the trust is to continue beyond A's death, paying the income to A's daughter, X, for her lifetime, remainder in corpus to such person or persons, including X, her estate, her creditors, and the creditors of her estate, as X shall appoint; in default of appointment, to X's descendants who survive X, by representation.

A's exercise of his nongeneral power of appointment gave a presently exercisable general power of appointment to X. For purposes of Section 2-901 [72-2-1002], any nonvested property interest or power of appointment created by an exercise of X's presently exercisable general power of appointment is deemed to be "created" when X irrevocably exercises her power of appointment, not when her power of appointment or A's power of appointment was created.

A's exercise of his nongeneral power also granted a nonvested property interest to X's descendants (under the gift-in-default clause). Were it not for the presently exercisable general power granted to X, the nonvested property interest in X's surviving descendants would, under the relation-back doctrine, be deemed "created" for purposes of Section 2-901 [72-2-1002] at the time of G's death. However, under Section 2-902(b) [72-2-1003(2)], the fact that X is granted the presently exercisable general power postpones the time of creation of the nonvested property interest of X's descendants. Under Section 2-902(b) [72-2-1003(2)], that nonvested property interest is deemed not to have been "created" for purposes of Section 2-901 [72-2-1002] at G's death but rather when X's presently exercisable general power "terminates." Consequently, the time of "creation" of the nonvested interest of X's descendants is postponed as of the time that X was granted the presently exercisable general power (upon A's death) and continues in abeyance until X's power terminates. X's power terminates by the first to happen of the following: X's irrevocable exercise of her power; X's release of her power; X's entering into a contract to exercise or not to exercise her power; X's dying without exercising her power; or any other action or nonaction that would have the effect of terminating her power.

Subsection (b) [72-2-1003(2)]. Subsection (b) [72-2-1003(2)] provides that, if one person can exercise a power to become the unqualified beneficial owner of a nonvested property interest (or a property interest subject to a power of appointment described in Section 2-901(b) [72-2-1002(2)] or 2-901(c) [72-2-1002(3)], the time of creation of the nonvested property interest (or the power of appointment) is postponed until the power to become the unqualified beneficial owner ceases to exist. This is in accord with existing common law. The standard example of the application of this subsection is a revocable inter-vivos trust. For perpetuity purposes, both at common law and under Subpart 1 of Part 9 [72-2-1001 through 72-2-1007], the nonvested property interests and powers of appointment created in the trust are created when the power to revoke expires, usually at the settlor's death. For another example of the application of subsection (b) [72-2-1003(2)], see the last paragraph of Example 2, above.

Subsection (c) [72-2-1003(3)]. Subsection (c) [72-2-1003(3)] provides that nonvested property interests and powers of appointment arising out of transfers to a previously funded trust or other existing property arrangement are created when the nonvested property interest or power of appointment arising out of the original contribution was created. This avoids an administrative difficulty that can arise at common law when subsequent transfers are made to an existing irrevocable inter-vivos trust. Arguably, at common law, each transfer starts the period of the Rule running anew as to each transfer. The prospect of staggered periods is avoided by subsection (c) [72-2-1003(3)]. Subsection (c) [72-2-1003(3)] is in accord with the saving-clause principle of wait-and-see embraced by Part 9 [Title 72, chapter 2, part 10]. If the irrevocable inter-vivos trust had contained a saving clause, the perpetuity-period component of the clause would be measured by reference to lives in being when the original contribution to the trust was made, and the clause would cover subsequent contributions as well.

Reference. Section 2-902 [72-2-1003] is Section 2 of the Uniform Statutory Rule Against Perpetuities (Uniform Act). For further discussion of this section, with examples illustrating its application, see the Official Comment to Section 2 of the Uniform Act.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-902.

72-2-1004. Reformation.

Official Comments

Section 2-903 [72-2-1004] implements the deferred-reformation feature of the Uniform Statutory Rule Against Perpetuities. Upon the petition of an interested person, the court is directed to reform a disposition within the limits of the allowable 90-year period, in the manner deemed by the court most closely to approximate the transferor's manifested plan of distribution, in any one of three circumstances. The "interested person" who would frequently bring the reformation suit would be the trustee.

Section 2-903 [72-2-1004] applies only to dispositions the validity of which is governed by the wait-and-see element of Section 2-901(a)(2) [72-2-1002(1)(b)], 2-901(b)(2) [72-2-1002(2)(b)], or 2-901(c)(2) [72-2-1002(3)(b)]; it does not apply to dispositions that are initially valid under Section 2-901(a)(1) [72-2-1002(1)(a)], 2-901(b)(1) [72-2-1002(2)(a)], or 2-901(c)(1) [72-2-1002(3)(a)] — the codified version of the validating side of the common-law Rule.

Section 2-903 [72-2-1004] will seldom be applied. Of the fraction of trusts and other property arrangements that fail to meet the requirements for initial validity under the codified version of the validating side of the common-law Rule, almost all of them will have been settled under their own terms long before any of the circumstances requisite to reformation under Section 2-903 [72-2-1004] arise.

If, against the odds, one of the circumstances requisite to reformation does arise, it will be found easier than perhaps anticipated to determine how best to reform the disposition. The court is given two criteria to work with: (i) the transferor's manifested plan of distribution, and (ii) the allowable 90-year period. Because governing instruments are where transferors manifest their plans of distribution, the imaginary horrible of courts being forced to probe the minds of long-dead transferors will not materialize.

Subsection (1) [72-2-1004(1)]. The theory of Section 2-903 [72-2-1004] is to defer the right to reformation until reformation becomes truly necessary. Thus, the basic rule of Section 2-903(1) [72-2-1004(1)] is that the right to reformation does not arise until a nonvested property interest or a power of appointment becomes invalid; under Section 2-901 [72-2-1002], this does not occur until the expiration of the 90-year permissible vesting period. This approach is more efficient than the "immediate cy pres" approach to perpetuity reform because it substantially reduces the number of reformation suits. It also is consistent with the saving-clause principle embraced by the Statutory Rule. Deferring the right to reformation until the permissible vesting period expires is the only way to grant every reasonable opportunity for the donor's disposition to work itself out without premature interference.

Subsection (2) [72-2-1004(2)]. Although, generally speaking, reformation is deferred until an invalidity has occurred, Section 2-903 [72-2-1004] grants an earlier right to reformation when it becomes necessary to do so or when there is no point in waiting the full 90-year period out. Thus subsection (2) [72-2-1004(2)], which pertains to class gifts that are not yet but still might become invalid under the Statutory Rule, grants a right to reformation whenever the share of any class member whose share had vested within the permissible vesting period might otherwise have to wait out the remaining part of the 90 years before obtaining his or her share. Reformation under this subsection will seldom be needed, however, because of the common practice of structuring trusts to split into separate shares or separate trusts at the death of each income beneficiary, one such separate share or separate trust being created for each of the income beneficiary's then-living children; when this pattern is followed, the circumstances described in subsection (2) [72-2-1004(2)] will not arise.

Subsection (3) [72-2-1004(3)]. Subsection (3) [72-2-1004(3)] also grants a right to reformation before the 90-year permissible vesting period expires. The circumstances giving rise to the right to reformation under subsection (3) [72-2-1004(3)] occurs if a nonvested property interest can vest but not before the 90-year period has expired. Though unlikely, such a case can theoretically arise. If it does, the interest — unless it terminates by its own terms earlier — is bound to become invalid under Section 2-901 [72-2-1002] eventually. There is no point in deferring the right to reformation until the inevitable happens. Section 2-903 [72-2-1004] provides for early reformation in such a case, just in case it arises.

Infectious Invalidity. Given the fact that this section makes reformation mandatory, not discretionary with the court, the common-law doctrine of infectious invalidity is superseded by this section. In a state in which the courts have been particularly zealous about applying the infectious-invalidity doctrine, however, an express codification of the abrogation of this doctrine might be thought desirable. If so, the above section could be made subsection (a), with the following new subsection (b) added:

(b) The common-law rule known as the doctrine of infectious invalidity is abolished. [Montana has not adopted this option.]

Reference. Section 2-903 [72-2-1004] is Section 3 of the Uniform Statutory Rule Against Perpetuities (Uniform Act). For further discussion of this section, with examples illustrating its application, see the Official Comment to Section 3 of the Uniform Act.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-903.

72-2-1005. Exclusions from statutory rule against perpetuities.

Official Comments

This section lists the interests and powers that are excluded from the Statutory Rule Against Perpetuities. This section is in part declaratory of existing common law but in part not. Under subsection (7) [72-2-1005(7)], all the exclusions from the common-law Rule recognized at common law and by statute in the state are preserved.

The major departure from existing common law comes in subsection (1) [72-2-1005(1)]. In line with long-standing scholarly commentary, subsection (1) [72-2-1005(1)] excludes nondonative transfers from the Statutory Rule. The Rule Against Perpetuities is an inappropriate instrument of social policy to use as a control of such arrangements. The period of the Rule — a life in being plus 21 years — is suitable for donative transfers only, and this point applies with equal force to the 90-year allowable waiting period under the wait-and-see element of Section 2-901 [72-2-1002]. That period, as noted, represents an approximation of the period of time that would be produced, on average, by tracing a set of actual measuring lives and adding a 21-year period following the death of the survivor.

Certain types of transactions — although in some sense supported by consideration, and hence arguably nondonative — arise out of a domestic situation, and should not be excluded from the Statutory Rule. To avoid uncertainty with respect to such transactions, subsection (1) [72-2-1005(1)] lists and restores such transactions, such as premarital or postmarital agreements, contracts to make or not to revoke a will or trust, and so on, to the donative-transfers category that does not qualify for an exclusion.

Reference. Section 2-904 [72-2-1005] is Section 4 of the Uniform Statutory Rule Against Perpetuities (Uniform Act). For further discussion of this section, with examples illustrating its application, see the Official Comment to Section 4 of the Uniform Act.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-904.

Case Notes

Nondonative Transfer — Rule Against Perpetuities Not Violated by Conservation Restrictions Enforced by Trust: The District Court did not err by deciding that certain nonvested conservation restrictions that were enforced by a trust were not void as violations of 72-2-1002 regarding the rule against perpetuities. The Supreme Court reasoned that 72-2-1002 does not apply to all nonvested property interests, including a nondonative transfer as provided in 72-2-1005. The fact that the transfer of the property was for valuable consideration placed the restrictions outside the reach of the rule against perpetuities. Scott v. Lee and Donna Metcalf Charitable Trust, 2015 MT 265, 381 Mont. 64, 358 P.3d 879.

72-2-1006. Prospective application.

Official Comments

Section 2-905 [72-2-1006] provides that, except for Section 2-905(b) [72-2-1006(2)], this Part [Title 72, chapter 2, part 10] applies only to nonvested property interests or powers of appointment created on or after the effective date of this Subpart [72-2-1001 through 72-2-1007, effective October 1, 1989]. The second sentence of subsection (a) [72-2-1006(1)] establishes a special rule for nonvested property interests (and powers of appointment) created by the exercise of a power of appointment. The import of this special rule, which applies to the exercise of all types of powers of appointment (general testamentary powers and nongeneral powers as well as presently exercisable general powers), is that all the provisions of this Subpart [72-2-1001 through 72-2-1007] except Section 2-905(b) [72-2-1006(2)] apply if the donee of a power of appointment exercises the power on or after the effective date of this Subpart [72-2-1001 through 72-2-1007, effective October 1, 1989], whether the donee's exercise is revocable or irrevocable. In addition, all the provisions of Subpart 1 [72-2-1001 through 72-2-1007] except Section 2-905(b) [72-2-1006(2)] apply if the donee exercised the power before the effective date of this Subpart [72-2-1001 through 72-2-1007, effective October 1, 1989] if (i) that pre-effective-date exercise was revocable and (ii) that revocable exercise becomes irrevocable on or after the effective date of this Subpart [72-2-1001 through 72-2-1007, effective October 1, 1989]. The special rule, in other words, prevents the common-law doctrine of relation back from inappropriately shrinking the reach of this Subpart [72-2-1001 through 72-2-1007].

Although the Uniform Statutory Rule does not apply retroactively, Section 2-905(b) [72-2-1006(2)] authorizes a court to exercise its equitable power of reform instruments that contain a violation of the state's former rule against perpetuities and to which the Uniform Statutory Rule does not apply because the offending property interest or power of appointment was created before the effective date of this Subpart [72-2-1001 through 72-2-1007, effective October 1, 1989]. Courts are urged to consider reforming such dispositions by judicially inserting a perpetuity saving clause, because a perpetuity saving clause would probably have been used at the drafting stage of the disposition had it been drafted competently. To obviate any possibility of an inequitable exercise of the equitable power to reform, Section 2-905(b) [72-2-1006(2)] limits the authority to reform to situations in which the violation of the former rule against perpetuities is determined in a judicial proceeding that is commenced on or after the effective date of this

Subpart [72-2-1001 through 72-2-1007, effective October 1, 1989]. The equitable power to reform would typically be exercised in the same judicial proceeding in which the invalidity is determined.

Reference. Section 2-905 [72-2-1006] is Section 5 of the Uniform Statutory Rule Against Perpetuities (Uniform Act). For further discussion of this section, with examples illustrating its application, see the Official Comment to Section 5 of the Uniform Act.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-905.

72-2-1017. Honorary trusts — trusts for pets.

Official Comments

Subpart 2 [72-2-1017] contains an optional provision on honorary trusts and trusts for pets. If this optional provision is enacted, a new subsection (8) [not adopted in Montana] should be added to Section 2-904 [72-2-1005] to avoid an overlap or conflict between Subpart 1 of Part 9 [72-2-1001 through 72-2-1007] (USRAP) and Subpart 2 of Part 9 [72-2-1017]. Subsection (8) [not adopted in Montana] makes it clear that Subpart 2 of Part 9 [72-2-1017] is the exclusive provision applicable to the property interests or arrangements subjected to a time limit by the provisions of Subpart 2 [72-2-1017]. Subsection (8) [not adopted in Montana] states:

(8) a property interest or arrangement subjected to a time limit under Subpart 2 of Part 9 [72-2-1017].

Additionally, the "or" at the end of Section 2-904(6) [72-2-1005(6)] should be removed and placed after Section 2-904(7) [72-2-1005(7)]. [Montana has not implemented this recommendation.]

Subsection (a) of this section [72-2-1017(1)] authorizes so-called honorary trusts and places a 21-year limit on their duration. The figure "21" is bracketed to indicate that an enacting state may select a different figure.

Subsection (b) [72-2-1017(2)] provides more elaborate provisions for a particular type of honorary trust, the trust for the care of pets. Under subsection (b) [72-2-1017(2)], a trust for the care of a designated domestic or pet animal and the animal's offspring is valid for a period of up to 21 years. Again, the figure "21" is bracketed to indicate that an enacting state may select a different figure.

The normal life span of some animal species exceeds 21 years. If a state would prefer to allow the trust to continue until the death of the animal, subsection (b) [72-2-1017(2)] can easily be adapted to that purpose. If a state chooses to take this approach, it would probably be desirable not to allow the trust to continue for the lifetime of the animal's offspring. Appropriate adjustments for achieving this approach are to delete the phrase "and the animal's offspring" from the introductory portion of subsection (b) [72-2-1017(2)] and to modify subsection (b)(2) [72-2-1017(2)(b)] to read: "The trust terminates at the death of the animal."

Subsection (b) [72-2-1017(2)] meets a concern of many pet owners by providing them a means for leaving funds to be used for the pet's care.

Compiler's Comments

1995 Amendment: Chapter 592 substituted (1) concerning performing trust for 21 years for "A trust for a noncharitable corporation or unincorporated society or for a lawful noncharitable purpose may be performed by the trustee for 21 years but no longer, whether or not there is a beneficiary who can seek the trust's enforcement or termination and whether or not the terms of the trust contemplate a longer duration"; inserted (1)(a) concerning lawful purpose selected by trustee; inserted (1)(b) concerning no ascertainable beneficiary; in (2), in first sentence, inserted reference to subsection (3) and after "animal" deleted "and the animal's offspring", deleted "Except as expressly provided otherwise in the trust instrument, the following provisions apply:

(a) No portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of a covered animal", in second sentence, after "terminates", deleted "at the earlier of 21 years after the trust was created or", inserted third sentence concerning liberal construction, and inserted fourth sentence concerning extrinsic evidence; inserted (3) and (3)(a) concerning prohibition on converting principal or income to another use; deleted former (2)(g) that read: "(g) A governing instrument must be liberally construed to bring the transfer within the applicability of this section, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor's intent"; adjusted subsection references; and made minor changes in style.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 2-907.

CHAPTER 3
UPC — PROBATE AND ADMINISTRATION

Chapter Official Comments

The provisions of this [chapter] describe the Flexible System of Administration of Decedents' Estates. Designed to be applicable to both intestate and testate estates and to provide persons interested in decedents' estates with as little or as much by way of procedural and adjudicative safeguards as may be suitable under varying circumstances, this system is the heart of the Uniform Probate Code.

The organization and detail of the system here described may be expressed in varying ways and some states may see fit to reframe parts of this article to better accommodate local institutions. Variations in language from state to state can be tolerated without loss of the essential purposes of procedural uniformity and flexibility, if the following essential characteristics are carefully protected in the re-drafting process:

(1) Post-mortem probate of a will must occur to make a will effective and appointment of a personal representative by a public official after the decedent's death is required in order to create the duties and powers attending the office of personal representative. Neither is compelled, however, but both are left to be obtained by persons having an interest in the consequence of probate or appointment. Estates descent at death to successors identified by any probated will, or to heirs if no will is probated, subject to rights which may be implemented through administration.

(2) Two methods of securing probate of wills which include a nonadjudicative determination (informal probate) on the one hand, and a judicial determination after notice to all interested persons (formal probate) on the other, are provided.

(3) Two methods of securing appointment of a personal representative which include appointment without notice and without final adjudication of matters relevant to priority for appointment (informal appointment), on the one hand, and appointment by judicial order after notice to interested persons (formal appointment) on the other, are provided.

(4) A five-day waiting period from death preventing informal probate or informal appointment of any but a special administrator is required.

(5) Probate of a will by informal or formal proceedings or an adjudication of intestacy may occur without any attendant requirement of appointment of a personal representative.

(6) One judicial, in rem, proceeding encompassing formal probate of any wills (or a determination after notice that the decedent left no will), appointment of a personal representative and complete settlement of an estate under continuing supervision of the court (supervised administration) is provided for testators and persons interested in a decedent's estate, whether testate or intestate, who desire to use it.

(7) Unless supervised administration is sought and ordered, persons interested in estates (including personal representatives, whether appointed informally or after notice) may use an "in and out" relationship to the court so that any question or assumption relating to the estate, including the status of an estate as testate or intestate, matters relating to one or more claims, disputed titles, accounts of personal representatives, and distribution, may be resolved or established by adjudication after notice without necessarily subjecting the estate to the necessity of judicial orders in regard to other or further questions or assumptions.

(8) The status of a decedent in regard to whether he left a valid will or died intestate must be resolved by adjudication after notice in proceedings commenced within three years after his death. If not so resolved, any will probated informally becomes final, and if there is no such probate, the status of the decedent as intestate is finally determined, by a statute of limitations which bars probate and appointment unless requested within three years after death.

(9) Personal representatives appointed informally or after notice, and whether supervised or not, have statutory powers enabling them to collect, protect, sell, distribute and otherwise handle all steps in administration without further order of the court, except that supervised personal representatives may be subjected to special restrictions on power as endorsed on their letters.

(10) Purchasers from personal representatives and from distributees of personal representatives are protected so that adjudications regarding the testacy status of a decedent or any other question going to the propriety of a sale are not required in order to protect purchasers.

(11) Provisions protecting a personal representative who distributes without adjudication are included to make nonadjudicated settlements feasible.

(12) Statutes of limitation bar creditors of the decedent who fail to present claims within four months after legal advertising of the administration and unsecured claims not previously barred by nonclaim statutes are barred after three years from the decedent's death.

Overall, the system accepts the premise that the court's role in regard to probate and administration, and its relationship to personal representatives who derive their power from public appointment, is wholly passive until some interested person invokes its power to secure resolution of a matter. The state, through the court, should provide remedies which are suitable and efficient to protect any and all rights regarding succession, but should refrain from intruding into family affairs unless relief is requested, and limit its relief to that sought.

Chapter Compiler's Comments

Source — Explanation of Editorial Comments for 1989 Amendments: Chapter 582, L. 1989, generally revised the Uniform Probate Code and related law. The editorial comments that follow each section amended by Ch. 582 were prepared by Professor E. Edwin Eck of the University of Montana (now University of Montana-Missoula) School of Law.

Chapter Case Notes

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Distribution of Decedent's Personal Property Located in Another State: Decedent was domiciled and prepared his will in another state. His personal representative was properly discharged, and the estate closed after property located in this state was distributed. The laws of decedent's domicile apply to decedent's personal assets; therefore, Montana courts do not have jurisdiction to order the personal representative to gather and distribute decedent's personal property located in the state of decedent's domicile. Estate of Phelan, 235 M 257, 766 P2d 876, 45 St. Rep. 2366 (1988).

Chapter Collateral References

Montana Probate Forms, State Bar of Montana (2006).

Part 1
General Provisions

72-3-101. Devolution of estate at death — restrictions.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-101.

Case Notes

Probate Estate Deemed Sufficient to Satisfy Statutory Allowances — No Error: A man and his first wife executed a revocable living trust. One-half of the trust became irrevocable on the death of the wife. The man remarried, and he executed a codicil to his will to include his new wife and child and devised all tangible personal property to his new wife. Litigation followed the man's death. The Supreme Court found that the District Court did not err when it determined the probate estate was sufficient to satisfy the new wife's statutory allowances through the abatement of her specific devises. In re Estate of Dower, 2021 MT 245, 405 Mont. 443, 495 P.3d 1083.

Deduction of Devisee's Expenses for Upkeep of Real Property From Devisee's Share of Estate: Mary was bequeathed her mother's house and lived in it after her mother died. The question arose whether the estate, or Mary as devisee, was responsible for necessary expenses related to upkeep of the real property during the will contest. The Supreme Court cited the general rule from 34 C.J.S. Executors and Administrators 542 (2003), that unauthorized advancements and disbursements made in good faith by the representative for the benefit of legatees or distributees of the estate are to be reimbursed from their respective portions of the estate. The house immediately devolved to Mary, and only if the personal representative had determined that it was necessary to take possession of the house for administration purposes, would the estate have been responsible for related expenses. However, because the personal representative did not take possession of the house, payments made by the personal representative for upkeep on the property were solely for Mary's benefit and thus chargeable to Mary's portion of the estate. In re Estate of McMurchie, 2004 MT 98, 321 M 21, 89 P3d 18 (2004). See also In re Stutchbury's Will, 138 N.Y.S. 2d 653 (1954).

Real Property Subject to Contract as Personalty: Wooten, an attorney, made and executed a holographic will which appointed Grafft as personal representative. The will gave Grafft personalty and a life estate in real property with several charities as remaindermen. Wooten died, and Grafft was appointed personal representative. At the time of death, a portion of the land was subject to a contract for deed. After the death, the buyer defaulted and her interest in the contract and the property was terminated. In response to a petition filed by the remaindermen, the District Court held that all of the land was to pass to the remaindermen, thereby holding that the testator held the property subject to the contract as real property rather than personalty at the time of his death. The Supreme Court overruled that decision, saying that applying statutory rules, the right of decedent in the contracted land was that of a seller under contract and so was personalty. The personal property was specifically devised to Grafft. The decedent's security interest (the default provisions of the contract) also passed to Grafft, and the default after decedent's death was a default in a contract vested in Grafft, subject to the administration of the estate. In re the Estate of Wooten, 198 M 132, 643 P2d 1196, 39 St. Rep. 816 (1982).

Jurisdiction to Determine Validity of Will Prior to Death: The Courts have no power to pass on the validity of the will of a living person. Colbo v. Coty, 184 M 72, 601 P2d 697 (1979).

72-3-102. Necessity of order of probate of will.

Official Comments

The basic idea of this section follows Section 85 of the Model Probate Code. The exception referring to [72-3-1101] relates to affidavit procedures which are authorized for collection of estates worth less than $5,000.

Section [72-3-121] and various sections in Parts 3 and 4 of this [chapter] make it clear that a will may be probated without appointment of a personal representative, including any nominated by the will.

The requirement of probate stated here and the limitations on probate provided in [72-3-122] mean that questions as to testacy may be eliminated simply by the running of time. Under these sections, an informally probated will cannot be questioned after the later of three years from the decedent's death or one year from the probate whether or not an executor was appointed, or, if an executor was appointed, without regard to whether the estate has been distributed. If the decedent is believed to have died without a will, the running of three years from death bars probate of a late-discovered will and so makes the assumption of intestacy conclusive.

The exceptions to the section (other than the exception relevant to small estates) are not intended to accommodate cases of late-discovered wills. Rather, they are designed to make the probate requirement inapplicable where circumstances led survivors of a decedent to believe that there was no point to probating a will of which they may have had knowledge. If any will was probated within three years of death, or if letters of administration were issued in this period, the exceptions to the section are inapplicable. If there has been no proceeding in probate, persons seeking to establish title by an unprobated will must show, with reference to the estate they claim, either that it has been possessed by those to whom it was devised or that it has been unknown to the decedent's heirs or devisees and not possessed by any.

It is to be noted, also, that devisees who are able to claim under one of the exceptions to this section may not obtain probate of the will or administration of the estate to assist them in their efforts to obtain the estate in question. The exceptions are to a rule which bars admission of a will into evidence, rather than to the section barring late probate and late appointment of personal representatives. Still, the exceptions should serve to prevent two "hard" cases which can be imagined readily. In one, a surviving spouse fails to seek probate of a will, giving her the entire estate of the decedent because she is informed or believes that all of her husband's property was held by them jointly, with right of survivorship. Later, it is discovered that she was mistaken as to the nature of her husband's title. The other case involves a devisee who sees no point to securing probate of a will in his favor because he is unaware of any estate. Subsequently, valuable rights of the decedent are discovered.

Compiler's Comments

2019 Purported Amendment: Section 56, Ch. 313, L. 2019, purported to amend this section. However, only the section catchline was changed by inserting "order of". Pursuant to 1-11-103(5), section catchlines are not part of the law, so no substantive change occurred.

1995 Amendment: Chapter 592 at end deleted "except that a duly executed and unrevoked will which has not been probated may be admitted as evidence of a devise if:

(1) no court proceeding concerning the succession or administration of the estate has occurred; and

(2) either:

(a) the devisee or his successors and assigns possessed the property devised in accordance with the provisions of the will; or

(b) the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings".

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-102.

Case Notes

DECISIONS UNDER 1975 MONTANA UNIFORM PROBATE CODE

Promissory Estoppel Requiring Reversal of Summary Judgment — No Will Produced: The Supreme Court reversed summary judgment, finding that genuine issues of material fact existed regarding testimony that an original will had been altered, yet no changed will was ever produced, and that all parties agreed to abide by deceased's wishes, but there was some disagreement as to what those wishes were. Further, appellant's reliance on the promise to abide resulted in potential injury and invoked the doctrine of promissory estoppel, precluding summary judgment. Tope v. Taylor, 224 M 131, 728 P2d 789, 43 St. Rep. 2074 (1986).

72-3-103. Necessity of appointment for administration.

Official Comments

This section makes it clear that appointment by a public official is required before one can acquire the status of personal representative. "Qualification" is dealt with in [72-3-512]. "Letters" are the subject of section [72-1-204]. Section [72-3-601] is also related, since it deals with the time of accrual of duties and powers of personal representatives.

See [72-3-122] for the time limit on requests for appointment of personal representatives.

In [Chapter 4, 72-4-303 and 72-4-301] permit a personal representative from another state to obtain the powers of one appointed locally by filing evidence of his authority with a local court.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-103.

72-3-104. Claims against decedent — necessity of administration.

Official Comments

This and sections of Part 8 [Chapter 3], are designed to force creditors of decedents to assert their claims against duly appointed personal representatives. Creditors of a decedent are interested persons who may seek the appointment of a personal representative ([72-3-201 through 72-3-205]). If no appointment is granted to another within 45 days after the decedent's death, a creditor may be eligible to be appointed if other persons with priority decline to serve or are ineligible ([72-3-501 through 72-3-505]). But, if a personal representative has been appointed and has closed the estate under circumstances which leave a creditor's claim unbarred, the creditor is permitted to enforce his claims against distributees, as well as against the personal representative if any duty owed to creditors under [72-3-808 or 72-3-1004] has been breached. The methods for closing estates are outlined in [72-3-1001 through 72-3-1004]. Termination of appointment under [72-3-521, et seq.] may occur though the estate is not closed and so may be irrelevant to the question of whether creditors may pursue distributees.

Compiler's Comments

1999 Amendment: Chapter 51 in (1) at end of second sentence substituted "Title 72, chapter 3, parts 1 through 10, and 72-3-1101 through 72-3-1103" for "72-3-101 through 72-3-1103"; and made minor changes in style. Amendment effective March 15, 1999.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-104.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Deceased Defendant in Tort Action — Unmarried Without Children or Estate — Action Against Parents as Successors in Interest: Where the defendant in a tort action was deceased, it was not error to dismiss the deceased and his estate and substitute his parents as successors in interest to the deceased. The deceased was unmarried and childless at the time of his death and left no estate; thus, there was no representative, and under 27-1-501 his parents, as successors in interest, are the proper parties. Such substitution is permitted under former Rule 17(a), M.R.Civ.P. (now superseded), without adversely affecting any applicable Statute of Limitations. Simonson v. White, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986).

DECISIONS UNDER FORMER LAW

Hospital Expenses: In action to recover unpaid hospital expenses from decedent's heirs at law who had distributed assets of decedent's estate without having administrator appointed, Trial Court improperly granted relief to plaintiff hospital since it could not sue upon its claim until it first presented such claim to administrator; thus, proper remedy would have been for hospital to apply for letters of administration as creditor, and hospital's attempted remedy circumvented statutory priorities for payment of debts. Daughters of Jesus v. Gee, 153 M 342, 457 P2d 471 (1969).

Attorney General's Opinions

Attorney General Opinion Inappropriate: Whether District Court Clerk must accept for filing creditor's claims against a decedent prior to appointment of a personal representative and whether such filing tells the 3-year limitation on presentment of claims are inappropriate questions for an Attorney General Opinion. 37 A.G. Op. 135 (1978).

72-3-105. Interested persons' rights of application and petition.

Official Comments

This and other sections of [Chapter 3] contemplate a nonjudicial officer who will act on informal application and a judge who will hear and decide formal petitions. See [72-1-205] which permits the judge to perform or delegate the functions of the [clerk]. However, the primary purpose of [Chapter 3] is to describe functions to be performed by various public officials, rather than to prescribe how these responsibilities should be assigned within a given state or county. Hence, any of several alternatives to the organizational scheme assumed for purposes of this draft would be acceptable.

For example, a state might assign responsibility for maintenance of probate files and records, and for receiving and acting upon informal applications, to existing, limited power probate offices. Responsibility for hearing and deciding formal petitions would then be assigned to the court of general jurisdiction of each county or district.

If separate courts or officers are not feasible, it may be preferable to concentrate authority for allocating responsibility respecting formal and informal proceedings in the judge. To do so helps fix responsibility for the total operation of the office. This is the assumption of this draft.

It will be up to each adopting state to select the organizational arrangement which best meets its needs.

If the office with jurisdiction to hear and decide formal petitions is the county or district court of general jurisdiction, there will be little basis for objection to the broad statement of concurrent jurisdiction of this section. However, if a more specialized "estates" court is used, there may be pressure to prevent it from hearing negligence and other actions involving jury trials, even though it may be given unlimited power to decide other cases to which a personal representative is a party. A system for certifying matters involving jury trials to the general trial court could be provided, although the alternative of permitting the estates court to empanel juries where necessary might not be unworkable. In any event, the jurisdiction of the "estates" or "probate" court in regard to negligence litigation would only be concurrent with that of the general trial court. The important point is that the estates court, whatever it is called, should have unlimited power to hear and finally dispose of all matters relevant to determination of the extent of the decedent's estate and of the claims against it. The jury trial question is peripheral.

See the Comment to [UPC § 3-106 appearing under 72-3-111] regarding the adjustments which might be made in the code by a state with a single court of general jurisdiction for each county or district.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-105(first part).

Changes From Uniform Act: Montana codified section 3-105 of the Uniform Probate Code as 72-3-105 and 72-3-111(1). The Official Comments appearing under 72-3-105 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-105 of the Uniform Probate Code.

Case Notes

Action for Formal Intestacy Proceedings by Claimed Common-Law Wife: In an action for formal intestacy proceedings by a claimed common-law wife, the Supreme Court affirmed the trial court's dismissal of appellant's petition. Here the facts used to support the existence of a common-law marriage are mere isolated instances in which appellant allegedly represented herself as decedent's wife. The facts fail to show any specific agreement between appellant and the decedent concerning marriage; they do not establish a continuous marital relationship and are in conflict with testimony presented by respondent. In re Estate of Peltomaa, 193 M 74, 630 P2d 215, 38 St. Rep. 943 (1981).

72-3-106. Interested person's right to demand notice of order or filing.

Official Comments

The notice required as the result of demand under this section is regulated as far as time and manner requirements are concerned by [72-1-301].

This section would apply to any order which might be made in a supervised administration proceeding.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-204.

Attorney General's Opinions

Attorney General Opinion Inappropriate: Whether District Court Clerk must accept for filing creditor's claims against a decedent prior to appointment of a personal representative and whether such filing tolls the 3-year limitation on presentment of claims are inappropriate questions for an Attorney General Opinion. 37 A.G. Op. 135 (1978).

72-3-109. Acknowledgment of fiduciary relationship and obligations — personal representative, guardian, or conservator.

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Saving Clause: Section 11, Ch. 238, L. 2011, was a saving clause.

72-3-111. Exclusive jurisdiction of court — binding nature of orders after notice.

Official Comments to UPC § 3-105

This and other sections of [Chapter 3] contemplate a non-judicial officer who will act on informal application and a judge who will hear and decide formal petitions. See [72-1-205] which permits the judge to perform or delegate the functions of the [clerk]. However, the primary purpose of [Chapter 3] is to describe functions to be performed by various public officials, rather than to prescribe how these responsibilities should be assigned within a given state or county. Hence, any of several alternatives to the organizational scheme assumed for purposes of this draft would be acceptable.

For example, a state might assign responsibility for maintenance of probate files and records, and for receiving and acting upon informal applications, to existing, limited power probate offices. Responsibility for hearing and deciding formal petitions would then be assigned to the court of general jurisdiction of each county or district.

If separate courts or offices are not feasible, it may be preferable to concentrate authority for allocating responsibility respecting formal and informal proceedings in the judge. To do so helps fix responsibility for the total operation of the office. This is the assumption of this draft.

It will be up to each adopting state to select the organizational arrangement which best meets its needs.

If the office with jurisdiction to hear and decide formal petitions is the county or district court of general jurisdiction, there will be little basis for objection to the broad statement of concurrent jurisdiction of this section. However, if a more specialized "estates" court is used, there may be pressure to prevent it from hearing negligence and other actions involving jury trials, even though it may be given unlimited power to decide other cases to which a personal representative is a party. A system for certifying matters involving jury trials to the general trial court could be provided, although the alternative of permitting the estates court to empanel juries where necessary might not be unworkable. In any event, the jurisdiction of the "estates" or "probate" court in regard to negligence litigation would only be concurrent with that of the general trial court. The important point is that the estates court, whatever it is called, should have unlimited power to hear and finally dispose of all matters relevant to determination of the extent of the decedent's estate and of the claims against it. The jury trial question is peripheral.

See the Comment to [UPC § 3-106 also appearing under this section] regarding adjustments which might be made in the Code by a state with a single court of general jurisdiction for each county or district.

Official Comments to UPC § 3-106

The language in this [section] and [UPC § 3-105] which divides matters coming before the probate court between those within the court's "exclusive" jurisdiction and those within its "concurrent" jurisdiction would be inappropriate if probate matters were assigned to a branch of a single court of general jurisdiction. The Code could be adjusted to an assumption of a single court in various ways. Any adjusted version should contain a provision permitting the court to hear and settle certain kinds of matters after notice as provided in [72-1-301]. It might be suitable to combine [72-3-111(1) and 72-3-111(2)] into a single section as follows:

"The Court may hear and determine formal proceedings involving administration and distribution of decedents' estates after notice to interested persons in conformity with [72-1-301]. Persons notified are bound though less than all interested persons may have been given notice."

An adjusted version also might provide:

"Subject to general rules concerning the proper location of civil litigation and jurisdiction of persons, the Court (meaning the probate division) may hear and determine any other controversy concerning a succession or to which an estate, through a personal representative, may be a party."

The propriety of this sort of statement would depend upon whether questions of docketing and assignment, including the division of matters between coordinate branches of the Court, should be dealt with by legislation.

Compiler's Comments

UPC Section: The corresponding sections in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws are sections 3-105(last part) and 3-106.

Changes From Uniform Act:

Montana codified section 3-105 of the Uniform Probate Code as 72-3-105 and 72-3-111(1). The Official Comments appearing under 72-3-111 are the comments of the National Conference of Commissioners on Uniform State Laws for sections 3-105 and 3-106 of the Uniform Probate Code.

Montana substituted 72-3-111(1) for the following two sentences: "The court has exclusive jurisdiction of formal proceedings to determine how decedents' estates subject to the laws of this state are to be administered, expended and distributed. The court has concurrent jurisdiction of any other action or proceeding concerning a succession or to which an estate, through a personal representative, may be a party, including actions to determine title to property alleged to belong to the estate, and of any action or proceeding in which property distributed by a personal representative or its value is sought to be subjected to rights of creditors or successors of the decedent."

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

District Court Assuming Subject Matter Jurisdiction Over Estate When Tribal Council Unequivocally Declined to Assert Subject Matter Jurisdiction — No Error: A court may take judicial notice of records of any court of this state or of any court of record of the United States or any court of record of any state of the United States. A tribal court order, though not expressly listed in the rule, is a record analogous to those listed in Rule 202(b)(6), M.R.Ev. (Title 26, ch. 10), and is thus law of which the Supreme Court may take judicial notice. In re Estate of Gopher, 2013 MT 264, 372 Mont. 9, 310 P.3d 521.

Matters Involving Prior Accounting Merged in Final Account: In response to the personal representative's argument that the court had no jurisdiction over matters handled during the administration of the estate that were not included in the order issued prior to the final account, the Supreme Court held that in any supervised administration, the court is given continuing authority in a single in rem proceeding to secure the complete administration of the estate until the entry of an order approving distribution and discharging the personal representative. The matters involving the prior accounting were merged in the final account, and the court had jurisdiction over them. In re Estate of Barber, 239 M 129, 779 P2d 477, 46 St. Rep. 1565 (1989).

State Probate Jurisdiction of Federal Claim — Homestead Exemption — Priority of Liens: Creditor obtained a default judgment in the U.S. District Court for the Southern District of New York against an Alaska resident and attempted to execute on property in Montana that had subsequently come under Montana's exclusive probate jurisdiction. While the federal court retained jurisdiction over claims impacting the estate, the court could not seize and control property in the possession of the state probate court. It was within the jurisdiction of the state court to determine that the real property was subject to family protection allowances and exempt from execution. Although the lien was attached prior to debtor's death, the lien was extinguished upon the exercise of the family protection allowances, and the homestead allowance was exempt from and had priority over all other claims against the estate. In re Estate of Wilhelm, 233 M 255, 760 P2d 718, 45 St. Rep. 1468 (1988).

Probate Court's Jurisdiction Over Title to Real Property: Weeks after executing a will identical to her husband's, leaving their property to each other or to the husband's heirs, the decedent executed a new will naming a personal representative of her estate and giving him full power of attorney. Shortly before decedent's death, her personal representative transferred part of decedent's real property to her heirs. Husband's conservator sought to set aside the conveyances and remove decedent's personal representative. The District Court denied conservator's motion for summary judgment and determined that while sitting in probate, it lacked the requisite jurisdiction to determine title to real property. The Supreme Court affirmed. In Montana, title to real property, whether determined incidentally or intentionally, must be resolved in proper proceedings instituted for that purpose. In re Estate of Thomas, 216 M 87, 699 P2d 1046, 42 St. Rep. 662 (1985).

Jurisdiction to Determine Validity of Will Prior to Death: The Courts have no power to pass on the validity of the will of a living person. Colbo v. Coty, 184 M 72, 601 P2d 697 (1979).

DECISIONS UNDER FORMER LAW

Testamentary Trustee's Duty to Make Account: Under 72-12-101 (now repealed), a testamentary trustee must account to the District Court sitting in probate, covering all his acts as trustee under the will, the method thereby provided being exclusive; the will governs the trusteeship and the time for its determination. Montgomery v. Gilbert, 111 M 250, 108 P2d 616 (1940).

Federal Court Without Jurisdiction: Federal Court was without jurisdiction to set aside decree of Probate Court of state when law provided ample means for revision and correction of probate decrees by Probate Courts themselves. Montgomery v. Gilbert, 77 F2d 39 (9th Cir. 1935).

Jurisdiction of District Court:

The District Court, sitting in probate in a proceeding by testamentary trustees seeking settlement of their accounts, has the same general jurisdiction and powers as are exercised by a Court of Equity over trusts. In re Harper's Estate, 98 M 356, 40 P2d 51 (1934).

Section 72-12-101 (now repealed) confers exclusive jurisdiction upon the District Court when sitting as a Probate Court to determine whether the purpose of the testamentary trust has been accomplished, wherever it has acquired jurisdiction of the estate by probate of the will which has created a trust to continue after final distribution. Philbrick v. Am. Bank & Trust Co., 58 M 376, 193 P 59 (1920).

72-3-112. Venue for estate proceedings.

Official Comments

Sections [72-1-203 and 72-3-112] cover the subject of venue for estate proceedings. Sections [72-3-114, 72-3-201 through 72-3-205, 72-3-212, 72-3-213, and 72-3-224] also may be relevant.

Provisions for transfer of venue appear in [72-1-203].

The interplay of these several sections may be illustrated best by examples.

(1) A formal probate or appointment proceeding is initiated in A County. Interested persons who believe that venue is in B County rather than A County must raise their question about venue in A County, because [72-1-203] gives the Court in which the proceeding is first commenced authority to resolve disputes over venue. If the Court in A County erroneously determines that it has venue, the remedy is by appeal.

(2) An informal probate or appointment application is filed and granted without notice in A County. If interested persons wish to challenge the registrar's determination of venue, they may not simply file a formal proceeding in the county of their choice and thus force the proponent in the prior proceeding to debate the question of venue in their county, [72-3-112(2)] locates the venue of any subsequent proceeding where the first proceeding occurred. The function of [(2)] is obvious when one thinks of subsequent proceedings as those which relate to claims, or accounts, or to efforts to control a personal representative. It is less obvious when it seems to locate the forum for squabbles over venue at the place accepting the first informal application. Still, the applicant seeking an informal order must be careful about the statements he makes in his application because he may be charged with perjury under [72-1-301] if he is deliberately inaccurate. Moreover, the registrar must be satisfied that the allegations in the application

support a finding of venue. [Section 72-3-112(3)] provides a remedy for one who is upset about the venue-locating impact of a prior order in an informal proceeding and who does not wish to engage in full litigation about venue in the forum chosen by the other interested person unless he is forced to do so. Using it, he may succeed in getting the A County Court to transfer the proceedings to the county of his choice. He would be well advised to initiate formal proceedings if he gets the chance, for if he relies on informal proceedings, he, too, may be "bumped" if the judge in B County agrees with some movant that venue was not in B County.

(3) If the decedent's domicile was not in the state, venue is proper under [72-3-112 and 72-1-203] in any county where he had assets.

One contemplating starting administration because of the presence of local assets should have several other sections of the Code in mind. First, by use of the recognition provisions in [Chapter 4], it may be possible to avoid administration in any state other than that in which the decedent was domiciled. Second, [72-3-501 through 72-3-508] may apply to give priority for local appointment to the representative appointed at domicile. Third, under [72-3-224], informal appointment proceedings in this state will be dismissed if it is known that a personal representative has been previously appointed at domicile.

Compiler's Comments

2019 Amendment: Chapter 313 inserted (4) regarding location of assets that may be relevant in cases involving non-domiciliaries. Amendment effective October 1, 2019.

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-201(a), (b), (c).

Changes From Uniform Act: Montana codified section 3-201 of the Uniform Probate Code as 72-3-112 and 72-3-113 (72-3-113 now repealed). The Official Comments appearing under 72-3-112 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-201 of the Uniform Probate Code.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

District Court Assuming Subject Matter Jurisdiction Over Estate When Tribal Council Unequivocally Declined to Assert Subject Matter Jurisdiction — No Error: A court may take judicial notice of records of any court of this state or of any court of record of the United States or any court of record of any state of the United States. A tribal court order, though not expressly listed in the rule, is a record analogous to those listed in Rule 202(b)(6), M.R.Ev. (Title 26, ch. 10), and is thus law of which the Supreme Court may take judicial notice. In re Estate of Gopher, 2013 MT 264, 372 Mont. 9, 310 P.3d 521.

No Requirement That Decedent's Montana Property Have Significant Connection to Montana — Venue in Montana County Proper: Strange died in Arizona and never resided in Montana but had periodically visited his son in Billings and had left a small amount of property of little value with the son. The son also managed a small investment account in Strange's name with a company in Massachusetts. When Strange died, the son applied for informal probate and for appointment as personal representative in Montana, having been named as a corepresentative with his brother. Strange's wife moved to dismiss the application, arguing that the District Court lacked both venue and jurisdiction. The court concluded that it had jurisdiction over the son, but that venue in Montana was not proper because Strange's Montana assets did not establish a significant connection to Montana, so the motion to dismiss the application was granted. The son appealed, and the Supreme Court reversed. There is no "single forum" requirement under the Uniform Probate Code (UPC). Rather, the UPC allows for an initial filing in Montana if a decedent owned property here, followed by ancillary probate proceedings in other jurisdictions when necessary. The probate venue statutes do not require that a decedent have a certain type or amount of property in Montana, but rather provide that venue is proper in any county where the decedent had assets. Regardless of whether Strange's property was de minimis, the District Court should have concluded that venue was proper in Yellowstone County because there was no evidence that Strange had property elsewhere in Montana, so dismissal of the son's application on venue grounds was reversible error. In re Estate of Strange, 2008 MT 158, 343 M 296, 184 P3d 1029 (2008).

Land Below High-Water Mark of Flathead Lake Tribal Property Not Subject to Distribution by Estate: When she died, Hobbs owned property on the south shore of Flathead Lake. Her will designated that three nieces divide one parcel of about 1 acre above the high-water mark and that a fourth niece and her husband, the Conrads, receive an adjacent 1.9-acre parcel from the high-water mark inland. A survey established the boundary between the parcels, but did not include any land below the high-water mark to the meander line of the lake. The District Court approved the survey, distributed the property, and closed the estate. The parties later became involved in a dispute over zoning and building regulations. The personal representative petitioned to reopen the estate for the purpose of filing a corrected survey and to distribute the portion of land lying below the high-water mark to the meander line, thereby increasing the acreage of both lots. The personal representative presented exhibits and affidavits verifying that Hobbs had paid taxes on the land out to the meander line. The Conrads objected on grounds that Hobbs's will specifically left land above the high-water mark and that because the estate did not own the land below the high-water mark, it could not be distributed to anyone. Nevertheless, the District Court approved the corrected survey and distributed the land below the high-water mark to the meander line between the heirs. The Supreme Court noted that the bed and banks of Flathead Lake within Indian reservation boundaries are held by the United States in trust for the tribes, and that any private title to Flathead Lake shore property extends only to the high-water mark. The District Court erroneously distributed the land below the high-water mark to the meander line, because the court did not have jurisdiction to distribute the tribal trust property. The estate could not distribute property that it did not own. In re Estate of Hobbs, 2002 MT 85, 309 M 308, 46 P3d 594 (2002), following Mont. Power Co. v. Rochester, 127 F2d 189 (9th Cir. 1942), and Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen, 665 F2d 951 (9th Cir. 1982).

DECISIONS UNDER FORMER LAW

Residence of Decedent: County where intestate decedent was domiciled had sole and exclusive jurisdiction over the estate, and where order from another county recited the correct domicile but nevertheless issued letters of administration, the order was void on its face and subject to both collateral and direct attack. In re Estate of Brown, 156 M 170, 477 P2d 882 (1970).

72-3-114. Conflicting claim as to domicile in another state.

Official Comments

This section is designed to reduce the possibility that conflicting findings of domicile in two or more states may result in inconsistent administration and distribution of parts of the same estate. Section [72-3-312] dealing with the effect of adjudications in other states concerning testacy supports the same general purpose to use domiciliary law to unify succession of property located in different states.

Whether testate or intestate, succession should follow the presumed wishes of the decedent whenever possible. Unless a decedent leaves a separate will for the portion of his estate located in each different state, it is highly unlikely that he would want different portions of his estate subject to different rules simply because courts reach conflicting conclusions concerning his domicile. It is pointless to debate whether he would prefer one or the other of the conflicting rules, when the paramount inference is that the decedent would prefer that his estate be unified under either rule rather than wasted in litigation.

The section adds very little to existing law. If a previous estate proceeding in State A has determined that the decedent was a domiciliary of A, persons who were personally before the court in A would be precluded by the principles of res judicata or collateral estoppel (and full faith and credit) from relitigating the issue of domicile in a later proceeding in State B. Probably, it would not matter in this setting that domicile was a jurisdictional fact. Stoll v. Gottlieb (1938) 305 U.S. 165, 83 L.Ed. 104, 59 S.Ct. 134. Even if the parties to a present proceeding were not personally before the court in an earlier proceeding in State A involving the same decedent, the prior judgment would be binding as to property subject to the power of the courts in A, on persons to whom due notice of the proceeding was given. Riley v. New York Trust Co. (1942) 315 U.S. 343, 86 L.Ed. 885, 62 S.Ct. 608; Mullane v. Central Hanover Bank and Trust Co. (1950) 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652.

Where a court learns that parties before it are also parties to previously initiated litigation involving a common question, traditional judicial reluctance to deciding unnecessary questions, as well as considerations of comity, are likely to lead it to delay the local proceedings to await the result in the other court. A somewhat more troublesome question is involved when one of the parties before the local court manifests a determination not to appear personally in the prior initiated proceedings so that he can preserve his ability to litigate contested points in a more friendly, or convenient, forum. But, the need to preserve all possible advantages available to particular litigants should be subordinated to the decedent's probable wish that his estate not be wasted in unnecessary litigation. Thus, the section requires that the local claimant either initiate litigation in the forum of his choice before litigation is started somewhere else, or accept the necessity of contesting unwanted views concerning the decedent's domicile offered in litigation pending elsewhere.

It is to be noted, in this connection, that the local suitor always will have a chance to contest the question of domicile in the other state. His locally initiated proceedings may proceed to a valid judgment accepting his theory of the case unless parties who would oppose him appear and defend on the theory that the domicile question is currently being litigated elsewhere. If the litigation in the other state has proceeded to judgment, [72-3-312] rather than the instant section will govern. If this section applies, it will mean that the foreign proceedings are still pending, so that the local person's contention concerning domicile can be made therein even though until the defense of litigation elsewhere is offered in the local proceedings, he may not have been notified of the foreign proceeding.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-202.

72-3-121. Scope of proceedings when no supervised administration — proceedings independent — combination of proceedings.

Official Comments

This section and others in [Chapter 3] describe a system of administration of decedents' estates which gives interested persons control of whether matters relating to estates will become occasions for judicial orders. Sections [72-3-401 through 72-3-406] describe supervised administration, a judicial proceeding which is continuous throughout administration. It corresponds with the theory of administration of decedents' estates which prevails in many states. See, section 62, Model Probate Code. If supervised administration is not requested, persons interested in an estate may use combinations of the formal proceedings (order by judge after notice to persons concerned with the relief sought), informal proceedings (request for the limited response that nonjudicial personnel of the probate court are authorized to make in response to verified application) and filings provided in the remaining parts of [Chapter 3] to secure authority and protection needed to administer the estate. Nothing except self-interest will compel resort to the judge. When resort to the judge is necessary or desirable to resolve a dispute or to gain protection, the scope of the proceeding if not otherwise prescribed by the code is framed by the petition. The securing of necessary jurisdiction over interested persons in a formal proceeding is facilitated by [72-3-111(3) and 72-3-511]. [Sections 72-3-112 and 72-3-113 (72-3-113 now repealed)] locate venue for all proceedings at the place where the first proceeding occurred.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-107.

Case Notes

Probate Court's Jurisdiction Over Title to Real Property: Weeks after executing a will identical to her husband's, leaving their property to each other or to the husband's heirs, the decedent executed a new will naming a personal representative of her estate and giving him full power of attorney. Shortly before decedent's death, her personal representative transferred part of decedent's real property to her heirs. Husband's conservator sought to set aside the conveyances and remove decedent's personal representative. The District Court denied conservator's motion for summary judgment and determined that while sitting in probate, it lacked the requisite jurisdiction to determine title to real property. The Supreme Court affirmed. In Montana, title to real property, whether determined incidentally or intentionally, must be resolved in proper proceedings instituted for that purpose. In re Estate of Thomas, 216 M 87, 699 P2d 1046, 42 St. Rep. 662 (1985).

72-3-122. Time limit on probate, testacy, and appointment proceedings — exceptions.

Official Comments

This section establishes a basic limitation period of three years within which it may be determined whether a decedent left a will and to commence administration of his estate. But, an exception assures that heirs will have at least one year after an informal probate to initiate a contest and to secure administration of the estate as intestate.

If no will is probated within three years from death, the section has the effect of making the assumption of intestacy final. If a will has been informally probated within the period, the section has the effect of making the informal probate conclusive after three years or within twelve months from informal probate, if later. Heirs or devisees can protect themselves against change within the three years of assumption concerning whether the decedent left a will or died intestate by bringing a formal proceeding shortening the period to that described in [72-3-317 and 72-3-318].

A personal representative who has been appointed under an assumption concerning testacy which may be reversed in the three-year period if there has been no formal proceeding, is protected by [72-3-611]. It relieves a personal representative of liability for surcharge for certain distributions made pursuant to an informally probated will, or under authority of informally issued letters of administration. Distributees who receive an estate distributed before the three-year period expires where there has been no formal determination accelerating the time for certainty, remain potentially liable to persons determined to be entitled by formal proceedings instituted within the basic period under [72-3-906 and 72-3-1013].

Purchasers from personal representatives and distributees may be protected without regard to whether the three-year period has run. See [72-3-613 and 72-3-907].

All creditors' claims are barred after three years from death. See [72-3-803(1)(b)]. Because of this, and since any possibility that letters may be issued at any time would be seen as a "cloud" on the title of heirs or devisees otherwise secure under [72-3-101], the three-year statute of limitations applies to bar appointment of a personal representative after the basic period has passed. Section 83 of the Model Probate Code barred probate and administration after five years, and other statutes imposing time limits on these proceedings are cited at pp. 307-310 of the Model Probate Code. A qualification covers the situation where a closed administration is sought to be reopened to administer after-discovered assets. See [72-3-1016]. If there has been no probate or appointment within three years, and if either exception to [72-3-102] applies, devisees under a late-discovered will may use a will to establish their title. But, they may not secure probate of the will, nor may they obtain appointment of a personal representative. The same pattern applies to heirs who, in a case where there has been no administration, discover assets after the three-year period has run. such persons will not be able to protect purchasers with the ease of those interested in an estate where a personal representative has been appointed.

The basic premise underlying all of these time provisions is that interested persons who want to assume the risks implicit in the three-year period of limitations should be provided legitimate means by which they can do so. At the same time, parties should be afforded ample opportunity for earlier protection if they want it.

Compiler's Comments

2019 Amendment: Chapter 313 in (1)(d) near beginning substituted "thereafter" for "after the time period"; and made minor changes in style. Amendment effective October 1, 2019.

1995 Amendment: Chapter 592 substituted (1)(d) concerning commencement of appointment proceeding and (1)(e) concerning commencement of formal testacy proceeding within 3 years for former text that read: "(d) if no proceeding concerning the succession or administration of the estate has occurred within 3 years after the decedent's death, a formal testacy proceeding may be commenced at any time thereafter for the sole purpose of establishing a devise of property which the devisee or his successors and assigns possessed in accordance with the will or property which was not possessed or claimed by anyone by virtue of the decedent's title during the 3-year period, and the order of the court must be limited to that property"; and made minor changes in style.

1989 Amendment: Inserted (1)(d) relating to formal testacy proceeding to establish devise of property possessed in accordance with a will or not claimed during 3-year period; in (2), after "intestate", deleted "nor do they limit the right of interested persons to commence informal probate or appointment proceedings or formal testacy or appointment proceedings at any time after 3 years from the decedent's death if there have been no previous formal or informal probate or appointment proceedings commenced in respect of that decedent"; and made minor changes in phraseology.

1989 Editorial Comment: This change results from an amendment proposed by the Joint Editorial Board of the national Uniform Probate Code in 1987. Subsection (1)(d) provides a statutory procedure for obtaining a court order confirming a devise of property by an unprobated will after the 3-year time limit for probating a will and opening an administration has passed. The possibility of a valid devise by an unprobated will arises because of exceptions provided in 72-3-102.

Additionally, subsection (2) was modified to bring it into conformance with the national Uniform Probate Code in another respect. Former Montana law had a broad exception to the 3-year rule if no previous formal or informal probate or appointment proceeding had occurred. This Montana exception conflicted with other provisions, most notably 72-3-317(3)(b). The

1989 change eliminates this former Montana exception and thereby eliminates the conflict. See corresponding national Uniform Probate Code section 3-108.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-108.

Changes From Uniform Act: The next to last sentence in the corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners reads as follows: "These limitations do not apply to proceedings to construe probated wills or determine heirs of an intestate."

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Petition to Probate 13 Years After Death — Decedent Died Intestate: Prior to his death, the decedent dictated a will to his niece and her husband. The couple did not petition to probate the will until 13 years after his death. The decedent's nephew challenged the will. The District Court ultimately held that the decedent died intestate. On appeal, the Supreme Court affirmed, holding that none of the statutory exceptions to the 3-year time bar in 72-3-122 applied, that the estate's motion to amend its pleadings was properly denied, that the nephew's motion to amend his pleadings was properly granted because it was timely and based on newly discovered evidence, that the decedent died intestate, and that the District Court properly awarded costs under 72-12-206. In re Estate of Kurth, 2016 MT 188, 384 Mont. 261, 378 P.3d 1151.

Exception to Probate Time Limit Proper — Difference Between Devises and Claims — Possession of Estate Assets: The children of a decedent challenged informal probate of a will with mineral rights benefiting only the decedent's husband because the husband, acting as the estate's personal representative, initiated probate proceedings 14 years after the decedent's death, rather than within the 3-year limitation on probate proceedings set by 72-3-122. However, the District Court properly allowed probate because pursuant to an exception in this section, there were no other proceedings regarding the succession or estate administration during the 3-year period after the decedent's death, no claims other than administration expenses were presented against the estate because the term "claims" encompassed matters such as estate debts rather than challenges concerning devises, and the husband did not possess the mineral rights beyond necessary to perfect title in the estate's successors because he had not taken control of the mineral rights to pay claims against the estate and he applied for probate to perfect title in accordance with the will. In re Estate of Harris, 2015 MT 182, 379 Mont. 474, 352 P.3d 20.

Probate Not Barred by Laches — Contestants Unaware of Will's Existence: Laches did not bar the probating of a 1997 will because the individuals contesting the probate were not aware of the existence of the will until the estate's personal representative initiated informal probate proceedings 14 years after the testator's death. However, laches would have barred an earlier will benefiting the contestants because at least one contestant was aware of the will's existence and did not seek to probate it for 14 years. In re Estate of Harris, 2015 MT 182, 379 Mont. 474, 352 P.3d 20.

Statute of Limitations Barring Probate Based on Equitable Estoppel: Where the decedent had executed a will leaving most of his estate to the petitioner but had died allegedly intestate, the District Court did not err in holding that a petition for the probate of the decedent's will filed 7 years after his death was barred by the Statute of Limitations, even though the decedent's wife had made oral representations to the petitioner leading the petitioner to wrongly assume that his share of the estate had not been changed. The Statute of Limitations is clear and unambiguous, and the comments to the Uniform Probate Code from which the statute is taken also show that there are to be no exceptions for late filings of petitions based on facts constituting collateral estoppel. Neither the cases cited by the petitioner, which applied to general statutes of limitations, nor the principles of law and equity contained in 72-1-104 convince the court otherwise. In re the Estate of Taylor, 207 M 400, 675 P2d 944, 41 St. Rep. 34 (1984), overruled in part by In re Estate of Harris, 2015 MT 182, 379 Mont. 474, 352 P.3d 20.

DECISIONS UNDER FORMER LAW

Petition Contesting Will: Petition contesting will was properly dismissed where the citation was not issued within the statutory period following admission of will to probate. In re Estate of Willner, 147 M 538, 416 P2d 24 (1966).

Attorney General's Opinions

Attorney General Opinion Inappropriate: Whether District Court Clerk must accept for filing creditor's claims against a decedent prior to appointment of a personal representative and whether such filing tolls the 3-year limitation on presentment of claims are inappropriate questions for an Attorney General Opinion. 37 A.G. Op. 135 (1978).

72-3-123. Statutes of limitation on decedent's cause of action — applicability.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-109.

72-3-131. Effect of approval of agreements involving trusts, inalienable interests, or interests of third persons.

Compiler's Comments

2019 Purported Amendment: Section 59, Ch. 313, L. 2019, purported to amend this section. However, only the section catchline was changed by substituting catchline for "Compromise of controversies". Pursuant to 1-11-103(5), section catchlines are not part of the law, so no substantive change occurred.

1995 Amendment: Chapter 592 in (1), near middle after "any", substituted "governing instrument" for "probate will"; and made minor changes in style.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-1101.

Case Notes

Tax Based on Will Distribution: An inheritance tax is computed according to a probated will, not according to the settlement agreement subsequently entered into among the beneficiaries. An inheritance tax is a tax on the right to receive property, rather than a tax on the property itself. In re Estate of Winter, 226 M 24, 734 P2d 178, 44 St. Rep. 430 (1987).

72-3-132. Procedure for securing court approval of compromise.

Official Comments

This section and the one preceding it outline a procedure which may be initiated by competent parties having beneficial interests in a decedent's estate as a means of resolving controversy concerning the estate. If all competent persons with beneficial interests or claims which might be affected by the proposal and parents property representing interests of their children concur, a settlement scheme differing from that otherwise governing the devolution may be substituted. The procedure for securing representation of minors and unknown or missing persons with interests must be followed. See [72-1-303]. The ultimate control of the question of whether the substitute proposal shall be accepted is with the court which must find: "that the contest or controversy is in good faith and that the effect of the agreement upon the interests of parties represented by fiduciaries is just and reasonable."

The thrust of the procedure is to put the authority for initiating settlement proposals with the persons who have beneficial interests in the estate, and to prevent executors and testamentary trustees from vetoing any such proposal. The only reason for approving a scheme of devolution which differs from that framed by the testator or the statutes governing intestacy is to prevent dissipation of the estate in wasteful litigation. Because executors and trustees may have an interest in fees and commissions which they might earn through efforts to carry out testator's intention, the judgment of the court is substituted for that of such fiduciaries in appropriate cases. A controversy which the court may find to be in good faith, as well as concurrence of all beneficially interested and competent persons and parent-representatives provide prerequisites which should prevent the procedure from being abused. Thus, the procedure does not threaten the planning of a testator who plans and drafts with sufficient clarity and completeness to eliminate the possibility of good faith controversy concerning the meaning and legality of his plan.

See [72-1-303] for rules governing representatives and appointment of guardians ad litem.

These sections are modeled after section 93 of the Model Probate Code. Comparable legislative provisions have proved quite useful in Michigan. See M.C.L.A. §§ 702.45—702.49.

Compiler's Comments

1995 Amendment: Chapter 592 in (2), near beginning after "personal representative", inserted "if any"; and made minor changes in style.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-1102.

Part 2
Informal Probate and Appointment Proceedings

Part Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Conversion of Probate Proceeding From Informal to Formal Proceeding and Effect of Failure to Give Proper Notices: When the personal representative of an estate in informal proceedings petitioned for judicial approval of his final account and for the settlement and distribution of the estate, the proceeding was converted into a formal proceeding for those purposes. The Montana Rules of Civil Procedure apply to formal proceedings. The bank, which was a creditor of the estate and filed a claim against the estate, was entitled to notice of the hearing on the petition and entitled to an opportunity to appear and contest. Because the notice was not given, the court's decree was void and reversed as to the bank. The bank was also entitled to notice of the entry of the formal estate decree, and because that notice was not given, the 30-day time period for the bank to appeal did not run and the bank's appeal, filed after that period, was timely. In re Estate of Spencer, 2002 MT 304, 313 M 40, 59 P3d 1160 (2002).

Rules of Civil Procedure Not Applicable to Informal Probate Proceeding: Former Rule 81(c), M.R.Civ.P. (now superseded), does not interject the Montana Rules of Civil Procedure into other statutory schemes that provide different procedural requirements and thus does not make the rules applicable to informal probate proceedings. In re Estate of Spencer, 2002 MT 304, 313 M 40, 59 P3d 1160 (2002). See Wells Fargo Bank, N.A. v. Kaml, 2008 MT 153, 343 M 240, 184 P3d 296 (2008), in which it was clarified that the Montana Rules of Civil Procedure apply to formal probate proceedings.

DECISIONS UNDER FORMER LAW

"Penal Statute"— Not Applicable to Sale in Good Faith: Section 72-12-601 (now repealed) was a "penal statute" and would not be construed as subjecting to such liability one selling property in good faith, without intent to deprive decedent's estate of value thereof, as in case of sale in good faith under power in chattel mortgage before appointment of administrator of deceased mortgagor's estate. Regional Ag. Credit Corp. of Spokane v. Chapman, 129 F2d 435 (9th Cir. 1942), reversing 38 F. Supp. 604 (D.C. Mont. 1941).

Jurisdiction of Court:

An order of the District Court sitting in probate made pursuant to a citation to a former administrator under 72-12-601 through 72-12-603 (now repealed) to appear and be examined concerning his disposition of personal property belonging to the estate could not go further than require a disclosure to be used in an action pending or to be brought in behalf of the estate; it could not finally adjudicate any right. Baker v. Hanson, 72 M 22, 231 P 902 (1924).

Funds of an estate expended by the administrator for attorney's fees were not recoverable on the theory that the attorney has property of the estate in his possession for which he could be called to account under 72-12-602 through 72-12-604 (now repealed). The jurisdiction of the Court sitting in probate, under these provisions, extended no further than to require the accused to appear and submit to an examination, it having no power to adjudge rights which may be asserted or involved. State ex rel. Cohen v. District Court, 53 M 210, 162 P 1053 (1917).

Authority of Court Limited: The order authorized by 72-12-603 (now repealed) could go no further than to require a disclosure that could be used in an action pending or to be brought in behalf of the estate. In re Roberts' Estate, 48 M 40, 135 P 909 (1913).

Nature of Proceedings: The provisions of 72-12-602 through 72-12-604 (now repealed) were remedial in their nature and conferred power upon the Court, when sitting in probate proceedings, analogous in its scope and object to the power of a Court in chancery upon bills of discovery. The proceeding authorized by them was of an ancillary character, however, and was confined to securing a discovery of evidence upon which the administrator or executor may recover assets belonging to the estate which would otherwise be lost. In re Roberts' Estate, 48 M 40, 135 P 909 (1913).

Petition for Citation — Sufficiency: A petition by an administrator for a citation requiring certain persons to appear and be examined was fatally defective in failing to allege that any of the persons cited had in their possession or had knowledge of any deeds or papers containing evidences of the right, title, or interest of the decedent to the property described in the petition. State ex rel. Chapin v. District Court, 35 M 318, 89 P 62 (1907).

72-3-201. Applications to be verified.

Official Comments

Forcing one who seeks informal probate or informal appointment to make oath before a public official concerning the details required of applications should deter persons who might otherwise misuse the no-notice feature of informal proceedings. The application is available as a part of the public record. If deliberately false representation is made, remedies for fraud will be available to injured persons without specified time limit (see [Chapter 1]). [Sections 72-3-201 through 72-3-205 are] believed to provide important safeguards that may extend well beyond those presently available under supervised administration for persons damaged by deliberate wrongdoing.

Section [72-1-206] deals with verification.

Compiler's Comments

2019 Amendment: Chapter 313 inserted last sentence regarding jurisdiction of the court over an applicant for informal probate or informal appointment. Amendment effective October 1, 2019.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-301(part).

Changes From Uniform Act: Montana codified section 3-301 of the Uniform Probate Code as 72-3-201 through 72-3-205. The Official Comments appearing under 72-3-201 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-301 of the Uniform Probate Code.

72-3-202. Required contents of application.

Official Comments

Forcing one who seeks informal probate or informal appointment to make oath before a public official concerning the details required of applications should deter persons who might otherwise misuse the no-notice feature of informal proceedings. The application is available as a part of the public record. If deliberately false representation is made, remedies for fraud will be available to injured persons without specified time limit (see [Chapter 1]). [Sections 72-3-201 through 72-3-205 are] believed to provide important safeguards that may extend well beyond those presently available under supervised administration for persons damaged by deliberate wrongdoing.

Section [72-1-206] deals with verification.

Compiler's Comments

2019 Amendment: Chapter 313 inserted (6) regarding a statement that the time limit for informal probate or appointment has not expired; and made minor changes in style. Amendment effective October 1, 2019.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-301(a).

Changes From Uniform Act: Montana codified section 3-301 of the Uniform Probate Code as 72-3-201 through 72-3-205. The Official Comments appearing under 72-3-202 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-301 of the Uniform Probate Code.

72-3-203. Probate and appointment under will — additional information required.

Official Comments

Forcing one who seeks informal probate or informal appointment to make oath before a public official concerning the details required of applications should deter persons who might otherwise misuse the no-notice feature of informal proceedings. The application is available as a part of the public record. If deliberately false representation is made, remedies for fraud will be available to injured persons without specified time limit (see [Chapter 1]). [Sections 72-3-201 through 72-3-205 are] believed to provide important safeguards that may extend well beyond those presently available under supervised administration for persons damaged by deliberate wrongdoing.

Section [72-1-206] deals with verification.

Compiler's Comments

2019 Amendment: Chapter 313 deleted former (1)(d) that read: "(d) that the time limit for informal probate, as provided in this chapter, has not expired either because 3 years or less have passed since the decedent's death or, if more than 3 years from death have passed, that circumstances as described by 72-3-122 authorizing tardy probate have occurred"; and made minor changes in style. Amendment effective October 1, 2019.

2005 Amendment: Chapter 410 in (1)(a) at end after second "application" inserted "or that an authenticated copy of a will filed without probate in another jurisdiction and proved, as provided in 72-3-220, accompanies the application"; and made minor changes in style. Amendment effective July 1, 2005.

Retroactive Applicability: Section 7, Ch. 410, L. 2005, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to the probate of testate nondomiciliary decedents' estates that have not been closed before [the effective date of this act]." Effective July 1, 2005.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-301(b), (c).

Changes From Uniform Act: Montana codified section 3-301 of the Uniform Probate Code as 72-3-201 through 72-3-205. The Official Comments appearing under 72-3-203 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-301 of the Uniform Probate Code.

72-3-204. Appointment in intestacy — additional information required.

Official Comments

Forcing one who seeks informal probate or informal appointment to make oath before a public official concerning the details required of applications should deter persons who might otherwise misuse the no-notice feature of informal proceedings. The application is available as a part of the public record. If deliberately false representation is made, remedies for fraud will be available to injured persons without specified time limit (see [Chapter 1]). [Sections 72-3-201 through 72-3-205 are] believed to provide important safeguards that may extend well beyond those presently available under supervised administration for persons damaged by deliberate wrongdoing.

Section [72-1-206] deals with verification.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-301(d).

Changes From Uniform Act: Montana codified section 3-301 of the Uniform Probate Code as 72-3-201 through 72-3-205. The Official Comments appearing under 72-3-204 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-301 of the Uniform Probate Code.

Case Notes

Objection to Appointment of Personal Representative Not Allowed: Reeves argued that the lower court had improperly appointed her brother personal representative for their father's estate because he had not approached Reeves and had her agree to his nomination as personal representative. The Supreme Court refused to rule on the issue of whether the lower court had improperly appointed the personal representative because in an informal proceeding a person can only petition to have the personal representative removed for cause and cannot object to the appointment of the personal representative. Estate of Melvin, 261 M 408, 862 P2d 1159, 50 St. Rep. 1382 (1993).

72-3-205. Application for appointment of successor personal representative.

Official Comments

Forcing one who seeks informal probate or informal appointment to make oath before a public official concerning the details required of applications should deter persons who might otherwise misuse the no-notice feature of informal proceedings. The application is available as a part of the public record. If deliberately false representation is made, remedies for fraud will be available to injured persons without specified time limit (see [Chapter 1]). [Sections 72-3-201 through 72-3-205 are] believed to provide important safeguards that may extend well beyond those presently available under supervised administration for persons damaged by deliberate wrongdoing.

Section [72-1-206] deals with verification.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-301(e), (f).

Changes From Uniform Act: Montana codified section 3-301 of the Uniform Probate Code as 72-3-201 through 72-3-205. The Official Comments appearing under 72-3-205 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-301 of the Uniform Probate Code.

72-3-211. Informal probate — notice requirements.

Official Comments

This provision assumes that there will be a single office within each county or other area of jurisdiction of the probate court which can be checked for demands for notice relating to estates in that area. If there are or may be several registrars within a given area, provision would need to be made so that information concerning demands for notice might be obtained from the chief registrar's place of business.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-306.

72-3-212. Informal probate — clerk to make findings.

Official Comments

The purpose of [72-3-212 and 72-3-213(1), (2), (3), (4)] is to permit informal probate of a will which, from a simple attestation clause, appears to have been executed properly. It is not necessary that the will be notarized as is the case with "pre-proved" wills in some states. If a will is "pre-proved" as provided in [Chapter 2], it will, of course, "appear" to be well executed and include the recital necessary for easy probate here. If the instrument does not contain a proper recital by attesting witnesses, it may be probated informally on the strength of an affidavit by a person who can say what occurred at the time of execution.

Except where probate or its equivalent has occurred previously in another state informal probate is available only where an original will exists and is available to be filed. Lost or destroyed wills must be established in formal proceedings. See [72-3-301]. Pendency of formal probate proceedings blocks under [72-3-302 through 72-3-304].

Compiler's Comments

2005 Amendment: Chapter 410 in (5) near middle after "will" inserted "an authenticated copy of a will probated in another jurisdiction, or an authenticated copy of a will filed without probate in another jurisdiction and proved, as provided in 72-3-220"; and made minor changes in style. Amendment effective July 1, 2005.

Retroactive Applicability: Section 7, Ch. 410, L. 2005, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to the probate of testate nondomiciliary decedents' estates that have not been closed before [the effective date of this act]." Effective July 1, 2005.

1993 Amendment: Chapter 494 in (3) deleted reference to subsection (21) of 72-1-103; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-303(a).

Changes From Uniform Act: Montana codified section 3-303 of the Uniform Probate Code as 72-3-212 and 72-3-213(1), (2), (3), (4). The Official Comments appearing under 72-3-212 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-303 of the Uniform Probate Code.

72-3-213. Rules for grant or denial of informal probate.

Official Comments to UPC § 3-303

The purpose of [72-3-212 and 72-3-213(1), (2), (3), (4)] is to permit informal probate of a will which, from a simple attestation clause, appears to have been executed properly. It is not necessary that the will be notarized as is the case with "pre-proved" wills in some states. If a will is "pre-proved" as provided in [Chapter 2], it will, of course, "appear" to be well executed and include the recital necessary for easy probate here. If the instrument does not contain a proper recital by attesting witnesses, it may be probated informally on the strength of an affidavit by a person who can say what occurred at the time of execution.

Except where probate or its equivalent has occurred previously in another state informal probate is available only where an original will exists and is available to be filed. Lost or destroyed wills must be established in formal proceedings. See [72-3-301]. Pendency of formal probate proceedings blocks under [72-3-302 through 72-3-304].

Official Comments to UPC § 3-304

The Registrar handles the informal proceeding, but is required to decline applications in certain cases where circumstances suggest that formal probate would provide desirable safeguards.

Compiler's Comments

1993 Amendment: Chapter 494 in (1) deleted reference to 72-2-303; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

1989 Amendment: In (5) substituted "(other than a will and one or more codicils to the will)" for "(other than wills and codicils)".

1989 Editorial Comment: This change results from an amendment proposed by the Joint Editorial Board of the national Uniform Probate Code in 1987. The Board felt that the present text was confusing. No change of meaning was intended. See corresponding national Uniform Probate Code section 3-304.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws are sections 3-303(b), (c), (d), (e) and 3-304.

Changes From Uniform Act: Montana codified section 3-303 of the Uniform Probate Code as 72-3-212 and 72-3-213(1), (2), (3), (4). The Official Comments appearing under 72-3-213 are the comments of the National Conference of Commissioners on Uniform State Laws for sections 3-303 and 3-304 of the Uniform Probate Code.

72-3-214. Power of clerk to deny informal probate — effect of denial.

Official Comments

The purpose of this section is to recognize that the [clerk] should have some authority to deny probate to an instrument even though all stated statutory requirements may be said to have been met. Denial of an application for informal probate cannot be appealed. Rather, the proponent may initiate a formal proceeding so that the matter may be brought before the judge in the normal way for contested matters.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-305.

72-3-215. Clerk to issue statement of informal probate — effect — procedural defect not to void probate.

Official Comments

Model Probate Code Sections 68 and 70 contemplate probate by judicial order as the only method of validating a will. This "umbrella" section and the sections it refers to describe an alternative procedure called "informal probate." It is a statement of probate by the [clerk]. A succeeding section describes cases in which informal probate is to be denied. "Informal probate" is subjected to safeguards which seem appropriate to a transaction which has the effect of making a will operative and which may be the only official reaction concerning its validity. "Informal probate," it is hoped, will serve to keep the simple will which generates no controversy from becoming involved in truly judicial proceedings. The procedure is very much like "probate in common form" as it is known in England and some states.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-302.

72-3-220. Nondomiciliary decedent — will filed and not probated in domiciliary state.

Compiler's Comments

Effective Date: Section 6, Ch. 410, L. 2005, provided: "[This act] is effective July 1, 2005."

Retroactive Applicability: Section 7, Ch. 410, L. 2005, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to the probate of testate nondomiciliary decedents' estates that have not been closed before [the effective date of this act]." Effective July 1, 2005.

72-3-221. Informal appointment — notice requirements.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-310.

72-3-222. Informal appointment — clerk to make findings.

Official Comments

Sections [72-3-701 and 72-3-702] make it clear that a special administrator may be appointed to conserve the estate during any period of delay in probate of a will. Even though the will has not been approved, [72-3-701] gives priority for appointment as special administrator to the person nominated by the will which has been offered for probate. [Sections 72-3-501 through 72-3-508 govern] priorities for appointment. Under it, one or more of the same class may receive priority through agreement of the others.

The last sentence of [72-3-223(1)] is designed to prevent informal appointment of a personal representative in this state when a personal representative has been previously appointed at the decedent's domicile. Sections [4-204 of the UPC and 72-4-301] may make local appointment unnecessary. Appointment in formal proceedings is possible, however.

Compiler's Comments

1993 Amendment: Chapter 494 in (3) deleted reference to subsection (21) of 72-1-103; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-308(a).

Changes From Uniform Act: Montana codified section 3-308 of the Uniform Probate Code as 72-3-222 and 72-3-223(1). The Official Comments appearing under 72-3-222 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-308 of the Uniform Probate Code.

72-3-223. Rules for denial of informal appointment.

Official Comments to UPC § 3-308

Sections [72-3-701 and 72-3-702] make it clear that a special administrator may be appointed to conserve the estate during any period of delay in probate of a will. Even though the will has not been approved, [72-3-701] gives priority for appointment as special administrator to the person nominated by the will which has been offered for probate. [Sections 72-3-501 through 72-3-508 govern] priorities for appointment. Under it, one or more of the same class may receive priority through agreement of the others.

The last sentence of [72-3-223(1)] is designed to prevent informal appointment of a personal representative in this state when a personal representative has been previously appointed at the decedent's domicile. Sections [4-204 of the UPC and 72-4-301] may make local appointment unnecessary. Appointment in formal proceedings is possible, however.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws are sections 3-308(b) and 3-311.

Changes From Uniform Act: Montana codified section 3-308 of the Uniform Probate Code as 72-3-222 and 72-3-223(1). The Official Comments appearing under 72-3-223 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-308 of the Uniform Probate Code.

72-3-224. Informal appointment — power of clerk to deny — effect of denial.

Official Comments

Authority to decline an application for appointment is conferred on the [clerk]. Appointment of a personal representative confers broad powers over the assets of a decedent's estate. The process of declining a requested appointment for unclassified reasons should be one which a [clerk] can use quickly and informally.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-309.

72-3-225. Duty of clerk to make appointment — effect.

Official Comments

Section [72-3-602] describes the duty of a personal representative and the protection available to one who acts under letters issued in informal proceedings. The provision requiring a delay of thirty days from death before appointment of a personal representative for a nonresident decedent is new. It is designed to permit the first appointment to be at the decedent's domicile. See [72-3-501 through 72-3-503].

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-307.

Part 3
Formal Testacy and Appointment Proceedings

Part Case Notes

Denial of Motion to Set Aside Default Judgment — Admission of Will to Probate — Slight Abuse of Discretion: Following the decedent's death, one of his three sons, Howard, petitioned for formal probate of the decedent's will. Another son, David, filed a detailed letter in response to the petition, in which he challenged the decedent's soundness of mind at the time the will was executed; however, David failed to object to the petition within the deadline set by the District Court, and the District Court entered default against David and his brother John. The District Court subsequently denied David's motion to set aside the default judgment. On appeal, the Supreme Court noted that a default judgment may be set aside for good cause. Whether good cause exists is an equitable determination that requires the consideration of three factors: (1) whether the default was willful; (2) whether the plaintiff would be prejudiced if the default were set aside; and (3) whether the defendant presented a meritorious defense to the plaintiff's claim. Applying these factors, the Supreme Court reversed, finding that, in light of the letter David submitted, it was difficult to conclude that the default was willful or that David failed to raise a meritorious defense. Therefore, the District Court slightly abused its discretion in denying David's motion to set aside the default judgment. In re Estate of Mills, 2015 MT 245, 380 Mont. 426, 354 P.3d 1271.

72-3-301. Petition for formal testacy or appointment — contents — last will.

Official Comments

If a petitioner seeks an adjudication that a decedent died intestate, he is required also to obtain a finding of heirship. A formal proceeding which is to be effective on all interested persons must follow reasonable notice to such persons. It seems desirable to force the proceedings through a formal determination of heirship because the finding will bolster the order, as well as preclude later questions that might arise at the time of distribution.

Unless an order of supervised administration is sought, there will be little occasion for a formal order concerning appointment of a personal representative which does not also adjudicate the testacy status of the decedent. If a formal order of appointment is sought because of disagreement over who should serve, [72-3-319] describes the appropriate procedure.

The words "otherwise unavailable" in [the last paragraph of subsection (1)] are not intended to be read restrictively.

Section [72-1-206] expresses the verification requirement which applies to all documents filed with the courts.

Compiler's Comments

2005 Amendment: Chapter 410 in (1)(c) near middle of second sentence after second "petition" inserted "or if an authenticated copy of a will filed without probate in another jurisdiction and proved, as provided in 72-3-320, does not accompany the petition"; and made minor changes in style. Amendment effective July 1, 2005.

Retroactive Applicability: Section 7, Ch. 410, L. 2005, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to the probate of testate nondomiciliary decedents' estates that have not been closed before [the effective date of this act]." Effective July 1, 2005.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-402.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Promissory Estoppel Requiring Reversal of Summary Judgment — No Will Produced: The Supreme Court reversed summary judgment, finding that genuine issues of material fact existed regarding testimony that an original will had been altered, yet no changed will was ever produced, and that all parties agreed to abide by deceased's wishes, but there was some disagreement as to what those wishes were. Further, appellant's reliance on the promise to abide resulted in potential injury and invoked the doctrine of promissory estoppel, precluding summary judgment. Tope v. Taylor, 224 M 131, 728 P2d 789, 43 St. Rep. 2074 (1986).

Lost Will: Where three witnesses testified as to contents of a lost will but only the attorney who prepared it had actually seen the will and could recall with specificity its provisions, and where there was testimony that testator intended to change his will, the presumption of destruction with intent to revoke was not overcome, and the will was not entitled to probate. In re Estate of Spear, 169 M 121, 546 P2d 257 (1976).

DECISIONS UNDER FORMER LAW

Lost Will: Those seeking to introduce a lost will had burden of proof that will was actually in existence or in existence in contemplation of law at time of decedent's death; if the will was last seen in custody of deceased, petitioners were required to present clear, satisfactory, and convincing evidence to overcome the rebuttable presumption that deceased destroyed the will. In re Estate of Newman, 164 M 15, 518 P2d 800 (1974).

72-3-302. Formal testacy proceedings — nature — how and when commenced.

Official Comments

The word "testacy" is used to refer to the general status of a decedent in regard to wills. Thus, it embraces the possibility that he left no will, any question of which of several instruments is his valid will, and the possibility that he died intestate as to a part of his estate, and testate as to the balance. See [72-1-103(44)].

The formal proceedings described by [72-3-302 through 72-3-304] may be: (i) an original proceeding to secure "solemn form" probate of a will; (ii) a proceeding to secure "solemn form" probate to corroborate a previous informal probate; (iii) a proceeding to block a pending application for informal probate, or to prevent an informal application from occurring thereafter; (iv) a proceeding to contradict a previous order of informal probate; (v) a proceeding to secure a declaratory judgment of intestacy and a determination of heirs in a case where no will has been offered. If a pending informal application for probate is blocked by a formal proceeding, the applicant may withdraw his application and avoid the obligation of going forward with prima facie proof of due execution. See [72-3-310 and 72-3-311]. The petitioner in the formal proceedings may be content to let matters stop there, or he can frame his petition, or amend, so that he may secure an adjudication of intestacy which would prevent further activity concerning the will.

If a personal representative has been appointed prior to the commencement of a formal testacy proceeding, the petitioner must request confirmation of the appointment to indicate that he does not want the testacy proceeding to have any effect on the duties of the personal representative, or refrain from seeking confirmation, in which case, the proceeding suspends the distributive power of the previously appointed representative. If nothing else is requested or decided in respect to the personal representative, his distributive powers are restored at the completion of the proceeding, with [72-3-610] directing him to abide by the will. "Distribute" and "distribution" do no include payment of claims. See [72-1-103(10), 72-3-808, and 72-3-901].

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-401(first part).

Changes From Uniform Act: Montana codified section 3-401 of the Uniform Probate Code as 72-3-302 through 72-3-304. The Official Comments appearing under 72-3-302 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-401 of the Uniform Probate Code.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Allegations of Previous Will — Sufficient Basis for Standing to Challenge Probate and Agreements: A son filed an objection to the probate of his father's 2009 will, claiming that his father lacked testamentary capacity and that a previous will, under which he would receive a larger portion of the estate, should instead be probated. The son also challenged agreements to sell portions of the estate's property. The estate filed a motion to dismiss the son's objection, which the District Court granted, concluding that the son did not have standing because he had not produced the previous will. The Supreme Court disagreed, holding that the son was an "interested party" and thus had standing simply by alleging the existence of a previous will. Accordingly, the Supreme Court reversed and ordered the District Court to allow discovery regarding the existence of a prior will. In re Estate of Glennie, 2011 MT 291, 362 Mont. 508, 265 P.3d 654, followed in In re Estate of Lawlor, 2015 MT 54, 378 Mont. 281, 343 P.3d 577.

Promissory Note — Undue Influence in Making: A promissory note was executed to appellant by the deceased with whom he had a close confidential relationship. The decedent's age caused her to rely quite heavily on appellant in running her farm and made her more susceptible to his influence. The amount of the note was also quite large in relation to the alleged consideration. Under the five-factor test enumerated in Cameron v. Cameron, 179 M 219, 587 P2d 939 (1978), there was substantial evidence to support a finding of undue influence in the creation of the note. Heintz v. Vestal, 185 M 233, 605 P2d 606, 37 St. Rep. 99 (1980).

DECISIONS UNDER FORMER LAW

"Interested Person" Defined — Executor of Prior Will as Lacking Standing to Contest Subsequent Will: Under former law, in defining "interested person" the Court held where the dispositive provisions of two wills are identical, the only difference being that the subsequent will nominated a different executor, the prior nominated executor lacks standing to contest the subsequent will where his only interest is in probating of the prior will, as he will not suffer any detriment of a recognized interest from the probating of the subsequent will. In re Estate of Fender, 168 M 200, 541 P2d 784 (1975).

Hearing Required: Issues of fact affecting the validity of a will are to be tried; where proponent of a will submitted an affidavit that no hearing had been held, and the record contained no minute entry indicating that a hearing had been held, the Appeals Court would not indulge in the presumption that proceedings had been held. In re Craddock's Estate, 166 M 68, 530 P2d 483 (1975).

Second Hearing: Proponent of holographic will was entitled to full hearing before a substituted judge, after the original petition for probate of will had been heard by a judge who was subsequently disqualified and no rulings had been made on the merits and no transcript of the first hearing had been prepared. In re Craddock's Estate, 166 M 68, 530 P2d 483 (1975).

72-3-303. Formal proceeding supersedes all informal applications.

Official Comments

The word "testacy" is used to refer to the general status of a decedent in regard to wills. Thus, it embraces the possibility that he left no will, any question of which of several instruments is his valid will, and the possibility that he died intestate as to a part of his estate, and testate as to the balance. See [72-1-103(44)].

The formal proceedings described by [72-3-302 through 72-3-304] may be: (i) an original proceeding to secure "solemn form" probate of a will; (ii) a proceeding to secure "solemn form" probate to corroborate a previous informal probate; (iii) a proceeding to block a pending application for informal probate, or to prevent an informal application from occurring thereafter; (iv) a proceeding to contradict a previous order of informal probate; (v) a proceeding to secure a declaratory judgment of intestacy and a determination of heirs in a case where no will has been offered. If a pending informal application for probate is blocked by a formal proceeding, the applicant may withdraw his application and avoid the obligation of going forward with prima facie proof of due execution. See [72-3-310 and 72-3-311]. The petitioner in the formal proceedings may be content to let matters stop there, or he can frame his petition, or amend, so that he may secure an adjudication of intestacy which would prevent further activity concerning the will.

If a personal representative has been appointed prior to the commencement of a formal testacy proceeding, the petitioner must request confirmation of the appointment to indicate that he does not want the testacy proceeding to have any effect on the duties of the personal representative, or refrain from seeking confirmation, in which case, the proceeding suspends the distributive power of the previously appointed representative. If nothing else is requested or decided in respect to the personal representative, his distributive powers are restored at the completion of the proceeding, with [72-3-610] directing him to abide by the will. "Distribute" and "distribution" do not include payment of claims. See [72-1-103(10), 72-3-808, and 72-3-901].

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-401(middle part).

Changes From Uniform Act: Montana codified section 3-401 of the Uniform Probate Code as 72-3-302 through 72-3-304. The Official Comments appearing under 72-3-303 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-401 of the Uniform Probate Code.

72-3-304. Effect of formal proceeding on power of informally appointed personal representative.

Official Comments

The word "testacy" is used to refer to the general status of a decedent in regard to wills. Thus, it embraces the possibility that he left no will, any question of which of several instruments is his valid will, and the possibility that he died intestate as to a part of his estate, and testate as to the balance. See [72-1-103(44)].

The formal proceedings described by [72-3-302 through 72-3-304] may be: (i) an original proceeding to secure "solemn form" probate of a will; (ii) a proceeding to secure "solemn form" probate to corroborate a previous informal probate; (iii) a proceeding to block a pending application for informal probate, or to prevent an informal application from occurring thereafter; (iv) a proceeding to contradict a previous order of informal probate; (v) a proceeding to secure a declaratory judgment of intestacy and a determination of heirs in a case where no will has been offered. If a pending informal application for probate is blocked by a formal proceeding, the applicant may withdraw his application and avoid the obligation of going forward with prima facie proof of due execution. See [72-3-310 and 72-3-311]. The petitioner in the formal proceedings may be content to let matters stop there, or he can frame his petition, or amend, so that he may secure an adjudication of intestacy which would prevent further activity concerning the will.

If a personal representative has been appointed prior to the commencement of a formal testacy proceeding, the petitioner must request confirmation of the appointment to indicate that he does not want the testacy proceeding to have any effect on the duties of the personal representative, or refrain from seeking confirmation, in which case, the proceeding suspends the distributive power of the previously appointed representative. If nothing else is requested or decided in respect to the personal representative, his distributive powers are restored at the completion of the proceeding, with [72-3-610] directing him to abide by the will. "Distribute" and "distribution" do not include payment of claims. See [72-1-103(10), 72-3-808, and 72-3-901].

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-401(last part).

Changes From Uniform Act: Montana codified section 3-401 of the Uniform Probate Code as 72-3-302 through 72-3-304. The Official Comments appearing under 72-3-304 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-401 of the Uniform Probate Code.

72-3-305. Notice of hearing on petition for formal testacy proceeding.

Official Comments

Provisions governing the time and manner of notice required by [72-3-305 and 72-3-306] and other sections in the Code are contained in [72-1-301].

The provisions concerning search for the alleged decedent are derived from Model Probate Code, Section 71.

Testacy proceedings involve adjudications that no will exists. Unknown wills as well as any which are brought to the attention of the Court are affected. Persons with potential interests under unknown wills have the notice afforded by death and by publication. Notice requirements extend also to persons named in a will that is known to the petitioners to exist, irrespective of whether it has been probated or offered for formal or informal probate, if their position may be affected adversely by granting of the petition. But, a rigid statutory requirement relating to such persons might cause undue difficulty. Hence, the statute merely provides that the petitioner may notify other persons.

It would not be inconsistent with [72-3-305 and 72-3-306] for the Court to adopt rules designed to make petitioners exercise reasonable diligence in searching for as yet undiscovered wills.

Section [72-3-111(2)] provides that an order is valid as to those given notice, though less than all interested persons were given notice. Section [72-3-1002] provides a means of extending a testacy order to previously unnotified persons in connection with a formal closing.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-403(a).

Changes From Uniform Act: Montana codified section 3-403 of the Uniform Probate Code as 72-3-305 and 72-3-306. The Official Comments appearing under 72-3-305 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-403 of the Uniform Probate Code.

Case Notes

Named Devisees Entitled to Notice of Entry of Order in a Formal Probate Proceeding: Named devisees are "interested persons" under 72-1-103 and must be given notice of the initiation of formal probate proceedings under 72-3-305, which indicates that the Legislature intended named devisees to be parties to formal probate proceedings, and as such they are entitled to notice of the entry of an order in the proceeding as required by former Rule 77(d), M.R.Civ.P. (now superseded). In re Estate of Holmes, 183 M 290, 599 P2d 344 (1979).

72-3-306. Notice and procedure when fact of death in doubt.

Official Comments

Provisions governing the time and manner of notice required by [72-3-305 and 72-3-306] and other sections in the Code are contained in [72-1-301].

The provisions concerning search for the alleged decedent are derived from Model Probate Code, Section 71.

Testacy proceedings involve adjudications that no will exists. Unknown wills as well as any which are brought to the attention of the Court are affected. Persons with potential interests under unknown wills have the notice afforded by death and by publication. Notice requirements extend also to persons named in a will that is known to the petitioners to exist, irrespective of whether it has been probated or offered for formal or informal probate, if their position may be affected adversely by granting of the petition. But, a rigid statutory requirement relating to such persons might cause undue difficulty. Hence, the statute merely provides that the petitioner may notify other persons.

It would not be inconsistent with [72-3-305 and 72-3-306] for the Court to adopt rules designed to make petitioners exercise reasonable diligence in searching for as yet undiscovered wills.

Section [72-3-111(2)] provides that an order is valid as to those given notice, though less than all interested persons were given notice. Section [72-3-1002] provides a means of extending a testacy order to previously unnotified persons in connection with a formal closing.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-403(b).

Changes From Uniform Act: Montana codified section 3-403 of the Uniform Probate Code as 72-3-305 and 72-3-306. The Official Comments appearing under 72-3-306 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-403 of the Uniform Probate Code.

72-3-307. Hearings and proof in uncontested cases.

Official Comments

For various reasons, attorneys handling estates may want interested persons to be gathered for a hearing before the court of a formal allowance of the will. The court is not required to conduct a hearing, however.

If no hearing is required, uncontested formal probates can be completed on the strength of the pleadings. There is no good reason for summoning attestors when no interested person wants to force the production of evidence on a formal probate. Moreover, there seems to be no valid distinction between litigation to establish a will, and other civil litigation, in respect to whether the court may enter judgment on the pleadings.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-405.

72-3-308. Written objections to probate.

Official Comments

Model Probate Code section 72 requires a contestant to file written objections to any will he would oppose. The provision prevents potential confusion as to who must file what pleading that can arise from the notion that the probate of a will is in rem. The petition for probate of a revoking will is sufficient warning to proponents of the revoked will.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-404.

Case Notes

Denial of Motion to Set Aside Default Judgment — Admission of Will to Probate — Slight Abuse of Discretion: Following the decedent's death, one of his three sons, Howard, petitioned for formal probate of the decedent's will. Another son, David, filed a detailed letter in response to the petition, in which he challenged the decedent's soundness of mind at the time the will was executed; however, David failed to object to the petition within the deadline set by the District Court, and the District Court entered default against David and his brother John. The District Court subsequently denied David's motion to set aside the default judgment. On appeal, the Supreme Court noted that a default judgment may be set aside for good cause. Whether good cause exists is an equitable determination that requires the consideration of three factors: (1) whether the default was willful; (2) whether the plaintiff would be prejudiced if the default were set aside; and (3) whether the defendant presented a meritorious defense to the plaintiff's claim. Applying these factors, the Supreme Court reversed, finding that, in light of the letter David submitted, it was difficult to conclude that the default was willful or that David failed to raise a meritorious defense. Therefore, the District Court slightly abused its discretion in denying David's motion to set aside the default judgment. In re Estate of Mills, 2015 MT 245, 380 Mont. 426, 354 P.3d 1271.

Allegations of Previous Will — Sufficient Basis for Standing to Challenge Probate and Agreements: A son filed an objection to the probate of his father's 2009 will, claiming that his father lacked testamentary capacity and that a previous will, under which he would receive a larger portion of the estate, should instead be probated. The son also challenged agreements to sell portions of the estate's property. The estate filed a motion to dismiss the son's objection, which the District Court granted, concluding that the son did not have standing because he had not produced the previous will. The Supreme Court disagreed, holding that the son was an "interested party" and thus had standing simply by alleging the existence of a previous will. Accordingly, the Supreme Court reversed and ordered the District Court to allow discovery regarding the existence of a prior will. In re Estate of Glennie, 2011 MT 291, 362 Mont. 508, 265 P.3d 654, followed in In re Estate of Lawlor, 2015 MT 54, 378 Mont. 281, 343 P.3d 577.

Notice Required in Will Contests: Since this section requires parties who oppose the probate of a will to state their objection in the form of pleadings, will contests are pleadings, and all interested persons must be given notice that they had been filed as provided for in 72-1-303. In re Estate of Holmes, 183 M 290, 599 P2d 344 (1979).

72-3-310. Burdens in contested cases.

Official Comments

This section is designed to clarify the law by stating what is believed to be a fairly standard approach to questions concerning burdens of going forward with evidence in will contest cases.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-407(first part).

Changes From Uniform Act: Montana codified section 3-407 of the Uniform Probate Code as 72-3-310 and 72-3-311. The Official Comments appearing under 72-3-310 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-407 of the Uniform Probate Code.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Two Contested Wills and Trusts — Appointment of Neutral Representative — Undue Influence, Fraud, or Duress: The decedent executed a will and trust in 2010 leaving the majority of her estate to her niece, with whom she shared a close relationship. In 2012, the decedent executed a new will leaving a sizable portion of her estate to her housekeeper and handyman. The decedent died a year later. The housekeeper petitioned for probate of the 2012 will, and the niece objected and cross-petitioned for probate of the 2010 will. The District Court appointed a neutral personal representative to serve as a special fiduciary to the decedent's trust. A jury found that the 2012 will was procured by undue influence, fraud, or duress. However, the District Court rejected the niece's requests to receive fees and costs and to admit the 2010 will and trust because the special verdict form did not ask the jury to make any findings on the 2010 will or trust. On appeal by both parties, the Supreme Court affirmed in part, upholding the District Court's appointment of a neutral personal representative and special fiduciary, admission of settlement document evidence because one party opened the door to the line of questioning, and suppression of testimony by the decedent's attorneys relating to her dispositional intentions. The Supreme Court also found that while the District Court erred in precluding testimony because a party violated a sequestration order, numerous professional witnesses and friends of the decedent provided similar testimony. The Supreme Court held that the will contestants have the burden of establishing undue influence, fraud, or duress and that the jury properly found that the 2012 will was procured in this manner. However, the Supreme Court found that the District Court erred in refusing to admit the 2010 will to probate and in finding that the niece was statutorily barred from recovering attorney fees. In re Estate of Edwards, 2017 MT 93, 387 Mont. 274, 393 P.3d 639.

Undue Influence — Testamentary Capacity — Summary Judgment Proper: Three individuals challenged the probate of a will based on testamentary capacity and undue influence by a devisee who was appointed as the estate's personal representative. The Supreme Court affirmed, finding that affidavits which merely demonstrated opportunity for undue influence but did not show specific acts of undue influence as well as other affidavits alleging that the testator was under mental stress but failing to show that the testator did not understand the nature of her testamentary act, property, or relations when the will was executed were insufficient to establish a triable dispute. Thus, the District Court did not err in granting summary judgment for the personal representative. In re Estate of Harris, 2015 MT 182, 379 Mont. 474, 352 P.3d 20.

Testator's Printed Name a Valid Signature When Written in Presence of Notary and Two Witnesses — Burden of Proof of Due Execution Met: The decedent's daughter petitioned the District Court to be appointed personal representative to probate the decedent's estate but was opposed by the decedent's sister, who asserted the decedent had previously executed a will in 2002 that named the sister to the position. The District Court concluded that the decedent died intestate, ruling that she had not signed the will because she had printed her name, rather than writing it in a cursive script. On appeal, the Supreme Court reversed the District Court, holding that the decedent's will was validly executed under either 72-2-522 or 72-2-523. The Supreme Court relied on the testimony of the notary and one of the witnesses, who both said the decedent presented the document as her last will and testament when she signed it in block letters in front of them. The decedent had also acknowledged the document as her will in a sworn deposition in

2009. In light of the evidence, the Supreme Court concluded the decedent had validly executed her will and that the decedent's sister had met the burden of presenting a prima facie case of due execution as the proponent of the will. In re Estate of Harless, 2013 MT 283, 372 Mont. 117, 310 P.3d 550.

Intent of Testator — Will Not Form Document — No Hearsay Exception: A duly executed will admitted to probate presumptively reflects the true intentions of the testator and is different from a standard form document that is often provided by a bank or other institution and is drafted to protect the institution. A testator's intent is not a disputed fact and is not subject to admission in evidence in an affidavit for a summary judgment under the hearsay rule exception allowing statements with circumstantial guarantees of trustworthiness comparable to other hearsay rule exceptions. In re Estate of Harmon, 2011 MT 84, 360 Mont. 150, 253 P.3d 821.

Self-Proved Will — Burden on Challenger: A self-proved will, a will that has been simultaneously executed, attested, and acknowledged by the testator and witnesses as provided in 72-3-309 (now repealed), may be admitted to probate without testimony of attesting witnesses. Once a duly executed will is admitted to probate, it is presumed that the testator was competent and sound of mind, and the party contesting the will bears the burden of establishing lack of validity as provided in this section. In re Estate of Harmon, 2011 MT 84, 360 Mont. 150, 253 P.3d 821.

Lack of Testamentary Capacity Rendering Holographic Will Invalid: A son and a daughter both sought probate of different wills signed by their mother. The District Court found that the decedent lacked testamentary capacity at the time both wills were executed, so probate was denied, resulting in intestacy. The son appealed on grounds that the District Court improperly found that the mother lacked testamentary capacity when signing the second, holographic will, but the Supreme Court affirmed. There was evidence that years before the wills were executed, the mother was confused and uncertain about her assets and was paranoid, often did not know what was happening around her and was delusional, could not remember people or recall what she had done with her property, thought that the sheriff and people of Richland County were all on drugs, thought people were stealing from her, was not aware that through two wills she would be treating her children differently, and did not understand when signing the holographic will that it would govern distribution of her assets and revoke any prior wills. This was substantial evidence to justify the District Court's conclusion that the mother lacked testamentary capacity, rendering the will invalid. In re Estate of Lightfield, 2009 MT 244, 351 M 426, 213 P3d 468 (2009).

Substantial Circumstantial Evidence of Undue Influence in Order to Acquire Parent's Assets: A son and a daughter both sought probate of different wills signed by their mother. The District Court found that the decedent was subject to undue influence at the time she transferred certain property to the son, so probate was denied, resulting in intestacy. The son appealed, but the Supreme Court affirmed. There was substantial circumstantial evidence that the son took advantage of the mother's physical and mental weakness when she transferred the property to the son. Based on the nature and timing of the transfer, the District Court did not err in concluding that the transfer was the result of undue influence by the son. In re Estate of Lightfield, 2009 MT 244, 351 M 426, 213 P3d 468 (2009).

Summary Judgment Proper Absent Proof of Undue Influence: Stanton sued for distribution of trust proceeds that were bequeathed to him in Barker's will. Defendants asserted that Stanton had exerted undue influence over Barker, invalidating the will, and that a prior version of the will should be followed, which included defendants as beneficiaries. The District Court found that defendants did not prove undue influence and granted summary judgment to Stanton. On appeal, the Supreme Court applied the criteria in In re Estate of Bradshaw, 2001 MT 92, 305 M 178, 24 P3d 211 (2001), to determine whether Stanton had exerted undue influence, noting that the defendants bore the burden of proof. Stanton admitted a confidential relationship with Barker, but that fact was insufficient in itself to prove undue influence. Because of the relationship, Stanton had the opportunity to exercise undue influence. However, opportunity alone is not sufficient to prove undue influence and invalidate a will. Barker's physical and mental condition and the naturalness of the disposition were not at issue. Defendants failed to prove undue influence, and summary judgment for Stanton was affirmed. Stanton v. Wells Fargo Bank Mont., N.A., 2007 MT 22, 335 M 384, 152 P3d 115 (2007).

No Finding of Undue Influence Under Bradshaw Criteria: Contestants to their father's will asserted that their father was unduly influenced by one of his sons. The District Court found no undue influence, and on appeal, the Supreme Court examined each of the criteria in In re Estate of Bradshaw, 2001 MT 92, 305 M 178, 24 P3d 211 (2001), and affirmed. All of the children had confidential relationships with their father at certain points in their lives, but the mere opportunity to exercise influence on a testator is not sufficient to prove undue influence. Although the contestants may have suspected that the father was unduly influenced, they did not meet their burden of proving that fact. Also, the District Court made the requisite findings regarding the father's physical and mental capacity and condition, the possibility of unnaturalness of the disposition, and the timing and circumstances surrounding the demands and importunities that may have affected the father's ability to withstand any possible influence, and the findings were supported by credible evidence. In re Estate of Harms, 2006 MT 320, 335 M 66, 149 P3d 557 (2006).

Acts of Testator Demonstrating Intent to Revoke Prior Will — Unwitnessed Will Treated as Executed Will: Hall executed his original will in 1984, and in 1997, he and his current wife met with their attorney and drew up a joint will. They signed the joint will, and the attorney notarized it, and although there were no other witnesses, they believed that the joint will would stand as valid until a final version was executed. Hall directed that the 1984 will be destroyed. Hall died before a final version was executed, and his wife sought to informally probate the joint will, but Hall's daughter objected and requested formal probate. The District Court admitted the joint will to probate, and the daughter appealed, but the Supreme Court affirmed. In contested cases, the proponent of a will must establish that the testator duly executed the will. For a will to be valid, typically, two people must witness the testator signing the will, and then sign the will themselves. However, under 72-2-523, a document may still be treated as if it had been executed under certain circumstances, even if it was not properly witnessed, and one such circumstance is if the proponent establishes by clear and convincing evidence that the decedent intended the document to be the decedent's will. Here, Hall clearly intended the joint will to be his final will, as evidenced by superseding language in the joint will revoking the prior will, by Hall's belief that the joint will would stand as valid until a final version was drawn up, and by Hall's destruction of the earlier will. Thus, the District Court did not err in admitting the unwitnessed joint will to probate. In re Estate of Hall, 2002 MT 171, 310 M 486, 51 P3d 1134 (2002).

No Requirement That All Five Statutory Criteria Be Proved to Show Undue Influence — Return to Discretionary Standard and Line of Cases Requiring That All Criteria Must Be Satisfied Overruled: Section 28-2-407 sets forth the statutory definition of undue influence. In 1965, in In re Maricich, 145 M 146, 400 P2d 873 (1965), the Supreme Court set forth five criteria as factors that a court may consider in determining a question of undue influence: (1) any confidential relationship between the person alleged to be exercising undue influence and the donor; (2) the physical condition of the donor as it may affect the donor's ability to withstand influence; (3) the mental condition of the donor as it *may* affect the donor's ability to withstand influence; (4) the unnaturalness of the disposition as it relates to showing an unbalanced mind or a mind easily susceptible to undue influence; and (5) demands and importunities as they may affect the donor, taking into account the time, place, and surrounding circumstances. The court continued this discretionary approach in Cameron v. Cameron, 179 M 219, 587 P2d 939 (1978). Then, beginning with In re Estate of Aageson, 217 M 78, 702 P2d 338 (1985), the court strayed from that approach and held that a court *must* consider the five criteria and set a standard for their consideration in which a proponent of an undue influence theory must satisfy each of the statutory criteria. In the present case, the Supreme Court was asked to consider whether the District Court incorrectly determined that a person's status as a beneficiary was the result of undue influence. The District Court found all five factors to be present, but the presence of four of the five factors was challenged on appeal. The court noted that the standard requiring a finding of all five statutory criteria was not supported by any authority and did not square with the alternative statutory definitions of undue influence in 28-2-407. Therefore, the court returned to the Cameron standard and overruled subsequent cases holding to the contrary, stating that a court *may* consider the five criteria in determining the existence of undue influence but that the five criteria need not all be proved to show undue influence in any given case. The statutory requirements control, and the five criteria are simply nonexclusive considerations available to guide the District Court in its application of the requirements. In the present case, the District Court correctly determined that each of the criterion for establishing a claim of undue influence had been established. In re Estate of Bradshaw, 2001 MT 92, 305 M 178, 24 P3d 211 (2001), overruling Christensen v. Britton, 240 M 393, 784 P2d 908 (1989), In re Estate of Luger, 244 M 301, 797 P2d 229 (1990), Taylor v. Koslosky, 249 M 215, 814 P2d 985 (1991), In re Estate of Jochems, 252 M 24, 826 P2d 534 (1992), Flikkema v. Kimm, 255 M 34, 839 P2d 1239 (1992), In re Estate of Lien, 270 M 295, 892 P2d 530 (1995), In re Estate of DeCock, 278 M 437, 925 P2d 488 (1996), In re Estate of Lande, 1999 MT 162, 295 M 160, 983 P2d 308 (1999), and Luke v. Gager, 2000 MT 377, 303 M 474, 16 P3d 377

(2000), and followed in In re Estate of Wittman, 2001 MT 109, 305 M 290, 27 P3d 35 (2001), and In re Estate of Harms, 2006 MT 320, 335 M 66, 149 P3d 557 (2006).

Claim of Omitted Child Summarily Dismissed — Failure to Present Evidence of Mistaken Belief of Death of Child: Scotty Prescott married Howard Putman in 1946, and they had a son, William, in 1949. Scotty later found out that Howard's previous marriage had not been dissolved when they married, and Scotty was granted an annulment in 1954. She remained in Montana, attending Montana State College, and Howard moved to California with William. Aside from two letters in 1954, there was no evidence of any contact among Scotty, Howard, and William. William had no independent recollection of his mother and never attempted to contact her during the remaining 42 years of her life. Scotty executed a will in 1985, bequeathing the profits from the sale of her ranch to the college, the remainder of her estate to the Museum of the Rockies, and nothing to William, who later asserted that he was entitled to a share of the estate pursuant to 72-2-332 because Scotty mistakenly believed that he was dead. In a nonsubstantial revision of the will in 1991, Scotty had stated that "the line of succession for this branch of the Prescott family ends with me", which William contended raised a question of material fact as to whether his mother believed him to be dead. However, the statement was not made until 6 years after the will was executed and was consistent with the separate way that they lived their lives. Further, the record was replete with uncontroverted proof that the disposition of Scotty's estate was consistent with her intention stated as early as 1964 to endow the college and did not indicate that William was omitted from the will solely because Scotty believed him to be dead. In the absence of sufficient evidence required by 72-2-332(3) proving that William was an omitted child, the District Court correctly dismissed William's claim by summary judgment. In re Estate of Prescott, 2000 MT 200, 300 M 469, 8 P3d 88, 57 St. Rep. 779 (2000).

Test to Prove Lack of Testamentary Capacity — Bodin Test: A son was not included in his mother's will and challenged her testamentary capacity. The Supreme Court applied the long-standing test in In re Bodin's Estate, 144 M 555, 398 P2d 616 (1965), to determine testamentary capacity, which requires that the testator be aware of three elements: (1) the nature of the act to be performed; (2) the nature and extent of property to be disposed of; and (3) the objects of the testator's bounty. Here, the undisputed facts proved all three elements, showing that the mother possessed the requisite testamentary capacity on the day that she executed the will. Absent evidence to the contrary, the District Court's finding to that effect was affirmed. In re Estate of Prescott, 2000 MT 200, 300 M 469, 8 P3d 88, 57 St. Rep. 779 (2000), followed in In re Estate of Harms, 2006 MT 320, 335 M 66, 149 P3d 557 (2006), In re Estate of Lightfield, 2009 MT 244, 351 M 426, 213 P3d 468 (2009), and In re Estate of Quirin, 2015 MT 132, 379 Mont. 173, 348 P.3d 658.

Document Signing Attested to by Only One Witness Not Duly Executed: In contested cases, the proponent of a will must establish that it has been duly executed, which includes the requirement that the document be signed by two individuals acknowledging either the signature or the will. The number of attesting witnesses who must testify in a contested will proceeding pursuant to 72-3-309 (now repealed) is an entirely different question from whether a purported will meets the requirements for a duly executed will under 72-2-522. Here, the document was signed by only one person who witnessed the testator signing the purported will. A second signature by a notary public, who was a family friend and recognized the testator's signature but who was not present when the document was signed, did not constitute the signature of a second witness as required under 72-2-522. The proponent thus did not meet the statutory burden under this section that the document had been duly executed, and the District Court properly denied admission of the document to probate. In re Estate of Brooks, 279 M 516, 927 P2d 1024, 53 St. Rep. 1263 (1996), distinguishing In re Estate of Weidner, 192 M 421, 628 P2d 285 (1981).

Proponent's Burden to Prove Decedent's Intent That Writing Constituted Will: Even absent due execution, a document can still be admitted to probate as a valid will under certain circumstances. Under the express language of 72-2-523, the proponent of a document has the burden of proving the decedent's intent that the writing constitutes the decedent's will. Insofar as this section imposes a burden on the contestant of a will to prove lack of testamentary intent or capacity, that section does not apply when the document sought to be admitted to probate is not a duly executed will. In this case, the proponent did not meet the statutory burden of proving testator's testamentary capacity, which was error, but because the error did not affect the outcome of the case, it was considered harmless. In re Estate of Brooks, 279 M 516, 927 P2d 1024, 53 St. Rep. 1263 (1996), followed in In re Estate of Hall, 2002 MT 171, 310 M 486, 51 P3d 1134 (2002), and In re Estate of Harless, 2013 MT 283, 372 Mont. 117, 310 P.3d 550.

Costs Denied Winner of Trust Invalidation Case: Under the circumstances of the case, the Supreme Court declined to order that the sons challenging parts of their father's trust benefiting his wife be assessed costs of appeal on the grounds that they appealed without substantial or reasonable grounds. In re McKittrick Trust, 262 M 406, 865 P2d 1099, 50 St. Rep. 1613 (1993).

Denial of Cumulative Testimony of Questionable Value as to Cult Involvement in Trust's Creation: The lower court did not abuse its discretion in refusing to allow a witness for persons seeking invalidation of part of testamentary trust to testify on the issue of possible involvement of the trustor in a cult and on an attorney/cult member's involvement in the trust. The witness would have testified that she visited the trustor in the hospital, that three other people stopped by during her visit, and that the trustor introduced one of them as an attorney and member of his church. The witness was unnamed, the offered testimony did not allege that the attorney/cult member influenced the trustor, and the offered testimony was cumulative and of questionable relevance. In re McKittrick Trust, 262 M 406, 865 P2d 1099, 50 St. Rep. 1613 (1993).

Expert Examination of Document Denied Because of Delay, Expense, and Questionable Value: In sons' action to invalidate portions of their father's trust that benefited his wife, the sons requested that their document expert examine a trust draft offered by the wife. The judge stated that any determination would at best be inconclusive, the examination would cause additional expense and delay, and no one had suggested an arrangement satisfactory to the judge for giving the document to an expert. The judge did not abuse discretion in refusing the request. In re McKittrick Trust, 262 M 406, 865 P2d 1099, 50 St. Rep. 1613 (1993).

Holographic Will in Letters of Testator Upheld — Burden on Contestant to Prove Lack of Intent: On two different occasions, from his jail cell, Julian Ramirez wrote letters to his sister saying that if something ever happened to him, their mother should get all of his possessions and take care of his son Nicolas. After Julian's death, the District Court refused to admit the letters to probate as a holographic will, holding that there was insufficient evidence of Julian's testamentary intent. Citing In re Augestad's Estate, 111 M 138, 106 P2d 1087 (1940), In re Van Voast's Estate, 127 M 450, 266 P2d 377 (1954), and Estate of Coleman, 139 M 58, 359 P2d 502 (1961), the Supreme Court held that the letters contained sufficient evidence of testamentary intent. The Supreme Court also noted that the District Court was under the mistaken misapprehension that the burden of proof is upon the person seeking to enter the will to probate. The Supreme Court noted that under this section, the contestant has the burden of proving a lack of testamentary intent, and that burden was not satisfied in this case. In re Estate of Ramirez, 264 M 33, 869 P2d 263, 51 St. Rep. 133 (1994).

No Undue Influence by Wife Over Husband's Trust Benefiting Her: Husband's trust gave his wife the option of complete withdrawal from the trust during her lifetime and control over disposition of most of the trust estate to his descendants upon her death. The couple's sons, seeking invalidation of the provisions, on the basis of undue influence, claimed, without citation of authority, that it was not required that the husband and wife have a confidential relationship as to the trust because the marriage relationship is a confidential relationship as to all things. Any presumption of confidentiality was diminished by the fact that husband generally did not discuss business and financial matters with his wife. It was natural for husband to give his wife the control and withdrawal rights. The court properly held that there was no undue influence exerted by the wife. In re McKittrick Trust, 262 M 406, 865 P2d 1099, 50 St. Rep. 1613 (1993).

No Presumption of Competency in Transactions Between Conservator and Protected Persons: The lower court ruled that the protected persons, the elderly parents of the conservator, were competent. The Supreme Court reversed and remanded, stating that although the establishment of conservatorship is not an adjudication of incompetency and the protected person is presumed to have the capacity to contract with third persons, the presumption shifts with respect to transactions with the conservator. In such cases, the conservator has the burden of proving that the protected persons were at all times capable of understanding the nature of any transaction in which the conservator obtained a benefit. In re Estate of Clark, 237 M 179, 772 P2d 299, 46 St. Rep. 718 (1989), followed in Luke v. Gager, 2000 MT 377, 303 M 474, 16 P3d 377, 57 St. Rep. 1599 (2000).

Will Contest — Probate Barred — Claim Based on Promissory Estoppel — Jury Verdict: Will contest that was barred by 3-year statute of limitations could proceed on other theories of recovery. There was sufficient evidence to support the jury verdict and to deny the request for a new trial. Tope v. Taylor, 235 M 124, 768 P2d 845, 45 St. Rep. 2242 (1988).

Opportunity for Undue Influence Not Tantamount to Actual Undue Influence — Presumption Not Granted Absent Evidence of Misadministration: Where the older brother was named trustee and residuary devisee, younger brothers argued that 72-20-208 (now repealed) required the

District Court to give them the benefit of the presumption against the trustee. They asserted that the statute places on the proponents of the will the burden of proving no undue influence. The Supreme Court held that the mere opportunity to exercise undue influence was not tantamount to the actual exercise of undue influence and that the burden of proving undue influence under 72-3-310 lies with the contestant of a will. The mere naming of a party as both trustee and residuary devisee does not create a transaction between the trustee and grantor/beneficiary and thereby shift the burden of proof to the trustee. The presumption created by 72-20-208 (now repealed) is rebuttable, and substantial evidence showed the will was properly executed, the testator was competent, and there was no improper act in the administration of the trust. In re Estate of Watson, 227 M 212, 738 P2d 494, 44 St. Rep. 1020 (1987).

No Capacity of Seriously Ill Person to Revoke Will: A man who suffered multiple heart attacks and complications that included respiratory arrest, who was unable to speak, and who was questionably lucid and coherent was held not to have the cognitive capacity to make a knowing and voluntary destruction of his will or to possess the capacity to direct the revocation of his will. In re Estate of Fogerty, 221 M 336, 719 P2d 425, 43 St. Rep. 873 (1986).

Lack of Capacity to Execute Will and Deed — Burden of Proof: Appellants claimed the conservator did not meet his burden in proving that the protected person, Mae, lacked the mental capacity to execute a subject deed and will. The Supreme Court set out the test for testamentary capacity in In re Bodin's Estate, 144 M 555, 398 P2d 616 (1965). In applying the test to the present case, the court found little doubt that Mae lacked the necessary testamentary capacity to execute the subject will. The court further held that the same facts led to the conclusion that Mae also lacked the necessary capacity to execute the subject deed or to enter into binding contracts with the appellants. The District Court judgment was affirmed. In re Tennant, 220 M 78, 714 P2d 122, 43 St. Rep. 189 (1986), followed in In re Estate of Jochems, 252 M 24, 826 P2d 534, 49 St. Rep. 116 (1992). See also In re Estate of Lien, 270 M 295, 892 P2d 530, 52 St. Rep. 190 (1995), following In re Bodin's Estate, and In re Estate of Prescott, 2000 MT 200, 300 M 469, 8 P3d 88, 57 St. Rep. 779 (2000), following In re Bodin's Estate.

Undue Influence — Burden of Proof: The appellants contended that the conservator failed to meet his burden of proving that the appellants exercised undue influence over the decedent to procure her execution of a deed and will. In the case of In re Maricich's Estate, 145 M 146, 400 P2d 873 (1965), the Supreme Court set out the elements for determining the existence of undue influence on a testator, which are essentially the same as the statutory elements of undue influence found in 28-2-407. After applying the test to the present case, the court held that appellants did exercise undue influence over the decedent to procure her execution of the subject deed and will and declared both documents void. In re Tennant, 220 M 78, 714 P2d 122, 43 St. Rep. 189 (1986). See also In re Estate of Lien, 270 M 295, 892 P2d 530, 52 St. Rep. 190 (1995), following In re Maricich's Estate, and followed in In re Estate of Bradshaw, 2001 MT 92, 305 M 178, 24 P3d 211 (2001), and In re Estate of Wittman, 2001 MT 109, 305 M 290, 27 P3d 35 (2001). Estate of Lien was distinguished in In re Estate of Lande, 1999 MT 162, 295 M 160, 983 P2d 308, 56 St. Rep. 642 (1999), and Estate of Lien and Estate of Lande were overruled, to the extent that a court is not required to but may consider the criteria in determining the existence of undue influence, but the five criteria need not all be proved to show undue influence in any given case, in In re Estate of Bradshaw, 2001 MT 92, 305 M 178, 24 P3d 211 (2001).

Presumption of Intent to Revoke Holographic Will by Cancellation: Where appellant's wife died leaving a holographic will in her bedroom nightstand and the will contained unexplained X's drawn on the single page of the will such that all of the paragraphs except one had the markings through them, the court erred in admitting the will to formal probate because the will was revoked by its maker. By the existence of the unexplained X's over the will, it is presumed that the maker intended to revoke the will by cancellation, and the opponents of the will have thereby satisfied their burden of proof under 72-3-310. As the appellant failed to explain the markings, the presumed revocation controls. In re Estate of Cox, 190 M 436, 621 P2d 1057, 37 St. Rep. 2018 (1980).

Promissory Note — Undue Influence in Making: A promissory note was executed to appellant by the deceased with whom he had a close confidential relationship. The decedent's age caused her to rely quite heavily on appellant in running her farm and made her more susceptible to his influence. The amount of the note was also quite large in relation to the alleged consideration. Under the five-factor test enumerated in Cameron v. Cameron, 179 M 219, 587 P2d 939 (1978), there was substantial evidence to support a finding of undue influence in the creation of the note. Heintz v. Vestal, 185 M 233, 605 P2d 606, 37 St. Rep. 99 (1980).

Testamentary Capacity: Testimony of witnesses that the decedent, at the time of execution of the will, named all her relatives, the nature and extent of her property, and understood how she was disposing of the property and that the contested will was substantially similar to an earlier draft prepared in 1974 when there was no question of competency indicated that the decedent was not confused or disoriented on the day the will was executed. In re Estate of LaTray, 183 M 141, 598 P2d 619 (1979).

Directed Verdict in Contested Will Proceedings: When upon trial of an issue by a jury the case presents only questions of law, the judge may direct the jury to return a verdict in favor of the party entitled thereto. Where there is no substantial evidence of incompetency at the time of making the will, it is error to allow the issue to go to the jury. In re Estate of Monaco, Monaco v. Cecconi, 180 M 111, 589 P2d 156 (1979).

Undue Influence — What Constitutes: In determining the issue of undue influence, the Court may consider the confidential relationship of the person attempting to influence the donor, the physical and mental condition of the donor as it affects his ability to withstand the influence, the unnaturalness of the disposition as it relates to showing an unbalanced mind or a mind easily susceptible to undue influence, and demands and importunities as they may affect the particular donor, taking into consideration the time, place, and all surrounding circumstances. Cameron v. Cameron, 179 M 219, 587 P2d 939 (1978), followed in In re McKittrick Trust, 262 M 406, 865 P2d 1099, 50 St. Rep. 1613 (1993), In re Estate of Lien, 270 M 295, 892 P2d 530, 52 St. Rep. 190 (1995), and In re Estate of Bradshaw, 2001 MT 92, 305 M 178, 24 P3d 211 (2001).

Presumption Favoring Revocation: The presumption favoring revocation of a will not found subsequent to testator's death and the statutory requirements of proof of a lost will are not one and the same, the presumption being a substantive rule of law and the proof requirements being procedural in nature. Therefore, repeal of the statutory requirements of proof does not abolish the presumption, and the contestant may use it in meeting his burden of proving revocation. In re Hartman, 172 M 225, 563 P2d 569 (1977).

What Jury Is to Determine: Court was correct in rejecting instructions which were merely abstract statements of law since the jury was not in the position to enter a general verdict. Likewise, interrogatories aimed at determining testator's intent were improper because questions of intent are not questions for the jury. Patten v. Patten, 171 M 399, 558 P2d 659 (1976).

DECISIONS UNDER FORMER LAW

Undue Influence — Testimony of Attorney: Although testatrix was 85 and had infirmities associated with old age at the time her will was executed, testimony of her attorney that, due to her age and failing eyesight and her desire to make unequal distribution of her property, he had made a special effort to assure himself of her competence before preparing her will and deeds was sufficient to overcome allegations of contestants. Blackmer v. Blackmer, 165 M 69, 525 P2d 559 (1974).

Undue Influence — Evidence:

Evidence that testator devised bulk of his estate to charitable institution and that public administratrix who had drafted will was named as executor of estate and that her fee was set at a higher figure by statute than that which a relative or other ordinary person would receive as executor was insufficient to set aside directed verdict allowing probate of will because evidence did not disclose that undue influence was actually exercised and that such influence resulted in testamentary provisions which were not those of the testator's will but those of the parties exercising such influence. Wallin v. Kinyon Estate, 164 M 160, 519 P2d 1236 (1974).

Hospital records of testator's terminal illness, during which he executed contested will, were relevant on issue of testamentary capacity and should have been admitted in will contest. Estate of Hall v. Milkovich, 158 M 438, 492 P2d 1388 (1972).

Directed verdict upholding contested will was improper where there was evidence that testator was in a long period of declining physical and mental health due to terminal cancer and sedation, was influenced by a mutual fund salesman, and executed four wills within a 6-month period, all of them disinheriting his natural children, making dispositions at great variance with previous wills, and tending to erode the estate. Estate of Hall v. Milkovich, 158 M 438, 492 P2d 1388 (1972), distinguishing In re Estate of Cocanougher, 141 M 16, 375 P2d 1009 (1962) and In re Estate of Powers, 163 M 67, 515 P2d 368 (1973).

Substantial evidence of undue influence was shown where beneficiary under a second will was never close to the testator until learning of his bank account and importuned upon testator while he was in a weakened condition, so that testator rejected his friends. In re Maricich's Estate, 145 M 146, 400 P2d 873 (1965).

Undue Influence — Burden of Proof: Contestant had burden of showing undue influence. In re Maricich's Estate, 145 M 146, 400 P2d 873 (1965).

Undue Influence — What Constitutes: In considering undue influence, Court could take into account confidential relationship of person attempting to influence testator, testator's physical and mental condition as it affected his ability to withstand influence, the unnaturalness of the disposition, and the demands made upon the testator in light of the circumstances. In re Maricich's Estate, 145 M 146, 400 P2d 873 (1965); followed in In re Estate of Hogan, 218 M 428, 708 P2d 1018, 42 St. Rep. 1711 (1985).

Probate Proceeding of Equitable Nature: A proceeding for the probate of a will is a special statutory proceeding, equitable in its nature and, on appeal, is governed by the rules applicable in a suit in equity. In re Bragg's Estate, 106 M 132, 76 P2d 57 (1938).

Special Interrogatories — Discretion of Trial Court: Under 72-12-202 (now repealed) the obligation rested upon the Court to submit such issues as would be necessary for the proper disposition of the case. The number and form of special interrogatories to be submitted to the jury in a will contest are matters lodged in the discretion of the Trial Court, so long as they are sufficient to comprehend the issues involved in the case; hence, where it submitted one interrogatory on the one issue involved, namely the competency of testator at the time he made the will, refusal of three others offered by contestees on the same subject did not show an abuse of discretion in view of the instructions given thoroughly covering the issue. In re Carroll's Estate, 59 M 403, 196 P 996 (1921).

Right to Jury Trial: An issue in a probate matter is to be tried and determined as an ordinary action, except that a jury trial is a privilege and not a matter of right. In re Peterson's Estate, 49 M 96, 140 P 237 (1914).

Admission to Probate: Section 72-12-204 (now repealed) showed how the will was admitted to probate. In re Hobbins' Estate, 41 M 39, 108 P 7 (1910).

72-3-311. Priority of determinations in contested cases.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-407(last part).

Changes From Uniform Act: Montana codified section 3-407 of the Uniform Probate Code as 72-3-310 and 72-3-311.

72-3-312. Effect of final order in another state.

Official Comments

This section is designed to extend the effect of final orders of another jurisdiction of the United States. It should not be read to restrict the obligation of the local court to respect the judgment of another court when parties who were personally before the other court also are personally before the local court. An "authenticated copy" includes copies properly certified under the full faith and credit statute. If conflicting claims of domicile are made in proceedings which are commenced in different jurisdictions, [72-3-114] applies. This section is framed to apply where a formal proceeding elsewhere has been previously concluded. Hence, if a local proceeding is concluded before formal proceedings at domicile are concluded, local law will control.

Informal proceedings by which a will is probated or a personal representative is appointed are not proceedings which must be respected by a local court under either [72-3-114] or this section.

Nothing in this section bears on questions of what assets are included in a decedent's estate.

This section adds nothing to existing law as applied to cases where the parties before the local court were also personally before the foreign court, or where the property involved was subject to the power of the foreign court. It extends present law so that, for some purposes, the law of another state may become binding in regard to due execution or revocation of wills controlling local land, and to questions concerning the meaning of ambiguous words in wills involving local land. But, choice of law rules frequently produce a similar result. See § 240 Restatement of the Law, Second: Conflict of Laws, p. 73, Proposed Official Draft III, 1969.

This section may be easier to justify than familiar choice of law rules, for its application is limited to instances where the protesting party has had notice of, and an opportunity to participate in, previous litigation resolving the question he now seeks to raise.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-408.

72-3-313. Order for formal probate.

Official Comments

Model Probate Code section 80(a), slightly changed. If the court is not satisfied that the alleged decedent is dead, it may permit amendment of the proceeding so that it would become a proceeding to protect the estate of a missing and therefore "disabled" person. See [Chapter 5] of this Code.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-409(first part).

Changes From Uniform Act: Montana codified section 3-409 of the Uniform Probate Code as 72-3-313 and 72-3-316. The Official Comments appearing under 72-3-313 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-409 of the Uniform Probate Code.

Case Notes

Jurisdiction to Determine Validity of Will Prior to Death: The Courts have no power to pass on the validity of the will of a living person. Colbo v. Coty, 184 M 72, 601 P2d 697 (1979).

72-3-314. Probate of more than one instrument — order.

Official Comments

Except as otherwise provided in [72-3-317], an order in a formal testacy proceeding serves to end the time within which it is possible to probate after-discovered wills, or to give effect to late-discovered facts concerning heirship. Determination of heirs is not barred by the three-year limitation but a judicial determination of heirs is conclusive unless the order may be vacated.

This section authorizes a court to engage in some construction of wills incident to determining whether a will is entitled to probate. It seems desirable to leave the extent of this power to the sound discretion of the court. If wills are not construed in connection with a judicial probate, they may be subject to construction at any time. See [72-3-122].

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-410.

72-3-315. Order of partial intestacy.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-411.

72-3-316. Will from place where probate unprovided for.

Official Comments

Model Probate Code section 80(a), slightly changed. If the court is not satisfied that the alleged decedent is dead, it may permit amendment of the proceeding so that it would become a proceeding to protect the estate of a missing and therefore "disabled" person. See [Chapter 5] of this Code.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-409(last part).

Changes From Uniform Act: Montana codified section 3-409 of the Uniform Probate Code as 72-3-313 and 72-3-316. The Official Comments appearing under 72-3-316 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-409 of the Uniform Probate Code.

72-3-317. Effect of formal testacy order — modification or vacation — fact of death — remedies of alleged decedent.

Official Comments

The provisions barring proof of late-discovered wills is derived in part from section 81 of Model Probate Code. The same section is the source of the provisions of (5) above. The provisions permitting vacation of an order determining heirs on certain conditions reflect the effort to offer parallel possibilities for adjudications in testate and intestate estates. See [72-3-302 through 72-3-304]. An objective is to make it possible to handle an intestate estate exactly as a testate

estate may be handled. If this is achieved, some of the pressure on persons to make wills may be relieved.

If an alleged decedent turns out to have been alive, heirs and distributees are liable to restore the "estate or its proceeds." If neither can be identified through the normal process of tracing assets, their liability depends upon the circumstances. The liability of the distributees to claimants whose claims have not been barred, or to persons shown to be entitled to distribution when a formal proceeding changes a previous assumption informally established which guided an earlier distribution, is different. See [72-3-906 and 72-3-1012].

Compiler's Comments

1995 Amendment: Chapter 592 near beginning of introductory clause substituted "72-3-318 and this section" for "herein and in 72-3-318"; and made minor changes in style.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-412.

Case Notes

Time-Barred Claim for Relief from Formal Testacy Order: Adult children who would have inherited more under a prior will alleged they were told by the estate representative that they would receive their "fair share". They did not challenge the will until years later, alleging that the testator lacked capacity and the representative perpetrated fraud. The District Court found their claim was time-barred. On appeal, the Supreme Court affirmed the dismissal of the petition to reopen the estate, noting that 72-1-111 has no bearing on a claim of testamentary capacity and that the adult children's claims were not sufficient to toll the statute of limitations of 72-3-317. In re Estate of Swanberg, 2020 MT 153, 400 Mont. 247, 465 P.3d 1165.

Formal Testacy Order — Governed Under Uniform Probate Code — Rule 60, M.R.Civ.P., Inapplicable: Because appeals or vacations from a formal testacy order are subject to 72-3-317 and 72-3-318, and because those sections are inconsistent with Rule 60, M.R.Civ.P. (Title 25, ch. 20), the District Court did not err in determining that a motion for relief from a formal testacy order must be considered under those sections rather than under Rule 60. In re Estate of Erickson, 2017 MT 260, 389 Mont. 147, 406 P.3d 1.

Modification of Final Testacy Order Denied — Failure to Show Lack of Knowledge of Later-Offered Will's Existence — No Error: Although a decedent's wife claimed that her counsel was negligent in failing to introduce a document purportedly having testamentary intent at the hearing finalizing the formal probate order, this section requires that a proponent be unaware of a later-offered will's existence at the time of the proceeding in order for a court to consider a modification. The proponent did not assert that she did not have any knowledge of the document that her counsel failed to introduce, and the District Court did not err in denying the wife's motion to modify the formal testacy order. In re Estate of Erickson, 2017 MT 260, 389 Mont. 147, 406 P.3d 1.

72-3-318. Modification or vacation for other cause.

Official Comments

See [72-1-207 and 72-1-209].

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-413.

Case Notes

Formal Testacy Order — Governed Under Uniform Probate Code — Rule 60, M.R.Civ.P., Inapplicable: Because appeals or vacations from a formal testacy order are subject to 72-3-317 and 72-3-318, and because those sections are inconsistent with Rule 60, M.R.Civ.P. (Title 25, ch. 20), the District Court did not err in determining that a motion for relief from a formal testacy order must be considered under those sections rather than under Rule 60. In re Estate of Erickson, 2017 MT 260, 389 Mont. 147, 406 P.3d 1.

Effect of Failure to Send Notice of Entry of Order in Formal Probate Proceeding: Under 72-3-318, the Court may vacate orders in a formal probate proceeding within the time allowed for appeal. Since the Clerk failed to send notice of entry of an order as required by former Rule 77(d), M.R.Civ.P. (now superseded), the time allowed for appeal had not begun to run, and the party was still entitled to request the Court to modify or vacate its order. In re Estate of Holmes, 183 M 290, 599 P2d 344 (1979).

72-3-319. Formal appointment proceedings.

Official Comments

A petition raising a controversy concerning the priority or qualifications of a personal representative may be combined with a petition in a formal testacy proceeding. However, it is not necessary to petition formally for the appointment of a personal representative as a part of a formal testacy proceeding. A personal representative may be appointed on informal application either before or after formal proceedings which establish whether the decedent died testate or intestate or no appointment may be desired. See [72-3-121, 72-3-203(2), 72-3-204, and 72-3-225]. Furthermore, procedures for securing the appointment of a new personal representative after a previous assumption as to testacy has been changed are provided by [72-3-523]. These may be informal, or related to pending formal proceedings concerning testacy. A formal order relating to appointment may be desired when there is a dispute concerning priority or qualification to serve but no dispute concerning testacy. It is important to distinguish formal proceedings concerning appointment from "supervised administration." The former includes any proceeding after notice involving a request for an appointment. The latter originates in a "formal proceeding" and may be requested in addition to a ruling concerning testacy or priority or qualifications of a personal representative, but is descriptive of a special proceeding with a different scope and purpose than those concerned merely with establishing the bases for an administration. In other words, a personal representative appointed in a "formal" proceeding may or may not be "supervised."

Another point should be noted. The court may not immediately issue letters even though a formal proceeding seeking appointment is involved and results in an order authorizing appointment. Rather, [72-3-512], et seq. control[s] the subject of qualification. Section [72-1-204] deals with letters.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-414.

72-3-320. Nondomiciliary decedent — will filed and not probated in domiciliary state.

Compiler's Comments

Effective Date: Section 6, Ch. 410, L. 2005, provided: "[This act] is effective July 1, 2005."

Retroactive Applicability: Section 7, Ch. 410, L. 2005, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to the probate of testate nondomiciliary decedents' estates that have not been closed before [the effective date of this act]." Effective July 1, 2005.

72-3-321. Formal testacy proceedings — contested cases.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

Case Notes

Self-Proved Will — Burden on Challenger: A self-proved will, a will that has been simultaneously executed, attested, and acknowledged by the testator and witnesses as provided in this section, may be admitted to probate without testimony of attesting witnesses. Once a duly executed will is admitted to probate, it is presumed that the testator was competent and sound of mind, and the party contesting the will bears the burden of establishing lack of validity as provided in 72-3-310. In re Estate of Harmon, 2011 MT 84, 360 Mont. 150, 253 P.3d 821.

Document Signing Attested to by Only One Witness Not Duly Executed: In contested cases, the proponent of a will must establish that it has been duly executed, which includes the requirement that the document be signed by two individuals acknowledging either the signature or the will. The number of attesting witnesses who must testify in a contested will proceeding pursuant to this section is an entirely different question from whether a purported will meets the requirements for a duly executed will under 72-2-522. Here, the document was signed by only one person who witnessed the testator signing the purported will. A second signature by a notary public, who was a family friend and recognized the testator's signature but who was not present when the document was signed, did not constitute the signature of a second witness as required under 72-2-522. The proponent thus did not meet the statutory burden under 72-3-310 that the document had been duly executed, and the District Court properly denied admission of the document to probate. In re Estate of Brooks, 279 M 516, 927 P2d 1024, 53 St. Rep. 1263 (1996), distinguishing In re Estate of Weidner, 192 M 421, 628 P2d 285 (1981).

Apparently Executed Subsequent Will — Evidence Necessary to Support: The deceased and her husband executed a joint will in 1954. The will left all the property to the surviving spouse and provided that at the survivor's death their son would receive $5 because he was already provided for and that the daughter would receive the remainder of the property. The husband died in 1957. The wife died in 1980, and the daughter sought to probate the 1954 will. The son petitioned for a formal determination of intestacy. He produced an unexecuted copy of a second will, the original of which was purportedly executed in 1965 by the decedent. The 1965 will contained a standard revocation clause. The Supreme Court held that the 1965 will was not duly executed. The drafter of the will could not establish that there was a second witness who had witnessed either the signing by the testator or the testator's acknowledgment of her signature of the will. There was insufficient evidence to support a finding that the 1965 will was fully executed. The 1954 will was properly admitted to probate. In re the Estate of Weidner, 192 M 421, 628 P2d 285, 38 St. Rep. 747 (1981), distinguished in In re Estate of Brooks, 279 M 516, 927 P2d 1024, 53 St. Rep. 1263 (1996).

Part 4
Supervised Administration

72-3-401. Supervised administration — nature and purpose — presumptive entitlement.

Official Comments

This and the following sections of this part describe an optional procedure for settling an estate in one continuous proceeding in the Court. The proceeding is characterized as "in rem" to align it with the concepts described by the Model Probate Code. See Section 62, M.P.C. In cases where supervised administration is not requested or ordered, no compulsion other than self-interest exists to compel use of a formal testacy proceeding to secure an adjudication of a will or no will, because informal probate or appointment of an administrator in intestacy may be used. Similarly, unless administration is supervised, there is no compulsion other than self-interest to use a formal closing proceeding. Thus, even though an estate administration may be begun by use of a formal testacy proceeding which may involve an order concerning who is to be appointed personal representative, the proceeding is over when the order concerning testacy and appointment is entered. See [72-3-121]. Supervised administration, therefore, is appropriate when an interested person desired assurance that the essential steps regarding opening and closing of an estate will be adjudicated. See the Comment following [72-3-402].

Compiler's Comments

2019 Amendment: Chapter 313 inserted second and third sentences concerning the responsibilities, duties, and powers of a supervised personal representative; deleted former (2) that read: "(2) If a probate estate has not been closed within 3 years after the first appointment of a personal representative or administrator, any devisee under a will, beneficiary of a trust, or intestate heir of the decedent is entitled to petition for supervised administration under this section and is presumptively entitled to receive an order for supervised administration. The burden of proof to show cause why supervised administration should not be granted is on the personal representative or administrator"; and made minor changes in style. Amendment effective October 1, 2019.

2011 Amendment: Chapter 238 inserted (2) relating to a probate estate not closed within 3 years; and made minor changes in style. Amendment effective October 1, 2011.

Saving Clause: Section 11, Ch. 238, L. 2011, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-501(first part).

Changes From Uniform Act: Montana codified section 3-501 of the Uniform Probate Code as 72-3-401 and 72-3-404(1), (2). The Official Comments appearing under 72-3-401 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-501 of the Uniform Probate Code.

Case Notes

Matters Involving Prior Accounting Merged in Final Account: In response to the personal representative's argument that the court had no jurisdiction over matters handled during the administration of the estate that were not included in the order issued prior to the final account, the Supreme Court held that in any supervised administration, the court is given continuing authority in a single in rem proceeding to secure the complete administration of the estate until the entry of an order approving distribution and discharging the personal representative. The matters involving the prior accounting were merged in the final account, and the court had jurisdiction over them. In re Estate of Barber, 239 M 129, 779 P2d 477, 46 St. Rep. 1565 (1989).

72-3-402. Petition and order.

Official Comments

The expressed wishes of a testator regarding supervised administration should bear upon, but not control, the question of whether supervised administration will be ordered. This section is designed to achieve a fair balance between the wishes of the decedent, and the interests of successors in regard to supervised administration.

Since supervised administration normally will result in an adjudicated distribution of the estate, the issue of will or no will must be adjudicated. This section achieves this by forcing a petition for supervised administration to include matters necessary to put the issue of testacy before the court. It is possible, however, that supervised administration will be requested because administrative complexities warranting it develop after the issue of will or no will has been resolved in a previously concluded formal testacy proceeding.

It should be noted that supervised administration, though it compels a judicial settlement of an estate, is not the only route to obtaining judicial review and settlement at the close of an administration. The procedures described in [72-3-131 and 72-3-132] are available for use by or against personal representatives who are not supervised. Also efficient remedies for breach of duty by a personal representative who is not supervised are available under Part 6 of this [chapter]. Finally, each personal representative consents to jurisdiction of the court as invoked by mailed notice of any proceeding relating to the estate which may be initiated by an interested person. Also, persons interested in the estate may be subjected to orders of the court following mailed notices made in proceedings initiated by the personal representative. In combination, these possibilities mean that supervised administration will be valuable principally to persons who see some advantage in a single judicial proceeding which will produce adjudications on all major points involved in an estate settlement.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-502.

Case Notes

Informal Probate Not Civil Action — Motion to Substitute Judge Premature: The daughter of the decedent was appointed the personal representative and her application for an informal probate was accepted by the clerk of the court. Her brother's attorney moved for substitution of the judge and subsequently moved for supervised administration of the probate. The Supreme Court held that an informal probate is not a civil action because it is not subject to the jurisdiction of a District Court. After a probate is designated as subject to supervised administration, the probate is subject to the District Court's jurisdiction and is a civil action. The Supreme Court ruled that the brother's attorney's motion to substitute the judge was untimely as it was premature and that it should have been filed after the probate became subject to supervised administration. In re Estate of Greene, 2013 MT 174, 370 Mont. 490, 305 P.3d 52.

72-3-403. Effect on other proceedings and previously appointed personal representative.

Official Comments

The duties and powers of a personal representative are described in Part [6] of this [chapter]. The ability of a personal representative to create a good title in a purchaser of estate assets is not hampered by the fact that the personal representative may breach a duty created by statute, court order or other circumstances in making the sale. See [72-3-613]. However, formal proceedings against a personal representative may involve requests for qualification of the power normally possessed by personal representatives which, if granted, would subject the personal representative to the penalties for contempt of court if he disregarded the restriction. See [72-3-617]. If a proceeding also involved a demand that particular real estate be kept in the estate pending determination of a petitioner's claim thereto, notice of the pendency of the proceeding could be recorded as is usual under the jurisdiction's system for the lis pendens concept.

The word "restricts" in the last sentence is intended to negate the idea that a judicial order specially qualifying the powers and duties of a personal representative is a restraining order in the usual sense. The section means simply that some supervised personal representative may receive the same powers and duties as ordinary personal representatives, except that they must obtain a court order before paying claimants or distributing, while others may receive a more restricted set of powers. Section [72-3-617] governs petitions which seek to limit the power of a personal representative.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-503.

72-3-404. Powers of personal representative in supervised administration.

Official Comments to § 3-504 of the UPC

This section provides authority to issue letters showing restrictions of power of supervised administrators. In general, persons dealing with personal representatives are not bound to inquire concerning the authority of a personal representative, and are not affected by provisions in a will or judicial order unless they know of it. But, it is expected that persons dealing with personal representatives will want to see the personal representative's letters, and this section has the practical effect of requiring them to do so. No provision is made for noting restrictions in letters except in the case of supervised representatives. See [72-3-613].

Compiler's Comments

2019 Amendment: Chapter 313 deleted former (1) and (2) that read: "(1) A supervised personal representative is responsible to the court, as well as to the interested parties, and is subject to directions concerning the estate made by the court on its own motion or on the motion of any interested party.

(2) Except as otherwise provided in this part or as otherwise ordered by the court, a supervised personal representative has the same duties and powers as a personal representative who is not supervised"; and made minor changes in style. Amendment effective October 1, 2019.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding sections in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws are sections 3-501(last part) and 3-504.

Changes From Uniform Act: Montana codified section 3-501 of the Uniform Probate Code as 72-3-401 and 72-3-404(1), (2). The Official Comments appearing under 72-3-404 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-504 of the Uniform Probate Code.

Case Notes

Payment of Fees — Repayment of Loans: The personal representative had authority to pay the estate's attorney and repay herself for loans she had made to the estate without a prior order from the District Court. Under this section, a supervised personal representative has, without interim orders approving the exercise of a power, all powers of personal representatives under the code, except that the personal representative may not make a distribution of the estate without the prior order of the court. This authority includes the power, under 72-3-613, to pay her own compensation and other expenses incident to the administration of the estate. In re Estate of Barber, 239 M 129, 779 P2d 477, 46 St. Rep. 1565 (1989).

72-3-405. Interim orders.

Official Comments

Since supervised administration is a single proceeding, the notice requirement contained in [72-3-111(2)] relates to the notice of institution of the proceedings which is described with particularity by [72-3-402]. [Section 72-3-406] makes it clear that an additional notice is required for a closing order. It was discussed whether provision for notice of interim orders should be included. It was decided to leave the point to be covered by court order or rule. There was a suggestion for a rule as follows: "Unless otherwise required by order, notice of interim orders in supervised administration need be given only to interested persons who request notice of all orders entered in the proceeding." [Section 72-1-302] permits any person to waive notice by a writing filed in the proceeding.

A demand for notice under [72-3-106] would entitle any interested person to notice of any interim order which might be made in the course of supervised administration.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-505(last part).

Changes From Uniform Act: Montana codified section 3-505 of the Uniform Probate Code as 72-3-405 and 72-3-406. The Official Comments appearing under 72-3-405 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-505 of the Uniform Probate Code.

72-3-406. Closing orders.

Official Comments

Since supervised administration is a single proceeding, the notice requirement contained in [72-3-111(2)] relates to the notice of institution of the proceedings which is described with particularity by [72-3-402]. The above section makes it clear that an additional notice is required for a closing order. It was discussed whether provision for notice of interim orders should be included. It was decided to leave the point to be covered by court order or rule. There was a suggestion for a rule as follows: "Unless otherwise required by order, notice of interim orders in supervised administration need be given only to interested persons who request notice of all orders entered in the proceeding." [Section 72-1-302] permits any person to waive notice by a writing filed in the proceeding.

A demand for notice under [72-3-106] would entitle any interested person to notice of any interim order which might be made in the course of supervised administration.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-505(first part).

Changes From Uniform Act: Montana codified section 3-505 of the Uniform Probate Code as 72-3-405 and 72-3-406. The Official Comments appearing under 72-3-406 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-505 of the Uniform Probate Code.

Part 5
Personal Representative
Appointment Priorities, Bond, and Termination

72-3-501. Who may not be personal representative.

Official Comments

The priorities applicable to informal proceedings are applicable to formal proceedings. However, if the proceedings are formal, a person with a substantial interest may object to the selection of one having priority other than because of will provisions. The provision for majority approval which is triggered by such a protest can be handled in a formal proceeding since all interested persons will be before the court, and a judge capable of handling discretionary matters, will be involved.

In considering [72-3-501 through 72-5-508 as they relate] to a devise to a trustee for various beneficiaries, it is to be noted that "interested persons" is defined by [72-1-103] to include fiduciaries. Also, [72-1-303(2)] and [72-3-915] show a purpose to make trustees serve as representatives of all beneficiaries. The provision [of 72-3-505] is consistent.

If a state's statutes recognize a public administrator or public trustee as the appropriate agency to seek administration of estates in which the state may have an interest, it would be appropriate to indicate in [72-3-501 through 72-3-508] the circumstances under which such an officer may seek administration. If no officer is recognized locally, the state could claim as heir by virtue of [72-2-115].

[Section 72-3-506] was inserted in connection with the decision to abandon the effort to describe ancillary administration in [Chapter 4]. Other provisions in [Chapter 5] which are relevant to administration of assets in a state other than that of the decedent's domicile are [72-1-201] (territorial effect), [72-3-112] (venue), [72-3-222] (informal appointment for non-resident decedent delayed 30 days), [72-3-224] (no informal appointment here if a representative has been appointed at domicile), [72-3-821] (duty of personal representative where administration is more than one state) and [72-4-306 through 72-4-308] (local recognition of foreign personal representatives).

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-203(f).

Changes From Uniform Act: Montana codified section 3-203 of the Uniform Probate Code as 72-3-501 through 72-3-508. The Official Comments appearing under 72-3-501 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-203 of the Uniform Probate Code.

Attorney General's Opinions

Attorney General Opinion Inappropriate: Whether District Court Clerk must accept for filing creditor's claims against a decedent prior to appointment of a personal representative and whether such filing tells the 3-year limitation on presentment of claims are inappropriate questions for an Attorney General Opinion. 37 A.G. Op. 135 (1978).

72-3-502. Priorities for appointment.

Official Comments

[See Official Comments under 72-3-501.]

Compiler's Comments

2019 Amendment: Chapter 313 inserted (6) regarding the parent of an adult decedent who was survived by issue; and made minor changes in style. Amendment effective October 1, 2019.

1989 Amendment: Inserted (3) clarifying that custodial parent has priority over noncustodial parent for appointment as personal representative of deceased minor's estate; and made minor change in punctuation.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-203(a).

Changes From Uniform Act: Montana codified section 3-203 of the Uniform Probate Code as 72-3-501 through 72-3-508.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Appointment of Ex-Wife as Personal Representative Based on Her Being Custodial Parent, Guardian, and Conservator of Heirs Affirmed — Best Interest of Estate Considered: The father of two young children died intestate and his father was appointed the personal representative of the estate. The decedent's former wife, the guardian and mother of the children, sought to remove the decedent's father as the personal representative and appoint herself instead based on her being the custodial parent, guardian, and conservator of the heirs. The District Court agreed that it was in the best interest of the estate to remove the decedent's father and appoint the former wife as its personal representative. The decedent's father appealed to the Supreme Court, which affirmed his removal and the appointment of his former daughter-in-law. Under the Uniform Probate Code, the conservator has the right to nominate the personal representative of the estate even if it is the former spouse of the decedent. In re Estate of Bennett, 2013 MT 228, 371 Mont. 270, 312 P.3d 400.

Appeal of Appointment of Personal Representative Not Timely: The District Court appointed a son as personal representative of his mother's estate and ordered that letters of administration be issued to him, and his sister appealed the appointment. Pursuant to In re Estate of Peterson, 264 M 104, 874 P2d 1230 (1994), the Supreme Court reviewed the appointment to determine whether the District Court correctly interpreted the law. Under former Rule 1, M.R.App.P. (now superseded), an order granting letters of administration was appealable, but former Rule 5, M.R.App.P. (now superseded), provided that an aggrieved party has 30 days from the date of entry of an order to file a notice of appeal. By the time that the sister appealed, her brother had been personal representative of the estate for 14 months, so the appeal was not timely. In re Estate of McMurchie, 2004 MT 98, 321 M 21, 89 P3d 18 (2004).

Wife Sued for Recovery of Medical Expenses of Estranged Husband — Material Question of Fact Whether Husband Abandoned Wife or Whether They Were Separated by Agreement as Precluding Summary Judgment: The husband moved from the family home, the wife filed for divorce, and the husband died a few weeks later after incurring $32,496 in medical expenses. The wife served as personal representative of her husband's estate and claimed the family allowance as his surviving spouse. Plaintiff was assigned the debt for medical services for purposes of collection. Citing Missoula YWCA v. Bard, 1999 MT 177, 295 M 260, 983 P2d 933 (1999), plaintiff argued that the medical expenses were necessaries of the family and that the wife was therefore responsible for the debt under 40-2-106, while the wife argued that she was not responsible because the parties were legally separated at the time that the expenses were incurred and because the husband had not supported the family during that time. The District Court concluded that because the wife acted as personal representative and received the family allowance as surviving spouse, she was estopped from arguing that she was not legally married and that because there were no factual disputes, plaintiff was entitled to summary judgment. The wife appealed, and the Supreme Court reversed. Nothing in statute precludes an abandoned or separated spouse from acting as personal representative of a deceased spouse's estate, nor does the role of personal representative preclude a spouse from arguing abandonment or separation by agreement. Section 40-2-104 provides an exception to liability imposed under 40-2-106 if a spouse has been abandoned or if spouses are living separately by agreement. Because a question of material fact existed as to whether the wife was abandoned or separated, summary judgment was inappropriate, so the case was remanded for further proceedings. Balyeat Collection Professionals v. Garland, 2002 MT 167, 310 M 464, 51 P3d 1127 (2002).

Appointment or Removal of Personal Representative and Renunciation of Right to Appointment — Standards of Review: Whether a party has a statutory priority for appointment as a personal representative in Montana as a result of appointment as a personal representative in another state, as well as a coincident right to obtain removal of a special administrator, is a legal question that the Supreme Court will review to determine whether the District Court correctly interpreted the law (see In re Estate of Peterson, 264 M 104, 874 P2d 1230 (1994)). A question of whether a person has renounced the right to appointment as a personal representative involves the interpretation and application of the statute governing renunciation and will be reviewed for correctness (see In re Inquiry Into A.W., D.G., & M.G., Jr., 1999 MT 42, 293 M 358, 975 P2d 1250 (1999)). Whether a District Court has erred in refusing to appoint a person as a personal administrator, because that person has a conflict with another that prevents that person from being appointed a personal administrator, will be reviewed to determine whether there has been an abuse of the District Court's discretion (see In re Estate of Obstarczyk, 141 M 346, 377 P2d 531 (1963)). In re Estate of Kuralt, 2001 MT 153, 306 M 73, 30 P3d 345 (2001).

Priority of Surviving Spouse for Appointment as Personal Representative: If a personal representative has not been named under a will and there are no devisees, the decedent's surviving spouse has priority for appointment. A person determined to be a surviving spouse for purposes of intestate succession has priority for appointment over other heirs, the public administrator, and any creditor. In this case, when the issue of a surviving spouse's conflict of interest was raised with regard to children of the decedent, the interests of the children were properly protected through a court-ordered supervision of the estate's administration. In re Estate of Goick, 275 M 13, 909 P2d 1165, 53 St. Rep. 12 (1996).

Standing of Decedent's Relatives to Appeal Settlement and Distribution Agreements: Decedent's mother, brother, and sister sought to appeal a contested settlement agreement and a distribution agreement ordered by the District Court, but decedent's surviving spouse, Barbara, contended that there was no standing for an appeal. The Supreme Court held that: (1) Barbara was not precluded from raising the issue of standing for the first time on appeal, even though she failed to object in District Court, because objections to standing cannot be waived; (2) decedent's mother, as a creditor of the estate, had standing to appeal the appointment of Barbara as personal representative, but a brother and sister, who were neither creditors nor heirs of the estate, lacked standing; (3) because decedent's mother, brother, and sister were not successors to the estate, they had no legal interest or personal stake in the distribution of the estate and thus lacked standing to claim that the distribution agreement was improper; and (4) decedent's mother, brother, and sister were parties to the contested settlement agreement and were directly affected by the validity of the agreement and thus had standing to appeal that issue. In re Estate of Goick, 275 M 13, 909 P2d 1165, 53 St. Rep. 12 (1996), following Holmstrom Land Co. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060 (1979), Grossman v. Dept. of Natural Resources and Conservation, 209 M 427, 682 P2d 1319 (1984), and Olson v. Dept. of Revenue, 223 M 464, 726 P2d 1162 (1986). Goick was followed, as to prerequisites for standing, in In re Paternity of Vainio, 284 M 229, 943 P2d 1282, 54 St. Rep. 858 (1997).

Appointment of Brother, Sole Devisee, as Representative: Under the order of priorities in this section, decedent's brother had first priority of appointment under subsection (4) because there existed no other persons fitting the descriptions of priority of nomination in the will, surviving spouse who was a devisee, or custodial parent of a minor decedent and the brother was the sole devisee under decedent's will. In re Estate of Peterson, 265 M 104, 874 P2d 1230, 51 St. Rep. 454 (1994).

Priority of Custodial Parent When Noncustodial Parent Unsuitable: Noncustodial father maintained that since he and custodial mother could not agree on who should be appointed personal representative, the probate court should have appointed another qualified person. The court found that both parents, as heirs, shared priority for appointment, but since there was evidence of virtually no relationship between the deceased child and father and the father had shown no interest in supporting the child while she was alive or in helping with her final medical and funeral expenses, he was unsuitable as a personal representative, leaving the mother as the only suitable person with priority for appointment. In re Estate of Farnum, 224 M 304, 730 P2d 391, 43 St. Rep. 2205 (1986).

Father's Priority Over Public Administrator — Fourteen-Month Delay in Opening Estate: Fourteen months after the death of his son in a traffic accident, the father applied to be personal representative of his son's estate in response to a proceeding to appoint a public administrator so that the estate could be sued for insurance money on behalf of another who had died in the accident. No prior application for personal representative was required because the son left no estate to be administered. The father has priority to be personal representative under 72-3-502, notwithstanding speculation that in the accident trial he might be accorded more sympathy as father of the deceased than a public administrator would be accorded. The requirement of 72-15-102 that a public administrator may not file a petition for letters until after 30 days has elapsed does not raise a burden of justifying the delay on some other person applying for letters later than 30 days after a death. In re Estate of Karst, 200 M 254, 650 P2d 792, 39 St. Rep. 1723 (1982).

DECISIONS UNDER FORMER LAW

Creditor as Administrator: On claim for unpaid hospital expenses of decedent, proper remedy for hospital would have been to apply for letters of administration as creditor. Daughters of Jesus v. Gee, 153 M 342, 457 P2d 471 (1969).

Duty of Court: Former statute dealing with issuance of letters testamentary gave power to nominate executor to testator, so that Court was required to appoint person named in will as executor unless he was incompetent under statute. In re Estate of Graf, 150 M 577, 437 P2d 371 (1968).

Attorney General's Opinions

Attorney General Opinion Inappropriate: Whether District Court Clerk must accept for filing creditor's claims against a decedent prior to appointment of a personal representative and whether such filing tolls the 3-year limitation on presentment of claims are inappropriate questions for an Attorney General Opinion. 37 A.G. Op. 135 (1978).

72-3-503. Objection to appointment.

Official Comments

[See Official Comments under 72-3-501.]

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-203(b).

Changes From Uniform Act: Montana codified section 3-203 of the Uniform Probate Code as 72-3-501 through 72-3-508.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Appointment or Removal of Personal Representative and Renunciation of Right to Appointment — Standards of Review: Whether a party has a statutory priority for appointment as a personal representative in Montana as a result of appointment as a personal representative in another state, as well as a coincident right to obtain removal of a special administrator, is a legal question that the Supreme Court will review to determine whether the District Court correctly interpreted the law (see In re Estate of Peterson, 264 M 104, 874 P2d 1230 (1994)). A question of whether a person has renounced the right to appointment as a personal representative involves the interpretation and application of the statute governing renunciation and will be reviewed for correctness (see In re Inquiry Into A.W., D.G., & M.G., Jr., 1999 MT 42, 293 M 358, 975 P2d 1250 (1999)). Whether a District Court has erred in refusing to appoint a person as a personal administrator, because that person has a conflict with another that prevents that person from being appointed a personal administrator, will be reviewed to determine whether there has been an abuse of the District Court's discretion (see In re Estate of Obstarczyk, 141 M 346, 377 P2d 531 (1963)). In re Estate of Kuralt, 2001 MT 153, 306 M 73, 30 P3d 345 (2001).

Standing of Decedent's Relatives to Appeal Settlement and Distribution Agreements: Decedent's mother, brother, and sister sought to appeal a contested settlement agreement and a distribution agreement ordered by the District Court, but decedent's surviving spouse, Barbara, contended that there was no standing for an appeal. The Supreme Court held that: (1) Barbara was not precluded from raising the issue of standing for the first time on appeal, even though she failed to object in District Court, because objections to standing cannot be waived; (2) decedent's mother, as a creditor of the estate, had standing to appeal the appointment of Barbara as personal representative, but a brother and sister, who were neither creditors nor heirs of the estate, lacked standing; (3) because decedent's mother, brother, and sister were not successors to the estate, they had no legal interest or personal stake in the distribution of the estate and thus lacked standing to claim that the distribution agreement was improper; and (4) decedent's mother, brother, and sister were parties to the contested settlement agreement and were directly affected by the validity of the agreement and thus had standing to appeal that issue. In re Estate of Goick, 275 M 13, 909 P2d 1165, 53 St. Rep. 12 (1996), following Holmstrom Land Co. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060 (1979), Grossman v. Dept. of Natural Resources and Conservation, 209 M 427, 682 P2d 1319 (1984), and Olson v. Dept. of Revenue, 223 M 464, 726 P2d 1162 (1986). Goick was followed, as to prerequisites for standing, in In re Paternity of Vainio, 284 M 229, 943 P2d 1282, 54 St. Rep. 858 (1997).

Objection to Appointment of Personal Representative Appropriate Only in Formal Proceedings: This section provides that an objection to the appointment of a personal representative can be made only in formal proceedings. In cases of informal probate, such an objection is inappropriate. In re Estate of Peterson, 265 M 104, 874 P2d 1230, 51 St. Rep. 454 (1994).

No Common-Law Marriage — Absence of Immediate Creation or Mutual Agreement to Marry: As in Sartain, cited below, the Supreme Court applied the standard of review set forth in Cameron, also cited below, and found that the purported common-law marriage lacked the essential of immediate creation. A common-law marriage cannot be created piecemeal but rather comes instantly into being or does not come at all. The District Court correctly applied Montana common-law marriage standards. In re Estate of White, 212 M 228, 686 P2d 915, 41 St. Rep. 1705 (1984).

The Supreme Court concluded that there is substantial evidence to support the District Court's findings of fact that no common-law marriage existed between Sherri and deceased and that deceased's ex-wife, Peggy, should be appointed personal representative. The findings of fact are not clearly erroneous and were not set aside. Because of contradictions in the evidence, the court respected the requirement under former Rule 52, M.R.Civ.P. (now superseded), that due regard be given to the opportunity of the District Court to judge the credibility of witnesses and applied the standard of review set forth in Cameron v. Cameron, 179 M 219, 587 P2d 939 (1978). The District Court properly applied Montana common-law marriage standards. Those standards were applied in Estate of Murnion, 212 M 107, 686 P2d 893, 41 St. Rep. 1627 (1984), in finding a mutual agreement to marry. In contrast, there was no evidence of any such agreement between Sherri and deceased. In re Estate of Sartain, 212 M 206, 686 P2d 909, 41 St. Rep. 1691 (1984).

Objection Not Limited to Heirs or Devisees: This section does not limit objectors in a proceeding to heirs or devisees. Subsection (2)(b) of 72-3-503 states that the priorities of 72-3-502 apply unless an heir or devisee having a sufficiently substantial interest objects. Upon objection, the court may appoint a person who does not meet the priorities of 72-3-502, but who is acceptable to heirs and devisees whose interest appears to be worth more than one-half of the estate. In re Estate of Karst, 200 M 254, 650 P2d 792, 39 St. Rep. 1723 (1982).

DECISIONS UNDER FORMER LAW

Causes for Disqualifying: The fact that named executors might have used undue influence in obtaining property of testator before death, thereby giving rise to claim in behalf of estate against executors, was not in itself evidence of want of integrity such as would disqualify them. In re Estate of Graf, 150 M 577, 437 P2d 371 (1968).

Attorney General's Opinions

Attorney General Opinion Inappropriate: Whether District Court Clerk must accept for filing creditor's claims against a decedent prior to appointment of a personal representative and whether such filing tolls the 3-year limitation on presentment of claims are inappropriate questions for an Attorney General Opinion. 37 A.G. Op. 135 (1978).

72-3-504. Renunciation — nomination of other — two or more persons sharing priority.

Official Comments

[See Official Comments under 72-3-501.]

Compiler's Comments

2019 Amendment: Chapter 313 in (1) near middle substituted "through (7)" for "through (6)". Amendment effective October 1, 2019.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-203(c).

Changes From Uniform Act: Montana codified section 3-203 of the Uniform Probate Code as 72-3-501 through 72-3-508.

Case Notes

Appointment or Removal of Personal Representative and Renunciation of Right to Appointment — Standards of Review: Whether a party has a statutory priority for appointment as a personal representative in Montana as a result of appointment as a personal representative in another state, as well as a coincident right to obtain removal of a special administrator, is a legal question that the Supreme Court will review to determine whether the District Court correctly interpreted the law (see In re Estate of Peterson, 264 M 104, 874 P2d 1230 (1994)). A question of whether a person has renounced the right to appointment as a personal representative involves the interpretation and application of the statute governing renunciation and will be reviewed for correctness (see In re Inquiry Into A.W., D.G., & M.G., Jr., 1999 MT 42, 293 M 358, 975 P2d 1250 (1999)). Whether a District Court has erred in refusing to appoint a person as a personal administrator, because that person has a conflict with another that prevents that person from being appointed a personal administrator, will be reviewed to determine whether there has been an abuse of the District Court's discretion (see In re Estate of Obstarczyk, 141 M 346, 377 P2d 531 (1963)). In re Estate of Kuralt, 2001 MT 153, 306 M 73, 30 P3d 345 (2001).

Error in Refusal to Appoint Domiciliary Personal Representative as Successor Personal Representative Because of Conflict With Devisee Rather Than Conflict With Estate: The District Court refused to appoint domiciliary personal representatives as successor personal representatives of an estate because of a perceived conflict with a devisee of the estate. As domiciliary personal representatives, they had priority for appointment, as well as the coincident right to obtain removal of a special administrator. However, a District Court may remove or refuse to appoint a personal representative for cause if there is a conflict between that person's interests and those of the estate. In this case, the refusal to appoint was an abuse of the District Court's discretion because the refusal was not based on a conflict of interest with the estate, but rather with a devisee. The Supreme Court found no reason to refuse the appointment simply because the personal representatives might resist the claims of the devisee. Rather, the court remanded with directions that the personal representatives post a satisfactory bond pursuant to 72-3-513 to account for the devisee's concerns. In re Estate of Kuralt, 2001 MT 153, 306 M 73, 30 P3d 345 (2001).

Objection to Appointment of Personal Representative Not Allowed: Reeves argued that the lower court had improperly appointed her brother personal representative for their father's estate because he had not approached Reeves and had her agree to his nomination as personal representative. The Supreme Court refused to rule on the issue of whether the lower court had improperly appointed the personal representative because in an informal proceeding a person can only petition to have the personal representative removed for cause and cannot object to the appointment of the personal representative. Estate of Melvin, 261 M 408, 862 P2d 1159, 50 St. Rep. 1382 (1993).

Attorney General's Opinions

Attorney General Opinion Inappropriate: Whether District Court Clerk must accept for filing creditor's claims against a decedent prior to appointment of a personal representative and whether such filing tolls the 3-year limitation on presentment of claims are inappropriate questions for an Attorney General Opinion. 37 A.G. Op. 135 (1978).

72-3-505. Rights of conservators relating to appointment.

Official Comments

[See Official Comments under 72-3-501.]

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-203(d).

Changes From Uniform Act: Montana codified section 3-203 of the Uniform Probate Code as 72-3-501 through 72-3-508.

Case Notes

Appointment of Ex-Wife as Personal Representative Based on Her Being Custodial Parent, Guardian, and Conservator of Heirs Affirmed — Best Interest of Estate Considered: The father of two young children died intestate and his father was appointed the personal representative of the estate. The decedent's former wife, the guardian and mother of the children, sought to remove the decedent's father as the personal representative and appoint herself instead based on her being the custodial parent, guardian, and conservator of the heirs. The District Court agreed that it was in the best interest of the estate to remove the decedent's father and appoint the former wife as its personal representative. The decedent's father appealed to the Supreme Court, which affirmed his removal and the appointment of his former daughter-in-law. Under the Uniform Probate Code, the conservator has the right to nominate the personal representative of the estate even if it is the former spouse of the decedent. In re Estate of Bennett, 2013 MT 228, 371 Mont. 270, 312 P.3d 400.

Attorney General's Opinions

Attorney General Opinion Inappropriate: Whether District Court Clerk must accept for filing creditor's claims against a decedent prior to appointment of a personal representative and whether such filing tolls the 3-year limitation on presentment of claims are inappropriate questions for an Attorney General Opinion. 37 A.G. Op. 135 (1978).

72-3-506. Priority of domiciliary personal representative.

Official Comments

[See Official Comments under 72-3-501.]

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-203(g).

Changes From Uniform Act: Montana codified section 3-203 of the Uniform Probate Code as 72-3-501 through 72-3-508.

Case Notes

Appointment or Removal of Personal Representative and Renunciation of Right to Appointment — Standards of Review: Whether a party has a statutory priority for appointment as a personal representative in Montana as a result of appointment as a personal representative in another state, as well as a coincident right to obtain removal of a special administrator, is a legal question that the Supreme Court will review to determine whether the District Court correctly interpreted the law (see In re Estate of Peterson, 264 M 104, 874 P2d 1230 (1994)). A question of whether a person has renounced the right to appointment as a personal representative involves the interpretation and application of the statute governing renunciation and will be reviewed for correctness (see In re Inquiry Into A.W., D.G., & M.G., Jr., 1999 MT 42, 293 M 358, 975 P2d 1250 (1999)). Whether a District Court has erred in refusing to appoint a person as a personal administrator, because that person has a conflict with another that prevents that person from being appointed a personal administrator, will be reviewed to determine whether there has been an abuse of the District Court's discretion (see In re Estate of Obstarczyk, 141 M 346, 377 P2d 531 (1963)). In re Estate of Kuralt, 2001 MT 153, 306 M 73, 30 P3d 345 (2001).

Error in Refusal to Appoint Domiciliary Personal Representative as Successor Personal Representative Because of Conflict With Devisee Rather Than Conflict With Estate: The District Court refused to appoint domiciliary personal representatives as successor personal representatives of an estate because of a perceived conflict with a devisee of the estate. As domiciliary personal representatives, they had priority for appointment, as well as the coincident right to obtain removal of a special administrator. However, a District Court may remove or refuse to appoint a personal representative for cause if there is a conflict between that person's interests and those of the estate. In this case, the refusal to appoint was an abuse of the District Court's discretion because the refusal was not based on a conflict of interest with the estate, but rather with a devisee. The Supreme Court found no reason to refuse the appointment simply because the personal representatives might resist the claims of the devisee. Rather, the court remanded with directions that the personal representatives post a satisfactory bond pursuant to 72-3-513 to account for the devisee's concerns. In re Estate of Kuralt, 2001 MT 153, 306 M 73, 30 P3d 345 (2001).

Attorney General's Opinions

Attorney General Opinion Inappropriate: Whether District Court Clerk must accept for filing creditor's claims against a decedent prior to appointment of a personal representative and whether such filing tolls the 3-year limitation on presentment of claims are inappropriate questions for an Attorney General Opinion. 37 A.G. Op. 135 (1978).

72-3-507. Appointment of one not having priority.

Official Comments

[See Official Comments under 72-3-501.]

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-203(e).

Changes From Uniform Act: Montana codified section 3-203 of the Uniform Probate Code as 72-3-501 through 72-3-508.

Attorney General's Opinions

Attorney General Opinion Inappropriate: Whether District Court Clerk must accept for filing creditor's claims against a decedent prior to appointment of a personal representative and whether such filing tolls the 3-year limitation on presentment of claims are inappropriate questions for an Attorney General Opinion. 37 A.G. Op. 135 (1978).

72-3-508. Application of priority provisions to appointment of successor.

Official Comments

[See Official Comments under 72-3-501.]

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-203(h).

Changes From Uniform Act: Montana codified section 3-203 of the Uniform Probate Code as 72-3-501 through 72-3-508.

Attorney General's Opinions

Attorney General Opinion Inappropriate: Whether District Court Clerk must accept for filing creditor's claims against a decedent prior to appointment of a personal representative and whether such filing tolls the 3-year limitation on presentment of claims are inappropriate questions for an Attorney General Opinion. 37 A.G. Op. 135 (1978).

72-3-511. Acceptance of appointment — consent to jurisdiction.

Official Comments

Except for personal representatives appointed pursuant to [72-3-402], appointees are not deemed to be "officers" of the appointing court or to be parties in one continuous judicial proceeding that extends until final settlement. See [72-3-121]. Yet, it is desirable to continue present patterns which prevent a personal representative who might make himself unavailable to service within the state from affecting the power of the appointing court to enter valid orders affecting him. See Michigan Trust Co. v. Ferry (1912), 228 U.S. 346, 57 L.Ed. 867, 33 S.Ct. 550. The concept employed to accomplish this is that of requiring each appointee to consent in advance to the personal jurisdiction of the court in any proceeding relating to the estate that may be instituted against him. The section requires that he be given notice of any such proceeding, which, when considered in the light of the responsibility he has undertaken, should make the procedure sufficient to meet the requirements of due process.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-602.

72-3-512. Qualification — filing of bond and statement of acceptance.

Official Comments

This and related sections of this part describe details and conditions of appointment which apply to all personal representatives without regard to whether the appointment proceeding involved is formal or informal, or whether the personal representative is supervised. Section [72-1-204] authorizes issuance of copies of letters and prescribes their content. The section should be read with [72-3-404(3)] which directs endorsement on letters of any restrictions of power of a supervised administrator.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-601.

72-3-513. Bond — when required.

Official Comments

This section must be read with the next three sections. The purpose of these provisions is to move away from the idea that bond always should be required of a probate fiduciary, or required unless a will excuses it. Also, it is designed to keep the registrar acting pursuant to applications in informal proceedings, from passing judgment in each case on the need for bond. The point is that the court and registrar are not responsible for seeing that personal representatives perform as they are supposed to perform. Rather, performance is coerced by the remedies available to interested persons. Interested persons are protected by their ability to demand prior notice of informal proceedings ([72-3-106]), to contest a requested appointment by use of a formal testacy proceeding or by use of a formal proceeding seeking the appointment of another person. Section [72-3-111(1)] gives general authority to the court in a formal proceeding to make appropriate orders as desirable incident to estate administration. This should be sufficient to make it clear that an informal application may be blocked by a formal petition which disputes the matters stated in the petition. Furthermore, an interested person has the remedies provided in [72-3-514 and 72-3-617]. Finally, interested persons have assurance under this code that their rights in respect to the values of a decedent's estate cannot be terminated without a judicial order after notice or before the passage of three years from the decedent's death.

It is believed that the total package of protection thus afforded may represent more real protection than a blanket requirement of bond. Surely, it permits a reduction in the procedures which must occur in uncomplicated estates where interested persons are perfectly willing to trust each other and the fiduciary.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-603.

Case Notes

Error in Refusal to Appoint Domiciliary Personal Representative as Successor Personal Representative Because of Conflict With Devisee Rather Than Conflict With Estate: The District Court refused to appoint domiciliary personal representatives as successor personal representatives of an estate because of a perceived conflict with a devisee of the estate. As domiciliary personal representatives, they had priority for appointment, as well as the coincident right to obtain removal of a special administrator. However, a District Court may remove or refuse to appoint a personal representative for cause if there is a conflict between that person's interests and those of the estate. In this case, the refusal to appoint was an abuse of the District Court's discretion because the refusal was not based on a conflict of interest with the estate, but rather with a devisee. The Supreme Court found no reason to refuse the appointment simply because the personal representatives might resist the claims of the devisee. Rather, the court remanded with directions that the personal representatives post a satisfactory bond pursuant to this section to account for the devisee's concerns. In re Estate of Kuralt, 2001 MT 153, 306 M 73, 30 P3d 345 (2001).

72-3-514. Demand for bond by interested person.

Official Comments

The demand for bond described in this section may be made in a petition or application for appointment of a personal representative, or may be made after a personal representative has been appointed. The mechanism for compelling bond is designed to function without unnecessary judicial involvement. If demand for bond is made in a formal proceeding, the judge can determine the amount of bond to be required with due consideration for all circumstances. If demand is not made in formal proceedings, methods for computing the amount of bond are provided by statute so that the demand can be complied with without resort to judicial proceedings. The information which a personal representative is required by [72-3-603] to give each beneficiary includes a statement concerning whether bond has been required.

Compiler's Comments

2019 Amendment: Chapter 313 in (1) in first sentence in two places substituted "$5,000" for "$1,000". Amendment effective October 1, 2019.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-605.

Case Notes

Failure to Post Bond — No Removal of Personal Representative Without Notice: It was proper to deny a motion to remove a personal representative for not posting the bond demanded under this section when the personal representative did not receive notice of the demand to post bond. In re Estate of Fogerty, 221 M 336, 719 P2d 425, 43 St. Rep. 873 (1986).

72-3-515. Bond amount — security — reduction.

Official Comments

This section permits estimates of value needed to fix the amount of required bond to be filed when it becomes necessary. A consequence of this procedure is that estimates of value of estates no longer need appear in the petitions and applications which will attend every administered estate. Hence, a measure of privacy that is not possible under most existing procedures may be achieved. A co-signature arrangement might constitute adequate security within the meaning of this section.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-604.

72-3-516. Terms of bond — liability of surety.

Official Comments

[Subsection (1)(a)] is based, in part, on Section 109 of the Model Probate Code. [Subsection (1)(c)] is derived from Section 118 of the Model Probate Code.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-606.

72-3-521. Termination of appointment — general effect.

Official Comments

"Termination," as defined by this and succeeding provisions, provides definiteness respecting when the powers of a personal representative (who may or may not be discharged by court order) terminate.

It is to be noted that this section does not relate to jurisdiction over the estate in proceedings which may have been commenced against the personal representative prior to termination. In such cases, a substitution of successor or special representative should occur if the plaintiff desires to maintain his action against the estate.

It is important to note that "termination" is not "discharge." However, an order of the court entered under [72-3-1001, 72-3-1002, or 72-3-1003] both terminates the appointment of, and discharges, a personal representative.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-608.

72-3-522. Termination of appointment — death or disability.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-609.

72-3-523. Termination of appointment — change of testacy status.

Official Comments

This section and [72-3-302 through 72-3-304] describe the relationship between formal or informal proceedings which change a previous assumption concerning the testacy of the decedent, and a previously appointed personal representative. The basic assumption of both sections is that an appointment, with attendant powers of management, is separable from the basis of appointment; i.e., intestate or testate?; what will is the last will? Hence, a previously appointed personal representative continues to serve in spite of formal or informal proceedings that may give another a prior right to serve as personal representative. But, if the testacy status is changed in formal proceedings, the petitioner also may request appointment of the person who would be entitled to serve if his assumption concerning the decedent's will prevails. Provision is made for a situation where all interested persons are content to allow a previously appointed personal representative to continue to serve even though another has a prior right because of a change relating to the decedent's will. It is not necessary for the continuing representative to seek reappointment under the new assumption for [72-3-604, 72-3-610, and 72-3-611 are] broad enough to require him to administer the estate as intestate, or under a later probated will, if either status is established after he was appointed. Under [72-3-305 and 72-3-306], notice of a formal testacy proceeding is required to be given to any previously appointed personal representative. Hence, the testacy status cannot be changed without notice to a previously appointed personal representative.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-612.

72-3-524. Termination of appointment — closing of estate.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-610(a), (b).

Changes From Uniform Act: Montana codified section 3-610 of the Uniform Probate Code as 72-3-524 and 72-3-525.

72-3-525. Termination of appointment — voluntary.

Official Comments

[Section 72-3-525] provides a procedure for resignation by a personal representative which may occur without judicial assistance.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-610(c).

Changes From Uniform Act: Montana codified section 3-610 of the Uniform Probate Code as 72-3-524 and 72-3-525. The Official Comments appearing under 72-3-525 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-610 of the Uniform Probate Code.

Case Notes

Personal Representative Removed for Cause — Resignation Rejected: The petitioner had brought an action to remove the personal representative for cause. Prior to any hearing on the petition, the personal representative submitted a letter of resignation. The lower court refused to accept the resignation and granted the petitioner's request to remove the personal representative for cause. The Supreme Court affirmed, holding that a resignation is not effective until a replacement is named. The lower court did not abuse its discretion in choosing to remove the personal representative rather than accept his resignation. Brown v. Robbins, 243 M 276, 794 P2d 677, 47 St. Rep. 1218 (1990).

72-3-526. Termination of appointment — removal for cause.

Official Comments

Thought was given to qualifying [(1)] above so that no formal removal proceedings could be commenced until after a set period from entry of any previous order reflecting judicial consideration of the qualifications of the personal representative. It was decided, however, that the matter should be left to the judgment of interested persons and the court.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-611.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Frivolous Pleadings, Lack of Judgment as Cause for Removal: After a personal representative brought frivolous pleadings delaying adjudication of an estate dispute, the judge removed the personal representative. The judge noted that the personal representative lacked judgment in filing the pleadings. The Supreme Court affirmed, finding removal necessary for the expeditious settlement and closure of the estate. In re Estate of Boland, 2019 MT 236, 397 Mont. 319, 450 P.3d 849.

No Standing to Remove Personal Representative for Cause: In determining whether a party has standing to petition for removal of a personal representative for cause, the Supreme Court held that "a person interested in the estate" is synonymous with "interested person" in 72-1-103, and that a pending will contest does not change a presumption of testacy or create a property right on which standing to remove a personal representative can be based. In re Estate of Lawlor, 2015 MT 54, 378 Mont. 281, 343 P.3d 577.

Potential Claim Against Personal Representative Sufficient Conflict of Interest to Warrant Removal for Cause: The District Court did not abuse its discretion in removing a personal representative for cause based on the existence of a potential claim against the personal representative sufficient to create a conflict of interest contrary to the best interests of the estate. In re Estate of Anderson-Feeley, 2007 MT 354, 340 M 352, 174 P3d 512 (2007), following In re Estate of Peterson, 264 M 104, 874 P2d 1230 (1994).

Insufficient Criteria to Warrant Removal of Personal Representative: Plaintiff claimed that the personal representative of Bjerke's estate should be removed because the representative distributed money contrary to the express terms of the will and improperly withheld property to which plaintiff was entitled. The District Court declined to remove the personal representative, and on appeal, the Supreme Court affirmed, given plaintiff's failure to establish any of the statutory criteria sufficient to warrant removal of the personal representative. Hanson v. Estate of Bjerke, 2004 MT 200, 322 M 280, 95 P3d 704 (2004).

Appointment or Removal of Personal Representative and Renunciation of Right to Appointment — Standards of Review: Whether a party has a statutory priority for appointment as a personal representative in Montana as a result of appointment as a personal representative in another state, as well as a coincident right to obtain removal of a special administrator, is a legal question that the Supreme Court will review to determine whether the District Court correctly interpreted the law (see In re Estate of Peterson, 264 M 104, 874 P2d 1230 (1994)). A question of whether a person has renounced the right to appointment as a personal representative involves the interpretation and application of the statute governing renunciation and will be reviewed for correctness (see In re Inquiry Into A.W., D.G., & M.G., Jr., 1999 MT 42, 293 M 358, 975 P2d 1250 (1999)). Whether a District Court has erred in refusing to appoint a person as a personal administrator, because that person has a conflict with another that prevents that person from being appointed a personal administrator, will be reviewed to determine whether there has been an abuse of the District Court's discretion (see In re Estate of Obstarczyk, 141 M 346, 377 P2d 531 (1963)). In re Estate of Kuralt, 2001 MT 153, 306 M 73, 30 P3d 345 (2001).

Error in Refusal to Appoint Domiciliary Personal Representative as Successor Personal Representative Because of Conflict With Devisee Rather Than Conflict With Estate: The District Court refused to appoint domiciliary personal representatives as successor personal representatives of an estate because of a perceived conflict with a devisee of the estate. As domiciliary personal representatives, they had priority for appointment, as well as the coincident right to obtain removal of a special administrator. However, a District Court may remove or refuse to appoint a personal representative for cause if there is a conflict between that person's interests and those of the estate. In this case, the refusal to appoint was an abuse of the District Court's discretion because the refusal was not based on a conflict of interest with the estate, but rather with a devisee. The Supreme Court found no reason to refuse the appointment simply because the personal representatives might resist the claims of the devisee. Rather, the court remanded with directions that the personal representatives post a satisfactory bond pursuant to 72-3-513 to account for the devisee's concerns. In re Estate of Kuralt, 2001 MT 153, 306 M 73, 30 P3d 345 (2001).

Hostility and Alienation — Removal of Copersonal Representative Within Discretion of Trial Court: Two sisters and a brother were appointed copersonal representatives of their mother's estate. The District Court removed the brother after finding that significant hostility and alienation existed between the sisters and him and that removal would enable an expeditious settlement and closure of the estate. The brother appealed the removal, contending that there were no legal grounds for it and that the court abused its discretion in doing so. The Supreme Court noted that a trial judge is given broad discretion to remove a personal representative for cause if the grounds are valid and supported by the record. Here, in addition to the hostility and alienation, the brother also violated specific orders of the court by refusing to prepare personal property lists and sign tax documents. The District Court did not err in finding that the brother provided no useful service as copersonal representative, and the Supreme Court affirmed his removal and declined to award his requested share of the personal representative fees. In re Estate of Greenheck, 2001 MT 114, 305 M 308, 27 P3d 42 (2001).

Conflict of Interest of Personal Representative Cured by Court Supervision of Estate: Prior to Zempel's death, he executed his will, naming his daughter, Palmer, as his sole devisee and his neighbor, Newman, as personal representative of the estate. Zempel then entered into an agreement to sell his ranch to Newman, who, acting pursuant to the power of attorney, executed a contract for deed and lease that transferred the ranch property to Newman. Following Zempel's death, the District Court appointed Palmer as special administrator based on an ex parte application. Shortly thereafter, Newman filed a petition for formal probate and appointment of personal representative, in conjunction with a motion to set aside the ex parte order. The District Court terminated the ex parte order, appointed Newman as personal representative, and ordered that any real estate transaction be approved by the court after notice and hearing. Palmer appealed Newman's appointment as personal representative, citing the conflict of interest that arose from the documents purportedly transferring estate assets to Newman. A conflict of interest is sufficient for removal of a personal representative for cause, but does not mandate removal. As established in In re Estate of Goick, 275 M 13, 909 P2d 1165 (1996), a transaction involving a conflict of interest between a personal representative and an estate can be cured by a court-ordered supervision of the transaction. The District Court did not act arbitrarily in this case because it required its approval for the final transaction between the personal representative and the estate, protecting any objection or challenge by Palmer through supervision of the disputed transaction, which cured the conflict of interest. The court did not err when it appointed Newman as personal representative, and the appointment was affirmed. In re Estate of Zempel, 2000 MT 283, 302 M 183, 14 P3d 441, 57 St. Rep. 1182 (2000).

Alleged Failure of Personal Representative to Conduct Duties Insufficient to Warrant Removal: Haagenson's children filed a petition seeking removal of their stepmother, Darla, as personal representative of Haagenson's estate and for supervised administration of the estate, contending that because of a conflict of interest, Darla had become unable to discharge the duties of a personal representative, had mismanaged the estate, and had failed to perform the duties of her office. The District Court properly determined that absent an evidentiary showing, the children's mere allegations were an insufficient basis upon which to find that Darla had mismanaged the estate in a manner warranting her removal as personal representative. In re Estate of Haagenson, 286 M 34, 952 P2d 1385, 54 St. Rep. 1271 (1997).

Claim Against Personal Representative for Excessive Attorney Fees Sufficient to Warrant Removal: A potential claim against a personal representative, who was an attorney, for excessive attorney fees was sufficient to create a conflict of interest warranting removal for cause under this section. In re Estate of Peterson, 264 M 104, 874 P2d 1230, 51 St. Rep. 454 (1994), citing In re Estate of Obstarczyk, 141 M 346, 377 P2d 531 (1963).

Objection to Appointment of Personal Representative Not Allowed: Reeves argued that the lower court had improperly appointed her brother personal representative for their father's estate because he had not approached Reeves and had her agree to his nomination as personal representative. The Supreme Court refused to rule on the issue of whether the lower court had improperly appointed the personal representative because in an informal proceeding a person can only petition to have the personal representative removed for cause and cannot object to the appointment of the personal representative. Estate of Melvin, 261 M 408, 862 P2d 1159, 50 St. Rep. 1382 (1993).

Circumstantial Evidence Sufficient for Removal of Personal Representative: The personal representative argued that there was insufficient evidence to support his removal by the lower court. The Supreme Court held that there was strong circumstantial evidence of wrongdoing. Three checks allegedly signed by the deceased and totaling $60,000 were deposited into an account to which the personal representative had access. The checks were dated at a time when the decedent had been comatose. The Supreme Court stated that the lower court did not abuse its discretion in concluding that the signatures had been forged by the personal representative. Brown v. Robbins, 243 M 276, 794 P2d 677, 47 St. Rep. 1218 (1990).

Inadequacy of Inventory and Appraisal — Removal of Personal Representative Warranted: The District Court did not abuse its discretion in removing a personal representative when substantial evidence showed that removal was in the best interest of the estate because: (1) an inventory and appraisement did not include the full and true value of each item, as required in 72-3-607; (2) several items were not listed in the inventory; (3) certain values were subject to question; and (4) the appraiser testified that he was not a certified gemologist and did not scientifically test items of jewelry listed in the inventory. In re Estate of Townsend, 243 M 185, 793 P2d 818, 47 St. Rep. 1120 (1990), followed in In re Estate of Hannum, 2012 MT 171, 366 Mont. 1, 285 P.3d 463.

Unsupported Removal of Personal Representative Improper: It was improper for the District Court to remove a personal representative in the absence of evidence establishing valid grounds for removal. In re Estate of Robbin, 230 M 30, 747 P2d 869, 44 St. Rep. 2228 (1987).

Abuse of Discretion — Refusal to Remove Personal Representative: Devisees appealed District Court's denial of petition to terminate the appointment of a personal representative. On appeal, the Supreme Court reversed and remanded for appointment of a successor, stating that the District Court had abused its discretion in disregarding uncontroverted evidence that the personal representative failed to judiciously administer the estate, failed to provide requests for accounting, and misled devisees. In re Estate of Stone, 223 M 327, 727 P2d 508, 43 St. Rep. 1760 (1986).

"Common Fund" Concept Not Applicable: When the petitioner made a motion to remove copersonal representatives after the court had held two hearings to approve accountings by the personal representatives and the motion was denied, the petitioner was not entitled to attorney fees from the estate. The common fund doctrine did not apply because the petitioner did not create, reserve, or increase a fund, and there were no reasonable grounds for her to expect to do so. In re Estate of Counts, 217 M 350, 704 P2d 1052, 42 St. Rep. 1243 (1985).

Hearing Not Mandatory — Res Judicata: When the District Court had held two hearings before approving accountings by copersonal representatives of the estate, the court did not abuse its discretion by denying, without a hearing, a subsequent motion to remove the personal representatives. The petition for removal was based on subjects covered in the first and second accountings, and petitioner was not denied an opportunity to be heard. Due process does not require a new hearing on matters that are res judicata. Petitioner's relief was to appeal the order approving the accountings, not to start a new action to remove the personal representatives. A hearing is required only if the petition states a cause for removal. In re Estate of Counts, 217 M 350, 704 P2d 1052, 42 St. Rep. 1243 (1985), followed in State ex rel. Dept. of Health and Environmental Sciences v. Reese, 260 M 24, 858 P2d 357, 50 St. Rep. 925 (1993).

Petition to Remove Personal Representative — Discovery Limited: The District Court did not err by ruling that copersonal representatives did not have to answer interrogatories filed in relation to petitioner's motion to remove the personal representatives. This is within the court's discretion to limit discovery under the Montana Rules of Civil Procedure. In re Estate of Counts, 217 M 350, 704 P2d 1052, 42 St. Rep. 1243 (1985).

Grounds for Removal to Be Valid and Supported by Record: Wooten, an attorney, made and executed a holographic will which appointed Grafft as personal representative. The will gave Grafft personalty and a life estate in real property with several charities as remaindermen. Wooten died, and Grafft was appointed as personal representative. The remaindermen petitioned to remove Grafft as personal representative. The District Court removed Grafft, who appealed. The Supreme Court found that a trial judge has broad discretion as to the grounds upon which he may remove a personal representative, but the grounds must be valid and supported by the record. The record contained numerous expenditures of estate funds of questionable legitimacy, including the use of funds to finance the defense of certain criminal charges. The removal was upheld. In re the Estate of Wooten, 198 M 132, 643 P2d 1196, 39 St. Rep. 816 (1982); followed in In re Estate of Lehner, 220 M 129, 714 P2d 130, 43 St. Rep. 231 (1986).

DECISIONS UNDER FORMER LAW

Examination of Administrator: In proceeding for removal of administrator for misappropriation of funds of estate, administrator could be examined as adverse witness as provided in former Rule 43, M.R.Civ.P. (now superseded); former Rule 81 (now superseded), excluding statutory proceedings from Rules of Civil Procedure to extent that statutory proceedings are contrary to rules, did not bar examination of administrator as adverse witness. In re Estate and Guardianship of Wyman, 149 M 525, 429 P2d 629 (1967).

Inventory of Assets: Administratrix who failed to file inventory and appraisement within 3 months after appointment, failed to file first accounting within 6 months after appointment, failed to make money from sale of property available to heirs, failed to provide estate with interest on money from sale of property, lost inheritance tax credit, and allowed tax penalties to be assessed against estate was properly removed. In re Estate of Smith, 149 M 326, 426 P2d 575 (1967).

72-3-527. Successor personal representative.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-613.

Part 6
Personal Representative Powers, Duties, and Compensation

Part Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Limits on Role of Personal Representative — Conflict of Interest — Appointment of Special Administrator: While a claim by an estate was pending, the law partner of the attorney opposing the claim was appointed personal representative of the estate. On appeal from the denial of a petition to remove the personal representative or to appoint a special administrator, the Montana Supreme Court held that a special administrator should be appointed to handle the above claim. The personal representative was allowed to continue his duties with the exception of the claim involving his law partner. In re the Estate of Sauter, 189 M 244, 615 P2d 875, 37 St. Rep. 1425 (1980).

DECISIONS UNDER FORMER LAW

Jurisdiction of District Court on Remand: When the Supreme Court in the disposition of an appeal from an order settling an administrator's account remands the cause with directions to require that officer to file a further account and orders, as it could under 72-10-111 (now repealed), that the costs incident to the appeal shall be paid by the administrator personally, the jurisdiction of the District Court is limited to the enforcement of the order, except that it may determine disputed questions of costs or, on final settlement of the account, allow such portions of the costs incurred as a charge against the estate as justice may require. (Provisions of 72-12-502 (now repealed) were not applicable.) In re Jennings' Estate, 79 M 73, 254 P 1067 (1927).

72-3-601. Time of accrual of duties and powers — power of executor prior to appointment — ratification.

Official Comments

This section codifies the doctrine that the authority of a personal representative relates back to death from the moment it arises. It also makes it clear that authority of a personal representative stems from his appointment. The sentence concerning ratification is designed to eliminate technical questions that might arise concerning the validity of acts done by others prior to appointment. Section [72-3-613(21)] relates to delegation of authority after appointment. The third sentence accepts an idea found in the Illinois Probate Act, § 79.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-701.

72-3-602. Priority among different letters.

Official Comments

The qualification relating to "modification" of an appointment is intended to refer to the change that may occur in respect to the exclusive authority of one with letters upon later appointment of a corepresentative or of a special administrator. The sentence concerning erroneous dual appointment is derived from recent New York legislation. See Section 704, Surrogate's Court Procedures Act.

Erroneous appointment of a second personal representative is possible if formal proceedings after notice are employed. It might be desirable for a state to promulgate a system whereby a notation of letters issued by each county probate office would be relayed to a central record keeping office which, in turn could indicate to any other office whether letters for a particular decedent, perhaps identified by social security number, had been issued previously. The problem can arise even though notice to known interested persons and by publication is involved.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-702.

72-3-603. Notice of appointment to heirs and devisees.

Official Comments

This section requires the personal representative to inform persons who appear to have an interest in the estate as it is being administered, of his appointment. Also, it requires the personal representative to give notice to persons who appear to be disinherited by the assumption concerning testacy under which the personal representative was appointed. The communication involved is not to be confused with the notice requirements relating to litigation. The duty applies even though there may have been a prior testacy proceeding after notice, except that persons who have been adjudicated to be without interest in the estate are excluded. The rights, if any, of persons in regard to estates cannot be cut off completely except by the running of the three-year statute of limitations provided in [72-3-122], or by a formal judicial proceeding which will include full notice to all interested persons. The interests of some persons may be shifted from rights to specific property of the decedent to the proceeds from sale thereof, or to rights to values received by distributees. However, such a shift of protected interest from one thing to another, or to funds or obligations, is not new in relation to trust beneficiaries. A personal representative may initiate formal proceedings to determine whether persons, other than those appearing to have interests, may be interested in the estate, under [72-3-302 through 72-3-304] or, in connection with a formal closing, as provided by [72-3-1001 and 72-3-1002].

No information or notice is required by this section if no personal representative is appointed.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: Inserted (2)(b) relating to notification of administration by personal representative under Uniform Probate Code without supervision by the court; and made minor changes in form and phraseology.

1989 Editorial Comment: This change results from an amendment proposed by the Joint Editorial Board of the national Uniform Probate Code in 1987. The addition improves the likelihood that persons interested in an estate administered in the national Uniform Probate Code's "unsupervised estate" mode will realize that certain information from the personal representative may be expected and that the probate court, though unlikely to intervene on its own motion, is the appropriate place to file petitions for any desired relief by the court. See corresponding national Uniform Probate Code section 3-705.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-705.

72-3-604. Standing to sue.

Official Comments

[Sections 72-3-604, 72-3-605, 72-3-610, and 72-3-611] are especially important sections for they state the basic theory underlying the duties and powers of personal representatives. Whether or not a personal representative is supervised, [72-3-604, 72-3-610, and 72-3-611 apply] to describe the relationship he bears to interested parties. If a supervised representative is appointed, or if supervision of a previously appointed personal representative is ordered, an additional obligation to the court is created. See [72-3-401 and 72-3-404].

The fundamental responsibility is that of a trustee. Unlike many trustees, a personal representative's authority is derived from appointment by the public agency known as the Court. But, the Code also makes it clear that the personal representative, in spite of the source of his authority, is to proceed with the administration, settlement and distribution of the estate by use of statutory powers and in accordance with statutory directions. See [72-3-121 and 72-3-605]. [Section 72-3-611] is particularly important, for it ties the question of personal liability for administrative or distributive acts to the question of whether the act was "authorized at the time" [see 72-3-611]. Thus, a personal representative may rely upon and be protected by a will which has been probated without adjudication or an order appointing him to administer which is issued in no-notice proceedings even though proceedings occurring later may change the assumption as to whether the decedent died testate or intestate. See [72-3-215] concerning the status of a will probated without notice and [72-3-102] concerning ineffectiveness of an unprobated will. However, it does not follow from the fact that the personal representative distributed under authority that the distributees may not be liable to restore the property or values received if the assumption concerning testacy is later changed. See [72-3-906 and 72-3-1012]. Thus, a distribution may be "authorized at the time" within the meaning of [72-3-611], but be "improper" under the latter section.

[Section 72-3-604] is designed to reduce or eliminate differences in the amenability to suit of personal representatives appointed under this Code and under traditional assumptions. Also, the [section] states that so far as the law of the appointing forum is concerned, personal representatives are subject to suit in other jurisdictions. It, together with various provisions of [Chapter 4], are designed to eliminate many of the present reasons for ancillary administrations.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-703(c).

Changes From Uniform Act: Montana codified section 3-703 of the Uniform Probate Code as 72-3-604, 72-3-610, and 72-3-611. The Official Comments appearing under 72-3-604 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-703 of the Uniform Probate Code.

Case Notes

Attorney's Duty of Care Owed to Estate Beneficiary — Standing of Estate to Bring Legal Malpractice Action: A personal representative brought a legal malpractice damage suit on behalf of the estate against an attorney who drafted a trust document and will. Before granting summary judgment to the attorney, the District Court raised the issue of whether the estate and personal representative had standing to bring the suit, based on a questionable fiduciary relationship between the plaintiffs and the attorney. On appeal, the Supreme Court concluded that as a representative of the decedent, the estate stood in the shoes of the decedent and was thus considered to be in privity with the attorney, so the estate had standing to bring a malpractice claim. Further, the question of whether the trust and the personal representative had standing was a question of fact to be determined at trial, so summary judgment was precluded and the case remanded for further proceedings. Watkins Trust v. Lacosta, 2004 MT 144, 321 M 432, 92 P3d 620 (2004).

Appointment of Special Administrator for Failure of Personal Representatives to Sue: The residual beneficiary under a will petitioned to have itself appointed as special administrator of the estate. The personal representatives disagreed with the petitioner's opinion that the Skrochs abused their confidential relationship with the testatrix and unduly influenced her to create a joint tenancy, with rights of survivorship, in bank accounts totaling $190,000, at a time when she was allegedly incompetent. The petitioner wanted the personal representatives to litigate the claim, and they refused to do so after investigating the matter. There was no showing that the personal representatives were guilty of fraud, collusion, conflict of interest, or inability to act or that other special equitable circumstances required the petition to be granted. The petition was properly denied. In re Estate of Long, 225 M 429, 732 P2d 1347, 44 St. Rep. 375 (1987).

72-3-605. Personal representative to proceed without court order — power to invoke jurisdiction.

Official Comments

This section is intended to confer authority on the personal representative to initiate a proceeding at any time when it is necessary to resolve a question relating to administration. Section [72-3-111(1)] grants broad subject matter jurisdiction to the probate court which covers a proceeding initiated for any purpose other than those covered by more explicit provisions dealing with testacy proceedings, proceedings for supervised administration, proceedings concerning disputed claims and proceedings to close estates.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-704.

Case Notes

Probate Court's Jurisdiction Over Wrongful Death Action in Another District: Estate was being probated in one District Court, and personal representative's wrongful death action was being considered in another district. The probate court exceeded its jurisdiction when it assumed jurisdiction over the settlement of the wrongful death action, approved it, and ordered dismissal of the action. The Supreme Court stated that whether the proceeds of the settlement or award in the wrongful death action belonged to the estate or to the heirs was pertinent to the issue of the probate court's jurisdiction over the wrongful death action and that the probate court had jurisdiction only if the proceeds belonged to the estate. The Supreme Court did not appear to definitively decide the underlying issue, though it leaned toward the traditional rule that the proceeds belong to the heirs, are personal to them, and constitute no part of the estate. The court stated that it was for the Legislature to decide whether a District Court acting as a probate court should have some jurisdiction over a wrongful death claim filed in another District Court. In re Pegg's Estate, 209 M 71, 680 P2d 316, 41 St. Rep. 558 (1984).

72-3-606. Possession and protection of estate.

Official Comments

Section [72-3-101] provides for devolution of title on death. Section [72-3-616] defines the status of the personal representative with reference to "title" and "power" in a way that should make it unnecessary to discuss the "title" to decedent's assets which his personal representative acquires. This section deals with the personal representative's duty and right to possess assets. It proceeds from the assumption that it is desirable whenever possible to avoid disruption of possession of the decedent's assets by his devisees or heirs. But, if the personal representative decides that possession of an asset is necessary or desirable for purposes of administration, his judgment is made conclusive in any action for possession that he may need to institute against an heir or devisee. It may be possible for an heir or devisee to question the judgment of the personal representative in later action for surcharge for breach of fiduciary duty, but this possibility should not interfere with the personal representative's administrative authority as it relates to possession of the estate.

This code follows the Model Probate Code in regard to partnership interests. In the introduction to the Model Probate Code, the following appears at p.22:

"No provisions for the administration of partnership estates when a partner dies have been included. Several states have statutes providing that unless the surviving partner files a bond with the probate court, the personal representative of the deceased partner may administer the partnership estate upon giving an additional bond. Kan. Gen. Stat. (Supp. 1943) §§ 59-1001 to 59-1005; Mo. Rev. Stat. Ann. (1942) §§ 81 to 93. In these states the administration of partnership estates upon the death of a partner is brought more or less completely under the jurisdiction of the probate court. While the provisions afford security to parties in interest, they have caused complications in the settlement of partnership estates and have produced much litigation. Woener, Administration (3rd ed., 1923) §§ 128 to 130; annotation, 121 A.L.R. 860. These statutes have been held to be inconsistent with section 37 of the Uniform Partnership Act [Title 35, ch. 10] providing for winding up by the surviving partner. Davis v. Hutchinson (C.C.A. 9th, 1929) 36 F.(2d) 309. Hence the Model Probate Code contains no provision regarding partnership property except for inclusion in the inventory of the decedent's proportionate share of any partnership. See § 120. However, it is suggested that the Uniform Partnership Act should be included in the statutes of the states which have not already enacted it."

Compiler's Comments

2009 Amendments — Composite Section: Chapter 2 in (1) near beginning of first sentence after "will" deleted "and subject to the provisions of chapter 12, part 7"; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-709.

Changes From Uniform Act: The Montana enactment inserted "and subject to the provisions of chapter 12, part 7" in the first sentence of the section.

Case Notes

Personal Representative's Right to Control Property for Purposes of Administration — No Control Over Decedent's Half Interest in Real Property That Passed Immediately to Decedent's Wife as Devisee: At the time of the plaintiff's father's death, the plaintiff's mother and father had each executed wills listing the other as primary devisee of the farm property they owned. Because title to a property vests in a devisee at the moment of the testator's death and does not depend on the devisee's receipt of deed or decree of distribution, the plaintiff's mother's title to the father's half interest in the real property vested immediately when he died. Therefore, the Supreme Court rejected the plaintiff's argument that a lease of the property that had been signed by her mother only was invalid because she, in her capacity as personal representative of her father's estate, had not signed the lease. In upholding the lease, the court rejected the plaintiff's argument that she had taken control over her father's half interest in the real property because it was necessary for purposes of administration under this section. The court reiterated that a personal representative's right to control property for administration is a qualified right that extends only to such purposes as paying creditors' claims, administration expenses, or family allowances. Therefore, absent any evidence in the record to suggest that it was necessary for the plaintiff to take control of the property for purposes of administering her father's estate, the plaintiff had no authority over the property. The plaintiff's mother was the sole owner of the property at the time she executed the lease, and the court upheld the lease as valid. Shephard v. Widhalm, 2012 MT 276, 367 Mont. 166, 290 P.3d 712.

Sufficient Finding of Undue Influence Over Parent — Constructive Trusts Properly Imposed and Damages Awarded: When Josephine became too ill to manage herself and her affairs, her daughter Melissa agreed to move in with Josephine and care for her. In the process, as Josephine's health steadily declined, Melissa used her confidential relationship with Josephine to manipulate Josephine and her finances, controlling Josephine's checking account, mail, and payment of bills and expenses. By the time Josephine died, Melissa had obtained title to all of Josephine's real property, sold Josephine's property in Ovando and Florida, encumbered the remaining property with over $175,000 in loans taken out in Josephine's name, used part of the loan proceeds to buy property in Missoula and Las Vegas, exhausted all cash in Josephine's house, repeatedly overdrawn Josephine's checking account, fraudulently cashed one of Josephine's certificates of deposit by forging Josephine's name to it, used and obtained credit cards in Josephine's name and charged the account to the credit limit, exhausted all of Josephine's savings, Social Security, retirement, and annuity income, retained rental income from Josephine's rental units without accounting for it, destroyed years of Josephine's financial records while keeping very few records after assuming control of Josephine's affairs, fabricated lease documents and forged signatures on them to obtain loans in Josephine's name, used Josephine's money to pay all personal bills and obligations, never informed her siblings or provided an accounting of expenditures of Josephine's income and assets, and refused to provide a copy of Josephine's will, answer questions, or provide any other information. Melissa's brother Robert obtained a copy of the will and commenced an action to recover assets of Josephine's estate from Melissa. The District Court held Melissa accountable for a money judgment of $177,000 and for other items, totaling nearly $400,000. The court imposed a constructive trust on all real property that Melissa had obtained from Josephine or purchased with loan proceeds obtained in Josephine's name and awarded Robert costs and attorney fees. Melissa appealed. The Supreme Court applied the criteria in In re Estate of Bradshaw, 2001 MT 92, 305 M 178, 24 P3d 211 (2001), and determined that Melissa had exercised undue influence over Josephine. It concluded that there were ample reasons for imposition of the constructive trusts because the properties were obtained through undue influence and would have unjustly enriched Melissa if she were allowed to retain title to the properties. The damage award was based on substantial evidence and did not constitute error. The award of attorney fees and costs was within the equitable powers of the District Court based on the extraordinary efforts by Melissa to conceal her use of Josephine's property and money, which required Robert to make substantial efforts to successfully uncover and prove Melissa's wrongful conduct. The District Court was affirmed on all issues. Monroe v. Marsden, 2009 MT 137, 350 M 327, 207 P3d 320 (2009).

Deduction of Devisee's Expenses for Upkeep of Real Property From Devisee's Share of Estate: Mary was bequeathed her mother's house and lived in it after her mother died. The question arose whether the estate, or Mary as devisee, was responsible for necessary expenses related to upkeep of the real property during the will contest. The Supreme Court cited the general rule from 34 C.J.S. Executors and Administrators 542 (2003), that unauthorized advancements and disbursements made in good faith by the representative for the benefit of legatees or distributees of the estate are to be reimbursed from their respective portions of the estate. The house immediately devolved to Mary, and only if the personal representative had determined that it was necessary to take possession of the house for administration purposes, would the estate have been responsible for related expenses. However, because the personal representative did not take possession of the house, payments made by the personal representative for upkeep on the property were solely for Mary's benefit and thus chargeable to Mary's portion of the estate. In re Estate of McMurchie, 2004 MT 98, 321 M 21, 89 P3d 18 (2004). See also In re Stutchbury's Will, 138 N.Y.S. 2d 653 (1954).

Appointment of Special Administrator for Failure of Personal Representatives to Sue: The residual beneficiary under a will petitioned to have itself appointed as special administrator of the estate. The personal representatives disagreed with the petitioner's opinion that the Skrochs abused their confidential relationship with the testatrix and unduly influenced her to create a joint tenancy, with rights of survivorship, in bank accounts totaling $190,000, at a time when she was allegedly incompetent. The petitioner wanted the personal representatives to litigate the claim, and they refused to do so after investigating the matter. There was no showing that the personal representatives were guilty of fraud, collusion, conflict of interest, or inability to act or that other special equitable circumstances required the petition to be granted. The petition was properly denied. In re Estate of Long, 225 M 429, 732 P2d 1347, 44 St. Rep. 375 (1987).

Denial of Partial Distribution — No Abuse of Discretion: In an action by the children of the decedent for partial distribution of the estate, the personal representative resisted the request because the distribution would leave insufficient assets from which the share of debts, expenses, and taxes could be paid or provided. This was not error or abuse of the personal representative's discretion. It is the personal representative's responsibility, under 72-3-606, to manage, protect, and preserve the estate. In re Estate of Barber, 216 M 26, 699 P2d 90, 42 St. Rep. 612 (1985).

72-3-607. Inventory — appraisal.

Official Comments

[This section eliminates] the practice now required by many probate statutes under which the judge is involved in the selection of appraisers. If the personal representative breaches his duty concerning the inventory, he may be removed. Section [72-3-526]. Or, an interested person seeking to surcharge a personal representative for losses incurred as a result of his administration might be able to take advantage of any breach of duty concerning inventory. The section provides two ways in which a personal representative may handle an inventory. If the personal representative elects to send copies to all interested persons who request it, information concerning the assets of the estate need not become a part of the records of the probate court. The alternative procedure is to file the inventory with the court. This procedure would be indicated in estates with large numbers of interested persons, where the burden of sending copies to all would be substantial. The Court's role in respect to the second alternative is simply to receive and file the inventory with the file relating to the estate. See [72-3-106], which permits any interested person to demand notice of any document relating to an estate which may be filed with the Court.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 564, L. 2023. Amendment effective October 1, 2023.

2019 Amendment: Chapter 313 in (2) substituted "fair market value" for "full and true value", substituted current second sentence for "The personal representative may appoint one or more qualified and disinterested persons to assist the personal representative in ascertaining the fair market value as of the date of the decedent's death of all assets included in the estate", and in third sentence substituted "appraiser" for "appraisers"; and in (3)(a) substituted "the following who request it: heirs, devisees, and creditors with allowed claims that have not been satisfied" for "interested persons". Amendment effective October 1, 2019.

2003 Amendment: Chapter 68 substituted (1) concerning inventory within 9 months of appointment of personal representative for former text that read: "If the estate must file a United States estate tax return, within the time required for the filing of the United States estate tax return plus any extensions granted by the internal revenue service, a personal representative, who is not a special administrator or a successor to another representative who has previously discharged this duty, shall prepare and file or mail an inventory. The inventory must include a listing of all property that:

(a) the decedent owned, had an interest in or control over, individually, in common, or jointly, or otherwise had at the time of the decedent's death;

(b) the decedent had possessory or dispository rights over at the time of death or had disposed of for less than its fair market value within 3 years of the decedent's death; or

(c) was affected by the decedent's death for the purpose of estate taxes"; in (2) near beginning of second sentence substituted "may" for "shall"; in (3)(b) substituted language concerning filing the original of the inventory and sending a copy to interested persons for "the personal representative may file the original of the inventory with the court. In any event, a copy of the inventory and statement of value must be mailed to the department of revenue"; and made minor changes in style. Amendment effective March 14, 2003.

Retroactive Applicability: Section 9, Ch. 68, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to deaths occurring after December 31, 2000, for which the probate of the decedents' estates closes after [the effective date of this act]." Effective March 14, 2003.

2000 Amendment by Referendum: Chapter 9 at beginning of (1) inserted "If the estate must file a United States estate tax return"; and made minor changes in style. Amendment effective November 7, 2000.

Applicability: Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

1989 Amendment: At beginning of (1) substituted reference to U.S. estate tax filing period for "Within 3 months after his appointment".

1989 Editorial Comment: Former Montana law required the personal representative to prepare and file or mail an inventory and appraisement within 3 months after his appointment. This change extends the deadline to the time required for filing of a United States estate tax return (9 months after the date of the decedent's death, Internal Revenue Code section 6075(a)) plus any extension granted by the Internal Revenue Service. See corresponding national Uniform Probate Code section 3-706.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-706.

Changes From Uniform Act: The first paragraph of the corresponding section in the Uniform Probate Code reads as follows: "Within three months after his appointment, a personal representative, who is not a special administrator or a successor to another representative who has previously discharged this duty, shall prepare and file or mail an inventory of property owned by the decedent at the time of his death, listing it with reasonable detail, and indicating as to each listed item, its fair market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any item." The second sentence in the second paragraph is omitted in the official text. Section 3-707 of the Uniform Probate Code, relating to employment to appraisers, is omitted from the Montana enactment.

Case Notes

Inadequacy of Inventory and Appraisal — Removal of Personal Representative Warranted: The District Court did not abuse its discretion in removing a personal representative when substantial evidence showed that removal was in the best interest of the estate because: (1) an inventory and appraisement did not include the full and true value of each item, as required in this section; (2) several items were not listed in the inventory; (3) certain values were subject to question; and (4) the appraiser testified that he was not a certified gemologist and did not scientifically test items of jewelry listed in the inventory. In re Estate of Townsend, 243 M 185, 793 P2d 818, 47 St. Rep. 1120 (1990), followed in In re Estate of Hannum, 2012 MT 171, 366 Mont. 1, 285 P.3d 463.

72-3-609. Supplemental inventory.

Compiler's Comments

2003 Amendment: Chapter 68 near middle of first sentence substituted "make a supplemental inventory or appraisal" for "make a supplementary inventory or appraisement"; at end of second sentence deleted "and in any case shall mail a copy of it to the department of revenue"; and made minor changes in style. Amendment effective March 14, 2003.

Retroactive Applicability: Section 9, Ch. 68, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to deaths occurring after December 31, 2000, for which the probate of the decedents' estates closes after [the effective date of this act]." Effective March 14, 2003.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-708.

Changes from Uniform Act: The requirement for mailing a copy of the supplementary inventory to the Department of Revenue was added in the Montana enactment.

72-3-610. General duties — fiduciary.

Official Comments

See Official Comments under [72-3-604.]

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-703(a).

Changes From Uniform Act: Montana codified section 3-703 of the Uniform Probate Code as 72-3-604, 72-3-610, and 72-3-611.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Two Contested Wills and Trusts — Appointment of Neutral Representative — Undue Influence, Fraud, or Duress: The decedent executed a will and trust in 2010 leaving the majority of her estate to her niece, with whom she shared a close relationship. In 2012, the decedent executed a new will leaving a sizable portion of her estate to her housekeeper and handyman. The decedent died a year later. The housekeeper petitioned for probate of the 2012 will, and the niece objected and cross-petitioned for probate of the 2010 will. The District Court appointed a neutral personal representative to serve as a special fiduciary to the decedent's trust. A jury found that the 2012 will was procured by undue influence, fraud, or duress. However, the District Court rejected the niece's requests to receive fees and costs and to admit the 2010 will and trust because the special verdict form did not ask the jury to make any findings on the 2010 will or trust. On appeal by both parties, the Supreme Court affirmed in part, upholding the District Court's appointment of a neutral personal representative and special fiduciary, admission of settlement document evidence because one party opened the door to the line of questioning, and suppression of testimony by the decedent's attorneys relating to her dispositional intentions. The Supreme Court also found that while the District Court erred in precluding testimony because a party violated a sequestration order, numerous professional witnesses and friends of the decedent provided similar testimony. The Supreme Court held that the will contestants have the burden of establishing undue influence, fraud, or duress and that the jury properly found that the 2012 will was procured in this manner. However, the Supreme Court found that the District Court erred in refusing to admit the 2010 will to probate and in finding that the niece was statutorily barred from recovering attorney fees. In re Estate of Edwards, 2017 MT 93, 387 Mont. 274, 393 P.3d 639.

Insufficient Criteria to Warrant Removal of Personal Representative: Plaintiff claimed that the personal representative of Bjerke's estate should be removed because the representative distributed money contrary to the express terms of the will and improperly withheld property to which plaintiff was entitled. The District Court declined to remove the personal representative, and on appeal, the Supreme Court affirmed, given plaintiff's failure to establish any of the statutory criteria sufficient to warrant removal of the personal representative. Hanson v. Estate of Bjerke, 2004 MT 200, 322 M 280, 95 P3d 704 (2004).

Action Not Brought in Good Faith — No Costs or Attorney Fees: The District Court interpreted a will which left the residue of testatrix's estate to her grandchildren "in equal shares, per stirpes and not per capita" as devising one-eighth equal shares to the named grandchildren. A copersonal representative appealed, claiming that the estate should go one-half to her two children and one-half to the six children of her sister. The Supreme Court affirmed the District Court and denied appellant attorney fees and costs on the basis that appellant did not prosecute the action in good faith as a fiduciary of the estate and its successors. In re Estate of Evans, 217 M 89, 704 P2d 35, 42 St. Rep. 1047 (1985).

Denial of Partial Distribution — No Abuse of Discretion: In an action by the children of the decedent for partial distribution of the estate, the personal representative resisted the request because the distribution would leave insufficient assets from which the share of debts, expenses, and taxes could be paid or provided. This was not error or abuse of the personal representative's discretion. It is the personal representative's responsibility, under 72-3-606, to manage, protect, and preserve the estate. In re Estate of Barber, 216 M 26, 699 P2d 90, 42 St. Rep. 612 (1985).

Powers of Special Administrators and Rights of Heirs in Legal Actions: After a special administrator was appointed to continue prosecution of an action begun before the testatrix's death, the heir to the estate sought to intervene in the case but was denied. Although holding that ruling nonappealable, the Supreme Court did grant the heir's Writ of Supervisory Control. Nonetheless, it found the heir was not a proper intervenor in the suit because her interest was represented adequately by the special administrator, noting that the heir had no right to pursue the action herself unless the personal representative failed to act on the claim, which was not the case here. Further, an administrator could sue in his own name without joining with him the party for whose benefit the action is brought. State ex rel. Palmer v. District Court, 190 M 185, 619 P2d 1201, 37 St. Rep. 1876 (1980).

DECISIONS UNDER FORMER LAW

Performance of Requests Not Required: Administratrix who signed petition promising final distribution of estate according to terms and provisions of will had no obligation to carry out precatory language of will suggesting the subsequent disposition of devise by devisee. Stapleton v. DeVries, 167 M 108, 535 P2d 1267 (1975).

Collection of Assets: Executor was not liable for loss occasioned to estate by virtue of decedent's stockbroker's theft of decedent's securities, which theft occurred prior to the death of decedent but was not discovered until one year after decedent's death; the executor was responsible for the "assets" existing in the estate of the decedent at the time of death, and the only "asset" of the estate existing at the time was a claim for the value of the securities stolen from decedent during his lifetime, which the executor attempted diligently to collect through instigation of receivership proceedings against brokerage firm owned by decedent's stockbroker. In re Estate of Schueren, 162 M 417, 512 P2d 1283 (1973).

72-3-611. No surcharge for authorized acts generally — limitation.

Official Comments

[See Official Comments under 72-3-604.]

Compiler's Comments

2019 Amendment: Chapter 313 in (2) near middle inserted "whose claims have been allowed". Amendment effective October 1, 2019.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-703(b).

Changes From Uniform Act: Montana codified section 3-703 of the Uniform Probate Code as 72-3-604, 72-3-610, and 72-3-611.

72-3-612. No individual liability — exceptions — certain claims to be brought against personal representative.

Official Comments

In the absence of statute an executor, administrator or a trustee is personally liable on contracts entered into in his fiduciary capacity unless he expressly excludes personal liability in the contract. He is commonly personally liable for obligations stemming from ownership or possession of the property (e.g., taxes) and for torts committed by servants employed in the management of the property. The claimant ordinarily can reach the estate only after exhausting his remedies against the fiduciary as an individual and then only to the extent that the fiduciary is entitled to indemnity from the property. This and the following sections are designed to make the estate a quasi-corporation for purposes of such liabilities. The personal representative would be personally liable only if an agent for a corporation would be under the same circumstances, and the claimant has a direct remedy against the quasi-corporate property.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-808.

Case Notes

Fairness of Fee: Attorney fee contracts made after the establishment of the fiduciary attorney-client relationship are valid if they are "fair and equitable". Fairness is determined by taking account of such relevant factors as good faith and full disclosure in the execution of the contract, the amount of the fee, and the client's maturity, intelligence, and understanding of the transaction. The burden of establishing fairness is on the attorney. In re Estate of Magelssen, 182 M 372, 597 P2d 90 (1979).

Fee Contracts Binding on Estate: The personal representative of an estate can contract for an attorney's services, and the estate is bound by such contracts. Though the fee contract is open to review, the amount of the fee is not automatically converted into a quantum meruit measure of compensation. Indeed, quantum meruit compensation is normally appropriate only where a valid contract does not exist. In re Estate of Magelssen, 182 M 372, 597 P2d 90 (1979).

72-3-613. Transactions authorized for personal representative.

Official Comments

This section accepts the assumption of the Uniform Trustee's Powers Act that it is desirable to equip fiduciaries with the authority required for the prudent handling of assets and extends it to personal representatives. The section requires that a personal representative act reasonably and for the benefit of the interested person. Subject to this and to the other qualifications described by the preliminary statement, the enumerated transactions are made authorized transactions for personal representatives. Subparagraphs [(26)] and (18) support the other provisions of the code, particularly [72-3-605], which contemplates that personal representatives will proceed with all of the business of administration without court orders.

In part, subparagraph (4) involves a substantive question of whether noncontractual charitable pledges of a decedent can be honored by his personal representative. It is believed, however, that it is not desirable from a practical standpoint to make much turn on whether a charitable pledge is, or is not, contractual. Pledges are rarely made the subject of claims. The effect of subparagraph (4) is to permit the personal representative to discharge pledges where he believes the decedent would have wanted him to do so without exposing himself to a surcharge. The holder of a contractual pledge may, of course, pursue the remedies of a creditor. If a pledge provides that the obligation ceases on the death of the pledgor, no personal representative would be safe in assuming that the decedent would want the pledge completed under the circumstances.

Subsection (3) is not intended to affect the right to performance or to damages of any person who contracted with the decedent. To do so would constitute an unreasonable interference with private rights. The intention of the subsection is simply to give a personal representative who is obligated to carry out a decedent's contracts the same alternatives in regard to the contractual duties which the decedent had prior to his death.

Compiler's Comments

2019 Amendment: Chapter 313 in (11) and (17) at beginning deleted "with the consent of the heirs or devisees or the court"; in (23) at end deleted "provided, however, a personal representative may not, without prior court approval in a supervised proceeding, either directly or indirectly purchase any property of the estate that the personal representative represents, nor be interested in the sale. All sales must be fairly conducted and made for the best price obtainable"; and made minor changes in style. Amendment effective October 1, 2019.

1999 Amendment: Chapter 290 in (24) substituted "in the same business form, including a sole proprietorship, partnership, or limited liability company, unless otherwise ordered by the court in a formal proceeding initiated by an interested person on the basis that continuation of the business is not in the best interests of the estate or its beneficiaries" for "(a) in the same business form for a period of not more than 4 months from the date of appointment of a general personal representative if continuation is a reasonable means of preserving the value of the business, including good will;

(b) in the same business form for any additional period of time that may be approved by order of the court in a formal proceeding to which the persons interested in the estate are parties; or

(c) throughout the period of administration, if the business is incorporated by the personal representative and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate"; and made minor changes in style. Amendment effective April 9, 1999.

1989 Amendment: In (5), after "trustees generally", inserted remainder of (5) that read: "If the personal representative is authorized to invest funds in United States obligations, he may invest in these obligations either directly or in the form of securities of or other interests in an open-end or closed-end management type investment company or investment trust registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 through 80a-64), as amended, if:

(a) the portfolio of the investment company or investment trust is limited to United States government obligations and repurchase agreements fully collateralized by United States government obligations; and

(b) the investment company or investment trust takes delivery of the collateral for any repurchase agreement, either directly or through an authorized custodian"; and made minor changes in phraseology.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-715.

Changes From Uniform Act: The Montana enactment inserted the phrase "with the consent of the heirs or devisees or the court" at the beginning of subdivisions (11) and (17), and a subdivision in the Uniform Probate Code section authorizing provision "for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate" was omitted.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Attorney Fees Fairly Allocated to Estate — No Abuse of Discretion: Part of a probate case was settled in South Dakota and part in Montana. Attorneys kept separate billing records for each case, ensuring that only the costs of defending the Montana action would be chargeable to the estate. The services rendered were beneficial to the estate, and the District Court did not err in awarding $23,164.01 for defending the Montana case and $20,370.12 in statutory and extraordinary fees, including $1,750 for expert testimony concerning reasonableness of the fees, plus $692.78 in costs. In re Estate of McMurchie, 2004 MT 98, 321 M 21, 89 P3d 18 (2004).

Deduction of Devisee's Expenses for Upkeep of Real Property From Devisee's Share of Estate: Mary was bequeathed her mother's house and lived in it after her mother died. The question arose whether the estate, or Mary as devisee, was responsible for necessary expenses related to upkeep of the real property during the will contest. The Supreme Court cited the general rule from 34 C.J.S. Executors and Administrators 542 (2003), that unauthorized advancements and disbursements made in good faith by the representative for the benefit of legatees or distributees of the estate are to be reimbursed from their respective portions of the estate. The house immediately devolved to Mary, and only if the personal representative had determined that it was necessary to take possession of the house for administration purposes, would the estate have been responsible for related expenses. However, because the personal representative did not take possession of the house, payments made by the personal representative for upkeep on the property were solely for Mary's benefit and thus chargeable to Mary's portion of the estate. In re Estate of McMurchie, 2004 MT 98, 321 M 21, 89 P3d 18 (2004). See also In re Stutchbury's Will, 138 N.Y.S. 2d 653 (1954).

Contested Ownership of Independent Business — Standard of Review of Judgment on Pleadings: Hedges claimed ownership of an independent Melaleuca business, allegedly acquired through a written transfer of the business by Johnson, the former owner, before Johnson's death. As corepresentatives of Johnson's estate, the Woodhouses claimed ownership of the same business by virtue of a residuary devise in Johnson's will. The uncontroverted facts in the pleadings served as the factual basis for the parties' competing motions for judgment on the pleadings. A movant for judgment on the pleadings must establish that no material fact exists and that movant is entitled to judgment as a matter of law, and pleadings are to be construed in the light most favorable to the nonmoving party, whose allegations are taken as true. The conclusions of law standard of review is applied. The District Court properly looked to Johnson's Melaleuca contract, which required that Melaleuca accept signed and acknowledged forms in respect to transfer of a business during a business owner's lifetime and approve the transfer in writing. The contractual restrictions on assignment of a Melaleuca contract were not met by Johnson's written transfer of the business to Hedges, and the court correctly concluded that Johnson's assignment was not valid. Judgment on the pleadings for Woodhouses was affirmed. Hedges v. Woodhouse, 2000 MT 220, 301 M 180, 8 P3d 109, 57 St. Rep. 905 (2000).

Personal Representative Bound by Buyout Provision in Property Agreement — Specific Performance Proper: In 1960, four couples entered a property agreement regarding the use and maintenance of a vacation cabin on Holter Lake. Each couple received an undivided one-fourth interest in the property. The agreement contained a provision allowing cotenants to buy out a couple's interest by two methods: (1) through a voluntary inter vivos sale by a couple to the cotenants for $1,000 or the value of a couple's interest after a contribution toward the purchase of the interest of any former couple; or (2) through a compulsory buyout of a surviving spouse's interest at death. Over the years, all the parties died except Berger, who in 1991 tendered $1,334 to Baker's estate for her interest in the property, which by then constituted a one-third share. Baker's personal representative refused the tender on grounds that the agreement was unenforceable, but the District Court granted Berger specific performance of the agreement. On appeal, the Supreme Court affirmed the lower court decision as a proper use of discretion, holding that: (1) even under the maxim expressio unius est exclusio alterius, transfer of a surviving spouse's interest in the property was prohibited; (2) generally contracts made by a decedent are specifically enforceable against the decedent's personal representatives, heirs, devisees, and assigns even when they were not a party to the original agreement; (3) the agreement contained an express covenant to sell that justified enforcement of the agreement against the estate; and (4) despite any increase in the fair market value of the property, good consideration was established under the original terms of the agreement, so no new consideration was required, and Berger was entitled to receive what was contained in the original bargain. Baker v. Berger, 265 M 21, 873 P2d 940, 51 St. Rep. 389 (1994).

Payment of Fees — Repayment of Loans: The personal representative had authority to pay the estate's attorney and repay herself for loans she had made to the estate, without a prior order from the District Court. Under 72-3-404, a supervised personal representative has, without interim orders approving the exercise of a power, all powers of personal representatives under the code, except that the personal representative may not make a distribution of the estate without the prior order of the court. This authority includes the power provided under this section to pay her own compensation and other expenses incident to the administration of the estate. In re Estate of Barber, 239 M 129, 779 P2d 477, 46 St. Rep. 1565 (1989).

Employment Contract — Interpretation — Deduction of Payments Under Previous Contract: Appellant's contract of employment with Ollie May Vestal was terminated by her death. After her death, he entered into a new employment contract with the personal representative of her estate. Payments made under the original contract may not be deducted from payments due under the second contract of employment, even if payments made under the original contract were greater than the stated amount. Heintz v. Vestal, 185 M 233, 605 P2d 606, 37 St. Rep. 99 (1980).

Fairness of Fee: Attorney fee contracts made after the establishment of the fiduciary attorney-client relationship are valid if they are "fair and equitable". Fairness is determined by taking account of such relevant factors as good faith and full disclosure in the execution of the contract, the amount of the fee, and the client's maturity, intelligence, and understanding of the transaction. The burden of establishing fairness is on the attorney. In re Estate of Magelssen, 182 M 372, 597 P2d 90 (1979).

Fee Contracts Binding on Estate: The personal representative of an estate can contract for an attorney's services, and the estate is bound by such contracts. Though the fee contract is open to review, the amount of the fee is not automatically converted into a quantum meruit measure of compensation. Indeed, quantum meruit compensation is normally appropriate only where a valid contract does not exist. In re Estate of Magelssen, 182 M 372, 597 P2d 90 (1979).

Unsuccessful Applicant Not Entitled to Attorney Fees: An unsuccessful applicant for letters of administration is not entitled to attorney fees and costs out of the estate of decedent because litigation ensued in a contest to administer an estate is not beneficial to the estate or beneficiaries. In re Dygert, 170 M 31, 550 P2d 393 (1976).

DECISIONS UNDER FORMER LAW

Statute of Limitations — Confidential Relationship Tolls: Plaintiff's husband and defendant were brothers and partners in a ranching operation, although each owned the land individually. Plaintiff's husband died and defendant was named executor. A corporation was formed to operate the ranch on May 1, 1973. Both parties transferred all assets to the corporation. Defendant's family got 364 more shares than plaintiff, and defendant was named president of the corporation. Restrictions were placed on the valuation and transfer of stock. On May 29, 1975, plaintiff consulted her own attorney and for the first time fully realized her position. All corporate votes became deadlocked. On April 29, 1977, plaintiff filed suit to dissolve the corporation, alleging fraud and oppressive conduct by defendant and mistake at the formation. Defendant contended the suit was barred by the Statute of Limitations, claiming that any fraud or mistake occurred in 1973. The court found that defendant occupied a position of trust and confidence in relation to plaintiff. He was executor of her husband's estate and partner to her husband at the date of death; that status imposed on defendant the duties of a trustee. The confidential relationship did not cease until May 29, 1975, when plaintiff first discovered her inferior position. This action was filed within the 2-year period from that date. Skierka v. Skierka Bros., Inc., 192 M 505, 629 P2d 214, 38 St. Rep. 754 (1981).

Inheritance Tax: Real property and tangible personal property retain their status as such upon the death of a partner and are not exempt from inheritance tax under 72-16-801 (now repealed) as intangible property. In re Perry's Estate, 121 M 280, 192 P2d 532 (1948).

Partnership Property as Part of the Estate:

Until the affairs of the partnership have been settled, the partnership property is not property of the estate of the deceased party to be administered as such. In re Perry's Estate, 121 M 280, 192 P2d 532 (1948).

Until the affairs of a partnership are settled and the share of one of the partners who has died is paid over to his personal representative, partnership property is in no sense property of the decedent's estate to be administered as a part of the estate. White v. Prahl, 94 M 345, 22 P2d 315 (1933).

Partner Failing to Retain Possession of Partnership Property — Estoppel: In an action against the administrator of the estate of plaintiff's brother to establish that a partnership had existed between plaintiff and deceased, where plaintiff took possession of all property and business in question upon the death of the brother and retained it until the Court ordered that it be turned over to the administrator appointed, plaintiff's failure to retain possession did not estop him from claiming a right of possession for the purposes of his action to establish a partnership between him and decedent. Gaspar v. Buckingham, 116 M 236, 153 P2d 892 (1944).

Partnership — Sufficiency of Complaint to Establish: A complaint in an action against the administrator of the estate of plaintiff's brother to establish that a partnership had existed between plaintiff and deceased was not defective for failing to allege that plaintiff had made an accounting or that the claim had been presented to the administrator, where the action involved a transaction by defendant administrator who had taken over the partnership property by court order contrary to 72-12-701 (now repealed) together with plaintiff's personal bank account, since the case involved not the partnership operation prior to death or money claimed due from him at his death, but transactions after his death by his administrator not within the claim statute. Gaspar v. Buckingham, 116 M 236, 153 P2d 892 (1944).

Partnership Property in Possession of Administrator: When the administrator, under Probate Court order and guidance, had contrary to 72-12-701 (now repealed) taken over and assumed to administer the partnership property together with plaintiff's alleged bank account, plaintiff, who instituted an action to establish a partnership between himself and deceased in the livestock and ranching business and by reason thereof his right to one-half of all the assets of such business in the administrator's possession, and for his bank account and funds he had advanced for administration purposes, was entitled to a money judgment as plaintiff was not expected to account for defendant's management of partnership property. Gaspar v. Buckingham, 116 M 236, 153 P2d 892 (1944).

Action Against Partner for Accounting — Defenses of Statute of Limitations or Laches Not Available: One of two copartners in the livestock business died in 1903. By his will he reserved to his wife a life estate in all his property. The remaindermen and the widow agreed that the business should be continued as before, thus creating a new partnership between the surviving partner and the widow. The executor acted until his death in 1918; no successor was appointed. The widow died in 1929. The District Court dismissed an action thereafter brought to secure an accounting from the surviving partner in connection with the affairs of the original partnership, on the ground that it was barred under the Statute of Limitations as well as on the theory of laches. Under the agreement to continue the business as it had been run prior to the death of the original partner, the estate remained dormant until the death of the life tenant, the widow; in the interim, no cause of action could arise calling for action on the part of the remaindermen, and therefore, the finding that the action was barred was error. Thompson v. Flynn, 95 M 484, 27 P2d 505 (1933).

Failure of Surviving Partner to Account to Representative of Estate — Representative, Not Heirs, Required to Sue for Accounting: When a surviving partner fails to render an account to the personal representative of the deceased partner on settlement of the partnership business, the representative and not the heirs must sue for an accounting; however, it is incumbent upon those interested in the estate to see that the representative performs his duty in that regard. Thompson v. Flynn, 95 M 484, 27 P2d 505 (1933).

Power of Surviving Partner — Action on Note — Joinder of Heirs Unnecessary: A surviving partner is not required to join the heirs of his deceased partner as parties plaintiff in his action to recover on promissory notes held by the partnership. He alone has the right to collect claims due the partnership, unaffected by the fact that he made accounting to the administratrix of the estate of the decedent, the purpose of which was merely to show the condition of the partnership affairs or by the entry of decree of final distribution of the decedent's estate. White v. Prahl, 94 M 345, 22 P2d 315 (1933).

Mining Partnerships — Not Applicable: The rule declared by 72-12-701 (now repealed) that in case of death of one member of a partnership the surviving partner has the right to the possession of all of the partnership property and to settle its business, and that the partnership assets form no part of the individual estate of the deceased partner until the partnership affairs have been wound up by the survivor, applies to general trading partnerships only, not to mining partnerships. Bielenberg v. Higgins, 85 M 56, 277 P 631 (1929).

Surviving Partner's Action for Accounting Against Personal Representative: Section 72-12-701 (now repealed), relating to the duties of a surviving partner in winding up the affairs of the partnership, did not by implication abrogate the right of the survivor to bring a suit in equity for an accounting against the personal representative of the decedent in a proper case. If such was the intention, the section would be unconstitutional, since District Courts may not by legislative action be deprived of jurisdiction in all equity cases granted them by Art. VIII, sec. 11, 1889 Mont. Const. (now Art. VII, sec. 4, 1972 Mont. Const.). Link v. Haire, 82 M 406, 267 P 952 (1928).

Power of Surviving Partner — Duty to Account to Estate:

When the affairs of a general partnership dissolved by death were not fully settled, an action for an accounting by the surviving partner for his sole benefit against the executrix of the decedent did not lie, in view of the provisions of Title 72, ch. 12, part 7 (now repealed), which among other things make it the duty of the survivor who, in contemplation of law, is in actual possession of the partnership property to wind up its affairs, and thereupon account to the personal representative of the decedent. Mares v. Mares, 60 M 36, 199 P 267 (1921), distinguished in Gaspar v. Buckingham, 116 M 236, 153 P2d 892 (1944).

A surviving partner may be required to make known the amount of partnership debts and the amount of firm assets in his possession, to the end that the Court may determine whether the possession of firm property held by the estate of the deceased partner is necessary in order that the surviving partner may discharge the duties imposed upon him by Title 72, ch. 12, part 7 (now repealed). Silver v. Eakins, 55 M 210, 175 P 876 (1918).

When death dissolves a general trading partnership, the surviving partners are entitled to continue in possession and to settle the partnership affairs. It is their duty to account to the deceased partner's estate, and, upon failure to do so, they may be compelled by summary proceedings. Boehme v. Fitzgerald, 43 M 226, 115 P 413 (1911).

Power of Surviving Partner:

The death of a partner dissolves the partnership and the surviving partner at once becomes entitled to the possession of sufficient firm property to enable him to discharge the duties imposed by 72-12-701 (now repealed). Silver v. Eakins, 55 M 210, 175 P 876 (1918).

A surviving partner has the right to continue in possession of the partnership property and to settle the partnership business. The authority to settle up the business contemplates the completion of transactions begun before the death of the one partner. The surviving partner not only has the authority to expend the partnership means in protecting partnership property, but it is his duty. Weiss v. Hamilton, 40 M 99, 105 P 74 (1909).

Power of Surviving Partner — Effect of Failure to Give Bond: The failure of a surviving partner to give the bond required by 72-12-702 (now repealed) did not affect his right to the possession of the firm property or defeat his right to maintain any appropriate action concerning it. The bond was required merely to protect the interest of the deceased partner. Silver v. Eakins, 55 M 210, 175 P 876 (1918).

Power of Surviving Partner — Sufficiency of Complaint in Action Against Estate: A complaint in an action by a surviving partner to recover partnership property from the estate of the deceased partner was insufficient, under 72-12-701 (now repealed), for failure to disclose the amount of the firm's debts, if any, or the amount or value of its assets in plaintiff's possession. Silver v. Eakins, 55 M 210, 175 P 876 (1918).

Power of Surviving Partner — Exclusive Control of Property: While the death of one of two partners dissolves the partnership, it does not affect the partnership property, except to give the surviving partner exclusive control of the property, for the purpose of settling up the partnership business. First Nat'l Bank of Butte v. Silver, 45 M 231, 122 P 584 (1912).

Administrator Allowed to Maintain Action Against Surviving Partner: An administrator may maintain against a surviving partner any action which the deceased could have maintained. In the matter of relief, aside from the remedy furnished through the Probate Court, the personal representative of the decedent occupies the same relative position with reference to the surviving partners that the deceased, if alive, would sustain to his copartners. Boehme v. Fitzgerald, 43 M 226, 115 P 413 (1911).

72-3-614. Power to recover property that is subject of void or voidable transfer.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-710.

Changes From Uniform Act: Section 3-711 of the Uniform Probate Code, relating to powers of personal representatives in general, is omitted from the Montana enactment.

72-3-615. Transaction involving conflict of interest — voidable — exceptions.

Official Comments

If a personal representative violates the duty against self-dealing described by this section, a voidable title to assets sold results. Other breaches of duty relating to sales of assets will not cloud titles except as to purchasers with actual knowledge of the breach. See [72-3-618]. The principles of bona fide purchase would protect a purchaser for value without notice of defect in the seller's title arising from conflict of interest.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-713.

Case Notes

Conflict of Interest of Personal Representative Cured by Court Supervision of Estate: Prior to Zempel's death, he executed his will, naming his daughter, Palmer, as his sole devisee and his neighbor, Newman, as personal representative of the estate. Zempel then entered into an agreement to sell his ranch to Newman, who, acting pursuant to the power of attorney, executed a contract for deed and lease that transferred the ranch property to Newman. Following Zempel's death, the District Court appointed Palmer as special administrator based on an ex parte application. Shortly thereafter, Newman filed a petition for formal probate and appointment of personal representative, in conjunction with a motion to set aside the ex parte order. The District Court terminated the ex parte order, appointed Newman as personal representative, and ordered that any real estate transaction be approved by the court after notice and hearing. Palmer appealed Newman's appointment as personal representative, citing the conflict of interest that arose from the documents purportedly transferring estate assets to Newman. A conflict of interest is sufficient for removal of a personal representative for cause, but does not mandate removal. As established in In re Estate of Goick, 275 M 13, 909 P2d 1165 (1996), a transaction involving a conflict of interest between a personal representative and an estate can be cured by a court-ordered supervision of the transaction. The District Court did not act arbitrarily in this case because it required its approval for the final transaction between the personal representative and the estate, protecting any objection or challenge by Palmer through supervision of the disputed transaction, which cured the conflict of interest. The court did not err when it appointed Newman as personal representative, and the appointment was affirmed. In re Estate of Zempel, 2000 MT 283, 302 M 183, 14 P3d 441, 57 St. Rep. 1182 (2000).

72-3-616. Improper exercise of power — breach of fiduciary duty.

Official Comments

An interested person has two principal remedies to forestall a personal representative from committing a breach of fiduciary duty. (1) Under [72-3-617] he may apply to the court for an order restraining the personal representative from performing any specified act or from exercising any power in the course of administration. (2) Under [72-3-526] he may petition the court for an order removing the personal representative.

Evidence of a proceeding, or order, restraining a personal representative from selling, leasing, encumbering or otherwise affecting title to real property subject to administration, if properly recorded under the laws of this state, would be effective to prevent a purchaser from acquiring a marketable title under the usual rules relating to recordation of real property titles.

In addition, [72-1-202 and 72-3-105] authorize joinder of third persons who may be involved in contemplated transactions with a personal representative in proceedings to restrain a personal representative under [72-3-617].

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-712.

Case Notes

Breach of Fiduciary Claims Against Second Trustee — Same Claims Previously Litigated Against First Trustee — Claim Preclusion Applied: Family members sued the first trustee of their parents' estate for several breaches of fiduciary duty. Years after that case concluded, the family members sued the second trustee for breaches of fiduciary duty. The second trustee moved for summary judgment, claiming that all of the plaintiffs' claims were barred under the doctrine of claim preclusion. The District Court agreed and the plaintiffs appealed. The Supreme Court affirmed in part, agreeing that all but two of the plaintiffs' claims were precluded because those two claims did not involve the same issues previously litigated. The Supreme Court remanded the two claims to the District Court for further proceedings. Gibbs v. Altenhofen, 2014 MT 200, 376 Mont. 61, 330 P.3d 458.

72-3-617. Order restraining personal representative.

Official Comments

Cf. [72-3-304] which provides for a restraining order against a previously appointed personal representative incident to a formal testacy proceeding. The above section describes a remedy which is available for any cause against a previously appointed personal representative, whether appointed formally or informally.

This remedy, in combination with the safeguards relating to the process for appointment of a personal representative, permit "control" of a personal representative that is believed to be equal, if not superior to that presently available with respect to "supervised" personal representatives appointed by inferior courts. The request for a restraining order may mark the beginning of a new proceeding but the personal representative, by the consent provided in [72-3-511], is practically in the position of one who, on motion, may be cited to appear before a judge.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-607.

72-3-618. Persons dealing with personal representative — protection.

Official Comments

This section qualifies the effect of a provision in a will which purports to prohibit sale of property by a personal representative. The provisions of a will may prescribe the duties of a personal representative and subject him to surcharge or other remedies of interested persons if he disregards them. See [72-3-604, 72-3-610, and 72-3-611]. But, the will's prohibition is not relevant to the rights of a purchaser unless he had actual knowledge of its terms. Interested persons who want to prevent a personal representative from having the power described here must use the procedures described in [72-3-401 through 72-3-406]. Each state will need to identify the relation between this section and other statutory provisions creating liens on estate assets for inheritance and other taxes. The section cannot control whether a purchaser takes free of the lien of unpaid federal estate taxes. Hence, purchasers from personal representatives appointed pursuant to this code will have to satisfy themselves concerning whether estate taxes are paid, and if not paid, whether the tax lien follows the property they are acquiring. See section 6234, Internal Revenue Code.

The impact of formal recording systems beyond the usual probate procedure depends upon the particular statute. In states in which the recording system provides for recording wills as muniments of title, statutory adaptation should be made to provide that recording of wills should be postponed until the validity has been established by probate or limitation. Statutory limitation to this effect should be added to statutes which do not so provide to avoid conflict with power of the personal representative during administration. The purpose of the code is to make the deed or instrument of distribution the usual muniment of title. See [72-3-904, 72-3-905, and 72-3-907]. However, this is not available when no administration has occurred and in that event reliance upon general recording statutes must be had.

If a state continues to permit wills to be recorded as muniments of title, the above section would need to be qualified to give effect to the notice from recording.

Compiler's Comments

2019 Amendment: Chapter 313 in (1) near middle of last sentence substituted "72-3-404" for "72-3-404(3)". Amendment effective October 1, 2019.

2000 Amendment by Referendum: Chapter 9 at end of (3) deleted "nor does it in any way limit the provisions of 72-16-432 and 72-16-433"; and made minor changes in style. Amendment effective November 7, 2000.

Applicability: Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-714.

Changes From Uniform Act: The Montana enactment added the phrase "nor does it in any way limit the provisions of 72-16-432 or 72-16-433" at the end of the section.

Case Notes

District Court Error in Finding Purchaser Did Not Act in Good Faith — Summary Judgment Awarded: The plaintiff company filed a quiet title action to mineral rights it had purchased from a personal representative. Heirs of the estate objected, claiming that 72-3-618 did not protect the plaintiff's purchase because the plaintiff failed to act in good faith when it did not locate the will disposing of the estate. The District Court granted summary judgment in favor of the heirs. The plaintiff appealed to the Supreme Court, which reversed, ruling that because the plaintiff had no actual knowledge of any restrictions on the personal representative's authority, the purchase had been made in good faith and was therefore protected under 72-3-618. The Supreme Court ordered the District Court to enter summary judgment on behalf of the plaintiff. Northland Royalty Corp. v. Engel, 2014 MT 295, 377 Mont. 11, 339 P.3d 599.

72-3-619. Powers of personal representatives in general.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

72-3-621. Powers and duties of successor personal representative.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-716.

72-3-622. Corepresentatives — when joint action required.

Official Comments

With certain qualifications, [72-3-622 and 72-3-623 are] designed to compel co-representatives to agree on all matters relating to administration when circumstances permit. Delegation by one to another representative is a form of concurrence in acts that may result from the delegation. A co-representative who abdicates his responsibility to co-administer the estate by a blanket delegation breaches his duty to interested persons as described by [72-3-610]. Section [72-3-613(21)] authorizes some limited delegations, which are reasonable and for the benefit of interested persons.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-717(first part).

Changes From Uniform Act: Montana codified section 3-717 of the Uniform Probate Code as 72-3-622 and 72-3-623. The Official Comments appearing under 72-3-622 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-717 of the Uniform Probate Code.

72-3-623. Persons dealing with single corepresentative — protection.

Official Comments

[See Official Comments under 72-3-622.]

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-717(last part).

Changes From Uniform Act: Montana codified section 3-717 of the Uniform Probate Code as 72-3-622 and 72-3-623.

72-3-624. Powers of remaining corepresentative.

Official Comments

Source, Model Probate Code section 102. This section applies where one of two or more corepresentatives dies, becomes disabled or is removed. In regard to coexecutors, it is based on the assumption that the decedent would not consider the powers of his fiduciaries to be personal, or to be suspended if one or more could not function. In regard to coadministrators in intestacy, it is based on the idea that the reason for appointing more than one ceases on the death or disability of either of them.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-718.

72-3-631. Compensation of personal representative.

Official Comments

This section has no bearing on the question of whether a personal representative who also serves as attorney for the estate may receive compensation in both capacities. If a will provision concerning a fee is framed as a condition on the nomination as personal representative, it could not be renounced.

Compiler's Comments

2019 Amendment: Chapter 313 in (1) deleted former second and third sentences (see 2019 Session Law for former text); deleted former (2), (3), (4), and (5) (see 2019 Session Law for former text); and made minor changes in style. Amendment effective October 1, 2019.

2000 Amendment by Referendum: Chapter 9 in second sentence of (1) in two places deleted reference to state inheritance tax; and made minor changes in style. Amendment effective November 7, 2000.

Applicability: Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-719.

Changes From Uniform Act: The corresponding section in the Uniform Probate Code as promulgated by the National Conference of Commissioners reads as follows: "A personal representative is entitled to reasonable compensation for his services. If a will provides for compensation of the personal representative and there is no contract with the decedent regarding compensation, he may renounce the provision before qualifying and be entitled to reasonable compensation. A personal representative also may renounce his right to all or any part of the compensation. A written renunciation of fee may be filed with the court."

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Payment of Fees — Repayment of Loans: The personal representative had authority to pay the estate's attorney and repay herself for loans she had made to the estate, without a prior order from the District Court. Under 72-3-404, a supervised personal representative has, without interim orders approving the exercise of a power, all powers of personal representatives under the code, except that the personal representative may not make a distribution of the estate without the prior order of the court. This authority includes the power provided under this section to pay her own compensation and other expenses incident to the administration of the estate. In re Estate of Barber, 239 M 129, 779 P2d 477, 46 St. Rep. 1565 (1989).

Fees of Personal Representative — Standard of Review: The Supreme Court cited decisions from several jurisdictions in formulating a standard of review for questions of fees paid or taken by a personal representative. Once review of a fee is sought by one with an interest in the estate, the personal representative has the burden of proving that the services rendered were necessary and the fee charged was reasonable. With regard to legal services, a reasonable fee should be ascertained by considering the time spent, the nature of the services, and the skill and experience required. A crucial factor for determining the reasonableness of a challenged fee is whether the services rendered were beneficial to the estate. Therefore, when a personal representative's negligence causes harm to the estate, he may be deprived of all or part of the fee. The review of fees is left to the sound discretion of the District Court. The Supreme Court will not overturn that decision absent a showing of abuse of discretion, and findings of fact will be upheld unless clearly erroneous. In re Estate of Stone, 236 M 1, 768 P2d 334, 46 St. Rep. 134 (1989), followed in Flikkema v. Kimm, 255 M 34, 839 P2d 1293, 49 St. Rep. 880 (1992).

Assessment of Costs From Probate-Related Litigation: While a claim by an estate was pending, the law partner of the attorney opposing the claim was appointed personal representative of the estate. On appeal from the denial of a petition to remove the personal representative or to appoint a special administrator, the Montana Supreme Court held that a special administrator should be appointed to handle the above claim while the personal representative was to continue his duties otherwise. For the litigation relating to the appointment of the special administrator and for this appeal, each party was ordered to bear his own costs, except that the personal representative, if the District Court determined that he was proceeding in good faith, was entitled to receive necessary expenses and disbursements, including reasonable attorney's fees as provided under 72-3-632. In re the Estate of Sauter, 189 M 244, 615 P2d 875, 37 St. Rep. 1425 (1980).

DECISIONS UNDER FORMER LAW

Neglect and Mismanagement of Estate: Removed administratrix and her attorneys who failed to make money from sale of property available to heirs, failed to provide for interest on money from sale of property for benefit of estate, lost inheritance tax credit, and allowed tax penalties to be assessed against the estate were properly allowed fees less than those provided for by statute since statute applied only to fees for successful completion of estate. In re Estate of Smith, 149 M 326, 426 P2d 575 (1967).

72-3-632. Expenses of personal representative in estate litigation.

Official Comments

Litigation prosecuted by a personal representative for the primary purpose of enhancing his prospects for compensation would not be in good faith.

A personal representative is a fiduciary for successors of the estate ([72-3-610]). Though the will naming him may not yet be probated, the priority for appointment conferred by [72-3-502] on one named executor in a probated will means that the person named has an interest, as a fiduciary, in seeking the probate of the will. Hence, he is an interested person within the meaning of [72-3-202 and 72-3-302]. Section [72-3-915] gives the successors of an estate control over the executor, provided all are competent adults. So, if all persons possibly interested in the probate of a will, including trustees of any trusts created thereby, concur in directing the named executor to refrain from efforts to probate the instrument, he would lose standing to proceed. All of these observations apply with equal force to the case where the named executor of one instrument seeks to contest the probate of another instrument. Thus, the code changes the idea followed in some jurisdictions that an executor lacks standing to contest other wills which, if valid, would supersede the will naming him, and standing to oppose other contests that may be mounted against the instrument nominating him.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-720.

Case Notes

Denial of Attorney Fees to Personal Representative Beyond Those Required to File Documents Necessary to Open Probate — No Abuse of Discretion. In re Estate of Williams, 2023 MT 72, 412 Mont. 58, 528 P.3d 1087.

Attorney Fees Fairly Allocated to Estate — No Abuse of Discretion: Part of a probate case was settled in South Dakota and part in Montana. Attorneys kept separate billing records for each case, ensuring that only the costs of defending the Montana action would be chargeable to the estate. The services rendered were beneficial to the estate, and the District Court did not err in awarding $23,164.01 for defending the Montana case and $20,370.12 in statutory and extraordinary fees, including $1,750 for expert testimony concerning reasonableness of the fees, plus $692.78 in costs. In re Estate of McMurchie, 2004 MT 98, 321 M 21, 89 P3d 18 (2004).

Award of Attorney Fees for Unsuccessful Defense of Will Contest: As a significant part of a will contest, Seright unsuccessfully defended the will for which he was a personal representative. The District Court granted Seright attorney fees and costs. Hauck asserted error in the award and contended that under 72-12-206, attorney fees are not included within the term "costs". However, under this section, Seright was entitled to reasonable fees for defending the will contest, whether or not the defense was successful. Hauck v. Seright, 1998 MT 198, 290 M 309, 964 P2d 749, 55 St. Rep. 838 (1998).

Good Faith Action — Fees Reasonable and Proper: The personal representative of an estate was properly ordered to pay certain attorney fees upon a finding that: (1) exhaustive research by the attorneys relating to a wrongful death survivorship action and an heirship proceeding resulted in substantial benefit to the estate and its rightful heir; (2) actions on behalf of the estate were maintained in good faith; (3) the attorneys' investigations, interviews, research, and development of ingenious theories of liability were conducted with a high level of experience and skill; and (4) the fees were reasonable and in accord with fees charged in the same geographical area. In re Estate of Stenson, 243 M 17, 792 P2d 1119, 47 St. Rep. 1162 (1990).

Obstructive Attorney — Additional Fees for Other Attorney: The attorney for the estate rendered extraordinary services in response to the objectors' obstreperous, obstructive, and groundless objections to all the steps and proceedings undertaken by the personal representative. Therefore, the attorney was entitled to an additional fee to be paid by the objectors, personally, and by their attorney because they were responsible for the detrimental objections to the progress of an ordinary estate. The personal representative of an estate may contract for an attorney's services, but the contract does not preclude the award of additional fees if the services rendered to the estate by the attorney are extraordinary and reasonably necessary for the good of the estate, as in this case. In re Estate of Barber, 239 M 129, 779 P2d 477, 46 St. Rep. 1565 (1989).

Fees of Personal Representative — Standard of Review: The Supreme Court cited decisions from several jurisdictions in formulating a standard of review for questions of fees paid or taken by a personal representative. Once review of a fee is sought by one with an interest in the estate, the personal representative has the burden of proving that the services rendered were necessary and the fee charged was reasonable. With regard to legal services, a reasonable fee should be ascertained by considering the time spent, the nature of the services, and the skill and experience required. A crucial factor for determining the reasonableness of a challenged fee is whether the services rendered were beneficial to the estate. Therefore, when a personal representative's negligence causes harm to the estate, he may be deprived of all or part of the fee. The review of fees is left to the sound discretion of the District Court. The Supreme Court will not overturn that decision absent a showing of abuse of discretion, and findings of fact will be upheld unless clearly erroneous. In re Estate of Stone, 236 M 1, 768 P2d 334, 46 St. Rep. 134 (1989), followed in Flikkema v. Kimm, 255 M 34, 839 P2d 1293, 49 St. Rep. 880 (1992).

Action Not Brought in Good Faith — No Costs or Attorney Fees: The District Court interpreted a will which left the residue of testatrix's estate to her grandchildren "in equal shares, per stirpes and not per capita" as devising one-eighth equal shares to the named grandchildren. A copersonal representative appealed, claiming that the estate should go one-half to her two children and one-half to the six children of her sister. The Supreme Court affirmed the District Court and denied appellant attorney fees and costs on the basis that appellant did not prosecute the action in good faith as a fiduciary of the estate and its successors. In re Estate of Evans, 217 M 89, 704 P2d 35, 42 St. Rep. 1047 (1985).

Assessment of Costs From Probate-Related Litigation: While a claim by an estate was pending, the law partner of the attorney opposing the claim was appointed personal representative of the estate. On appeal from the denial of a petition to remove the personal representative or to appoint a special administrator, the Montana Supreme Court held that a special administrator should be appointed to handle the above claim while the personal representative was to continue his duties otherwise. For the litigation relating to the appointment of the special administrator and for this appeal, each party was ordered to bear his own costs, except that the personal representative, if the District Court determined that he was proceeding in good faith, was entitled to receive necessary expenses and disbursements, including reasonable attorney's fees as provided under 72-3-632. In re the Estate of Sauter, 189 M 244, 615 P2d 875, 37 St. Rep. 1425 (1980).

Unsuccessful Applicant Not Entitled to Attorney Fees: An unsuccessful applicant for letters of administration is not entitled to attorney fees and costs out of the estate of decedent because litigation ensued in a contest to administer an estate is not beneficial to the estate or beneficiaries. In re Dygert, 170 M 31, 550 P2d 393 (1976).

72-3-634. Proceedings for review of employment of agents and compensation of personal representatives and employees.

Official Comments

In view of the broad jurisdiction conferred on the probate court by [72-3-111(1)], description of the special proceeding authorized by this section might be unnecessary. But, the code's theory that personal representatives may fix their own fees and those of estate attorneys marks an important departure from much existing practice under which fees are determined by the court in the first instance. Hence, it seemed wise to emphasize that any interested person can get judicial review of fees if he desires it. Also, if excessive fees have been paid, this section provides a quick and efficient remedy.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-721, and reads as follows: "After notice to all interested persons or on petition of an interested person or on appropriate motion if administration is supervised, the propriety of employment of any person by a personal representative including any attorney, auditor, investment adviser or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for his own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds."

Case Notes

Property Right in or Claim Against Estate Required to Be Considered Interested Person: When claimant's only claim against the estate was to the extent to which they were entitled to one-half of any insurance proceeds payable to the estate and there were no insurance proceeds, the claimants had no right in or claim against the estate, were not "interested persons", and had no standing to contest fees or to argue reasonableness of the fees of the personal representative or the estate's attorneys. An annuity contract did not constitute insurance proceeds. In re Estate of Miles v. Miles, 2000 MT 41, 298 M 312, 994 P2d 1139, 57 St. Rep. 191 (2000).

Fees of Personal Representative — Standard of Review: The Supreme Court cited decisions from several jurisdictions in formulating a standard of review for questions of fees paid or taken by a personal representative. Once review of a fee is sought by one with an interest in the estate, the personal representative has the burden of proving that the services rendered were necessary and the fee charged was reasonable. With regard to legal services, a reasonable fee should be ascertained by considering the time spent, the nature of the services, and the skill and experience required. A crucial factor for determining the reasonableness of a challenged fee is whether the services rendered were beneficial to the estate. Therefore, when a personal representative's negligence causes harm to the estate, he may be deprived of all or part of the fee. The review of fees is left to the sound discretion of the District Court. The Supreme Court will not overturn that decision absent a showing of abuse of discretion, and findings of fact will be upheld unless clearly erroneous. In re Estate of Stone, 236 M 1, 768 P2d 334, 46 St. Rep. 134 (1989), followed in Flikkema v. Kimm, 255 M 34, 839 P2d 1293, 49 St. Rep. 880 (1992).

Fairness of Fee: Attorney fee contracts made after the establishment of the fiduciary attorney-client relationship are valid if they are "fair and equitable". Fairness is determined by taking account of such relevant factors as good faith and full disclosure in the execution of the contract, the amount of the fee, and the client's maturity, intelligence, and understanding of the transaction. The burden of establishing fairness is on the attorney. In re Estate of Magelssen, 182 M 372, 597 P2d 90 (1979), followed in In re Estate of Barber, 239 M 129, 779 P2d 477, 46 St. Rep. 1565 (1989).

Fee Contracts Binding on Estate: The personal representative of an estate can contract for an attorney's services, and the estate is bound by such contracts. Though the fee contract is open to review, the amount of the fee is not automatically converted into a quantum meruit measure of compensation. Indeed, quantum meruit compensation is normally appropriate only where a valid contract does not exist. In re Estate of Magelssen, 182 M 372, 597 P2d 90 (1979).

Personal Representative Discretion in Fixing Compensation — Scope of Review: The factors bearing on the reasonableness of court-awarded attorney fees must be taken into account in determining if a particular fee is either excessive or reasonable. But under the probate code, it is the personal representative, not the Court, who sets the fee in the first instance. It is clear that a Court, when reviewing a fee agreement under a substantially performed contract, cannot blind itself to the terms of the contract and make its own determination of what is reasonable. In re Estate of Magelssen, 182 M 372, 597 P2d 90 (1979).

Part 7
Special Administrator

Part Case Notes

Powers of Special Administrators and Rights of Heirs in Legal Actions: After a special administrator was appointed to continue prosecution of an action begun before the testatrix's death, the heir to the estate sought to intervene in the case but was denied. Although holding that ruling nonappealable, the Supreme Court did grant the heir's Writ of Supervisory Control. Nonetheless, it found the heir was not a proper intervenor in the suit because her interest was represented adequately by the special administrator, noting that the heir had no right to pursue the action herself unless the personal representative failed to act on the claim, which was not the case here. Further, an administrator could sue in his own name without joining with him the party for whose benefit the action is brought. State ex rel. Palmer v. District Court, 190 M 185, 619 P2d 1201, 37 St. Rep. 1876 (1980).

72-3-701. Special administrator — how and when appointed.

Official Comments

The appointment of a special administrator other than one appointed pending original appointment of a general personal representative must be handled by the court. Appointment of a special administrator would enable the estate to participate in a transaction which the general personal representative could not, or should not, handle because of conflict of interest. If a need arises because of temporary absence or anticipated incapacity for delegation of the authority of a personal representative, the problem may be handled without judicial intervention by use of the delegation powers granted to personal representatives by [72-3-621].

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-614.

Case Notes

Appointment of Special Administrator for Failure of Personal Representatives to Sue: The residual beneficiary under a will petitioned to have itself appointed as special administrator of the estate. The personal representatives disagreed with the petitioner's opinion that the Skrochs abused their confidential relationship with the testatrix and unduly influenced her to create a joint tenancy, with rights of survivorship, in bank accounts totaling $190,000, at a time when she was allegedly incompetent. The petitioner wanted the personal representatives to litigate the claim, and they refused to do so after investigating the matter. There was no showing that the personal representatives were guilty of fraud, collusion, conflict of interest, or inability to act or that other special equitable circumstances required the petition to be granted. The petition was properly denied. In re Estate of Long, 225 M 429, 732 P2d 1347, 44 St. Rep. 375 (1987).

"Proper Person": The District Court dismissed a petitioner's request for appointment as special administrator of an estate. The final account had been filed and approved, and the court had authorized the copersonal representatives to distribute the assets of the estate. The appointment of the copersonal representatives had not been terminated. In affirming the District Court's dismissal of the petition, the Supreme Court agreed that the petitioner was not a "proper person" under 72-3-702. In re Estate of Mattila, 221 M 262, 718 P2d 343, 43 St. Rep. 797 (1986).

Limits on Role of Personal Representative — Conflict of Interest — Appointment of Special Administrator: While a claim by an estate was pending, the law partner of the attorney opposing the claim was appointed personal representative of the estate. On appeal from the denial of a petition to remove the personal representative or to appoint a special administrator, the Montana Supreme Court held that a special administrator should be appointed to handle the above claim. The personal representative was allowed to continue his duties with the exception of the claim involving his law partner. In re the Estate of Sauter, 189 M 244, 615 P2d 875, 37 St. Rep. 1425 (1980).

72-3-702. Special administrator — who may be appointed.

Official Comments

In some areas of the country, particularly where wills cannot be probated without full notice and hearing, appointment of special administrators pending probate is sought almost routinely. The provisions of this code concerning informal probate should reduce the number of cases in which a fiduciary will need to be appointed pending probate of a will. Nonetheless, there will be instances where contests begin before probate and where it may be necessary to appoint a special administrator. The objective of this section is to reduce the likelihood that contestants will be encouraged to file contests as early as possible simply to gain some advantage via having a person who is sympathetic to their cause appointed special administrator. Most will contests are not successful. Hence, it seems reasonable to prefer the named executor as special administrator where he is otherwise qualified.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-615.

Case Notes

"Proper Person": The District Court dismissed a petitioner's request for appointment as special administrator of an estate. The final account had been filed and approved, and the court had authorized the copersonal representatives to distribute the assets of the estate. The appointment of the copersonal representatives had not been terminated. In affirming the District Court's dismissal of the petition, the Supreme Court agreed that the petitioner was not a "proper person" under 72-3-702. In re Estate of Mattila, 221 M 262, 718 P2d 343, 43 St. Rep. 797 (1986).

72-3-703. Special administrator appointed informally — powers and duties.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-616.

72-3-704. Special administrator — formal proceedings — power and duties.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-617.

72-3-705. Special administrator — termination of appointment.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-618.

Part 8
Creditors' Claims

Part Case Notes

DECISIONS UNDER FORMER LAW

Regular Course of Administration: Section 72-12-803 (now repealed) related to the payment of claims during the regular course of administration and did not authorize an order directing the payment of a claim by a special administrator. State ex rel. Bartlett v. District Court, 18 M 481, 46 P 259 (1896), overruled on another point in State ex rel. King v. District Court, 24 M 494, 62 P 820 (1900).

72-3-801. Notice to creditors.

Official Comments

Section [72-3-1103], relating to small estates, contains an important qualification on the duty created by this section.

Failure to advertise for claims would involve a breach of duty on the part of the personal representative. If, as a result of such breach, a claim is later asserted against a distributee under [72-3-1012], the personal representative may be liable to the distributee for costs related to discharge of the claim and the recovery of contribution from other distributees. The protection afforded personal representatives under [72-3-1004] would not be available, for that section applies only if the personal representative truthfully recites that he has advertised for claims as required by this section.

It would be appropriate, by court rule, to channel publications through the personnel of the probate court. See [72-1-301]. If notices are controlled by a centralized authority, some assurance could be gained against publication in newspapers of small circulation. Also, the form of notices could be made uniform and certain efficiencies could be achieved. For example, it would be compatible with this section for the court to publish a single notice each day or each week listing the names of personal representatives appointed since the last publication, with addresses and dates of nonclaim.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1989 Amendment: At end of (1), after "barred", deleted "and proof of publication shall be filed with the clerk"; inserted (2) authorizing personal representative of estate to give written notice by mail to known or ascertainable creditors; and inserted (3) relieving personal representative from liability to creditor and successor for giving or failing to give notice.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-801.

Changes From Uniform Act: The Montana enactment added the phrase "and proof of publication shall be filed with the clerk" at the end of this section.

Case Notes

Sufficient Indica of Mutual Assent to Find Written Contract — Compensatory Damages — Constructive Fraud — Statute of Frauds — Statute of Limitations: The defendants sold a tract of land from their parents' estate despite the fact that the plaintiffs had an oral agreement with the parents for the purchase of a portion of the property. The District Court properly determined that the plaintiffs had an enforceable contract to buy the property under 70-20-102 and 30-11-111 based on (1) an unsigned land purchase agreement, (2) a land survey, (3) a check issued by one of the plaintiffs that was endorsed and deposited, and (4) a letter to a tax preparer referencing the check received as partial payment for the property at issue. Because the plaintiffs had an enforceable contract, the District Court properly determined that the plaintiffs suffered compensatory damages and that the personal representative's statements showed constructive fraud. The Supreme Court held that the District Court did not err in its conclusion that the limitations provided under 72-3-803 did not bar the plaintiffs' claim. Wood v. Anderson, 2017 MT 180, 388 Mont. 166, 399 P.3d 304.

Motion to Amend Judgment Improperly Denied — Judgment Against Estate Reduced to Policy Limits of Decedent: The plaintiff filed a lawsuit against the decedent's estate for injuries sustained from a vehicle driven by the estate's decedent. The complaint was filed 15 months after the estate had filed a notice to creditors pursuant to 72-3-801. After a jury awarded the plaintiff $400,000, the estate filed a motion to reduce the amount of damages to $100,000, which was the limit of the decedent's insurance policy. The District Court denied the motion. On appeal, the Supreme Court affirmed in part, finding that the plaintiff could not recover more than $100,000 from the estate itself but could instead try to collect the remainder from the decedent's insurance company under the Montana Unfair Trade Practices Act. The Supreme Court vacated the judgment and remanded the matter to the District Court to issue an order barring the plaintiff from recovering more than $100,000 from the estate. Locke v. Estate of Davis, 2015 MT 141, 379 Mont. 256, 350 P.3d 33.

Statute of Limitations on Tort Claim Against Decedent's Estate: Campbell brought a claim against Allen's estate in connection with injuries allegedly sustained while a prisoner in the state prison, alleging that the injuries occurred as a result of negligent supervision by Allen, who was a prison guard at the time of injury. The ordinary statute of limitations on Campbell's tort claim would be 3 years under 27-2-204; however, because no action was commenced during that time, the claim would be barred. Section 27-2-401 would normally extend the limit to 5 years because Campbell was imprisoned. However, this section requires that a claim against a decedent's estate must be filed within 4 months from the date of the first publication of notice to creditors, which constitutes a special statute of limitations as to decedents, and there is no extension provided by law even for persons who are incarcerated or are otherwise under a statutory disability. Therefore, the District Court properly held that Campbell's claim was time-barred under this section even if the general tort claim statute of limitations under Title 27, ch. 2, part 2, had not run. In re Estate of Allen, 255 M 469, 843 P2d 781, 49 St. Rep. 1071 (1992).

72-3-802. Statutes of limitations — waiver — suspension.

Official Comments

This section means that four months is added to the normal period of limitations by reason of a debtor's death before a debt is barred. It implies also that after the expiration of four months from death, the normal statute of limitations may run and bar a claim even though the nonclaim provisions of [72-3-803] have not been triggered. Hence, the nonclaim and limitation provisions of [72-3-803] are not exclusive.

It should be noted that under [72-3-803 and 72-3-804] it is possible for a claim to be barred by the process of claim, disallowance and failure by the creditor to commence a proceeding to enforce his claim prior to the end of the four-month suspension period. Thus, the regular statute of limitations applicable during the debtor's lifetime, the nonclaim provisions of [72-3-803 and 72-3-804], and the three-year limitation of [72-3-803] all have potential application to a claim. The first of the three to accomplish a bar controls.

Compiler's Comments

1989 Amendment: In (1), after "successors", inserted "whose interests would be affected"; in (2), after "death", substituted "or the giving of notice to creditors" for "and advertisement for claims against a decedent"; and made minor changes in form.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-802.

72-3-803. Nonclaim — limitations on presentation of claims — exceptions.

Official Comments

There was some disagreement among the Reporters over whether a short period of limitations, or of nonclaim, should be provided for claims arising at or after death. [Subsection (2)] was finally inserted because most felt it was desirable to accelerate the time when unadjudicated distributions would be final. The time limits stated would not, of course, affect any personal liability in contract, tort, or by statute, of the personal representative. Under [72-3-612] a personal representative is not liable on transactions entered into on behalf of the estate unless he agrees to be personally liable or unless he breaches a duty by making the contract. Creditors of the estate and not of the personal representative thus face a special limitation that runs four months after performance is due from the personal representative. Tort claims normally will involve casualty insurance of the decedent or of the personal representative, and so will fall within the exception of [subsection (3)]. If a personal representative is personally at fault in respect to a tort claim arising after the decedent's death, his personal liability would not be affected by the running of the special short period provided here.

The limitation stated in [subdivision (1)(b)] dovetails with the three-year limitation provided in [72-3-122] to eliminate most questions of succession that are controlled by state law after three years from death have elapsed. Questions of interpretation of any will probated within such period, or of the identity of heirs in intestacy are not barred, however.

Compiler's Comments

2019 Amendment: Chapter 313 in (1) near end inserted "and nonprobate transferees"; in (2) at beginning substituted "A claim described in subsection (1) which is" for "However, claims" and near end substituted "is" for "are also"; and made minor changes in style. Amendment effective October 1, 2019.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: At beginning of (1) and (2) deleted "With the exception of claims for taxes and claims founded on tort" and after "contract" inserted "tort"; at end of (1) substituted "within the earlier of the following time limitations" for "as follows"; in (1)(a), after "within", substituted "1 year" for language providing presentation of claim within 4 months after publication or within 3 years after decedent's death and addressing claims barred by a nonclaim statute; inserted (1)(b) providing references to 72-3-801 for creditors given actual notice and creditors barred by publication and in second sentence provided for barring of claims; in (2)(b), after "within", inserted "the latter of" and after "arises" inserted "or the time specified in subsection (1)(a)"; inserted (3)(c) providing that section does not prevent collection of compensation of services and expenses advanced by personal representative, attorney, or accountant; and made minor changes in style.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-803.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Sufficient Indica of Mutual Assent to Find Written Contract — Compensatory Damages — Constructive Fraud — Statute of Frauds — Statute of Limitations: The defendants sold a tract of land from their parents' estate despite the fact that the plaintiffs had an oral agreement with the parents for the purchase of a portion of the property. The District Court properly determined that the plaintiffs had an enforceable contract to buy the property under 70-20-102 and 30-11-111 based on (1) an unsigned land purchase agreement, (2) a land survey, (3) a check issued by one of the plaintiffs that was endorsed and deposited, and (4) a letter to a tax preparer referencing the check received as partial payment for the property at issue. Because the plaintiffs had an enforceable contract, the District Court properly determined that the plaintiffs suffered compensatory damages and that the personal representative's statements showed constructive fraud. The Supreme Court held that the District Court did not err in its conclusion that the limitations provided under 72-3-803 did not bar the plaintiffs' claim. Wood v. Anderson, 2017 MT 180, 388 Mont. 166, 399 P.3d 304.

Motion to Amend Judgment Improperly Denied — Judgment Against Estate Reduced to Policy Limits of Decedent: The plaintiff filed a lawsuit against the decedent's estate for injuries sustained from a vehicle driven by the estate's decedent. The complaint was filed 15 months after the estate had filed a notice to creditors pursuant to 72-3-801. After a jury awarded the plaintiff $400,000, the estate filed a motion to reduce the amount of damages to $100,000, which was the limit of the decedent's insurance policy. The District Court denied the motion. On appeal, the Supreme Court affirmed in part, finding that the plaintiff could not recover more than $100,000 from the estate itself but could instead try to collect the remainder from the decedent's insurance company under the Montana Unfair Trade Practices Act. The Supreme Court vacated the judgment and remanded the matter to the District Court to issue an order barring the plaintiff from recovering more than $100,000 from the estate. Locke v. Estate of Davis, 2015 MT 141, 379 Mont. 256, 350 P.3d 33.

Bad Faith Insurance Claims Not Subject to 1-Year Limitation: An insurance company could not use this section to shield itself from a third-party judgment in excess of policy limits based upon a bad faith claim under a policy covering the deceased in which the deceased was at fault. Goettel v. Estate of Ballard, 2010 MT 140, 356 Mont. 527, 234 P.3d 99.

Storing Valuables in Business Safe of Friend Who Dies — Necessity of Presenting Original Receipt or Filing Creditor's Claim to Recover Valuables: Boyer stored gold and silver in the coin shop safe of a friend with whom he did a lot of business and received a receipt, thereby creating a deposit for exchange under 70-6-107. The friend died. The friend's sons and widow assured Boyer that they knew of the storage agreement, that his metals were safe, that he did not have to file a creditor's claim against the estate, and that they would return the metals on presentation of the receipt and a demand for the metals. They refused to return the metals on demand because Boyer could not find the original receipt and presented a copy. They testified that they had paid other claims for which a creditor's claim against the estate had not been filed and had returned properties without presentation of the original receipts. They knew Boyer had not already used the original receipt to retrieve the metals and that Boyer had a good excuse for losing the original receipt. Relying on NW. Bank of Lewistown v. Estate of Coppedge, 219 M 473, 713 P2d 523 (1986), the Supreme Court held that they were estopped by their actions, statements, and knowledge from denying the existence and validity of the claim. The lower court erred in holding that a creditor's claim against the estate was necessary to require the estate to return the property. Boyer v. Sparboe, 263 M 289, 867 P2d 1116, 51 St. Rep. 60 (1994).

Claims Founded on Contract — Filing of Suit Outside Probate Proceedings — Insufficient Claim: A claim founded on contract must be either presented to the personal representative or filed with the court. The filing of a suit outside the probate proceedings, even though filed within the 4-month statutory period, does not suffice to properly submit a claim against an estate. Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 239 M 250, 780 P2d 608, 46 St. Rep. 1661 (1989).

Claim Barred When Statutory Condition Met: When any one of the conditions in this section has been met, the statute has run and a claim is barred. In re Estate of McDaniel, 231 M 109, 750 P2d 1103, 45 St. Rep. 470 (1988).

Claim Barred by Failure to Meet Filing Time — Subsequent Acknowledgement of Claim Not Relevant to Estoppel: Notwithstanding the exception for equitable estoppel outlined in NW. Bank of Lewistown v. Estate of Coppedge, 219 M 473, 713 P2d 523, 43 St. Rep. 102 (1986), failure of a creditor to meet the time limits for filing a claim against an estate forever bars such claim. Further, there is no provision in the Uniform Probate Code extending the time for filing or contesting claims based upon subsequent acknowledgement of debt. Bozeman Deaconess Hosp. v. In re Estate of Rosenberg, 225 M 232, 731 P2d 1305, 44 St. Rep. 195 (1987).

Requirement That Bank File Creditor's Claim Not Excused: The estate claimed judgment against it was invalid because the bank failed to file creditor's claim with personal representative within the time limits in 72-3-803. The bank claimed subsection (3)(a) relieved it of the filing requirement. The Supreme Court held against the bank because the bank's action was not foreclosure on a secured debt but an action to collect on a promissory note. The court remanded for a determination of whether the attorneys for the estate knew of the bank's claim and represented that a creditor's claim need not be filed. NW. Bank of Lewistown v. Estate of Coppedge, 219 M 473, 713 P2d 523, 43 St. Rep. 102 (1986).

Claim Against Estate — Statutory Period: In action to recover from an estate for services performed for decedent, the Court did not err in denying plaintiffs' motion to amend and supplement a complaint based on contract to include gift theory because the services were performed without expectation of payment and the claim sued upon (gift theory) was not filed within the statutory period. Summary judgment was proper. Ziegler v. Kramer, 175 M 236, 573 P2d 644 (1978).

DECISIONS UNDER FORMER LAW

Actual Notice Unnecessary: Bank which failed to present claim on note against decedent's estate within statutory time was barred where notice by publication appeared in only newspaper in community of 1,800 citizens of which both bank and decedent were residents; bank's contention that it received no actual notice which could have been accomplished with ease and that to bar claim under such circumstances was deprivation of property without due process of law was rejected. Baker Nat'l Bank v. Henderson, 151 M 526, 445 P2d 574 (1968).

Contract Claims: All claims against estate arising from contract were required to be presented to executor within 4 months of first publication of notice to creditors. Brown v. Midland Nat'l Bank, 150 M 422, 435 P2d 878 (1968).

Mechanics' Lien (Now Construction Lien): A mechanics' lien (now construction lien) was not a claim arising upon a contract within meaning of the statute, and the lien was lost because creditor's claim was not filed. Hammer v. Chapin, 256 F. Supp. 818 (D.C. Mont. 1966).

Attorney General's Opinions

Attorney General Opinion Inappropriate: Whether District Court Clerk must accept for filing creditor's claims against a decedent prior to appointment of a personal representative and whether such filing tolls the 3-year limitation on presentment of claims are inappropriate questions for an Attorney General Opinion. 37 A.G. Op. 135 (1978).

72-3-804. Manner of presentation of claims.

Official Comments

The filing of a claim with the probate court under (2) of this section does not serve to initiate a proceeding concerning the claim. Rather, it serves merely to protect the claimant who may anticipate some need for evidence to show that his claim is not barred. The probate court acts simply as a depository of the statement of claim, as is true of its responsibility for an inventory filed with it under [72-3-607].

In reading this section it is important to remember that a regular statute of limitation may run to bar a claim before the nonclaim provisions run. See [72-3-802].

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-804.

Case Notes

Claims Founded on Contract — Filing of Suit Outside Probate Proceedings — Insufficient Claim: A claim founded on contract must be either presented to the personal representative or filed with the court. The filing of a suit outside the probate proceedings, even though filed within the 4-month statutory period, does not suffice to properly submit a claim against an estate. Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 239 M 250, 780 P2d 608, 46 St. Rep. 1661 (1989).

Failure of Ex-Husband to Provide Sufficient Proof of Claim: Ex-husband contended that, although legally divorced, the couple were in fact acting as husband and wife and that his love and affection for his ex-wife precluded an action for large sums of money he claimed were owed him for his care and maintenance of his ex-wife and her property. The District Court properly found that claimant's failure to allege an express contract for services or to present a written copy of a contract was fatal to the claim. In affirming, the Supreme Court held that the ex-husband's uncertain, belated, and unilateral determination that he should be compensated for services rendered to a person unable to answer was not sufficient to raise a genuine issue of material fact. Neumann v. Rogstad, 232 M 24, 757 P2d 761, 45 St. Rep. 837 (1988).

Form of Proper Claim: This section does not require that a claimant specify the exact date a debt was incurred or that the claim be set forth in exact detail. The claimant need only set forth the basis of a claim, the amount claimed, and claimant's name and address. The duty to conduct further personal inquiry, within reasonable parameters, then passes to the personal representative. Neumann v. Rogstad, 232 M 24, 757 P2d 761, 45 St. Rep. 837 (1988).

No Presentation of Claim Required Where Action Pending: Prior to the death of her ex-husband, a divorced wife brought an action against him for his failure to make monthly payments to her as required by their property settlement agreement. As the matter was pending at the time of the ex-husband's death, no presentation of this claim to the personal representative of the ex-husband's estate was required. Reese v. Reese, 196 M 101, 637 P2d 1183, 38 St. Rep. 2157 (1981).

Attorney General's Opinions

Attorney General Opinion Inappropriate: Whether District Court Clerk must accept for filing creditor's claims against a decedent prior to appointment of a personal representative and whether such filing tolls the 3-year limitation on presentment of claims are inappropriate questions for an Attorney General Opinion. 37 A.G. Op. 135 (1978).

72-3-805. Allowance and disallowance of claims — interest on allowed claims.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: At end of (1) substituted "allowance" for "disallowance"; inserted (2) relating to limitations on change of allowance or disallowance of claim; and made minor changes in phraseology.

1989 Editorial Comment: This change results from an amendment proposed by the Joint Editorial Board of the national Uniform Probate Code in 1987. The addition of subsection (2) expressly permits the personal representative to change an allowed claim to a disallowed claim at any time prior to payment, unless a court order or judgment has directed the payment of the claim.

Additionally, subsection (1) was modified to bring it into conformance with the national Uniform Probate Code in another respect. Former Montana law uniquely treated inaction by the personal representative for 60 days after the original presentation of a claim as a notice of "disallowance". This change now treats such inaction as a notice of allowance. See corresponding national Uniform Probate Code section 3-806.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-806.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Presumption That Services Provided by Relative Rendered Gratuitously — Compensation for Personal Care Services Provided by Decedent's Daughters Properly Denied: Following their father's death, three daughters presented a claim against the estate for personal care services that they provided to their father. Their claims were disallowed, and the daughters appealed. The Supreme Court affirmed. Generally, when services are provided to one person by another and the services are knowingly and voluntarily accepted, the law presumes that the services were provided in expectation of payment. However, a generally acknowledged exception applies when a relative seeks payment for services, and the presumption in those cases is that the services were rendered gratuitously unless there was an express agreement for payment or unless such an agreement can be inferred. In this case, the decedent determined prior to death how he wished his assets to be distributed and, despite several opportunities to do so, made no provision for compensation for the personal services that his daughters provided. The daughters were unable to rebut the general presumption of gratuity, and the Supreme Court declined to disturb the District Court's denial of their claims for services. In re Estate of Orr, 2002 MT 325, 313 M 179, 60 P3d 962 (2002). See also San Antonio v. Spencer, 82 M 9, 264 P 944 (1928), Ziegler v. Kramer, 175 M 236, 573 P2d 644 (1978), Donnes v. Orlando, 221 M 356, 720 P2d 233 (1986), and Neumann v. Rogstad, 232 M 24, 757 P2d 761 (1988).

Conversion of Probate Proceeding From Informal to Formal Proceeding and Effect of Failure to Give Proper Notices: When the personal representative of an estate in informal proceedings petitioned for judicial approval of his final account and for the settlement and distribution of the estate, the proceeding was converted into a formal proceeding for those purposes. The Montana Rules of Civil Procedure apply to formal proceedings. The bank, which was a creditor of the estate and filed a claim against the estate, was entitled to notice of the hearing on the petition and entitled to an opportunity to appear and contest. Because the notice was not given, the court's decree was void and reversed as to the bank. The bank was also entitled to notice of the entry of the formal estate decree, and because that notice was not given, the 30-day time period for the bank to appeal did not run and the bank's appeal, filed after that period, was timely. In re Estate of Spencer, 2002 MT 304, 313 M 40, 59 P3d 1160 (2002).

Claim Barred by Failure to Meet Filing Time — Subsequent Acknowledgement of Claim Not Relevant to Estoppel: Notwithstanding the exception for equitable estoppel outlined in NW. Bank of Lewistown v. Estate of Coppedge, 219 M 473, 713 P2d 523, 43 St. Rep. 102 (1986), failure of a creditor to meet the time limits for filing a claim against an estate forever bars such claim. Further, there is no provision in the Uniform Probate Code extending the time for filing or contesting claims based upon subsequent acknowledgement of debt. Bozeman Deaconess Hosp. v. In re Estate of Rosenberg, 225 M 232, 731 P2d 1305, 44 St. Rep. 195 (1987).

Judgment in "Another Court" as an Allowance of Claim: Prior to the death of her ex-husband, a divorced wife brought an action against him for his failure to make monthly payments to her as required by their property settlement agreement. As the matter was pending at the time of the ex-husband's death, no presentation of this claim to the personal representative of the ex-husband's estate was required. The judgment for the money due under the property settlement agreement constituted an allowance of the claim. Although both the action under the property settlement agreement and the probate proceeding took place in the District Court of Lincoln County, the court was functioning as a probate court on estate matters and as a civil court, and hence "another court", on the property settlement agreement action. Reese v. Reese, 196 M 101, 637 P2d 1183, 38 St. Rep. 2157 (1981).

Unsuccessful Applicant Not Entitled to Attorney Fees: An unsuccessful applicant for letters of administration is not entitled to attorneys' fees and costs out of the estate of decedent because litigation ensued in a contest to administer an estate is not beneficial to the estate or beneficiaries. In re Dygert, 170 M 31, 550 P2d 393 (1976).

DECISIONS UNDER FORMER LAW

Claim for Hospital Expenses: In action to recover unpaid hospital expenses from decedent's heirs at law, who had distributed assets without having administrator appointed, Trial Court improperly granted relief to plaintiff hospital since it could not sue upon its claim until it first presented such claim to administrator. Thus, proper remedy would have been for hospital to apply for letters of administration as creditor, and hospital's attempted remedy circumvented statutory priorities for payment of debts. Daughters of Jesus v. Gee, 153 M 342, 457 P2d 471 (1969).

Variance Between Claim and Suit: Claim sued upon was required to be within scope of claim presented to executor, so that action for breach of contract to bequeath could not be predicated upon creditor's claim to recover debt. Brown v. Midland Nat'l Bank, 150 M 422, 435 P2d 878 (1968).

Effect of Fraud: Final decree of distribution and discharge in probate would not be set aside on ground of inadvertence or fraud under statute or former Rule 60(b), M.R.Civ.P. (now superseded), in absence of manifest abuse of Court's discretion to grant relief thereunder, in a case where moving party had every opportunity to protect his claim in probate and failed to do so. Werning v. McFarland, 149 M 137, 423 P2d 851 (1967).

Exclusive Nature of Procedure: Former Rule 41(e) (replaced by former Rule 4E), M.R.Civ.P. (now superseded), providing for dismissal of action for failure to serve summons as provided therein, did not apply to service of summons in suit on rejected claim in probate which was governed exclusively by former statute providing for contesting rejected claims in probate. Werning v. McFarland, 149 M 137, 423 P2d 851 (1967).

Summons After Discharge: Summons in suit on rejected claim filed within 3-month statutory limit, served after discharge in probate, was not substantial compliance with statutory requirement to "bring suit" within 3 months of rejection of claim, and relieved executrix of statutory duty to pay amount of disputed claim into Court. Werning v. McFarland, 149 M 137, 423 P2d 851 (1967).

72-3-806. Counterclaims — deduction.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-811.

72-3-807. Classification of claims as to priority of payment.

Compiler's Comments

2000 Amendment by Referendum: Chapter 9 in (1)(c) deleted reference to inheritance taxes; and made minor changes in style. Amendment effective November 7, 2000.

Applicability: Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

1997 Amendment: Chapter 482 inserted (1)(d) requiring representative, when estate assets are insufficient to pay all claims, to pay decedent's current and past-due child support obligation pursuant to court order; and made minor changes in style. Amendment effective May 2, 1997.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-805.

Case Notes

DECISIONS UNDER FORMER LAW

Circumvention of Payment Priorities: In action to recover unpaid hospital expenses from decedent's heirs at law who had distributed assets of decedent's estate without having administrator appointed, Trial Court improperly granted relief to plaintiff hospital since it could not sue upon its claim until it first presented such claim to administrator; thus, proper remedy would have been for hospital to apply for letters of administration as creditor, and hospital's attempted remedy circumvented statutory priorities for payment of debts. Daughters of Jesus v. Gee, 153 M 342, 457 P2d 471 (1969).

72-3-808. Payment of claims.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: Near beginning of (1) substituted "the earlier of the time limitations provided in 72-3-803 for the presentation of claims" for "4 months from the date of the first publication of the notice to creditors"; and made minor change in punctuation.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-807.

72-3-811. Secured claims.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-809.

72-3-812. Encumbered assets.

Official Comments

Section [72-2-617] establishes a rule of construction against exoneration. Thus, unless the will indicates to the contrary, a specific devisee of mortgaged property takes subject to the lien without right to have other assets applied to discharge the secured obligation.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-814.

72-3-813. Execution and levies prohibited.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-812.

72-3-814. Claims not due and contingent or unliquidated claims.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-810.

72-3-815. Compromise of claims.

Compiler's Comments

2019 Amendment: Chapter 313 after "personal representative" deleted "with the consent of the heirs or devisees or the court". Amendment effective October 1, 2019.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-813.

72-3-821. Administration in more than one state — payment of claims.

Official Comments

Under [72-3-803(1)(a)], if a local (property only) administration is commenced and proceeds to advertisement for claims before nonclaim statutes have run at domicile, claimants may prove claims in the local administration at any time before the local nonclaim period expires. [This section] has the effect of subjecting all assets of the decedent, wherever they may be located and administered, to claims properly presented in any local administration. It is necessary, however, that the personal representative of any portion of the estate be aware of other administrations in order for him to become responsible for claims and charges established against other administrations.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-815.

Case Notes

State Probate Jurisdiction of Federal Claim — Homestead Exemption — Priority of Liens: Creditor obtained a default judgment in the U.S. District Court for the Southern District of New York against an Alaska resident and attempted to execute on property in Montana that had subsequently come under Montana's exclusive probate jurisdiction. While the federal court retained jurisdiction over claims impacting the estate, the court could not seize and control property in the possession of the state probate court. It was within the jurisdiction of the state court to determine that the real property was subject to family protection allowances and exempt from execution. Although the lien was attached prior to debtor's death, the lien was extinguished upon the exercise of the family protection allowances, and the homestead allowance was exempt from and had priority over all other claims against the estate. In re Estate of Wilhelm, 233 M 255, 760 P2d 718, 45 St. Rep. 1468 (1988).

72-3-822. Distribution to domiciliary personal representative — exceptions.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-816.

Part 9
Special Provisions Relating to Distribution

72-3-901. Abatement.

Official Comments

A testator may determine the order in which the assets of his estate are applied to the payment of his debts. If he does not, then the provisions of this section express rules w[h]ich may be regarded as approximating what testators generally want. The statutory order of abatement is designed to aid in resolving doubts concerning the intention of a particular testator, rather than to defeat his purpose. Hence, subsection [(2)] directs that consideration be given to the purpose of a testator. This may be revealed in many ways. Thus, it is commonly held that, even in the absence of statute, general legacies to a wife, or to persons with respect to which the testator is in loco parentis, are to be preferred to other legacies in the same class because this accords with the probable purpose of the legacies.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-902.

Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Probate Estate Deemed Sufficient to Satisfy Statutory Allowances — No Error: A man and his first wife executed a revocable living trust. One-half of the trust became irrevocable on the death of the wife. The man remarried, and he executed a codicil to his will to include his new wife and child and devised all tangible personal property to his new wife. Litigation followed the man's death. The Supreme Court found that the District Court did not err when it determined the probate estate was sufficient to satisfy the new wife's statutory allowances through the abatement of her specific devises. In re Estate of Dower, 2021 MT 245, 405 Mont. 443, 495 P.3d 1083.

Abatement Statute Applies When Residue of Estate and Interest Accrued Insufficient to Pay All Expenses and Disbursements: The Supreme Court affirmed the lower court's finding that the abatement statute applied because the residue of the estate and accrued interest would be insufficient to pay all expenses and disbursements. The Supreme Court also held that under the abatement statute, the lower court had not erred in dividing the accrued interest, with one-half going to the widow and one-half going to the children. In re Estate of Barber, 239 M 129, 779 P2d 447 (1989).

Federal Estate Taxes: Where a widow renounced the will and elected to take her dower and intestate share pursuant to section 22-107, R.C.M. 1947 (since repealed), and her intestate share was one-third of the decedent's net estate in accordance with section 91-403(1), R.C.M. 1947 (since repealed), such elected statutory share, which qualified for the marital deduction and generated no federal estate tax liability, was nonetheless chargeable with a proportionate share of the estate's total estate tax liability. In re Estate of Mosby, 170 M 463, 554 P2d 1341 (1976).

DECISIONS UNDER FORMER LAW

Federal Estate Taxes: Where a will does not otherwise provide for the payment of federal estate taxes, the payment must be equitably apportioned among residuary interests so that a residuary interest not generating any estate taxes does not bear any burden for their payment. Robinson v. U.S., 518 F2d 1105 (9th Cir. 1975), reversing 369 F. Supp. 925 (D.C. Mont. 1974).

72-3-902. Distribution in kind preferred — method — valuation.

Official Comments

[Sections 72-3-902 and 72-3-903 establish] a preference for distribution in kind. [They direct] a personal representative to make distribution in kind whenever feasible and to convert assets to cash only where there is a special reason for doing so. [They provide] a reasonable means for determining value of assets distributed in kind. It is implicit in [72-3-101, 72-3-902, 72-3-903, and 72-3-911] that each residuary beneficiary's basic right is to his proportionate share of each asset constituting the residue.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: In (2), after "allowance or devise", substituted "of a stated sum of money may be satisfied in kind" for "payable in money may be satisfied by value in kind"; near middle of (3) substituted "between amounts bid and asked" for "between amounts bid and offered"; and in (4), after "distributed in", substituted "any equitable manner" for "kind if there is no objection to the proposed distribution and it is practicable to distribute undivided interests. In other cases, residuary property may be converted into cash for distribution."

1989 Editorial Comment: This change results from an amendment proposed by the Joint Editorial Board of the national Uniform Probate Code in 1987. The substantive change is found in subsection (4), which permits distribution of the residuary in "any equitable manner" rather than as undivided interests as tenants in common. The Board noted that some attorneys complained that former law created administrative and tax problems. See corresponding national Uniform Probate Code section 3-906.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-906(a).

Changes From Uniform Act: Montana codified section 3-906 of the Uniform Probate Code as 72-3-902 and 72-3-903. The Official Comments appearing under 72-3-902 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-906 of the Uniform Probate Code.

Case Notes

Distribution of Exact Percentage of Interest in Business Not Comporting With Testator's Intent — Probate Reversed for Equal Distribution of Business Shares: Snyder generally devised all her distributable property to her son and daughter in equal shares. A separate provision provided that if Snyder's Great Falls drugstore was owned by a corporation, Snyder's, Inc., at the time of Snyder's death, then 51% of the corporation stock should go to her son in recognition of his work at the business, without ultimately diminishing the equal distribution of the estate. As personal representative, the son sought an interpretation of the will, and the District Court, following the specific provisions, granted the son 51% of the corporate stock and the daughter 49% of the stock and required the son to give the daughter a cash settlement necessary to equalize the difference between the 51% and 49% distributed shares. The daughter appealed on grounds that the distribution was inequitable because she lived in Utah, she did not receive a salary from the corporation, the corporation did not pay dividends, and there was no market for the corporation stock. The son maintained that the specific provision in the will granting him 51% of the shares most accurately articulated Snyder's intent and, by necessary inference, gave the daughter the remaining 49% of the shares. The Supreme Court reversed the lower court's percentage distribution, based on the conclusion that if the drugstore was not incorporated, the son was to take the entire interest in the store and the daughter was to receive estate assets of comparable value. The court concluded that the estate could only be distributed equally by doing the same with the shares of the drugstore. When the will was read as a whole, the exact percentage of interest in the corporation to be distributed to the son and daughter was considered less important than Snyder's desire to have the estate distributed equally between the children. In re Estate of Snyder, 2000 MT 113, 299 M 421, 2 P3d 238, 57 St. Rep. 475 (2000). On remand, the District Court held that property still remaining in the estate should be appraised and distributed based on its current market value. The daughter appealed, and the Supreme Court reversed. The will in two places specified that Snyder intended to have the estate distributed pursuant to its value at Snyder's death as calculated for federal estate tax purposes, precluding the application of subsection (2)(b) of this section, and the Supreme Court remanded for valuation and distribution of the remaining estate according to the terms of the will. In re Estate of Snyder, 2007 MT 146, 337 M 449, 162 P3d 87 (2007).

Under the law of the case established in the 2000 and 2007 appeals, the son received all of the business shares, valued at $187,488 on the date of death, and the daughter was entitled to estate assets of equal value, with any remaining estate assets being divided equally. The value of certain real property on the date of death was $160,000, although the property was subsequently valued at more than $5 million. Nevertheless, the daughter was entitled to receive that property at the date-of-death value, plus additional estate assets totaling $27,488. In re Estate of Snyder, 2009 MT 291, 352 M 264, 217 P3d 1027 (2009).

72-3-903. Proposal for distribution — delivery — objection.

Official Comments

[Sections 72-3-902 and 72-3-903 establish] a preference for distribution in kind. [They direct] a personal representative to make distribution in kind whenever feasible and to convert assets to cash only where there is a special reason for doing so. [They provide] a reasonable means for determining value of assets distributed in kind. It is implicit in [72-3-101, 72-3-902, 72-3-903, and 72-3-911] that each residuary beneficiary's basic right is to his proportionate share of each asset constituting the residue.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-906(b).

Changes From Uniform Act: Montana codified section 3-906 of the Uniform Probate Code as 72-3-902 and 72-3-903. The Official Comments appearing under 72-3-903 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-906 of the Uniform Probate Code.

Case Notes

Interpretation of Will Devising Ranch — Distribution of Income: After two siblings disputed who should receive their parents' ranch, the District Court interpreted the decedent's will to devise the entirety of the ranch to one sibling. The other sibling, who was also the personal representative of the estate, appealed, arguing that under the will he was entitled to a portion of the ranch and that the other sibling should not have been allowed to object to the proposed distribution of income from the ranch. The Supreme Court affirmed, concluding that the District Court correctly interpreted the clear intent of the decedent and that once the District Court determined that one sibling was entitled to the entire ranch, it followed that the same sibling was entitled to receive all of the income from the ranch. Ecton v. Ecton, 2013 MT 114, 370 Mont. 52, 300 P.3d 706.

72-3-904. Distribution in kind — evidence of title.

Official Comments

This and sections following should read with [72-3-606] which permits the personal representative to leave certain assets of a decedent's estate in the possession of the person presumptively entitled thereto. The "release" contemplated by this section would be used as evidence that the personal representative had determined that he would not need to disturb the possession of an heir or devisee for purposes of administration.

Under section 3-711 [omitted in Montana] a personal representative's relationship to assets of the estate is described as the "same power over the title to property of the estate as an absolute owner would have." A personal representative may, however, acquire a full title to estate assets, as in the case where particular items are conveyed to the personal representative by sellers, transfer agents or others. The language of [this section] is designed to cover instances where the instrument of distribution operates as a transfer, as well as those in which its operation is more like a release.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-907.

72-3-905. Distribution by personal representative conclusive evidence of succession to interest by distributee.

Official Comments

The purpose of this section is to channel controversies which may arise among successors of a decedent because of improper distributions through the personal representative who made the distribution, or a successor personal representative. Section [72-3-122] does not bar appointment proceedings initiated to secure appointment of a personal representative to correct an erroneous distribution made by a prior representative. But see [72-3-1012].

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-908.

72-3-906. Improper distribution or payment — liability of distributee or payee.

Official Comments

The term "improperly" as used in this section must be read in light of [72-3-604, 72-3-610, and 72-3-611] and the manifest purpose of this and other sections of the code to shift questions concerning the propriety of various distributions from the fiduciary to the distributees in order to prevent every administration from becoming an adjudicated matter. Thus, a distribution may be "authorized at the time" as contemplated by [72-3-604, 72-3-610, and 72-3-611] and still be "improper" under this section. [Sections 72-3-604, 72-3-610, and 72-3-611 are] designed to permit a personal representative to distribute without risk in some cases, even though there has been no adjudication. When an unadjudicated distribution has occurred, the rights of persons to show that the basis for the distribution (e.g., an informally probated will, or informally issued letters of administration) is incorrect, or that the basis was improperly applied (erroneous interpretation, for example) is preserved against distributees by this section.

The definition of "distributee" to include the trustee and beneficiary of a testamentary trust in [72-1-103(11)] is important in allocating liabilities that may arise under [72-3-906 and 72-3-907] on improper distribution by the personal representative under an informally probated will. The provisions of [72-3-906 and 72-3-907] are based on the theory that liability follows the property and the fiduciary is absolved from liability by reliance upon the informally probated will.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-909.

Case Notes

Order to Quitclaim Property Back to Estate Reversed: Following remand of an estate distribution appeal in In re Estate of Snyder, 2000 MT 113, 299 M 421, 2 P3d 238 (2000), the District Court ordered that to complete the distribution of Snyder's property in Great Falls and Flathead County, Snyder's daughter must quitclaim her interest in the Flathead County property so that the court could order distribution of the property by partition, in-kind distribution, or sale and distribution of the proceeds. The daughter appealed on grounds that the court failed to comply with this section in ordering her to quitclaim the property back to the estate and that the court retained statutory flexibility to distribute the estate without the quitclaim order. The Supreme Court agreed. The quitclaim order appeared at best to be an unnecessary step in resolving the estate, and the quitclaim order was reversed. In re Estate of Snyder, 2007 MT 146, 337 M 449, 162 P3d 87 (2007).

72-3-907. Purchases from distributees protected.

Official Comments

The words "instrument or deed of distribution" are explained in [72-3-904]. The effect of this section may be to make an instrument or deed of distribution a very desirable link in a chain of title involving succession of land. Cf. [72-3-911].

In 1975, the Joint Editorial Board recommended additions that strengthen the protection extended by this section to bona fide purchasers from distributees. The additional language was derived from recommendations evolved with respect to the Colorado version of the Code by probate and title authorities who agreed on language to relieve title assurers of doubts they had identified in relation to some cases.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Completely rewrote the section (see 1981 Session Law for text) which formerly read: "If property distributed in kind or a security interest therein is acquired by a purchaser or lender for value from a distributee who has received an instrument or deed of distribution from the personal representative, the purchaser or lender takes title free of any claims of the estate and incurs no personal liability to the estate, whether or not the distribution was proper. To be protected under this provision, a purchaser or lender need not inquire whether a personal representative acted properly in making the distribution in kind."

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-910.

72-3-911. Successors' rights if no administration.

Official Comments

Title to a decedent's property passes to his heirs and devisees at the time of his death. See [72-3-101]. This section adds little to [72-3-101] except to indicate how successors may establish record title in the absence of administration.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-901.

72-3-912. Successor's indebtedness to estate offset against interest — defenses available.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-903.

Case Notes

Conflict Between Bankruptcy Discharge and Intent of Revocable Trust — Intent Controls: In 1989, the respondent executed a promissory note for $100,000 plus interest in favor of his stepsister but never made any payment on the promissory note. Later, the respondent's mother, Ms. Ward, amended her revocable trust to provide that before the respondent received any distribution from her trust, his share would be decreased, and the stepsister's share increased, by any amounts he owed the stepsister at the time of Ms. Ward's death. In 2005, the respondent filed for Chapter 7 bankruptcy. Four years later, Ms. Ward passed away and the trustee filed a petition in District Court to determine the appropriate amounts to distribute. The District Court concluded that the respondent's share should be reduced by the amount he owed his stepsister on the date of Ms. Ward's death, $298,356.16. The respondent appealed, contending that the debt had been discharged in his 2005 bankruptcy. The Supreme Court disagreed, holding that the plain language of the trust document controlled and that the bankruptcy provisions were inapplicable. In re Ward Revocable Trust, 2011 MT 308, 363 Mont. 72, 265 P.3d 1260.

Conflict Between Statute and Intent of Testator — Intent Controlling: When Winifred died, testate, she left her two sons as her sole heirs and a net estate of approximately $112,000. At the time of her death, her son John was indebted to her for approximately $26,000 and her son Kenneth was indebted to her for approximately $69,000, although approximately $55,000 of that debt had been discharged in bankruptcy. In her will, Winifred stated that if either of her sons owed her money at the time of her death, the debt was to be offset against the share of the estate and the debt forgiven in such a way that each son was to be treated equally. Citing St. v. Keller, 173 M 523, 568 P2d 166 (1977), and In re Estate of Ellison, 243 M 258, 792 P2d 5 (1990), the Supreme Court held that under 72-2-501 (now repealed), the intent of the testator is to control and that that intent takes precedent over a conflicting statute. The Supreme Court held that Kenneth's debt must be offset against his share of the estate, notwithstanding the language of this section and the fact that part of the debt was discharged. The Supreme Court also held that there was no basis to offset against Kenneth's share of the estate the value of real property earlier transferred to his mother at an inflated price because there was nothing in the record to show that Winifred objected to the terms of the sale. In re Estate of Firebaugh, 271 M 418, 897 P2d 1088, 52 St. Rep. 571 (1995). See also In re Ward Revocable Trust, 2011 MT 308, 363 Mont. 72, 265 P.3d 1260.

Corporate Indebtedness Not Subject to Right of Retainer: A corporation is a separate and distinct entity and is not a successor to the estate. (See In re Russell's Estate, 102 M 301, 59 P2d 777 (1936).) Since a corporation is not a successor to the estate, corporate indebtedness is not subject to the right of retainer. In re Estate of Haggerty, 246 M 351, 805 P2d 1338, 47 St. Rep. 2145 (1990).

Right of Retainer Inapplicable to Gifts: The District Court found that approximately $80,000 in bank drafts advanced to a son by his mother with little likelihood or expectation of repayment was a gift rather than a loan subject to the right of retainer. In re Estate of Haggerty, 246 M 351, 805 P2d 1338, 47 St. Rep. 2145 (1990).

72-3-913. Interest on general pecuniary devise.

Official Comments

Unlike the common law, this section provides that a general pecuniary devisee's right to interest begins one year from the time when administration was commenced, rather than one year from death. The rule provided here is similar to the common-law rule in that the right to interest for delayed payment does not depend on whether the estate in fact realized income during the period of delay. The section is consistent with section 5(b) of the Revised Uniform Principal and Income Act which allocates realized net income of an estate between various categories of successors.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-904.

72-3-914. Partition for purpose of distribution.

Official Comments

Ordinarily heirs or devisees desiring partition of a decedent's property will resolve the issue by agreement without resort to the courts. (See [72-3-915].) If court determination is necessary, the court with jurisdiction to administer the estate has jurisdiction to partition the property.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-911.

Case Notes

Land Below High-Water Mark of Flathead Lake Tribal Property Not Subject to Distribution by Estate: When she died, Hobbs owned property on the south shore of Flathead Lake. Her will designated that three nieces divide one parcel of about 1 acre above the high-water mark and that a fourth niece and her husband, the Conrads, receive an adjacent 1.9-acre parcel from the high-water mark inland. A survey established the boundary between the parcels, but did not include any land below the high-water mark to the meander line of the lake. The District Court approved the survey, distributed the property, and closed the estate. The parties later became involved in a dispute over zoning and building regulations. The personal representative petitioned to reopen the estate for the purpose of filing a corrected survey and to distribute the portion of land lying below the high-water mark to the meander line, thereby increasing the acreage of both lots. The personal representative presented exhibits and affidavits verifying that Hobbs had paid taxes on the land out to the meander line. The Conrads objected on grounds that Hobbs's will specifically left land above the high-water mark and that because the estate did not own the land below the high-water mark, it could not be distributed to anyone. Nevertheless, the District Court approved the corrected survey and distributed the land below the high-water mark to the meander line between the heirs. The Supreme Court noted that the bed and banks of Flathead Lake within Indian reservation boundaries are held by the United States in trust for the tribes, and that any private title to Flathead Lake shore property extends only to the high-water mark. The District Court erroneously distributed the land below the high-water mark to the meander line, because the court did not have jurisdiction to distribute the tribal trust property. The estate could not distribute property that it did not own. In re Estate of Hobbs, 2002 MT 85, 309 M 308, 46 P3d 594 (2002), following Mont. Power Co. v. Rochester, 127 F2d 189 (9th Cir. 1942), and Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen, 665 F2d 951 (9th Cir. 1982).

72-3-915. Private agreements among successors as to distribution — testamentary trustee as successor.

Official Comments

It may be asserted that this section is only a restatement of the obvious and should be omitted. Its purpose, however, is to make it clear that the successors to an estate have residual control over the way it is to be distributed. Hence, they may compel a personal representative to administer and distribute as they may agree and direct. Successors should compare the consequences and possible advantages of careful use of the power to renounce as described by [72-2-811, now repealed] with the effect of agreement under this section [renunciation replaced by disclaimer in 1993]. The most obvious difference is that an agreement among successors under this section would involve transfers by some participants to the extent it changed the pattern of distribution from that otherwise applicable.

Differing from a pattern that is familiar in many states, this code does not subject testamentary trusts and trustees to special statutory provisions, or supervisory jurisdiction. A testamentary trustee is treated as a devisee with special duties which are of no particular concern to the personal representative. Article VII [omitted in Montana] contains optional procedures extending the safeguards available to personal representatives to trustees of both inter vivos and testamentary trusts.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-912.

Case Notes

Oral Estate Settlement Agreement Not Binding: An estate settlement agreement reached by the parties' attorneys over the telephone was not binding on the parties because the agreement was not in writing and was not filed with the Clerk of Court or entered upon the minutes of the court. In re Estate of Goick, 275 M 13, 909 P2d 1165, 53 St. Rep. 12 (1996). However, see Lockhead v. Weinstein, 2003 MT 360, 319 M 62, 81 P3d 1284 (2003), overruling Goick under the provisions of 37-61-401.

Standing of Decedent's Relatives to Appeal Settlement and Distribution Agreements: Decedent's mother, brother, and sister sought to appeal a contested settlement agreement and a distribution agreement ordered by the District Court, but decedent's surviving spouse, Barbara, contended that there was no standing for an appeal. The Supreme Court held that: (1) Barbara was not precluded from raising the issue of standing for the first time on appeal, even though she failed to object in District Court, because objections to standing cannot be waived; (2) decedent's mother, as a creditor of the estate, had standing to appeal the appointment of Barbara as personal representative, but a brother and sister, who were neither creditors nor heirs of the estate, lacked standing; (3) because decedent's mother, brother, and sister were not successors to the estate, they had no legal interest or personal stake in the distribution of the estate and thus lacked standing to claim that the distribution agreement was improper; and (4) decedent's mother, brother, and sister were parties to the contested settlement agreement and were directly affected by the validity of the agreement and thus had standing to appeal that issue. In re Estate of Goick, 275 M 13, 909 P2d 1165, 53 St. Rep. 12 (1996), following Holmstrom Land Co. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060 (1979), Grossman v. Dept. of Natural Resources and Conservation, 209 M 427, 682 P2d 1319 (1984), and Olson v. Dept. of Revenue, 223 M 464, 726 P2d 1162 (1986). Goick was followed, as to prerequisites for standing, in In re Paternity of Vainio, 284 M 229, 943 P2d 1282, 54 St. Rep. 858 (1997). However, see Lockhead v. Weinstein, 2003 MT 360, 319 M 62, 81 P3d 1284 (2003), overruling Goick under the provisions of 37-61-401.

Tax Based on Will Distribution: An inheritance tax is computed according to a probated will, not according to the settlement agreement subsequently entered into among the beneficiaries. An inheritance tax is a tax on the right to receive property, rather than a tax on the property itself. In re Estate of Winter, 226 M 24, 734 P2d 178, 44 St. Rep. 430 (1987).

72-3-916. Distribution to trustee — registration — bond.

Official Comments

This section is concerned with the fiduciary responsibility of the executor to beneficiaries of trusts to which he may deliver. Normally, the trustee represents beneficiaries in matters involving third persons, including prior fiduciaries. Yet, the executor may apprehend that delivery to the trustee may involve risks for the safety of the fund and for him. For example, he may be anxious to see that there is no equivocation about the devisee's willingness to accept the trust, and no problem of preserving evidence of the acceptance. He may have doubts about the integrity of the trustee, or about his ability to function satisfactorily. The testator's selection of the trustee may have been based on facts which are still current, or which are of doubtful relevance at the time of distribution. If the risks relate to the question of the trustee's intention to handle the fund without profit for himself, a conflict of interest problem is involved. If the risk relates to the ability of the trustee to manage prudently, a more troublesome question is posed for the executor. Is he, as executor, not bound to act in the best interests of the beneficiaries?

In many instances involving doubts of this sort, the executor probably will want the protection of a court order. Sections [72-3-1001 through 72-3-1003] provide ample authority for an appropriate proceeding in the court which issued the executor's letters.

In other cases, however, the executor may believe that he may be adequately protected if the acceptance of the trust by the devisee is unequivocal, or if the trustee is bonded. The purpose of this section is to make it clear that it is proper for the executor to require the trustee to register the trust and to notify beneficiaries before receiving distribution. Also, the section complements section 7-304 [omitted in Montana] by providing that the personal representative may petition an appropriate court to require that the trustee be bonded.

Status of testamentary trustees under the Uniform Probate Code. Under the Uniform Probate Code, the testamentary trustee by construction would be considered a devisee, distributee, and successor to whom title passes at time of the testator's death even though the will must be probated to prove the transfer. The informally probated will is conclusive until set aside and the personal representative may distribute to the trustee under the informally probated will or settlement agreement and the title of the trustee as distributee represented by the instrument or deed of distribution is conclusive until set aside on showing that it is improper. Should the informally probated will be set aside or the distribution to the trustee be shown to be improper, the trustee as distributee would be liable for value received but purchasers for value from the trustee as distributee under an instrument of distribution would be protected. [The] definition of "distributee" [in 72-1-103(11)] limits the distributee liability of the trustee and substitutes that of the trust beneficiaries to the extent of distributions by the trustee.

As a distributee as defined by [72-1-103(11)] the testamentary trustee or beneficiary of a testamentary trust is liable to claimants like other distributees, would have the right of contribution from other distributees of the decedent's estate and would be protected by the same time limitations as other distributees [72-3-1013].

Incident to his standing as a distributee of the decedent's estate, the testamentary trustee would be an interested party who could petition for an order of complete settlement by the personal representative or for an order terminating testate administration. He also could appropriately receive the personal representative's account and distribution under a closing statement. As distributee he could represent his beneficiaries in compromise settlements in the decedent's estate which would be binding upon him and his beneficiaries. See [72-3-915].

The general fiduciary responsibilities of the testamentary trustee are not altered by the Uniform Probate Code and the trustee continues to have the duty to collect and reduce to possession within a reasonable time the assets of the trust estate including the enforcement of any claims on behalf of the trust against prior fiduciaries, including the personal representative, and third parties.

Compiler's Comments

2011 Amendment: Chapter 19 in (2) near beginning substituted "posting bond" for "giving bond" and in two places substituted "personal representative" for "trustee"; and made minor changes in style. Amendment effective October 1, 2011.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-913.

72-3-917. Distribution to person under disability.

Official Comments

Section [72-5-104] is especially important as a possible source of authority for a valid discharge for payment or distribution made on behalf of a minor.

Compiler's Comments

2019 Amendment: Chapter 313 in (3)(a)(ii) after "property not exceeding" substituted "$50,000" for "$10,000". Amendment effective October 1, 2019.

2011 Amendment: Chapter 109 in (2) in first sentence after "72-5-104" deleted "72-5-501". Amendment effective October 1, 2011.

2001 Amendment: Chapter 7 in first sentence of (2) after "authorized by" inserted "72-5-104"; and made minor changes in style. Amendment effective October 1, 2001.

1989 Amendment: In (1), after "distributing", substituted "in a manner expressly provided in the will" for "to his conservator or any other person authorized by this code or otherwise to give a valid receipt and discharge for the distribution"; inserted (2) relating to distribution when a conservator has been appointed or appointment is pending; and inserted (3) relating to distribution to an heir or devisee under a disability other than minority and use of money or property received for disabled person.

1989 Editorial Comment: This change results from an amendment proposed by the Joint Editorial Board of the national Uniform Probate Code in 1987. The Board felt that a more comprehensive and useful "facility of payment" provision was necessary. See corresponding national Uniform Probate Code section 3-915.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-915.

72-3-918. Disposition of unclaimed assets — escheat.

Official Comments

This section applies when it is believed that a claimant, heir or distributee exists but he cannot be located. See [72-2-115].

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-914.

Part 10
Closing Estates

Part Case Notes

DECISIONS UNDER UNIFORM PROBATE CODE

Written Objections: In response to the personal representative's argument that the court had no issue jurisdiction because no written objections were filed by the objectors to any of the accountings made by the personal representative, the Supreme Court stated that the provisions of the Uniform Probate Code do not provide for the filing of written objections to an accounting by a personal representative. Because there was no other statutory authority and it appeared otherwise proper, the Supreme Court considered the issues raised by the objectors in their various briefs as the issues for consideration by the court on appeal. In re Estate of Barber, 239 M 129, 779 P2d 477, 46 St. Rep. 1565 (1989).

DECISIONS UNDER FORMER LAW

Executor Guilty of Delay in Administering Estate: When an executor was guilty of delay in administering an estate he was not chargeable with interest on the cash due legatees and devisees. In re Lindhardt's Estate, 133 M 65, 320 P2d 357 (1958).

Irregularities in Management of Estate:

It is the policy of the Courts to sustain, if possible, irregular acts of executors or administrators when done in good faith and without detriment to the estate. Montgomery v. Gilbert, 111 M 250, 108 P2d 616 (1940).

When record in action involving alleged mismanagement of estate by executor showed a number of irregularities on his part but no attempt was made for 5 years after approval of his accounts to penalize or remove him from office, the executor was not liable for alleged losses in the absence of a positive showing of detriment of the estate or fraud upon the persons interested in the estate. Montgomery v. Gilbert, 111 M 250, 108 P2d 616 (1940).

Losses in Management of Estate: When a testator named a person as executor to serve without bond, giving him wide and discretionary powers in the administration of his estate similar to those he himself employed in carrying on his livestock business, the executor is required to act in entire good faith but is not an insurer of the assets of the estate, nor is he expected to be infallible, but is only liable for losses because of bad faith or want of due diligence. Montgomery v. Gilbert, 111 M 250, 108 P2d 616 (1940).

Interest Chargeable: When administrator was ordered by Court to sell for cash, but instead he sold on credit and without security after unnecessary delay, he was chargeable with interest at legal rate of 6% from date money should have been received together with loss in selling price from that date and date when sheep were thereafter sold. In re Astibia's Estate, 100 M 224, 46 P2d 712 (1935).

Bank Deposits:

An administrator is not an insurer of the assets of the estate represented by him, and if he deposits its funds with a responsible bank, acting in good faith in the exercise of his best judgment, he is not liable for loss occasioned by its failure. In re Mullen's Estate, 97 M 144, 33 P2d 270 (1934).

To charge an administrator with the loss of estate funds in a closed bank of which he was cashier, the evidence must show that he was negligent in not removing them before its closing, negligence here being the failure to do what a reasonable and prudent person would ordinarily have done in the circumstances of the situation. In re Mullen's Estate, 97 M 144, 33 P2d 270 (1934).

When cashier's checks drawn against the savings account of an estate were not paid owing to the bank's closing, although their amount was deducted from the account, and the administrator failed to present a claim to the receiver for its allowance within the proper time and the estate lost the amount through his neglect, he should be charged therewith. In re Mullen's Estate, 97 M 144, 33 P2d 270 (1934).

Burden of Proof: When indebtedness due an estate remains unpaid, the burden rests upon the executor or administrator, if he would escape liability, to show that his failure to make collection was not the result of his own neglect. In re Connolly's Estate, 79 M 445, 257 P 418 (1927).

Investment of Estate Funds: When an executor invests estate funds without authority of Court in the purchase of a note, he is properly chargeable with any loss sustained by the estate resulting therefrom. In re Connolly's Estate, 79 M 445, 257 P 418 (1927).

Joint Debt Secured by Pledge: When an executor became indebted to his testator during the latter's lifetime on a joint note secured by pledge of corporate stock which after maturity and after the estate came into his hands was worth around par and payment of which note could have been secured but for his failure to take timely action, the executor was properly held liable for the balance due on the instrument. In re Connolly's Estate, 79 M 445, 257 P 418 (1927).

Loss of Assets:

An executor fulfills his trust obligation to the estate for which he acts when he deposits its funds temporarily with a responsible bank and when he acts in good faith and in the exercise of his best judgment in making the deposit, he is not liable for loss occasioned by the subsequent failure of such bank. In re Connolly's Estate, 79 M 445, 257 P 418 (1927).

An executor or administrator is not liable for losses to the estate occurring through no fault of his, and is entitled to compensation for his services. In re Dolenty's Estate, 53 M 33, 161 P 524 (1916).

Advice of Attorney: An administrator may not excuse his failure to collect a debt due to the estate of his decedent by reliance upon the advice of an attorney that an attempt to collect would result in litigation and delay in settlement of the estate. Scott v. Tuggle, 74 M 476, 241 P 229 (1925).

Crop Mortgage: When a defaulting vendee of farm lands in consideration of being permitted to remain in possession agreed in writing to give the vendor a promissory note secured by a crop mortgage for money due, an equitable lien was created though neither note nor mortgage were ever given, which lien the administrator of the estate of the vendor knowing of its existence, was in duty bound to collect, if possible, and for his failure to attempt to collect he was chargeable in his account for the resulting loss. Scott v. Tuggle, 74 M 476, 241 P 229 (1925).

Growing Crops: When at the time of the appointment of an administrator there were crops growing upon the lands of the estate, which but for timely care and harvesting might have been lost, he may be allowed the reasonable expense incurred in that behalf, even though he obtained the necessary funds by borrowing upon the credit of the estate without first obtaining an order of Court permitting him to do so. In re Jennings' Estate, 74 M 449, 241 P 648 (1925).

Interest on Borrowed Money: Without an order of Court to that effect, an administrator may not borrow money and pledge the credit of the estate therefor (unless, perhaps, in case of emergency), and where he does so he is personally liable for interest thereon. In re Jennings' Estate, 74 M 449, 241 P 648 (1925).

Rents and Profits of Real Estate:

When an administrator himself occupies the real property of the decedent's estate or by his negligence fails to secure from it such rents and profits as it ought to yield, he is chargeable with such reasonable revenue as the property should have brought, as well as with interest at the legal rate upon the annual rentals, from the time they should have been paid. In re Jennings' Estate, 74 M 449, 241 P 648 (1925).

An executor or administrator is chargeable not only with the assets of the estate which actually came into his hands, but also with those, including rents and profits of real estate which in the exercise of ordinary care and diligence ought to have been received from it, which by reason of his neglect he has failed to get into his hands. In re Dolenty's Estate, 53 M 33, 161 P 524 (1916).

Operation of Farm by Administrator: When estate funds were used by an administrator in purchasing farm machinery used by him in operating a farm owned by the estate as his own, he is chargeable with the amount paid therefor, with interest, as well as with produce of livestock not accounted for and stock killed for his own use while so operating the property. In re Jennings' Estate, 74 M 449, 241 P 648 (1925).

Employment of Counsel: The employment and payment of counsel is a personal matter between the administrator and the attorney over which the Court has no authority, except for allowance or disallowance of the amount paid when presented as other claims. State ex rel. Kelly v. District Court, 25 M 33, 63 P 717 (1901).

72-3-1001. Formal proceedings terminating administration — testate or intestate — order of complete settlement.

Official Comments

[Section 72-3-1002] is derived from § 64(b) of the Illinois Probate Act (1967) [S.H.A. ch. 3, § 64(b)]. Section [72-3-111(2)] specifies that an order is binding as to all who are given notice even though less than all interested persons were notified. [Sections 72-3-1001 and 72-3-1002 provide] a method of curing an oversight in regard to notice which may come to light before the estate is finally settled. If the person who failed to receive notice of the earlier proceeding succeeds in obtaining entry of a different order from that previously made, others who received notice of the earlier proceeding may be benefited. Still, they are not entitled to notice of the curative proceeding, nor should they be permitted to appear.

See, also, Comment following [72-3-1003].

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-1001(a).

Changes From Uniform Act: Montana codified section 3-1001 of the Uniform Probate Code as 72-3-1001 and 72-3-1002. The Official Comments appearing under 72-3-1001 are the comments of the National Conference of Commissioners on Uniform State Laws for section 3-1001 of the Uniform Probate Code.

Case Notes

Conversion of Probate Proceeding From Informal to Formal Proceeding and Effect of Failure to Give Proper Notices: When the personal representative of an estate in informal proceedings petitioned for judicial approval of his final account and for the settlement and distribution of the estate, the proceeding was converted into a formal proceeding for those purposes. The Montana Rules of Civil Procedure apply to formal proceedings. The bank, which was a creditor of the estate and filed a claim against the estate, was entitled to notice of the hearing on the petition and entitled to an opportunity to appear and contest. Because the notice was not given, the court's decree was void and reversed as to the bank. The bank was also entitled to notice of the entry of the formal estate decree, and because that notice was not given, the 30-day time period for the bank to appeal did not run and the bank's appeal, filed after that period, was timely. In re Estate of Spencer, 2002 MT 304, 313 M 40, 59 P3d 1160 (2002).

Final Distribution Requires Discharge of Personal Representative: The estate of Nina Garland and her husband, who had killed her, disputed the distribution of assets as ordered by the lower court. The Supreme Court held that it was unclear if the District Court had intended its order to be a final distribution of the assets, but in light of the fact that the personal representative had not been discharged as required by statute, no final settlement could have been entered and the case had to be remanded to the District Court for further proceedings. In re Estate of Garland, 279 M 269, 928 P2d 928, 53 St. Rep. 1146 (1996).

72-3-1002. Order of complete settlement as to persons previously omitted or unnotified in previous formal testacy proceeding.

Official Comments

[See Official Comments under 72-3-1001.]

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-1001(b).

Changes From Uniform Act: Montana codified section 3-1001 of the Uniform Probate Code as 72-3-1001 and 72-3-1002.

72-3-1003. Formal proceedings terminating administration under informally probated will — settlement order construing will without adjudicating testacy.

Official Comments

[This section] permits a final determination of the rights between each other and against the personal representative of the devisees under a will when there has been no formal proceeding in regard to testacy. Hence, the heirs in intestacy need not be made parties. [Sections 72-3-1001 and 72-3-1002 permit] a final determination of the rights between each other and against the personal representative of all persons interested in an estate. If supervised administration is used, [72-3-405 and 72-3-406 direct] that the estate be closed by use of procedures like those described in [72-3-1001 and 72-3-1002]. Of course, testacy will have been adjudicated before time for the closing proceeding if supervised administration is used.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-1002.

72-3-1004. Closing estate by sworn statement of personal representative.

Official Comments

The code uses "termination" to refer to events which end a personal representative's authority. See [72-3-521], et seq. The word "closing" refers to circumstances which support the conclusions that the affairs of the estate either are, or have been alleged to have been, wound up. If the affairs of the personal representative are reviewed and adjudicated under either [72-3-1001, 72-3-1002, or 72-3-1003], the judicial conclusion that the estate is wound up serves also to terminate the personal representative's authority. See [72-3-524(2)]. On the other hand, a "closing" statement under [this section] is only an affirmation by the personal representative that he believes the affairs of the estate to be completed. The statement is significant because it reflects that assets have been distributed. Any creditor whose claim has not been barred and who has not been paid is permitted by [72-3-1012] to assert his claim against distributees. The personal representative is also still fully subject to suit under [72-3-511 and 72-3-513], for his authority is not "terminated" under [72-3-524(2)] until one year after a closing statement is filed. Even if his authority is "terminated," he remains liable to suit unless protected by limitation or unless an adjudication settling his accounts is the reason for "termination." See [72-3-1011 and 72-3-521].

From a slightly different viewpoint, a personal representative may obtain a complete discharge of his fiduciary obligations through a judicial proceeding after notice. Sections [72-3-1001 through 72-3-1003] describe two proceedings which enable a personal representative to gain protection from all persons or from devisees only. A personal representative who neither obtains a judicial order of protection nor files a closing statement, is protected by [72-3-611] in regard to acts or distributions which were authorized when done but which become doubtful thereafter because of a change in testacy status. On the other questions, the personal representative who does not take any of the steps described by the code to gain more protection, has no protection against later claims of breach of his fiduciary obligation other than any arising from consent or waiver of individual distributees who may have bound themselves by receipts given to the personal representative.

This section increases the prospects of full discharge of a personal representative who uses the closing statement route over those of a personal representative who relies on receipts. Full protection follows from the running of the six months' limitations period described in [72-3-1011]. But, [the latter section's] protection does not prevent distributees from claiming lack of full disclosure. Hence, it offers little more protection than a receipt. Still, it may be useful to decrease the likelihood of later claim of nondisclosure. Its more significant function, however, is to provide a means for terminating the office of personal representative in a way that will be obvious to third persons.

Compiler's Comments

2000 Amendment by Referendum: Chapter 9 in (1)(b) near beginning deleted reference to inheritance taxes; at end of (1)(c) inserted "by the accounting"; deleted former (1)(d) that read: "(d) complied with the provisions of 72-3-1006"; and made minor changes in style. Amendment effective November 7, 2000.

Applicability: Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

1989 Amendment: In (1)(a) substituted "determined that the time limitation for presentation of creditors' claims has expired" for "published notice to creditors as provided by 72-3-801 and that the first publication occurred more than 6 months prior to the date of the statement"; and made minor changes in punctuation.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-1003.

Changes From Uniform Act: The Montana enactment added subsection (1)(d).

72-3-1005. Final accounting required to close estate.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Inserted "residual" before "beneficiary" in (3).

Section Not Part of Uniform Act: This section is not part of the Uniform Probate Code as promulgated by the National Conference of Commissioners on Uniform State Laws.

Case Notes

Denial of Final Accounting — Joint Tenancy Property Passes Immediately Upon Death: According to the terms of his will, the testator did not intend ademption of three real estate lots when he sold them prior to his death but did intend ademption of five certificates of deposit that were no longer in existence. Although erroneously concluding that the certificates of deposit were not adeemed, the District Court did not err when it denied a final accounting and petition for distribution because the accounting contained errors. The accounting also erroneously included the value of joint tenancy property in the distributable estate. Property held in joint tenancy by the decedent should have passed immediately upon the decedent's death and should not have been included in the distributable estate. In re Estate of Schreiber, 2015 MT 282, 381 Mont. 173, 357 P.3d 920.

District Court Error in Allowing Personal Representative to Settle and Close Estate Without Required Accounting: Reeves argued that the lower court allowed her brother, who was acting as personal representative for their father's estate, to close and settle the estate without providing her with an adequate final accounting. Her brother countered that Reeves had been given copies of the inventory and appraisal and a copy of the estate tax form, as well as the check register and bank statements. The Supreme Court held that the record contained substantial evidence of numerous items of income, expense, and claims that should have been included in the final accounting and therefore the District Court had erred in approving the first and final accounting and in entering a decree of dissolution. Estate of Melvin, 261 M 408, 862 P2d 1159, 50 St. Rep. 1382 (1993).

Matters Involving Prior Accounting Merged in Final Account: In response to the personal representative's argument that the court had no jurisdiction over matters handled during the administration of the estate that were not included in the order issued prior to the final account, the Supreme Court held that in any supervised administration, the court is given continuing authority in a single in rem proceeding to secure the complete administration of the estate until the entry of an order approving distribution and discharging the personal representative. The matters involving the prior accounting were merged in the final account, and the court had jurisdiction over them. In re Estate of Barber, 239 M 129, 779 P2d 477, 46 St. Rep. 1565 (1989).

72-3-1006. Certificate.

Compiler's Comments

2009 Amendment: Chapter 364 in (1) near beginning after "filing of a" inserted "duplicate" and after "return" inserted "with the department of revenue pursuant to 72-16-906". Amendment effective October 1, 2009.

Retroactive Applicability: Section 8, Ch. 364, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to tax periods beginning after December 31, 2008."

2003 Amendment: Chapter 68 near beginning of (1) substituted "probate proceedings under this code requiring the filing of a United States estate tax return" for "all probate proceedings under this code"; at end of (1)(a) inserted "or that no tax is payable"; deleted former (1)(c) that read: "(c) a receipt from the county treasurer stating that any estate tax due on the assets of the estate has been paid"; and made minor changes in style. Amendment effective March 14, 2003.

Retroactive Applicability: Section 9, Ch. 68, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to deaths occurring after December 31, 2000, for which the probate of the decedents' estates closes after [the effective date of this act]." Effective March 14, 2003.

2000 Amendment by Referendum: Chapter 9 in (1)(a), (1)(b), and (1)(c) substituted references to estate tax for references to inheritance tax; and made minor changes in style. Amendment effective November 7, 2000.

Applicability: Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

1981 Amendment: In (1)(a) inserted "stating that any inheritance tax due on the assets of the estate has been paid"; and inserted (1)(b) relating to an extension agreement.

Section Not Part of Uniform Act: This section is not part of the Uniform Probate Code as promulgated by the National Conference of Commissioners on Uniform State Laws.

72-3-1011. Limitation on actions against personal representative.

Official Comments

This and the preceding section make it clear that a claimant whose claim has not been barred may have alternative remedies when an estate has been distributed subject to his claim. Under this section, he has six months to prosecute an action against the personal representative if the latter breached any duty to the claimant. For example, the personal representative may be liable to a creditor if he violated the provisions of [72-3-808]. The preceding section describes the fundamental liability of the distributees to unbarred claimants to the extent of the value received. The last sentence emphasizes that a personal representative who fails to disclose matters relevant to his liability in his closing statement and in the account of administration he furnished to distributees, gains no protection from the period described here. A personal representative may, however, use [72-3-1001 and 72-3-1002] or, where appropriate, [72-3-1003] to secure greater protection.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-1005.

Case Notes

Sufficient Indica of Mutual Assent to Find Written Contract — Compensatory Damages — Constructive Fraud — Statute of Frauds — Statute of Limitations: The defendants sold a tract of land from their parents' estate despite the fact that the plaintiffs had an oral agreement with the parents for the purchase of a portion of the property. The District Court properly determined that the plaintiffs had an enforceable contract to buy the property under 70-20-102 and 30-11-111 based on (1) an unsigned land purchase agreement, (2) a land survey, (3) a check issued by one of the plaintiffs that was endorsed and deposited, and (4) a letter to a tax preparer referencing the check received as partial payment for the property at issue. Because the plaintiffs had an enforceable contract, the District Court properly determined that the plaintiffs suffered compensatory damages and that the personal representative's statements showed constructive fraud. The Supreme Court held that the District Court did not err in its conclusion that the limitations provided under 72-3-803 did not bar the plaintiffs' claim. Wood v. Anderson, 2017 MT 180, 388 Mont. 166, 399 P.3d 304.

Decree of Distribution Not to Be Reopened Thirty-Six Years After Entry: A petition for an order of distribution in intestacy nunc pro tunc in the estate of Charles DeTienne was filed on March 11, 1982, on behalf of the heirs of Charles' daughter Elvina DeTienne. Charles died intestate in 1945. Elvina predeceased her father. Charles' estate was distributed to his six surviving children. The petition to reopen the matter stated that Elvina's heirs had been mistakenly excluded from the decree of distribution and that the mistake had been discovered on July 7, 1981. The District Court dismissed the petition, ruling that there had not been compliance with the 60-day deadline of the applicable statute, section 91-3516, R.C.M. 1947. The Supreme Court affirmed the dismissal and further ruled that even if the decree was a result of fraud, the petition had been filed too late after discovery of the possible fraud. In re Estate of DeTienne, 202 M 235, 656 P2d 827, 40 St. Rep. 55 (1983).

72-3-1012. Liability of distributees to claimants.

Official Comments

This section creates a ceiling on the liability of a distributee of "the value of his distribution" as of the time of distribution. The section indicates that each distributee is liable for all that a claimant may prove to be due, provided the claim does not exceed the value of the defendant's distribution from the estate. But, each distributee may preserve a right of contribution against other distributees. The risk of insolvency of one or more, but less than all distributees is on the distributee rather than on the claimant.

Compiler's Comments

2019 Amendment: Chapter 313 in (1) substituted current second sentence for former text that read: "A distributee is not liable to claimants for amounts in excess of the value of the distributee's distribution as of the time of distribution." Amendment effective October 1, 2019.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-1004.

72-3-1013. Limitation on actions against distributees.

Official Comments

This section describes an ultimate time limit for recovery by creditors, heirs and devisees of a decedent from distributees. It is to be noted: (1) Section [72-3-122] imposes a general limit of three years from death on one who must set aside an informal probate in order to establish his rights, or who must secure probate of a late-discovered will after an estate has been administered as intestate. Hence the time limit of [72-3-122] may bar one who would claim as an heir or devisee sooner than this section, although it would never cause a bar prior to three years from the decedent's death. (2) This section would not bar recovery by a supposed decedent whose estate has been probated. See [72-3-317]. (3) The limitation of this section ends the possibility of appointment of a personal representative to correct an erroneous distribution as mentioned in [72-3-1011 and 72-3-1016]. If there have been no adjudications under [72-3-313 and 72-3-316], or possibly [72-3-1001, 72-3-1002, or 72-3-1003], estate of the decedent which is discovered after administration has been closed may be the subject of different distribution than that attending the estate originally administered.

The last sentence excepting actions or suits to recover property kept from one by the fraud of another may be unnecessary in view of the blanket provision concerning fraud in [Chapter 1]. See [72-1-111].

Compiler's Comments

2019 Amendment: Chapter 313 in (1) at end substituted "but all claims of creditors of the decedent are barred 1 year after the decedent's death" for "thereof"; and made minor changes in style. Amendment effective October 1, 2019.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-1006.

Case Notes

Sufficient Indica of Mutual Assent to Find Written Contract — Compensatory Damages — Constructive Fraud — Statute of Frauds — Statute of Limitations: The defendants sold a tract of land from their parents' estate despite the fact that the plaintiffs had an oral agreement with the parents for the purchase of a portion of the property. The District Court properly determined that the plaintiffs had an enforceable contract to buy the property under 70-20-102 and 30-11-111 based on (1) an unsigned land purchase agreement, (2) a land survey, (3) a check issued by one of the plaintiffs that was endorsed and deposited, and (4) a letter to a tax preparer referencing the check received as partial payment for the property at issue. Because the plaintiffs had an enforceable contract, the District Court properly determined that the plaintiffs suffered compensatory damages and that the personal representative's statements showed constructive fraud. The Supreme Court held that the District Court did not err in its conclusion that the limitations provided under 72-3-803 did not bar the plaintiffs' claim. Wood v. Anderson, 2017 MT 180, 388 Mont. 166, 399 P.3d 304.

72-3-1014. Certificate discharging liens securing fiduciary performance.

Official Comments

This section does not affect the liability of the personal representative, or of any surety, but merely permits a release of security given by a PR, or his surety, when, from the passage of time and other conditions, it seems highly unlikely that there will be any liability remaining undischarged. See [72-3-617].

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-1007.

72-3-1015. Estate to be closed within two years.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Substituted "supreme court administrator" for "clerk of the district court" in the first sentence of (1).

Section Not Part of Uniform Act: This section is not part of the Uniform Probate Code as promulgated by the National Conference of Commissioners on Uniform State Laws.

72-3-1016. Subsequent administration upon discovery of other property.

Official Comments

This section is consistent with [72-3-122] which provides a general period of limitations of three years from death for appointment proceedings, but makes appropriate exception for subsequent administrations.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-1008.

Case Notes

Applicability: When the mineral rights distributed in a decree of settlement of final account and distribution of estate had been previously conveyed by sale, the discovery of the error does not constitute subsequently discovered property which triggers the operation of this section. In re Estate of Swandal, 179 M 429, 587 P2d 368 (1978).

Part 11

Collection of Personal Property by Affidavit and Summary Administration Procedure for Small Estates

Part Official Comments

The four sections which follow include two designed to facilitate transfer of small estates without use of a personal representative, and two designed to simplify the duties of a personal representative, who is appointed to handle a small estate.

The Flexible System of Administration described by earlier portions of [Chapter 3] lends itself well to situations involving small estates. Letters may be obtained quickly without notice or judicial involvement. Immediately, the personal representative is in a position to distribute to successors whose deeds or transfers will protect purchasers. This route accommodates the need for quick and inexpensive transfers of land of small value as well as other assets. Consequently, it was unnecessary to frame complex provisions extending the affidavit procedures to land.

Indeed, transfers via letters of administration may prove to be less troublesome than use of the affidavit procedure. Still, it seemed desirable to provide a quick collection mechanism which avoids all necessity to visit the probate court. For one thing, unpredictable local variations in probate practice may produce situations where the alternative procedure will be very useful. For another, the provision of alternatives is in line with the overall philosophy of [Chapter 3] to provide maximum flexibility.

Figures gleaned from a recent authoritative report of a major survey of probated estates in Cleveland, Ohio, demonstrate that more than one-half of all estates in probate had a gross value of less than $15,000. This means that the principal measure of the relevance of any legislation dealing with probate procedures is to be found in its impact on very small and moderate sized estates. Here is the area where probate affects most people.

72-3-1101. Collection of personal property by affidavit.

Official Comments

This section provides for an easy method for collecting the personal property of a decedent by affidavit prior to any formal disposition. Existing legislation generally permits the surviving widow or children to collect wages and other small amounts of liquid funds. [This section] goes further in that it allows the collection of personal property as well as money and permits any devisee or heir to make the collection. Since the appointment of a personal representative may be obtained easily under the code, it is unnecessary to make the provisions regarding small estates applicable to realty.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 453, L. 2023. Amendment effective October 1, 2023.

2013 Amendment: Chapter 85 in (1)(a) at end inserted exception clause; inserted (2) allowing the department of revenue to refund certain unclaimed property; and made minor changes in style. Amendment effective October 1, 2013.

2005 Amendment: Chapter 513 in (1)(a) increased maximum estate value to $50,000 from $20,000. Amendment effective April 28, 2005.

1999 Amendment: Chapter 234 in (1)(a) increased value of estates for which personal property can be collected by affidavit from $7,500 to $20,000. Amendment effective October 1, 1999.

1981 Amendment: Increased the value of estate in (1)(a) from $1,500 to $7,500.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-1201.

72-3-1102. Effect of affidavit.

Official Comments

Sections [72-3-112, 72-3-113 (now repealed), and 72-3-1102] apply to any personal property located in this state whether or not the decedent died domiciled in this state, to any successor to personal property located in this state whether or not a resident of this state, and, to the extent that the laws of this state may control the succession to personal property, to personal property wherever located of a decedent who died domiciled in this state.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-1202.

72-3-1103. Small estates — summary administration procedure.

Official Comments

This section makes it possible for the personal representative to make a summary distribution of a small estate without the necessity of giving notice to creditors. Since the probate estate of many decedents will not exceed the amount specified in the statute, this section will prove useful in many estates.

Compiler's Comments

1989 Amendment: Near beginning, before "entire estate", deleted "net distributable estate does not exceed $7,500 or the value of the"; and made minor change in phraseology.

1989 Editorial Comment: This section and 72-3-1104 contemplate that a personal representative may distribute a probate estate without giving notice to creditors. If, after filing the inventory and appraisal, it appears that the value of the entire estate less liens and encumbrances will not exceed the value of the family protections, costs of administration, reasonable funeral expenses, and the medical and hospital expenses resulting from the last illness of the decedent (preferred under 72-3-807), the personal representative may immediately disburse and distribute the estate to the appropriate persons without publishing the notice to creditors that would otherwise be required. Such a publication and the 4-month wait for creditors to file claims serve no purpose, since no creditors with a higher priority could exist.

Former Montana law had a unique provision referring to a "net distributable estate" that does not exceed $7,500, rather than the term "entire estate" used in the corresponding section of the national Uniform Probate Code. While the Montana version failed to define "net distributable estate", 72-1-103(11) defines "distributee" to mean "any person who has received property of a decedent from his personal representative other than as a creditor or purchaser". In other words, the net distributable estate is likely to mean that estate left for gratuitous transmission after satisfying all lawful claims. Thus, it was impossible to determine the net distributable estate until a notice to creditors had been published, creditors had filed claims, and the same had been satisfied. This change avoids that impossibility and places Montana in conformance with the national Uniform Probate Code. See corresponding national Uniform Probate Code sections 3-1203 and 3-1204.

Nothing in this change diminishes the ability of a person claiming to be the successor of the decedent from preparing and presenting an affidavit for the collection of property. This affidavit procedure, set forth in 72-3-1101 and 72-3-1102, is distinct and separate from the summary procedure for disbursement and distribution of 72-3-1103 and 72-3-1104.

1981 Amendment: Increased the value of net distributable estate from $1,500 to $7,500.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-1203.

Changes From Uniform Act: The Montana enactment inserted "the value of the net distributable estate does not exceed $7,500 or the" near the beginning of the section. The compiler substituted the reference to "section 72-3-1104" for an apparently erroneous reference to "section 72-3-1102" at the end of the section.

72-3-1104. Small estates — closing by sworn statement of personal representative.

Official Comments

The personal representative may elect to close the estate under [72-3-1003] in order to secure the greater protection offered by that procedure.

The remedies for fraudulent statement provided in [72-1-111] of course would apply to any intentional misstatements by a personal representative.

Compiler's Comments

2000 Amendment by Referendum: Chapter 9 in (1)(b) substituted "estate taxes" for "inheritance taxes"; and made minor changes in style. Amendment effective November 7, 2000.

Applicability: Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

1989 Amendment: In (1)(a), before "the value of the entire estate", deleted "the value of the net distributable estate did not exceed $7,500 or".

1989 Editorial Comment: See 1989 editorial comment under 72-3-1103.

1981 Amendment: Increased the value of net distributable estate in (1)(a) from $1,500 to $7,500.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-1204.

Changes From Uniform Act: The Montana enactment inserted "value of the net distributable estate did not exceed $7,500 or the" in subdivision (1)(a). The compiler substituted the references to "section 72-3-1103" in the first paragraph of subsection (1) and "section 72-3-1004" at the end of subsection (3) for apparently erroneous references to "section 72-3-1101" and "section 72-3-1012", respectively.

CHAPTER 4
UPC — FOREIGN PERSONAL REPRESENTATIVES AND ANCILLARY ADMINISTRATION

Chapter Official Comments

This [chapter] concerns the law applicable in estate problems which involve more than a single state. It covers the powers and responsibilities in the adopting state of personal representatives appointed in other states.

Some provisions of the code covering local appointment of personal representatives for nonresidents appear in [Chapter 3]. These include the following: [72-3-112] (venue), [72-3-114] (resolution of conflicting claims regarding domicile), [72-3-502] (priority as personal representative of a representative previously appointed at domicile), [72-3-225] (thirty days delay required before appointment of a local representative for a nonresident), [72-3-803(1)] (claims barred by nonclaim at domicile before local administration commenced are barred locally) and [72-3-821] (duty of personal representative in regard to claims where estate is being administered in more than one state). See also [72-3-222, 72-3-223, 72-3-526(1), and 72-3-822]. Also, see [72-4-401].

The recognition provisions contained in [Chapter 4] and the various provisions of [Chapter 3] which relate to administration of estates of nonresidents are designed to coerce respect for domiciliary procedures and administrative acts to the extent possible.

The first part of [Chapter 4] contains some definitions of particular relevance to estates located in two or more states.

The second part of [Chapter 4] deals with the powers of foreign personal representatives in a jurisdiction adopting the Uniform Probate Code. There are different types of power which may be exercised. [The text of the Comment discussing the types of power of foreign personal representatives is omitted since the Montana enactment substantially revised the Uniform Probate Code provisions. Cf. sections 4-201 through 4-207 of the Uniform Probate Code as promulgated by the National Conference of Commissioners.]

[Part 2] provides for power in the local court over foreign personal representatives who act locally. If a local or ancillary administration has been started, provisions in [Chapter 3] subject the appointee to the power of the court. See [72-3-511]. In [Part 2] of this [chapter], it is provided that a foreign personal representative submits himself to the jurisdiction of the local court by filing a copy of his appointment to get the powers provided in [72-4-301] or by doing any act which would give the state jurisdiction over him as an individual. In addition, the collection of funds as provided in [72-4-306] gives the court quasi-in rem jurisdiction over the foreign personal representative to the extent of the funds collected.

Finally, [72-4-203] provides that the foreign personal representative is subject to the jurisdiction of the local court "to the same extent that his decedent was subject to jurisdiction immediately prior to death." This is similar to the typical nonresident motorist provision that provides for jurisdiction over the personal representative of a deceased nonresident motorist, see Note, 44 Iowa L.Rev. 384 (1959).

Part 4 of the [chapter] deals with the res judicata effect to be given adjudications for or against a foreign personal representative. Any such adjudication is to be conclusive on a local personal representative "unless it resulted from fraud or collusion ... to the prejudice of the estate." This provision must be read with [72-3-312] which deals with certain out-of-state findings concerning a decedent's estate.

Chapter Collateral References

Montana Probate Forms, State Bar of Montana (2006).

Part 1
General Provisions

72-4-101. Definitions.

Official Comments

Section [72-1-103] includes definitions of "foreign personal representative," "personal representative" and "nonresident decedent."

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 4-101.

Correction of Inaccurate References: The compiler substituted the references to "Chapter 3" for references to "Article III" in subsections (1) and (2) and substituted the reference to "section 72-4-301" for an apparently erroneous reference to "section 72-4-307" at the end of subsection (2).

Part 2
Jurisdiction Over Foreign Personal Representatives

72-4-201. Jurisdiction by act of foreign personal representative.

Official Comments

The words "courts of this state" are sufficient under federal legislation to include a federal court having jurisdiction in the adopting state.

A foreign personal representative appointed at the decedent's domicile has priority for appointment in any local administration proceeding. See [72-3-506]. Once appointed, a local personal representative remains subject to the jurisdiction of the appointing court under [72-3-511].

In 1975, the Joint Editorial Board recommended substitution of the word "personally" for "himself", in the preliminary language of the first sentence. Also, language restricting the submission to jurisdiction to cases involving the estate was added in 1975.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1981 Amendment: Added (1)(a) relating to filing copies of appointment and (1)(b) relating to receiving money or property under 72-4-306 and rearranged other language in (1); substituted "under subsection (1)(b)" for "which arises solely from receiving payment of money or taking delivery of personal property" in (2).

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 4-301.

72-4-202. Jurisdiction by act of decedent.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 4-302.

72-4-203. Service on foreign personal representative.

Official Comments

The provision for ordinary mail as a substitute for registered or certified mail is provided because, under the present postal regulations, registered mail may not be available to reach certain addresses, 39 C.F.R. Sec. 51.3(c), and also certified mail may not be available as a process for service because of the method of delivery used, 39 C.F.R. Sec. 58.5(c) (rural delivery) and (d) (star route delivery).

Compiler's Comments

2019 Amendment: Chapter 313 in (1) in two places before "certified mail" inserted "registered or". Amendment effective October 1, 2019.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 4-303.

Part 3
Powers and Duties of Foreign Personal Representative

Part Case Notes

Distribution of Decedent's Personal Property Located in Another State: Decedent was domiciled and prepared his will in another state. His personal representative was properly discharged, and the estate closed after property located in this state was distributed. The laws of decedent's domicile apply to decedent's personal assets; therefore, Montana courts do not have jurisdiction to order the personal representative to gather and distribute decedent's personal property located in the state of decedent's domicile. Estate of Phelan, 235 M 257, 766 P2d 876, 45 St. Rep. 2366 (1988).

72-4-303. Filing of letters, bond, inventory, and affidavit.

Compiler's Comments

2005 Amendment: Chapter 513 in (1) near end after "shall file" deleted "in duplicate"; and in (2)(a) at beginning substituted "an authenticated copy" for "authenticated copies". Amendment effective April 28, 2005.

2003 Amendment: Chapter 68 in (1)(b) after "inventory" deleted "and appraisal"; deleted former (3) that read: "(3) The clerk shall also immediately forward a copy of the appointment, affidavit, and inventory and appraisal required by subsection (1) to the department of revenue"; and made minor changes in style. Amendment effective March 14, 2003.

Retroactive Applicability: Section 9, Ch. 68, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to deaths occurring after December 31, 2000, for which the probate of the decedents' estates closes after [the effective date of this act]." Effective March 14, 2003.

Section Not Part of Uniform Act: This section is not part of the Uniform Probate Code as promulgated by the National Conference of Commissioners on Uniform State Laws.

Attorney General's Opinions

Domiciliary Foreign Personal Representative: Section 25-1-201 does not authorize the Clerk of the District Court to charge a domiciliary foreign personal representative for filing authenticated copies of his appointment, any official bond, and an inventory and appraisal of the property of the nonresident decedent located in the state under 72-4-306. 37 A.G. Op. 111 (1978).

72-4-305. Right to inspect estate assets for inventory.

Compiler's Comments

2003 Amendment: Chapter 68 near end of first sentence after "inventory" deleted "and appraisal"; and made minor changes in style. Amendment effective March 14, 2003.

Retroactive Applicability: Section 9, Ch. 68, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to deaths occurring after December 31, 2000, for which the probate of the decedents' estates closes after [the effective date of this act]." Effective March 14, 2003.

Section Not Part of Uniform Act: This section is not part of the Uniform Probate Code as promulgated by the National Conference of Commissioners on Uniform State Laws.

72-4-306. Payment of debt and delivery of property to foreign representative.

Official Comments

Section [72-3-113, now repealed] refers to the location of tangible personal estate and intangible personal estate which may be evidenced by an instrument. The instant section includes both categories. Transfer of securities is not covered by this section since that is adequately covered by Section 3 of the Uniform Act for Simplification of Fiduciary Security Transfers.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Substituted the last phrase in the first paragraph and (1), (2), and (3) relating to the representative's affidavit and content thereof for "a certificate from the clerk of the court for the county where the domiciliary foreign personal representative has filed his affidavit, as described in 72-4-303, and a certificate from the department of revenue, as described in 72-4-304".

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 4-201.

Attorney General's Opinions

Domiciliary Foreign Personal Representative: Section 25-1-201 does not authorize the Clerk of the District Court to charge a domiciliary foreign personal representative for filing authenticated copies of his appointment, any official bond, and an inventory and appraisal of the property of the nonresident decedent located in the state under 72-4-306. 37 A.G. Op. 111 (1978).

72-4-307. Payment or delivery discharges debtor or possessor.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 4-202.

Changes From Uniform Act: The Montana enactment substituted "certificate of the clerk of court and the certificate of the department of revenue" for "proof of authority and affidavit" in the official text.

72-4-308. Payment or delivery to foreign representative prohibited by resident creditor notice.

Official Comments

Similar to provision in Colorado Revised Statute, 153-6-9.

Compiler's Comments

1981 Amendment: Deleted subsection (2) that read: "(2) In cases under subsection (1), the foreign personal representative must seek an order of the court in which he has filed his affidavit to obtain payment or delivery unless the notification by the resident creditor is withdrawn."

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 4-203.

72-4-309. Proof of authority — bond.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 4-204.

72-4-310. Powers of foreign representative generally.

Compiler's Comments

1981 Amendment: Deleted "Except as limited by 72-4-308" and substituted "72-4-309" for "72-4-303 and 72-4-304"; deleted former subsection (2) that read: "(2) A domiciliary foreign personal representative who has complied with all the requirements of 72-4-303(1) except for the filing of an inventory and appraisal may, when necessary to protect the estate of the decedent and upon appointment by the clerk of court, exercise the powers of a special administrator described in chapter 3, part 7."

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 4-205.

Attorney General's Opinions

Domiciliary Foreign Personal Representative: Section 25-1-201 does not authorize the Clerk of the District Court to charge a domiciliary foreign personal representative for filing authenticated copies of his appointment, any official bond, and an inventory and appraisal of the property of the nonresident decedent located in the state under 72-4-306. 37 A.G. Op. 111 (1978).

72-4-311. Effect of local administration on foreign representative, third persons, and local representative.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 4-206.

Part 4
Ancillary Administration

72-4-401. Ancillary administration — provisions governing.

Official Comments

The purpose of this section is to direct attention to Article III [reference omitted in Montana] for sections controlling local probates and administrations.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 4-207.

Changes From Uniform Act: The Montana enactment substituted "of this code" for "Article III of this code" in subsection (1).

72-4-402. Adjudication in other jurisdiction binding on local representative.

Official Comments

Adapted from Uniform Ancillary Administration of Estates Act, Section 8.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 4-401.

CHAPTER 5
UPC — PERSONS UNDER DISABILITY GUARDIANSHIP AND CONSERVATORSHIP

Chapter Official Comments

[Chapter 5] embodies separate systems of guardianship to protect persons of minors and mental incompetents. It also includes provisions for a type of power of attorney that does not terminate on disability of the principle which may be used by adults approaching senility or incompetence to avoid the necessity for other kinds of protective regimes. Finally, Part 4 of the [chapter] offers a system of protective proceedings, including conservatorships, to provide for the management of substantial aggregations of property of persons who are, for one reason or another, including minority and mental incompetence, unable to manage their own property.

It should be emphasized that the [chapter] contains many provisions designed to minimize or avoid the necessity of guardianship and protective proceedings, as well as provisions designed to simplify and minimize arrangements which become necessary for care of persons or their property. The power of attorney which confers authority notwithstanding later incompetence is one example of the former. Another is a facility of payment provision which permits relatively small sums owed to a minor to be paid whether or not there is a guardian or other official who has been designated to act for the minor. A new device tending to simplify necessary protective proceedings, is found in provisions in Part 4 which permit a judge to make appropriate orders concerning the property of a disabled person without appointing a fiduciary.

The highspots of the several parts of [Chapter 5], considered in somewhat more detail, include the following:

(a) The facility of payment clause, which is [72-5-104], permits one owing up to $5,000 per year to a minor to be validly discharged by payment to the minor, if he is over eighteen or married, to the minor's parent or grandparent or other adult with whom the minor resides, to a guardian, or by deposit in an account in the name of the minor.

(b) A provision in Part 2 permits the surviving parent of a minor to designate a guardian by will. A similar provision in Part 3 authorizes a parent or spouse to designate a guardian for an incapacitated person by will. Such designation becomes effective upon probate of the will and the filing of an acceptance by the guardian. Thereafter the status of guardian and ward arises. It is like guardianship of the person, rather than of estate. It is described as a parental relationship without the parental obligation of support. The relationship follows the guardian and ward and is properly recognized and implemented, as and when necessary, by the courts of any jurisdiction where these persons may be located. No requirement of periodic reports or accounts is imposed on a testamentary guardian. The question of his proper expenditure of the small sums which he may receive for the ward is left to be settled by the guardian and ward after the ward attains full age. If the amounts involved become more than the guardian cares to be responsible for on this basis, he or any other interested person may seek the appointment of a property manager who is called a "conservator" by the code. The guardian may be eligible to be appointed to this position.

Part 2 also permits a testamentary guardian of a minor to receive and expend sums payable to the minor for the minor's support and education without court order. He may not pay himself for services, however, and is under a duty to deposit excess funds, or to seek a suitable property-protection order if other management is needed.

(c) A parent or guardian is permitted to delegate his authority for short periods as necessitated by anticipated absence or incapacity.

(d) As previously mentioned, Part 4 . . . deals with protective proceedings designed to permit substantial property interests of minors and others unable properly to manage their own affairs to be controlled by court order or managed by a conservator appointed by the court. The causes for inability of owner-management that are listed by the statute are quite broad. Technical incompetency is but one of several reasons why one may be unable to manage his affairs. See [72-5-409(1)]. The draftsmen's view was that reliance should be placed on the fact that the court applying the statute would be a full power court and on the various procedural safeguards, including a right to jury trial, to protect against unwise use of the proceedings, rather than to attempt to state and rely upon a narrow or technical test of lack of ability.

Section [72-5-422] is important, for it makes it clear that a court entertaining a protective proceeding has full power, through its orders, to do anything the protected person himself might have done if not disabled. Another provision broadens the form of relief so that the court may handle a single transaction, like renewal of a mortgage, or a sale and related investment of proceeds, which is recommended in respect to the affairs of a protected person directly by its orders rather than through the appointment of a conservator.

(e) If a conservator is appointed, provisions in Part 4 of the draft give him broad powers of management that may be exercised without a court order. On the other hand, provision is made for restricting the managerial or distribution powers of a conservator, provided notation of the restriction appears on his letters of appointment. Unless restricted, the fiduciary may be able to distribute and end the arrangement without court order if he can meet the terms of the Act. Among other kinds of expenditures and disbursements authorized, payments for the support and education of the protected person as determined by a guardian of the protected person, if any, or by the conservator, if there is no guardian, are approved. Also, certain payments for the support of dependents of the protected person are approved by the code and hence would require no special approval.

(f) Other provisions in Part 4 round out the relationship of protective proceedings to creditors of the protected person and persons who deal with a conservator. Claims are handled by the conservator who is given a fiduciary responsibility to claimants and suitable discretion concerning allowance. If questions arise, the appointing court has all needed power to deal with disputes with creditors. The draft changes the common-law rule that contracts of a guardian are his personal responsibility. A conservator is not liable personally on contracts made for the estate unless he agrees to such liability. A section buttresses the managerial powers given to conservator by protecting all persons who deal with them.

(g) Another section seeks to reduce the importance of state lines in respect to the authority of conservators by permitting appointees of foreign courts to act locally. Also, it follows the pattern of [Chapter 3] dealing with ancillary administration of decedents' estates by giving the conservator appointed at the domicile of the protected person priority for appointment locally in case local administration of a protected person's assets becomes necessary.

(h) The many states which have adopted the Uniform Veterans Guardianship Act [section 91-4801, et seq., R.C.M. 1947, repealed effective July 1, 1975] now have two systems for protection of the property of minors and mental incompetents, one of which applies if the property was derived, in whole or in part, from benefits paid by the Veterans Administration [now Department of Veterans Affairs] and its minor or incompetent owner is or has been a beneficiary of the Veterans Administration [now Department of Veterans Affairs], and the other of which applies to all other property. It is sometimes difficult to ascertain whether a person has ever received a benefit from the Veterans Administration [now Department of Veterans Affairs] and commonly impossible to determine whether property was derived in part from benefits paid by the Veterans Administration [now Department of Veterans Affairs]. Part 4 would provide a single system for the protection of property of minors and others unable to manage their own property, thus superseding the Uniform Veterans Guardianship Act. It would preserve the right of the Veterans Administration [now Department of Veterans Affairs] to appear in protective proceedings involving the property of its beneficiaries and would permit the imposition of the same safeguards provided by the superseded Uniform Veterans Guardianship Act.

Chapter Compiler's Comments

Source — Explanation of Editorial Comments for 1989 Amendments: Chapter 582, L. 1989, generally revised the Uniform Probate Code and related law. The editorial comments that follow each section amended by Ch. 582 were prepared by Professor E. Edwin Eck of the University of Montana (now University of Montana-Missoula) School of Law.

Chapter Case Notes

DECISIONS UNDER FORMER LAW

Joint Final Account: When one coguardian filed a final account and the other coguardian appeared at the hearing and produced his records and filed an affidavit stating that the material portions of the final account as filed by the other coguardian were correct, the procedure followed was sufficient to authorize the Court to accept and approve the documents as a joint final account. Guardianship of Reid, 128 M 197, 271 P2d 1031 (1954).

Action on Bond:

In action on guardian's bond, contention of ward that the 3-year limitation had no application where there never had been a legal relationship of guardian and ward in existence was not sustainable, the purported guardian having been at least an equitable one. Janes v. Fidelity & Deposit Co. of Maryland, 112 M 580, 119 P2d 39 (1941).

The provision of 72-13-102 (now repealed) requiring action against the sureties on a guardian's bond to be brought within 3 years was a special Statute of Limitations for the benefit of the sureties and not for the principal. Berkin v. Marsh, 18 M 152, 44 P 528 (1896).

Judgment Against Principal — Liability of Surety: A surety on a guardian's bond is bound by a judgment against the principal if rendered as a part of probate proceedings because it is bound by the various notices required to be given in such proceedings. The rule is different when the judgment is rendered in a proceeding not connected with probate proceedings, in which case the surety must be made a party defendant in order to be bound by the judgment. Janes v. Fidelity & Deposit Co. of Maryland, 112 M 580, 119 P2d 39 (1941).

Right of Ward to Bring Action: The question whether action by ward on bond of his guardian was barred by 72-13-102 (now repealed) could not be raised by demurrer (demurrer abolished, former Rule 7(c), M.R.Civ.P., now superseded). An answer was required to enable the ward, whose complaint did not allege time when he was restored to capacity, to show by reply that he brought the action within 3 years after removal of his disability. Janes v. Fidelity & Deposit Co. of Maryland, 112 M 580, 119 P2d 39 (1941).

Appointment Void — Lack of Jurisdiction: An order of Court declaring the appointment of a guardian void ab initio (made some 10 years after appointment) was equivalent to his discharge, and the special limitation of 3 years provided by 72-13-102 (now repealed) became a part of the suretyship contract, notwithstanding the order. Janes v. Fidelity & Deposit Co. of Maryland, 112 M 580, 119 P2d 39 (1941).

Death of Ward:

The death of a ward is a discharge of the guardian within the meaning of 72-13-102 (now repealed). Berkin v. Marsh, 18 M 152, 44 P 528 (1896), explained in Mitchell v. McDonald, 114 M 292, 136 P2d 536 (1943).

A legal disability to sue pertains to the person desiring to sue and not to the cause of action, and therefore, though a cause of action on a guardian's bond may not accrue until after the guardian's final accounting, this does not place the administrator of a deceased ward under a disability from the time of the ward's death until the accounting. Berkin v. Marsh, 18 M 152, 44 P 528 (1896).

Chapter Collateral References

Montana Probate Forms, State Bar of Montana (2006).

Handbook for Guardians and Conservators, State Bar of Montana (2005).

Part 1
General Provisions

72-5-101. Definitions.

Official Comments

"Conservator," "estate," "guardian," and "minor," and other terms having relevance to [Chapter 5], are defined in [72-1-103]. "Disability" as defined in [72-1-103(10)] keys to an adjudication for the causes listed in [72-5-401]. The definition of "incapacitated" on the other hand contains the bases for appointment of a guardian under [72-5-315].

Compiler's Comments

2009 Amendments — Composite Section: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 237 in introductory clause after "context, in" substituted "chapters 1 through 5 and chapter 16, part 6" for "this code"; inserted definition of substituted judgment; and made minor changes in style. Amendment effective April 16, 2009.

1991 Amendment: In (1), after "disability", deleted "advanced age". Amendment effective April 8, 1991.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-101.

Case Notes

Petition for Full Guardianship Granted — Allegations of Disqualification Not Substantiated: An elderly woman's son filed a petition to become her guardian. Two of his brothers opposed the petition, citing that the son, their brother, was barred from being appointed her guardian under 72-5-312. They cited to the fact that the son managed the family farm and had cosigned on a loan with the mother. The District Court nevertheless appointed the son, finding that he was not likely to provide substantial services in a business capacity to the mother, was not likely to become her creditor, and was not likely to have interests that conflicted with the mother's interests. The Supreme Court affirmed, agreeing that the District Court had exercised its broad discretion in determining that the son's appointment was in the mother's best interests. In re Estate of M.D., 2017 MT 22, 386 Mont. 234, 388 P.3d 954.

Limited Guardianship Appropriate to Encourage Self-Reliance and Independence: West sought a change of guardianship in order to allow him to grant gifts and to establish a program of estate tax planning. The District Court terminated the general guardianship and established a limited guardianship but denied a joint petition to substitute the conservatorship with a trust. West contended error because he no longer met the definition of incapacitated person under this section and because 72-5-316 does not permit a limited guardianship when a protected person can meet the essential requirements for physical health and safety. A guardianship was appropriate in this case because West's physical capabilities were not likely to improve and some mental impairment remained. Under 72-5-306, a limited guardianship was permitted because it enumerated only certain decisions regarding financial affairs that could be made for West in the event that he was unable to do so, encouraging the development of maximum self-reliance and independence while promoting and protecting his well-being. In re Estate of West, 269 M 83, 887 P2d 222, 51 St. Rep. 1409 (1994).

No Showing of Incapacitation: Neither Ole nor Gladys Swandal, an elderly couple whose health was failing, was an "incapacitated person" within the meaning of 72-5-101 and 72-5-306. These statutes clearly require a showing of both physical and mental impairment, and no evidence was presented that showed that the Swandals were mentally infirm. The fact that other people might run the Swandals' ranch better than they do is not grounds to appoint a guardian for them. In re Swandal, 210 M 167, 681 P2d 701, 41 St. Rep. 986 (1984).

Personal Guardianship and Property Conservatorship No Bar to Trust Revocation — Construction Against Party Supplying Trust Form: A trustee appealed from a declaratory ruling of the District Court holding that a personal guardianship and a property conservatorship did not prevent the trustor from revoking the trust. The trustee, also a beneficiary, argued in effect that the trustor had been legally incapacitated from revoking the trust because she was under a personal guardianship and her property was under a conservatorship and because the trust provided that it was irrevocable upon the "incompetency" of the trustor. However, the conservatorship and guardianship did not begin before revocation of the trust. Further, a conservatorship would not affect the power to revoke under 72-5-421. The guardianship had been appointed because the trustor had become physically incapable of caring for herself, not because of mental incapacitation. Construing the term "incompetency" strictly against the trustee because it had supplied the trust form and was a beneficiary, the Supreme Court upheld the trial court's holding that the trust revocation was valid. Mont. Conference of the Seventh-Day Adventist Church v. Estate of Miller, 192 M 468, 628 P2d 1100, 38 St. Rep. 846 (1981), followed in In re Estate of West, 269 M 83, 887 P2d 222, 51 St. Rep. 1409 (1994).

Guardianship Appointment for Retarded Minor: A person afflicted only with incapacity caused by minority is specifically excluded from coverage under the guardianship of incapacitated persons statutes. All minors, regardless of mental condition, have been designated as persons under disability needing the protection of a guardian. The fact that a minor may be mentally retarded adds nothing to the legislative determination that he is in need of protection, and the procedure to be followed is that for appointing a guardian for a minor. In re the Guardianship of Evans, 179 M 438, 587 P2d 372 (1978).

72-5-102. Consolidation of proceedings.

Compiler's Comments

2009 Amendment: Chapter 236 deleted former (1) that read: "(1) The court has jurisdiction over protective proceedings and guardianship proceedings"; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-102 (5-103 in 1982 version of UPC).

72-5-103. Delegation of powers by parent or guardian.

Official Comments

This section permits a temporary delegation of parental powers. For example, parents (or guardian) of a minor plan to be out of the country for several months. They wish to empower a close relative (an uncle, e.g.) to take any necessary action regarding the child while they are away. Using this section, they could execute an appropriate power of attorney giving the uncle custody and power to consent. Then if an emergency operation were required, the uncle could consent on behalf of the child; as a practical matter he would of course attempt to communicate with the parents before acting. The section is designed to reduce problems relating to consents for emergency treatment.

Compiler's Comments

2015 Amendment: Chapter 235 in (2)(a) substituted "state military duty as defined in 10-1-1003" for "state active duty pursuant to Article VI, section 13, of the Montana constitution". Amendment effective April 13, 2015.

1999 Amendment: Chapter 104 inserted (2) exempting certain military personnel from the 6-month limitation in subsection (1); inserted (3) defining federal reserves; and made minor changes in style. Amendment effective March 18, 1999.

Retroactive Applicability: Section 3, Ch. 104, L. 1999, provided: "[Section 1] applies retroactively, within the meaning of 1-2-109, to powers of attorney executed before [the effective date of this act]." Effective March 18, 1999.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-104 (5-102 in 1982 version of UPC).

72-5-104. Informal discharge of duty to pay or deliver property to minor.

Official Comments

Where a minor has only a small amount of property, it would be wasteful to require protective proceedings to deal with the property. This section makes it possible for other persons, such as the guardian, to handle the less complicated property affairs of the ward. Protective proceedings, including the possible establishment of a conservatorship, will be sought where substantial property is involved.

This section does not go as far as many facility of payment provisions found in trust instruments which usually permit application of sums due minor beneficiary to any expense or charge for the minor. It was felt that a grant of so large an area of discretion to any category of person who might owe funds to a minor would be unwise. Nonetheless, the section as drafted should reduce the need for trust facility of payment provision somewhat, while extending opportunities to insurance companies and other debtors to minors for relatively simple methods of gaining discharge.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-103 (5-101 in 1982 version of UPC).

72-5-110. Vaccination status prohibited as evidence or grounds for decision.

Compiler's Comments

Effective Date: Section 7, Ch. 286, L. 2023, provided: "[This act] is effective on passage and approval." Approved April 26, 2023.

Severability: Section 6, Ch. 286, L. 2023, was a severability clause.

Part 2
Guardians of Minors

Part Case Notes

Probate Code Permanent Guardianship Proceeding — Dependency or Neglect Not Grounds for Terminating Mother's Custody of Child: A mother's parental rights were not terminated by circumstance when a court order granted, with her consent, temporary guardianship in the paternal grandparents. A later court, on the grandparents' petition for permanent guardianship under the Uniform Probate Code, found that the child was neglected or dependent and that the child's best interests would be served by granting the petition. The mother appeared in and contested the later action, withdrew her consent, and filed a petition to terminate the temporary guardianship. The guardianship provisions of the Uniform Probate Code were never intended as a substitute for the child custody provisions of Title 40 governing dissolution of marriage or for the procedures of Title 41 governing termination of the parent-child relationship. The court relied on cases stating that a dependent neglected best interests of the child determination could not be made in a Uniform Probate Code permanent guardianship proceeding and had to be made under a child custody or parental termination proceeding. In re Guardianship of D.T.N., 275 M 480, 914 P2d 579, 53 St. Rep. 253 (1996).

Procedures to Be Rigorously Followed: While there is some overlap in the various statutory schemes governing the termination of parental rights and the custody of children as to general subject matter, each is used for a distinct purpose and sets forth specific procedures which must be rigorously followed before a valid judgment or order may be issued, to insure that the minors involved receive the full protection of these laws. In re Guardianship of Aschenbrenner, 182 M 540, 597 P2d 1156 (1979).

72-5-201. Status of guardian of minor — how acquired generally — letters to indicate means of appointment.

Compiler's Comments

UPC Section: The corresponding sections in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws are sections 5-201 and 5-208(last part).

Case Notes

Guardianship Appointment for Retarded Minor: A person afflicted only with incapacity caused by minority is specifically excluded from coverage under the guardianship of incapacitated persons statutes. All minors, regardless of mental condition, have been designated as persons under disability needing the protection of a guardian. The fact that a minor may be mentally retarded adds nothing to the legislative determination that he is in need of protection, and the procedure to be followed is that for appointing a guardian for a minor. In re the Guardianship of Evans, 179 M 438, 587 P2d 372 (1978).

72-5-202. Consent to jurisdiction by acceptance of appointment.

Official Comments

The "long-arm" principle behind this section is well established. It seems desirable that the Court in which acceptance is filed be able to serve its process on the guardian wherever he has moved. The continuing interest of that court in the welfare of the minor is ample to justify this provision. The consent to service is real rather than fictional in the guardianship situation, where the guardian acts voluntarily in filing acceptance. It is probable that the form of acceptance will expressly embody the provisions of this section, although the statute does not expressly require this.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-208(first part).

Changes From Uniform Act: Montana codified section 5-208 of the Uniform Probate Code as 72-5-201(2) and 72-5-202. The Official Comments appearing under 72-5-202 are the comments of the National Conference of Commissioners on Uniform State Laws for section 5-208 of the Uniform Probate Code.

72-5-211. Testamentary appointment of guardian of minor — when effective — priorities — notice of appointment.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-202(part).

Changes From Uniform Act: Montana codified section 5-202 of the Uniform Probate Code as 72-5-211 and 72-5-212. The Montana enactment added 72-5-211(2).

72-5-212. Recognition of appointment of guardian by foreign will.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-202(part).

Changes From Uniform Act: Montana codified section 5-202 of the Uniform Probate Code as 72-5-211 and 72-5-212.

72-5-213. Objection by minor 14 years of age or older to testamentary appointment.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-203.

72-5-221. Venue for proceedings for court appointment of guardian of minor.

Official Comments

Section [72-1-203] provides for conflicts of venue and for transfer of venue.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-205.

72-5-222. Court appointment of guardian of minor — when allowed — priority of testamentary appointment.

Official Comments

The words "all parental rights of custody" are to be read with [72-5-201 and 72-5-231] which give testamentary and court-appointed guardians of minors certain parental rights respecting the minor. Hence, no authority to appoint a guardian for a minor exists if a testamentary guardian has accepted an effective appointment by will. The purpose of this restriction is to support and encourage testamentary appointments which may occur without judicial act. If a testamentary guardian proves to be unsatisfactory, removal proceedings as provided in [72-5-233] may be used if the objection device of [72-5-213] is unavailable.

Compiler's Comments

1999 Amendment: Chapter 290 in (1) before "suspended" inserted "if parental rights have been" and after "suspended" inserted "or limited". Amendment effective April 9, 1999.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-204.

Case Notes

Statutory Requirements Satisfied by District Court's Thorough Review of Record and Identification of Numerous Circumstances Limiting Mother's Capacity to Care for Children. In re Guardianship of L.R.T.S., 2023 MT 83, 412 Mont. 157, 529 P.3d 854.

Temporary Guardianship Terminated by Operation of Law — Appeal Moot: On appeal, the mother sought to terminate the temporary guardianship of her daughter. However, under 72-5-224, the temporary guardianship terminated by operation of law 6 months after it was ordered, so the mother's appeal was moot and the appeal was dismissed. In re Guardianship of M.R.O, 2008 MT 280, 345 M 309, 190 P3d 1109 (2008).

Parental Rights Suspended by Circumstances — Appointment of Guardians Proper Despite Withdrawal of Parental Consent: Two girls were living with their biological father when he was arrested for deliberate homicide. The father executed a special power of attorney, placing the girls in the care of a doctor and his wife who had provided past financial support, foster care, and day care for the children. The biological mother also gave the couple temporary permission to care for the girls and did not withdraw her consent until some 18 months later. The couple later petitioned for temporary guardianship of the girls pending the parents' ability to care for the children. On the same day, an uncle and aunt petitioned for full guardianship of the girls, and their petition was supported by the mother. The District Court concluded that the mother's parental rights were suspended by circumstances of her admitted inability to care for the children and eventually granted full guardianship to the couple. The mother appealed the suspension of her parental rights and the grant of guardianship. The Supreme Court affirmed on both issues. The mother waived the right to a hearing on suspension and voluntarily relinquished her parental rights by admitting that she was unfit to parent. The District Court properly considered the best interests of the children in determining guardianship rather than in the context of suspending the mother's parental rights, and the court did not err in maintaining the status quo by extending the temporary guardianship after the mother agreed to it, despite the fact that the mother eventually withdrew her consent. Last, the District Court did not need permission from either parent to appoint a guardian because the parental rights of both parents had been suspended by the circumstances. In re Guardianship & Conservatorship of J.C. & A.N.C., 2007 MT 106, 337 M 156, 157 P3d 1130 (2007).

Improper Reliance on Parenting Plan Statutes in Granting Temporary Guardianship — Reversal Required: Pursuant to a stipulated parenting plan, the father was designated primary custodian of the couple's son and the mother was awarded visitation every other weekend. When the father received orders to report for active military duty, he moved to have the couple that he and the son lived with and the mother's sister appointed as temporary guardians. The mother moved to dismiss, but the District Court granted the father's motion, and the mother appealed. Reviewing the appealable order granting temporary guardianship, the Supreme Court reversed. The District Court's reliance on 40-4-219 for granting the guardianship was misplaced because that section applies only to modification of a parenting plan with respect to the parents and does not provide authority to decide custody matters between a parent and a third party, including appointment of a third party as a guardian. The District Court's reliance on 40-4-228 for granting the guardianship was also misplaced because that section provides standards by which a court may award a parental interest to a nonparent who has brought a parenting plan proceeding pursuant to 40-4-211, but no such proceeding was brought in this case. The District Court also mistakenly relied on 41-3-427 in granting the guardianship because that section deals with child abuse and neglect, but does not provide independent authority for appointment of a guardian in disregard of the guardianship statutes. Rather, the father's request was governed by the guardianship statutes in this chapter, which the District Court did not address. The Supreme Court noted that the guardianship provisions in this section apply only when a court order has addressed a party's right to parent, as opposed to arrangements defining a parent's custody and visitation under a parenting plan. The mother's right to parent was never previously limited by court order, so the District Court lacked jurisdiction to appoint a guardian for the child pursuant to this section, and granting the father's petition for temporary guardianship was reversible error. The Supreme Court remanded for the entry of an order vacating the guardianship. Fischer v. Fischer, 2007 MT 101, 337 M 122, 157 P3d 682 (2007).

Probate Code Permanent Guardianship Proceeding — Dependency or Neglect Not Grounds for Terminating Mother's Custody of Child: A mother's parental rights were not terminated by circumstance when a court order granted, with her consent, temporary guardianship in the paternal grandparents. A later court, on the grandparents' petition for permanent guardianship under the Uniform Probate Code, found that the child was neglected or dependent and that the child's best interests would be served by granting the petition. The mother appeared in and contested the later action, withdrew her consent, and filed a petition to terminate the temporary guardianship. The guardianship provisions of the Uniform Probate Code were never intended as a substitute for the child custody provisions of Title 40 governing dissolution of marriage or for the procedures of Title 41 governing termination of the parent-child relationship. The court relied on cases stating that a dependent neglected best interests of the child determination could not be made in a Uniform Probate Code permanent guardianship proceeding and had to be made under a child custody or parental termination proceeding. In re Guardianship of D.T.N., 275 M 480, 914 P2d 579, 53 St. Rep. 253 (1996).

Parental Rights of Custody — Termination: Permanent and legal custody of a minor child having been awarded to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services), the Court did not err in dismissing a petition by the appellant foster parents to appoint appellants as guardians of the child, because guardians may be appointed only if all "parental rights of custody" have been terminated. "Parental rights of custody" include those rights of the Department, which have not been terminated. In re the Guardianship of P.J.D., a Minor, 183 M 491, 600 P2d 1170 (1979).

Custody Proceeding — Guardians: In an action seeking: (1) termination of the parental rights of the natural parents; (2) the award of full care and custody of the child to her aunt and uncle; (3) the institution of a restraining order against the mother's boyfriend to prevent him from molesting the child; and (4) for such other relief as the District Court deemed proper, the District Court had authority to name the child's aunt and uncle her general guardians under the fourth paragraph of the prayer for relief. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

Procedural Errors Requiring Reversal: The District Court's order, though couched in terms of temporary custody, was issued in response to a petition for appointment of guardian of minors and was, in effect, the appointment of a temporary guardian. Because there was no notice to the mother, no hearing prior to the appointment of the temporary guardian, no determination that the mother's parental rights of custody had been terminated or suspended, and no determination that the required notices had been given, the lower Court's order was reversed. In re Guardianship of Aschenbrenner, 182 M 540, 597 P2d 1156 (1979).

Suspension of Parental Rights "By Circumstances" — Error in Granting Guardianship: At the time of issuing its order granting temporary custody to the grandparents, the District Court had no evidence that the mother's parental rights of custody had been suspended or terminated by either prior court order or circumstance. The requirements of this section were not met, thus any order purporting to appoint a guardian is invalid. In re Guardianship of Aschenbrenner, 182 M 540, 597 P2d 1156 (1979).

Guardianship Appointment for Retarded Minor: A person afflicted only with incapacity caused by minority is specifically excluded from coverage under the guardianship of incapacitated persons statutes. All minors, regardless of mental condition, have been designated as persons under disability needing the protection of a guardian. The fact that a minor may be mentally retarded adds nothing to the legislative determination that he is in need of protection, and the procedure to be followed is that for appointing a guardian for a minor. In re the Guardianship of Evans, 179 M 438, 587 P2d 372 (1978).

Contested Guardianship Custody — Law to Be Considered: When a guardianship case is before the Court under 72-5-222 and the custody of a child is being contested, the Court must consider the provisions of 40-4-212 and guidelines set forth by this Court in recent custody cases. In re Gullette, 173 M 132, 566 P2d 396 (1977).

72-5-223. Guardian of minor by court appointment — qualifications — nominee of minor preferred.

Official Comments

Rather than provide for priorities among various classes of relatives, it was felt that the only priority should be for the person nominated by the minor. The important point is to locate someone whose appointment will be in the best interests of the minor. If there is contention among relatives over who should be named, it is not likely that a statutory priority keyed to degrees of kinship would help resolve the matter. For example, if the argument involved a squabble between relatives of the child's father and relatives of its mother, priority in terms of degrees of kinship would be useless.

Guardianships under this code are not likely to be attractive positions for persons who are more interested in handling a minor's estate than in his personal well-being. An order of a court having equity power is necessary if the guardian is to receive payment for services where there is no conservator for the minor's estate. Also, the powers of management of a ward's estate conferred on a guardian are restricted so that if a substantial estate is involved, a conservator will be needed to handle the financial matters.

Compiler's Comments

2009 Amendment: Chapter 210 at end of first sentence inserted "including the minor's interest in continuity of care"; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-206 (5-207 in 1982 version of UPC).

Case Notes

Father's Testamentary Appointment of Stepmother as Guardian Not Effective — Natural Mother Living and Not Incapacitated — Temporary Guardianship to Paternal Grandparents Proper: After their father's death, the District Court appointed the two children's paternal grandparents as their temporary guardians. The stepmother appealed the appointment, citing the father's testamentary appointment of her to serve as guardian of his minor child under 40-4-221. The Supreme Court affirmed, agreeing with the District Court that the children's best interests would be served by the appointment and that the father's testamentary appointment was not effective because their natural mother was living and not incapacitated. In re Guardianship of J.S.M., 2021 MT 86, 404 Mont. 21, 484 P.3d 939.

Lay Person May Be Guardian Ad Litem in Child Custody Proceeding: Generally, in a child custody proceeding, the court may appoint as a guardian ad litem for the child any person who does not have interests adverse to those of the child. The Supreme Court rejected the father's claim that the lower court should not have appointed a lay person, who the father likened to an expert witness and claimed was unqualified and had no known or disclosed experience or qualifications. In re Custody of Krause, 2001 MT 37, 304 M 202, 19 P3d 811 (2001).

Appointment of Mother Married to Manager of Ranch That Might Be Sued for Her Children's Injuries — No Conflict of Interest: The mother's four children were injured in a one-vehicle accident while an employee of the ranch that her husband managed was, at the mother's request, driving the children home to the ranch after school. The parties agreed that the employee was acting in the course and scope of his employment, that the ranch owned the pickup, that the ranch had about $800,000 of available insurance coverage, that the damages could exceed the limits of the insurance, and that a suit against the ranch was a possibility. The mother's ex-husband petitioned for his appointment as the children's guardian ad litem and conservator. The mother cross-petitioned that she be appointed. The District Court did not err in appointing the mother and deciding that she did not suffer from a conflict of interest that precluded her from serving as guardian ad litem and conservator of the children. The District Court found that she "would fulfill her fiduciary duties to her children tenaciously", that she would consider their emotional needs and future financial security, and that the evidence showed that she was an extremely involved and protective mother who gave much time, love, and attention to the children. In re Watson, 283 M 57, 939 P2d 982, 54 St. Rep. 492 (1997).

72-5-224. Temporary guardian of minor.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-207(c) (5-204 (part) in 1982 version of UPC).

Changes From Uniform Act: Montana codified section 5-207 of the Uniform Probate Code (5-204 (part) in 1982 version of UPC) as 72-5-224 and 72-5-225.

Case Notes

Temporary Guardianship Terminated by Operation of Law — Appeal Moot: On appeal, the mother sought to terminate the temporary guardianship of her daughter. However, under 72-5-224, the temporary guardianship terminated by operation of law 6 months after it was ordered, so the mother's appeal was moot and the appeal was dismissed. In re Guardianship of M.R.O, 2008 MT 280, 345 M 309, 190 P3d 1109 (2008).

Parental Rights Suspended by Circumstances — Appointment of Guardians Proper Despite Withdrawal of Parental Consent: Two girls were living with their biological father when he was arrested for deliberate homicide. The father executed a special power of attorney, placing the girls in the care of a doctor and his wife who had provided past financial support, foster care, and day care for the children. The biological mother also gave the couple temporary permission to care for the girls and did not withdraw her consent until some 18 months later. The couple later petitioned for temporary guardianship of the girls pending the parents' ability to care for the children. On the same day, an uncle and aunt petitioned for full guardianship of the girls, and their petition was supported by the mother. The District Court concluded that the mother's parental rights were suspended by circumstances of her admitted inability to care for the children and eventually granted full guardianship to the couple. The mother appealed the suspension of her parental rights and the grant of guardianship. The Supreme Court affirmed on both issues. The mother waived the right to a hearing on suspension and voluntarily relinquished her parental rights by admitting that she was unfit to parent. The District Court properly considered the best interests of the children in determining guardianship rather than in the context of suspending the mother's parental rights, and the court did not err in maintaining the status quo by extending the temporary guardianship after the mother agreed to it, despite the fact that the mother eventually withdrew her consent. Last, the District Court did not need permission from either parent to appoint a guardian because the parental rights of both parents had been suspended by the circumstances. In re Guardianship & Conservatorship of J.C. & A.N.C., 2007 MT 106, 337 M 156, 157 P3d 1130 (2007).

72-5-225. Procedure for court appointment of guardian of minor — notice — hearing — representation by attorney.

Compiler's Comments

2017 Amendment: Chapter 358 in (3) substituted "2-15-1029" for "47-1-201". Amendment effective July 1, 2017.

Severability: Section 48, Ch. 358, L. 2017, was a severability clause.

2009 Amendment: Chapter 210 in (2) near end of first sentence after "minor" inserted "including the need for continuity of care"; and made minor changes in style. Amendment effective October 1, 2009.

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in (3) after "may" deleted "appoint an attorney" and inserted reference to ordering office of state public defender to assign counsel and at end after "minor" deleted "giving consideration to the preference of the minor if the minor is 14 years of age or older" and deleted former second sentence that read: "The county attorney and the deputy county attorneys, if any, may not be appointed for this purpose"; and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-207(a), (b), (d) (5-206 in 1982 version of UPC).

Changes From Uniform Act: Montana codified section 5-207 of the Uniform Probate Code (5-204 (part) and 5-206 in 1982 version of UPC) as 72-5-224 and 72-5-225.

Case Notes

Statutory Requirements Satisfied by District Court's Thorough Review of Record and Identification of Numerous Circumstances Limiting Mother's Capacity to Care for Children. In re Guardianship of L.R.T.S., 2023 MT 83, 412 Mont. 157, 529 P.3d 854.

Parental Rights Suspended by Circumstances — Appointment of Guardians Proper Despite Withdrawal of Parental Consent: Two girls were living with their biological father when he was arrested for deliberate homicide. The father executed a special power of attorney, placing the girls in the care of a doctor and his wife who had provided past financial support, foster care, and day care for the children. The biological mother also gave the couple temporary permission to care for the girls and did not withdraw her consent until some 18 months later. The couple later petitioned for temporary guardianship of the girls pending the parents' ability to care for the children. On the same day, an uncle and aunt petitioned for full guardianship of the girls, and their petition was supported by the mother. The District Court concluded that the mother's parental rights were suspended by circumstances of her admitted inability to care for the children and eventually granted full guardianship to the couple. The mother appealed the suspension of her parental rights and the grant of guardianship. The Supreme Court affirmed on both issues. The mother waived the right to a hearing on suspension and voluntarily relinquished her parental rights by admitting that she was unfit to parent. The District Court properly considered the best interests of the children in determining guardianship rather than in the context of suspending the mother's parental rights, and the court did not err in maintaining the status quo by extending the temporary guardianship after the mother agreed to it, despite the fact that the mother eventually withdrew her consent. Last, the District Court did not need permission from either parent to appoint a guardian because the parental rights of both parents had been suspended by the circumstances. In re Guardianship & Conservatorship of J.C. & A.N.C., 2007 MT 106, 337 M 156, 157 P3d 1130 (2007).

Probate Code Permanent Guardianship Proceeding — Dependency or Neglect Not Grounds for Terminating Mother's Custody of Child: A mother's parental rights were not terminated by circumstance when a court order granted, with her consent, temporary guardianship in the paternal grandparents. A later court, on the grandparents' petition for permanent guardianship under the Uniform Probate Code, found that the child was neglected or dependent and that the child's best interests would be served by granting the petition. The mother appeared in and contested the later action, withdrew her consent, and filed a petition to terminate the temporary guardianship. The guardianship provisions of the Uniform Probate Code were never intended as a substitute for the child custody provisions of Title 40 governing dissolution of marriage or for the procedures of Title 41 governing termination of the parent-child relationship. The court relied on cases stating that a dependent neglected best interests of the child determination could not be made in a Uniform Probate Code permanent guardianship proceeding and had to be made under a child custody or parental termination proceeding. In re Guardianship of D.T.N., 275 M 480, 914 P2d 579, 53 St. Rep. 253 (1996).

No Jurisdiction to Declare Children Dependent and Neglected: In a consolidated proceeding based on a petition for a Writ of Habeas Corpus by a natural parent and a petition by a nonparent for guardianship, the Court was without jurisdiction to find the children involved dependent and neglected and to enter an order granting custody to the nonparent petitioners. Unless 41-3-401 (renumbered 41-3-422) is followed, the Court is without jurisdiction to deprive the parent of custody. Schultz v. Schultz, 184 M 245, 602 P2d 595 (1979), following In re Guardianship of Aschenbrenner, 182 M 540, 597 P2d 1156 (1979) and In re the Guardianship of Evans, 179 M 438, 587 P2d 372 (1978).

Petition for Guardianship — Dismissal: Where parental rights to a minor child were not terminated and remained in the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) and a guardian could not therefore be appointed under 72-5-222(1), the District Court did not abuse its discretion by dismissing, pursuant to 72-5-225(2), the appellant's petition for guardianship. In re Guardianship of P.J.D., a Minor, 183 M 491, 600 P2d 1170 (1979).

Dependent and Neglected Finding Invalid When Entered in Guardianship Proceeding: A District Court finding that children were dependent and neglected was invalid since it was rendered in a guardianship proceeding instituted by the paternal grandparents rather than in a proceeding instituted to have the children declared dependent and neglected, as it must be, by the County Attorney under Title 41, ch. 3. In re Guardianship of Aschenbrenner, 182 M 540, 597 P2d 1156 (1979). However, see also In re L.E.B., 259 M 492, 856 P2d 1382, 50 St. Rep. 895 (1993), in which Aschenbrenner was distinguished in a case brought under adoption proceedings rather than guardianship proceedings.

Notice in Guardianship Proceedings: Notice to a mentally retarded person is not to be regarded as either unnecessary or automatically waived. Failure to send notice to a mentally retarded minor in guardianship appointment proceedings renders the judgment void. In re the Guardianship of Evans, 179 M 438, 587 P2d 372 (1978).

Appointment of Counsel to Represent Minor: Whenever independent counsel for children is necessary to represent their interests protected by the Montana law and Constitution, the Court shall appoint the County Attorney or other counsel. In re Gullette, 173 M 132, 566 P2d 396 (1977).

72-5-231. Powers and duties of guardian of minor.

Official Comments

See [72-5-234]. See, also, [72-5-427(1)] which confers the powers of a guardian on a conservator who is responsible for the estate of a minor under eighteen for whom no guardian has been named.

Compiler's Comments

2003 Amendment: Chapter 238 inserted (5) allowing a guardian to provide for the final disposition of a ward's physical remains and personal effects after the ward's death. Amendment effective October 1, 2003.

1997 Amendment: Chapter 279 at beginning inserted "Unless otherwise limited by the court"; and made minor changes in style.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-209.

Case Notes

No Liability of Parent Guardian for Paternity by Minor Child: Defendants were sued in their capacity as guardians of their minor son for the expenses incurred in connection with the birth of an illegitimate child fathered by their son. A default judgment was rendered against the defendants. The Supreme Court reversed and vacated the default judgment, holding that the guardians' duty to safeguard the rights of their son during the legal proceeding did not subject them to personal liability for their son's allegedly wrongful acts. The Supreme Court also held that because the title of the case, the allegations in the complaint, and all motions at trial addressed the defendants in their capacity as guardians, they had insufficient notice of any likelihood of personal liability. Breuer v. Poe, 245 M 22, 797 P2d 944, 47 St. Rep. 1812 (1990).

72-5-233. Termination of appointment — how effected — certain liabilities and obligations not affected.

Compiler's Comments

2003 Amendment: Chapter 238 in (1) near middle of first sentence after "minor's death" inserted "except as provided in subsection (2)"; inserted (2) providing that the guardian's authority and responsibility for a minor who dies is terminated when the guardian provides for the final disposition of the ward's physical remains and personal effects; and made minor changes in style. Amendment effective October 1, 2003.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-210.

Case Notes

Best Interests of Child: The District Court must consider the best interests of the child when a natural parent petitions to have a properly instituted guardianship terminated and custody returned to the parent. This is the case when, as here, guardianship is conditioned on the natural parent retaining the ability to regain custody when circumstances change such that the child's best interests would be served by return of the child to the parent. In re Guardianship of J.R.G., 218 M 336, 708 P2d 263, 42 St. Rep. 1628 (1985).

Return of Parental Rights — Best Interests of Child: A return of parental rights can properly be denied in termination of guardianship proceedings when the child's best interests would be served by continuance of the guardianship. In re Guardianship of J.R.G., 218 M 336, 708 P2d 263, 42 St. Rep. 1628 (1985).

72-5-234. Procedure for resignation or removal — petition, notice, and hearing — representation by attorney.

Compiler's Comments

2017 Amendment: Chapter 358 in (3) substituted "2-15-1029" for "47-1-201". Amendment effective July 1, 2017.

Severability: Section 48, Ch. 358, L. 2017, was a severability clause.

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in (3) after "may" deleted "appoint an attorney" and inserted reference to ordering office of state public defender to assign counsel and after "minor" deleted "giving consideration to the preference of the minor if the minor is 14 or more years of age"; and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-212.

Case Notes

Guardian Not Entitled to Same Due Process as Parent — Exclusion From First Show Cause Hearing — Termination of Guardianship Based on Best Interests of Child: The state filed for protective custody of a boy whose grandmother and stepgrandfather had been his legal guardians since he was 5 weeks old. The District Court did not allow the stepgrandfather to participate in the first show cause hearing or a permanency plan hearing. Later, however, the stepgrandfather participated in the remainder of the proceedings. Ultimately, the District Court concluded the child's best interests warranted termination of the guardianship. On appeal, the stepgrandfather argued that he had not received adequate due process because of his exclusion from the first show cause hearing. The Supreme Court affirmed, ruling that a guardian is not afforded the same level of due process as a parent in a termination case. Moreover, the District Court had afforded the stepgrandfather adequate due process by allowing him to meaningfully participate in the remainder of the proceedings. In re D.B.J., 2012 MT 220, 366 Mont. 320, 286 P.3d 1201.

Best Interests of Child: The District Court must consider the best interests of the child when a natural parent petitions to have a properly instituted guardianship terminated and custody returned to the parent. This is the case when, as here, guardianship is conditioned on the natural parent retaining the ability to regain custody when circumstances change such that the child's best interests would be served by return of the child to the parent. In re Guardianship of J.R.G., 218 M 336, 708 P2d 263, 42 St. Rep. 1628 (1985). See also In re D.B.J., 2012 MT 220, 366 Mont. 320, 286 P.3d 1201.

Custody of Natural Parents — Presumption of Best Interests: In affirming the trial court's decision to terminate a grandmother's guardianship of a minor child and return custody to the natural mother, the Supreme Court adopted the presumption that the best interests of a child are served in custody of the natural parents. In re Guardianship of J.R.G., 218 M 336, 708 P2d 263, 42 St. Rep. 1628 (1985).

Return of Parental Rights — Best Interests of Child: A return of parental rights can properly be denied in termination of guardianship proceedings when the child's best interests would be served by continuance of the guardianship. In re Guardianship of J.R.G., 218 M 336, 708 P2d 263, 42 St. Rep. 1628 (1985).

Appointment of Counsel to Represent Minor: Whenever independent counsel for children is necessary to represent their interests protected by the Montana law and Constitution, the Court shall appoint the County Attorney or other counsel. In re Gullette, 173 M 132, 566 P2d 396 (1977).

Part 3
Guardians of Incapacitated Persons

Part Case Notes

Interested Person — No Standing to Assert Incapacitated Person's Due Process Rights: In a guardianship proceeding, although the adult child of an incapacitated person is an interested person under 72-1-103, being an interested person does not confer standing on the adult child to assert the incapacitated person's constitutional rights. In re Guardianship of A.M.M., 2015 MT 250, 380 Mont. 451, 356 P.3d 474.

Priorities Not Binding in Appointing Guardian — No Abuse of Discretion: In a guardianship proceeding, the son of an incapacitated person challenged the District Court's appointment of an attorney as the guardian of the incapacitated person. The son argued that he was entitled to priority in appointment over the attorney under 72-5-312 for two reasons: (1) the son was the adult child of the incapacitated person; and (2) the son submitted an affidavit of the incapacitated person in which she expressed her desire to have the son control her assets and medical care. The Supreme Court affirmed the appointment, concluding that although an adult child of an incapacitated person has priority to be named guardian under 72-5-312, the priority is not binding and a District Court is required to select a person who is best qualified and willing to serve. In addition, the Supreme Court found that the District Court correctly rejected the affidavit of the incapacitated person because the incapacitated person lacked capacity to make a reasonably intelligent choice when she expressed her desires. In re Guardianship of A.M.M., 2015 MT 250, 380 Mont. 451, 356 P.3d 474.

Appointment Not Terminated — Duties of Guardian Appropriately Performed: Gali contended that his son and daughter did not meet their duties to act in his best interests as his coguardians and conservators. The District Court found that although some personal conflicts had arisen between Gali and his children, such as the placement of financial limits on Gali's spending, the children had generally managed Gali's business and financial affairs well and appropriately performed their guardianship duties. Absent a showing of clear error, the Supreme Court affirmed the District Court's refusal to remove the children as guardians and to appoint new ones. In re Guardianship & Conservatorship of Gali, 2000 MT 83, 299 M 178, 998 P2d 541, 57 St. Rep. 361 (2000).

Attorney Fees Incurred in Seeking Guardianship Payable From Estate: A law firm requested $30,000 in fees from the conservator of an incapacitated person's estate for services requested by the attorney-in-fact in appointing a guardian for the incapacitated person. The District Court ordered payment of the fees out of the conservator estate. An appointing court's discretionary power encompasses the approval of attorney fees incurred by a guardian within the scope of the guardianship. Further, under 72-5-428, the conservator of the estate of an incapacitated person is authorized to distribute funds necessary for the support, education, care, or benefit of the protected person. The cost of initiating a good faith petition for the appointment of a guardian, when the appointment is determined to be in the best interests of the ward, constitutes a necessary expenditure on behalf of the ward and is therefore compensable out of the guardianship estate. The District Court did not abuse its discretion in ordering payment of the attorney fees, and the Supreme Court declined to disturb the order on appeal. In re Estate of Bayers, 1999 MT 154, 295 M 89, 983 P2d 339, 56 St. Rep. 607 (1999), following In re Allard Guardianship, 49 M 219, 141 P 661 (1914).

Guardianship and Commitment Proceedings Separate: In reviewing a guardianship proceeding, under this part, the Supreme Court will not review issues involving statutes which pertain to commitment proceedings. Although the two proceedings may overlap, they involve different procedures which must be followed to ensure that incapacitated persons receive the full protection of the law. Giarratana v. Thompson, 204 M 90, 663 P2d 316, 40 St. Rep. 684 (1983).

Personal Guardianship and Property Conservatorship No Bar to Trust Revocation — Construction Against Party Supplying Trust Form: A trustee appealed from a declaratory ruling of the District Court holding that a personal guardianship and a property conservatorship did not prevent the trustor from revoking the trust. The trustee, also a beneficiary, argued in effect that the trustor had been legally incapacitated from revoking the trust because she was under a personal guardianship and her property was under a conservatorship and because the trust provided that it was irrevocable upon the "incompetency" of the trustor. However, the conservatorship and guardianship did not begin before revocation of the trust. Further, a conservatorship would not affect the power to revoke under 72-5-421. The guardianship had been appointed because the trustor had become physically incapable of caring for herself, not because of mental incapacitation. Construing the term "incompetency" strictly against the trustee because it had supplied the trust form and was a beneficiary, the Supreme Court upheld the trial court's holding that the trust revocation was valid. Mont. Conference of the Seventh-Day Adventist Church v. Estate of Miller, 192 M 468, 628 P2d 1100, 38 St. Rep. 846 (1981), followed in In re Estate of West, 269 M 83, 887 P2d 222, 51 St. Rep. 1409 (1994).

72-5-301. Consent to jurisdiction by acceptance of appointment.

Official Comments

The proceedings under [Chapter 5] are flexible. The court should not appoint a guardian unless one is necessary or desirable for the care of the person. If it develops that the needs of the person who is alleged to be incapacitated are not those which would call for a guardian, the court may adjust the proceeding accordingly. By acceptance of the appointment, the guardian submits to the court's jurisdiction in much the same way as a personal representative. Cf. [72-3-511].

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-305 (5-307 in 1982 version of UPC).

72-5-302. Testamentary appointment of guardian for incapacitated person — when effective — priorities.

Official Comments

This section, modelled after [72-5-221], is designed to give the surviving parent, or the spouse, of an incapacitated person, the ability to confer the authority of a guardian on a person designated by will. This opportunity may be most useful in cases where parents, during their lifetime, have arranged an informal or voluntary commitment of an incompetent child, and are anxious to designate another who can maintain contact with the patient and act on his behalf without the necessity of a sanity hearing. The person designated by will must act by filing acceptance of the appointment. This provides a check against will directions which might prove to be unwise or unnecessary after the parents' death. Moreover, the testamentary designee will have the risk of the possibility that the ward is not in fact incapacitated to prevent him from using the authority conferred to restrain the liberty of the ward. In cases of doubt, the testamentary appointee should petition for a Court appointment under [72-5-315].

Compiler's Comments

1989 Amendment: In first sentence of (1), before "incapacitated person", inserted "unmarried" and inserted "or other writing signed by the parent and attested by at least two witnesses", at beginning of second sentence substituted "If both parents are dead or the surviving parent is adjudged incapacitated, a parental appointment" for "A testamentary appointment by a parent" and at end, after "informally or formally probated", deleted "if prior thereto both parents are dead or the surviving parent is adjudged incapacitated" and inserted clause relating to a nontestamentary nominating instrument, inserted third sentence relating to statement in notice concerning termination of appointment, and at end of fourth sentence, after "priority", deleted "unless it is terminated by the denial of probate in formal proceedings"; in first sentence of (2) inserted "or other writing signed by the spouse and attested by at least two witnesses", at end of second sentence inserted clause relating to a nontestamentary nominating instrument, inserted third sentence relating to statement in notice concerning termination of appointment, and at end of fourth sentence, after "parent", deleted "unless it is terminated by the denial of probate in formal proceedings"; and made minor changes in phraseology.

1989 Editorial Comment: The changes in 72-5-302, 72-5-303, and 72-5-304 result from an amendment proposed by the Joint Editorial Board of the national Uniform Probate Code in 1987. The changes meet a recommendation of the American Bar Association Commission on the Mentally Disabled. See corresponding national Uniform Probate Code section 5-301.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-301(1), (2).

Changes From Uniform Act: Montana codified section 5-301 of the Uniform Probate Code as 72-5-302 through 72-5-304. The Official Comments appearing under 72-5-302 are the comments of the National Conference of Commissioners on Uniform State Laws for section 5-301 of the Uniform Probate Code.

72-5-303. Recognition of appointment of guardian by foreign will.

Official Comments

[See Official Comments under 72-5-302.]

Compiler's Comments

1989 Amendment: Substituted language relating to filing of guardian's acceptance under a will probated in state of decedent's domicile for "This state shall recognize a testamentary appointment effected by filing acceptance under a will probated at the testator's domicile in another state."

1989 Editorial Comment: See 1989 editorial comment under 72-5-302.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-301(c).

Changes From Uniform Act: Montana codified section 5-301 of the Uniform Probate Code as 72-5-302 through 72-5-304.

72-5-304. Objection by alleged incapacitated person to testamentary appointment.

Official Comments

[See Official Comments under 72-5-302.]

Compiler's Comments

2009 Amendment: Chapter 236 in second sentence at end substituted "72-5-305, 72-5-306, 72-5-311 through 72-5-322, 72-5-324, and 72-5-325" for "72-5-305 through 72-5-325". Amendment effective October 1, 2009.

1989 Amendment: Inserted clause relating to nontestamentary nominating instrument; before "person" inserted "incapacitated"; in two places substituted "parental or spousal" for "testamentary"; at end substituted "72-5-305 through 72-5-325" for "this part"; and made minor changes in phraseology.

1989 Editorial Comment: See 1989 editorial comment under 72-5-302.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-301(d).

Changes From Uniform Act: Montana codified section 5-301 of the Uniform Probate Code as 72-5-302 through 72-5-304.

72-5-305. Definitions.

Compiler's Comments

2021 Amendment: Chapter 40 inserted definitions of less restrictive alternative and supported decisionmaking; and made minor changes in style. Amendment effective October 1, 2021.

Applicability: Section 5, Ch. 40, L. 2021, provided: "[This act] applies to guardianship proceedings commenced on or after [the effective date of this act]." Effective October 1, 2021.

Not Part of UPC: Section 72-5-305 is not part of the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws.

Case Notes

Order to Specify Full or Limited Guardianship: The District Court order appointing a guardian for an incapacitated person did not specify, as is required by subsection (2) of 72-5-316, whether a full or limited guardianship was created. The Supreme Court ruled that the guardianship created was a full one, noting that the condition of the incapacitated person was so severe that a limited guardianship would be inappropriate and the District Court order did not specify particular powers and duties of the guardian. The District Court was ordered to amend the order to comply with 72-5-316. Giarratana v. Thompson, 204 M 90, 663 P2d 316, 40 St. Rep. 684 (1983).

72-5-306. Purpose and basis for guardianship.

Compiler's Comments

Not Part of UPC: Section 72-5-306 is not part of the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws.

Case Notes

Court Discretion to Appoint Parent and State as Temporary Coguardians of Incapacitated Child: Because of severe abuse and neglect by his birth mother, a child came into state custody and care at age 6, and parental rights of both the mother and father were terminated. The father began to establish limited contact with the child at age 13. In anticipation of the child reaching majority, the state prepared a transition plan because of the child's mental and emotional health needs and inability to care for himself. The father petitioned for temporary full coguardianship. Over the state's objections, the District Court in an emergency hearing appointed both the father and the state as temporary coguardians, and the state appealed on grounds that there is no statutory authority to appoint a state agency as guardian of an incapacitated person without the agency's consent. The Supreme Court noted that this section requires that designation of guardianship of an incapacitated person may be used only as necessary to enhance the well-being of the person and must be designed to promote as much independence and self-reliance as possible in the best interest of the ward. Appointment of a guardian, subject to statutory restriction, is largely within the discretion of the District Court and will not be disturbed absent an abuse of that discretion. Under 72-5-312(5), a qualified state or federal agency may be appointed as guardian, without consent, if there is no qualified person to serve as guardian. In this case, the father, though willing, was not qualified to serve as the child's guardian, so the District Court did not abuse its discretion in appointing the father and the state as temporary coguardians pursuant to the procedure for appointment in 72-5-317. In re Coguardianship of D.A., 2004 MT 302, 323 M 442, 100 P3d 650 (2004).

Guardian Entitled to Award of Attorney Fees for Appointment as Guardian — Award in Nonadversarial Proceeding Held Not to Violate General Rule for Award of Attorney Fees — Award Approved Though Not Requested in Original Petition for Appointment: Appellant contested the payment of $30,000 in legal fees from the estate of a ward to the attorney representing the guardian appointed by the District Court, arguing that the general rule is that attorney fees are not payable to a prevailing party without special statutory provisions to the contrary and that the original petition for appointment of the guardian did not include a request for payment of attorney fees. The Supreme Court affirmed the order of the District Court awarding the fees. The Supreme Court pointed out, citing opinions from other states, that the general rule regarding payment of fees applies to adversarial proceedings and that the appointment of a guardian is not an adversarial proceeding but is a proceeding in rem to promote the bests interests of the ward and to protect the ward's estate. The Supreme Court also held that under former Rule 54(c), M.R.Civ.P. (now superseded), the District Court may grant relief to which a party is entitled regardless of whether the party has specifically requested the relief granted. The Supreme Court noted that the payment of the guardian's legal fees by the estate of the ward is relief to which the guardian would be entitled under 72-5-428(1) if the petition for appointment was brought in good faith and the appointment was in the bests interests of the ward. In re Estate of Bayers, 1999 MT 154, 295 M 89, 983 P2d 339, 56 St. Rep. 607 (1999).

Limited Guardianship Appropriate to Encourage Self-Reliance and Independence: West sought a change of guardianship in order to allow him to grant gifts and to establish a program of estate tax planning. The District Court terminated the general guardianship and established a limited guardianship but denied a joint petition to substitute the conservatorship with a trust. West contended error because he no longer met the definition of incapacitated person under 72-5-101 and because 72-5-316 does not permit a limited guardianship when a protected person can meet the essential requirements for physical health and safety. A guardianship was appropriate in this case because West's physical capabilities were not likely to improve and some mental impairment remained. Under this section, a limited guardianship was permitted because it enumerated only certain decisions regarding financial affairs that could be made for West in the event that he was unable to do so, encouraging the development of maximum self-reliance and independence while promoting and protecting his well-being. In re Estate of West, 269 M 83, 887 P2d 222, 51 St. Rep. 1409 (1994).

No Showing of Incapacitation: Neither Ole nor Gladys Swandal, an elderly couple whose health was failing, was an "incapacitated person" within the meaning of 72-5-101 and 72-5-306. These statutes clearly require a showing of both physical and mental impairment, and no evidence was presented that showed that the Swandals were mentally infirm. The fact that other people might run the Swandals' ranch better than they do is not grounds to appoint a guardian for them. In re Swandal, 210 M 167, 681 P2d 701, 41 St. Rep. 986 (1984).

72-5-311. Venue for proceedings for court appointment of guardian.

Official Comments

Venue in guardianship proceedings lies in the county where the incapacitated person is present, as well as where he resides. Thus, if the person is temporarily away from his county of usual abode, the court of the county where he happens to be may handle requests for guardianship proceedings relating to him. In protective proceedings, venue is normally in the county of residence. See [72-5-407]. See [72-1-203] for disposition when venue is in two counties, and for transfer of venue.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-302.

Case Notes

Transference of Venue After a Year — No Abuse of Discretion: The District Court did not abuse its discretion by ordering that venue be transferred in the case of a guardianship of an elderly ward after the ward moved from one county to another county. Although the originating court had the exclusive right to proceed before the ward moved, after the ward moved the new county also became a proper venue, and the District Court exercised its discretion to transfer the venue after finding that it should be located in the new county, even though more than a year had passed since the proceeding commenced. In re Guardianship of H.O., 2014 MT 285, 376 Mont. 519, 337 P.3d 91.

72-5-312. Who may be guardian — priorities.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Inserted "association, or nonprofit corporation or any of its members" in (1); inserted (2)(a), (2)(f), and (2)(g) adding a nominee, a relative or friend, and a program to priority list, respectively; and inserted (3) through (5) giving court guidance in applying priorities.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-311 (5-305 in 1982 version of UPC).

Case Notes

Petition for Full Guardianship Granted — Allegations of Disqualification Not Substantiated: An elderly woman's son filed a petition to become her guardian. Two of his brothers opposed the petition, citing that the son, their brother, was barred from being appointed her guardian under 72-5-312. They cited to the fact that the son managed the family farm and had cosigned on a loan with the mother. The District Court nevertheless appointed the son, finding that he was not likely to provide substantial services in a business capacity to the mother, was not likely to become her creditor, and was not likely to have interests that conflicted with the mother's interests. The Supreme Court affirmed, agreeing that the District Court had exercised its broad discretion in determining that the son's appointment was in the mother's best interests. In re Estate of M.D., 2017 MT 22, 386 Mont. 234, 388 P.3d 954.

Priorities Not Binding in Appointing Guardian — No Abuse of Discretion: In a guardianship proceeding, the son of an incapacitated person challenged the District Court's appointment of an attorney as the guardian of the incapacitated person. The son argued that he was entitled to priority in appointment over the attorney under 72-5-312 for two reasons: (1) the son was the adult child of the incapacitated person; and (2) the son submitted an affidavit of the incapacitated person in which she expressed her desire to have the son control her assets and medical care.

The Supreme Court affirmed the appointment, concluding that although an adult child of an incapacitated person has priority to be named guardian under 72-5-312, the priority is not binding and a District Court is required to select a person who is best qualified and willing to serve. In addition, the Supreme Court found that the District Court correctly rejected the affidavit of the incapacitated person because the incapacitated person lacked capacity to make a reasonably intelligent choice when she expressed her desires. In re Guardianship of A.M.M., 2015 MT 250, 380 Mont. 451, 356 P.3d 474.

Court Discretion to Appoint Person Best Qualified as Guardian Regardless of Statutory Priority List: The District Court properly determined that an elderly woman who suffered from multiple sclerosis and cognitive impairments needed a guardian. It acted within its discretion when it appointed the woman's brother and sister-in-law as coguardians in lieu of the woman's husband of over 50 years, who had acted inappropriately with respect to his wife's care but who had priority under this section, because the District Court was vested with the discretion to appoint the person who was the best qualified and willing to serve. In re J.A.L., 2014 MT 196, 376 Mont. 18, 329 P.3d 1273.

Court Discretion to Appoint Parent and State as Temporary Coguardians of Incapacitated Child: Because of severe abuse and neglect by his birth mother, a child came into state custody and care at age 6, and parental rights of both the mother and father were terminated. The father began to establish limited contact with the child at age 13. In anticipation of the child reaching majority, the state prepared a transition plan because of the child's mental and emotional health needs and inability to care for himself. The father petitioned for temporary full coguardianship. Over the state's objections, the District Court in an emergency hearing appointed both the father and the state as temporary coguardians, and the state appealed on grounds that there is no statutory authority to appoint a state agency as guardian of an incapacitated person without the agency's consent. The Supreme Court noted that 72-5-306 requires that designation of guardianship of an incapacitated person may be used only as necessary to enhance the well-being of the person and must be designed to promote as much independence and self-reliance as possible in the best interest of the ward. Appointment of a guardian, subject to statutory restriction, is largely within the discretion of the District Court and will not be disturbed absent an abuse of that discretion. Under subsection (5) of this section, a qualified state or federal agency may be appointed as guardian, without consent, if there is no qualified person to serve as guardian. In this case, the father, though willing, was not qualified to serve as the child's guardian, so the District Court did not abuse its discretion in appointing the father and the state as temporary coguardians pursuant to the procedure for appointment in 72-5-317. In re Coguardianship of D.A., 2004 MT 302, 323 M 442, 100 P3d 650 (2004).

No Conflict of Interest Found: There was no conflict of interest between an incapacitated person and her guardian when the guardian had thoroughly investigated alternative treatment for the incapacitated person and found that it was not advisable. Giarratana v. Thompson, 204 M 90, 663 P2d 316, 40 St. Rep. 684 (1983).

72-5-313. Visitor in guardianship proceedings defined.

Official Comments

The visitor should have professional training and should not have a personal interest in the outcome of the guardianship proceedings.

Compiler's Comments

1981 Amendment: Inserted "medical care, mental health care, pastoral care, education, or rehabilitation" after "social work".

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-308 (5-103(21) in 1982 version of UPC).

72-5-314. Notices in guardianship proceedings.

Official Comments

The persons entitled to notice in guardianship proceeding are usually fewer in number than those in a protective proceeding. Cf. [72-5-403]. Required notice shall be given in accordance with the general notice provision of the code. See [72-1-301].

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-309 (5-304 in 1982 version of UPC).

Case Notes

Issue of Notice of Conservatorship and Guardianship Proceedings Not Raised at Trial — No Appeal: At the request of her doctor, Myrtle Mae Tennant (Mae) was declared an incompetent by the District Court so that a conservator and guardian could be appointed for her. Thereafter, the conservator filed an action to recover from appellants Evans and Williams funds that they had received from Mae. On appeal, appellants claimed that the District Court erred by not giving Mae any notice of the conservatorship and guardianship proceedings and that therefore the appointments made during the proceedings were void ab initio. The Supreme Court found that the issue of notice to Mae was not previously raised or presented to the trial court and that therefore the issue could not be properly raised on appeal. Consequently, the appellants' claim of error was disregarded. In re Tennant, 220 M 78, 714 P2d 122, 43 St. Rep. 189 (1986).

Guardianship Appointment for Retarded Minor: A person afflicted only with incapacity caused by minority is specifically excluded from coverage under the guardianship of incapacitated persons statutes. All minors, regardless of mental condition, have been designated as persons under disability needing the protection of a guardian. The fact that a minor may be mentally retarded adds nothing to the legislative determination that he is in need of protection, and the procedure to be followed is that for appointing a guardian for a minor. In re the Guardianship of Evans, 179 M 438, 587 P2d 372 (1978).

72-5-315. Procedure for court appointment of guardian — hearing — examination — interview — procedural rights.

Official Comments

The procedure here is similar to, but not precisely the same as, protective proceedings for certain disabled persons. It is not required that the visitor be a lawyer. In urban areas, the visitor may be a social worker capable of determining the needs of the person for whom the appointment is sought. By brackets, the National Conference indicates that enacting states should decide whether it is appropriate to create a right to jury trial. [Montana provides a right to jury trial.]

Compiler's Comments

2017 Amendment: Chapter 358 in (2) in last sentence substituted "2-15-1029" for "47-1-201". Amendment effective July 1, 2017.

Severability: Section 48, Ch. 358, L. 2017, was a severability clause.

2007 Amendment: Chapter 184 in (2) deleted former third sentence that read: "The official or assigned counsel has the powers and duties of a guardian ad litem." Amendment effective April 10, 2007.

Applicability: Section 4, Ch. 184, L. 2007, provided: "[This act] applies to appointments on or after [the effective date of this act]." Effective April 10, 2007.

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in (2) in second sentence after "official or" deleted "attorney" and inserted reference to ordering office of state public defender to assign counsel; and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

1981 Amendment: In (3) inserted the second sentence relating to appointment of a visitor and the last sentence relating to use of any public or charitable agency for evaluation; substituted "who appears to have caused the petition to be filed and the person who is nominated to serve as guardian" for "seeking appointment as guardian" after "interview the person" near the middle of (3).

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-303.

Case Notes

Attorney Fees Incurred in Seeking Guardianship Payable From Estate: A law firm requested $30,000 in fees from the conservator of an incapacitated person's estate for services requested by the attorney-in-fact in appointing a guardian for the incapacitated person. The District Court ordered payment of the fees out of the conservator estate. An appointing court's discretionary power encompasses the approval of attorney fees incurred by a guardian within the scope of the guardianship. Further, under 72-5-428, the conservator of the estate of an incapacitated person is authorized to distribute funds necessary for the support, education, care, or benefit of the protected person. The cost of initiating a good faith petition for the appointment of a guardian, when the appointment is determined to be in the best interests of the ward, constitutes a necessary expenditure on behalf of the ward and is therefore compensable out of the guardianship estate. The District Court did not abuse its discretion in ordering payment of the attorney fees, and the Supreme Court declined to disturb the order on appeal. In re Estate of Bayers, 1999 MT 154, 295 M 89, 983 P2d 339, 56 St. Rep. 607 (1999), following In re Allard Guardianship, 49 M 219, 141 P 661 (1914).

72-5-316. Findings — order of appointment.

Official Comments

The purpose of guardianship is to provide for the care of a person who is unable to care for himself. There is no reason to seek a guardian in those situations where the problems to be dealt with center around the property of a disabled person. In that event, a protective proceeding under Part 4 may be in order.

It is assumed that the standards suggested by the definition in [72-5-101] for the "incapacitated" person are different from those which will determine when a person may be committed as mentally ill. For example, involuntary commitment proceedings may well be inappropriate unless it is determined that the patient is or probably will become dangerous to himself or the person or property of others. As indicated in [72-5-101], the meaning of "incapacitated" turns on whether the subject lacks "understanding or capacity to make or communicate responsible decisions concerning his person." There is overlap between the two sets of standards, but they are different. Hence, a finding that a person is "incapacitated" does not amount to a finding that he is mentally ill, or can be committed. In the reverse situation, if a person has been committed to institutional care and custody because of mental illness, it may be unnecessary to appoint a guardian for him. Nonetheless, it may be desirable to have a personal guardian for one who is or may be committed or who will be cared for by an institution. For one thing, a guardian, having custody, might arrange for a voluntary care arrangement like that which a parent for a minor and incapacitated child could establish. Moreover, the limited authority of a guardian over property of his ward may be appropriate in cases where the ward is committed. Because of the relationship between existing guardianship legislation and the handling of committed persons appears to vary considerably from state to state, the code was deliberately left rather general on points relevant to the relationship. Section [72-5-321] qualifies the power of a guardian to determine the place of residence of a ward who has been committed.

Compiler's Comments

2021 Amendment: Chapter 40 in (1) in middle of first sentence after "incapacitated" inserted "that the identified needs of the person cannot be met by a less restrictive alternative"; and made minor changes in style. Amendment effective October 1, 2021.

Applicability: Section 5, Ch. 40, L. 2021, provided: "[This act] applies to guardianship proceedings commenced on or after [the effective date of this act]." Effective October 1, 2021.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Substituted current section (see 1981 Session Law for text) for former section. For former version see sec. 1, Ch. 365, L. 1974.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-304.

Case Notes

Limited Guardianship Appropriate to Encourage Self-Reliance and Independence: West sought a change of guardianship in order to allow him to grant gifts and to establish a program of estate tax planning. The District Court terminated the general guardianship and established a limited guardianship but denied a joint petition to substitute the conservatorship with a trust. West contended error because he no longer met the definition of incapacitated person under 72-5-101 and because this section does not permit a limited guardianship when a protected person can meet the essential requirements for physical health and safety. A guardianship was appropriate in this case because West's physical capabilities were not likely to improve and some mental impairment remained. Under 72-5-306, a limited guardianship was permitted because it enumerated only certain decisions regarding financial affairs that could be made for West in the event that he was unable to do so, encouraging the development of maximum self-reliance and independence while promoting and protecting his well-being. In re Estate of West, 269 M 83, 887 P2d 222, 51 St. Rep. 1409 (1994).

Order to Specify Full or Limited Guardianship: The District Court order appointing a guardian for an incapacitated person did not specify, as is required by subsection (2) of 72-5-316, whether a full or limited guardianship was created. The Supreme Court ruled that the guardianship created was a full one, noting that the condition of the incapacitated person was so severe that a limited guardianship would be inappropriate and the District Court order did not specify particular powers and duties of the guardian. The District Court was ordered to amend the order to comply with 72-5-316. Giarratana v. Thompson, 204 M 90, 663 P2d 316, 40 St. Rep. 684 (1983).

72-5-317. Temporary guardians.

Official Comments

The temporary guardian is analogous to a special administrator under [72-3-701 through 72-3-705]. His appointment would be obtained in emergency situations or as a protective device against default by a guardian. The temporary guardian has all the powers of a guardian, except as the order appointing him may provide otherwise.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Inserted "or if there is no appointed guardian" after "duties" in the first sentence of (2); inserted the second through fourth sentences of (2) relating to appointment and authority of temporary guardian; inserted (3) providing for appointment of otherwise ineligible person; inserted "full" before "guardian" at the beginning of (4); and inserted the second and third sentences of (4) relating to power of temporary limited guardian and suspension of authority of permanent guardian.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-310 (5-308 in 1982 version of UPC).

Case Notes

Conservator's Exercise of Reasonable Judgment Regarding Lease of Estate Property — Remand for Audit of Leasing Arrangement: The District Court appointed Saylor's stepson, Tim, as temporary guardian. Saylor and her brother, Deane, both filed written objections to the appointment, and the District Court then approved an agreement that made Deane the limited guardian and conservator of Saylor's out-of-state property and Tim the conservator of Saylor's Montana property. Saylor and Deane subsequently moved to remove Tim as conservator based on his failure to disclose certain financial documents relating to his administration of the estate. Tim had entered a grazing lease on Saylor's property that Saylor contended provided no material benefit to the estate. The District Court found no good cause to remove Tim as conservator and dismissed the petition for removal. On appeal, the Supreme Court noted that conservators are under the same duties as trustees and held that Tim exercised reasonable judgment regarding the lease arrangement and did not breach his duty as conservator so as to require his removal. Saylor's proposed substitute model lease was unrealistic. However, as a matter of equity, the Supreme Court remanded with instructions that the District Court order an audit of the lease arrangement to ensure that the figures attached to the lease conform to actualities and to allow the District Court to revise its prior determinations should the audit reveal facts that would require revision. In re Guardianship & Conservatorship of Saylor, 2005 MT 236, 328 M 415, 121 P3d 532 (2005).

Court Discretion to Appoint Parent and State as Temporary Coguardians of Incapacitated Child: Because of severe abuse and neglect by his birth mother, a child came into state custody and care at age 6, and parental rights of both the mother and father were terminated. The father began to establish limited contact with the child at age 13. In anticipation of the child reaching majority, the state prepared a transition plan because of the child's mental and emotional health needs and inability to care for himself. The father petitioned for temporary full coguardianship. Over the state's objections, the District Court in an emergency hearing appointed both the father and the state as temporary coguardians, and the state appealed on grounds that there is no statutory authority to appoint a state agency as guardian of an incapacitated person without the agency's consent. The Supreme Court noted that 72-5-306 requires that designation of guardianship of an incapacitated person may be used only as necessary to enhance the well-being of the person and must be designed to promote as much independence and self-reliance as possible in the best interest of the ward. Appointment of a guardian, subject to statutory restriction, is largely within the discretion of the District Court and will not be disturbed absent an abuse of that discretion. Under 72-5-312(5), a qualified state or federal agency may be appointed as guardian, without consent, if there is no qualified person to serve as guardian. In this case, the father, though willing, was not qualified to serve as the child's guardian, so the District Court did not abuse its discretion in appointing the father and the state as temporary coguardians pursuant to the procedure for appointment in 72-5-317. In re Coguardianship of D.A., 2004 MT 302, 323 M 442, 100 P3d 650 (2004).

Guardianship Proceeding — Failure of District Court to Make Record Held Violation of Statute — Ex Parte Hearing Held Violation of Due Process: A District Court twice appointed the same temporary guardians for Kathleen Klos pursuant to this section, once in writing and once by making an oral order with no documentation of the hearing or order except a minute entry made by the Clerk of Court. In the second proceeding, counsel representing the guardians had actual notice, in the form of two letters, that Klos was represented by an attorney for the Montana Advocacy Program but failed to serve that attorney with notice of the hearing. The Supreme Court held that: (1) in failing to make a record of the proceedings and to enter a written order with findings of fact, the District Court violated the plain language of this section; (2) although this section does authorize an ex parte hearing, that authorization applies only in emergency circumstances that were not present in this case and the failure to provide notice therefore also violates this section; and (3) the failure of the guardians' counsel to serve notice on Klos's attorney violated Klos's right to due process of law provided by Art. II, sec. 17, Mont. Const. In re Klos, 284 M 197, 943 P2d 1277, 54 St. Rep. 843 (1997).

Order Granting Temporary Guardianship Held Final Order and Special Proceeding for Purposes of Appeal — Noncompliance With Former Rule 9, M.R.App.P. (Now Superseded), Excused — Expiration of Temporary Guardianship Held Not to Render Issue Moot: After a District Court twice appointed the same temporary guardians for Kathleen Klos pursuant to this section, once in writing and once by making an oral order with no documentation except a minute entry entered by the Clerk of Court, Klos filed a motion to set aside the second order of guardianship. The guardians argued that an order appointing a temporary guardian is not subject to appeal and that Klos had not complied with former Rule 9, M.R.App.P. (now superseded), because she did not file a transcript of a hearing appointing the guardians. The Supreme Court held that in as much as former Rule 1(b)(3), M.R.App.P. (now superseded), did not differentiate between a permanent order and a temporary order, a temporary order qualified as an appealable order. The Supreme Court also held that the temporary order is a "special proceeding", as defined by 27-1-102(2), for the purposes of former Rule 1(b)(1), M.R.App.P. (now superseded), and therefore appealable for that reason as well. Concerning the argument on noncompliance with former Rule 9, M.R.App.P. (now superseded), the Supreme Court noted that no transcript could be provided because none was ever made and held that Klos had substantially complied by notifying the Clerk of the Supreme Court of the lack of a transcript and by providing the District Court Clerk's minute entry. Citing Butte-Silver Bow Local Gov't v. Olsen, 228 M 77, 743 P2d 564 (1987), the Supreme Court also noted that just because the order had expired by operation of law did not mean that the issue of appealability was moot because the guardians had twice been appointed by a temporary order that expired by operation of law and could be appointed in the same manner again. Thus, if the order was not appealable, it would be "capable of repetition, yet evade review". In re Klos, 284 M 197, 943 P2d 1277, 54 St. Rep. 843 (1997), followed in Fischer v. Fischer, 2007 MT 101, 337 M 122, 157 P3d 682 (2007).

72-5-318. Request for notice — interested person.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-5-319. Contents of petition for appointment of guardian.

Compiler's Comments

2021 Amendment: Chapter 40 inserted (1)(i)(i) and (1)(i)(ii) concerning less restrictive alternatives for meeting the alleged incapacitated person's needs; and made minor changes in style. Amendment effective October 1, 2021.

Applicability: Section 5, Ch. 40, L. 2021, provided: "[This act] applies to guardianship proceedings commenced on or after [the effective date of this act]." Effective October 1, 2021.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-5-320. Purposes for establishment of limited guardianship.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-5-321. Powers and duties of guardian of incapacitated person.

Official Comments

The guardian is responsible for the care of the person of his ward. This section gives him the powers necessary to carry out this responsibility. Where there are no protective proceedings, the guardian also has limited authority over the property of the ward. Where the ward has substantial property, it may be desirable to have protective proceedings to handle his property problems. The same person, of course, may serve as guardian and conservator. Section [72-5-421] authorizes the court to make preliminary orders protecting the estate once a petition for appointment of a conservator is filed.

Compiler's Comments

2021 Amendment: Chapter 40 in (6)(b) near end after "restrictive" deleted "alternative"; and made minor changes in style. Amendment effective October 1, 2021.

Applicability: Section 5, Ch. 40, L. 2021, provided: "[This act] applies to guardianship proceedings commenced on or after [the effective date of this act]." Effective October 1, 2021.

2015 Amendment: Chapter 381 in (5) at beginning inserted exception clause; inserted (6) regarding a ward with a primary diagnosis of a major neurocognitive disorder and review of placement at the Montana mental health nursing care center; and made minor changes in style. Amendment effective January 1, 2016.

2009 Amendment: Chapter 237 in (2)(c) in fourth sentence after "may" inserted "not", after "authority" substituted "if it conflicts" for "only upon finding that consent to the withholding or withdrawal of life-sustaining treatment or the do not resuscitate order is consistent", and inserted fifth sentence pertaining to the court determining the ward's wishes. Amendment effective April 16, 2009.

2007 Amendment: Chapter 480 in (2)(c) inserted second through fourth sentences clarifying when a full guardian may consent to the withholding or withdrawal of life-sustaining treatment or to a do not resuscitate order. Amendment effective October 1, 2007.

2003 Amendment: Chapter 238 in (2)(f) near middle after "provided in this" substituted "chapter" for "code"; inserted (6) allowing a full or limited guardian to provide for the final disposition of a ward's physical remains and personal effects after the ward's death in the absence of an authorized personal representative; and made minor changes in style. Amendment effective October 1, 2003.

1983 Amendment: In (2)(e), inserted at beginning "unless waived by the court,"; at end of first sentence of (2)(e), substituted "annually for the preceding year" for ", as required by the court or court rule"; inserted last sentence of (2)(e) relating to service of the report; inserted (3) requiring court order to report.

1981 Amendment: Inserted (1) relating to a limited guardian; inserted "full" before "guardian" throughout section; substituted "limited" for "modified" near the end of the second sentence of (2); substituted "a full guardian" for "he" in (2)(d); inserted the second sentence of (3) relating to a limited guardian's role in conservatorship; inserted "The full guardian or limited guardian" in the third sentence of (3); inserted "or limited guardian authorized to oversee such aspects of the incapacitated person's care" in the last sentence of (3); and added (4) limiting involuntary commitment.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-312.

Case Notes

Court-Appointed Full Guardian Not Required to Follow Ward's Wishes: The Department of Public Health and Human Services suspended an assisted living facility's license and relocated its residents. When the facility regained its license, some residents who were wards with appointed guardians wanted to return, but the guardians refused to allow this. The facility sued in tort for intentional interference, and the District Court ruled for the guardians. On appeal, the Supreme Court affirmed, noting that a guardian is not required to follow a ward's wishes or apply substituted judgment when acting in the ward's best interests. Wingfield v. Dept. of Public Health and Human Services, 2020 MT 120, 400 Mont. 70, 463 P.3d 452.

Parent's Duty to Support Incapacitated Adult Child: A father appealed the District Court's determination that 40-6-214 required him to support his incapacitated adult twin sons, arguing that his obligation to provide child support terminated when the twins graduated from high school or when they turned 19 years old. The Supreme Court affirmed, concluding that 40-6-214 imposes a duty on the father to support the twins to the extent of his ability. The father's duty ran directly to the twins, not to the mother under the marital dissolution decree, and was properly enforced under the guardianship statutes. In re Guardianships of M.A.S. & C.M.S., 2011 MT 313, 363 Mont. 96, 266 P.3d 1267.

Conservator's Exercise of Reasonable Judgment Regarding Lease of Estate Property — Remand for Audit of Leasing Arrangement: The District Court appointed Saylor's stepson, Tim, as temporary guardian. Saylor and her brother, Deane, both filed written objections to the appointment, and the District Court then approved an agreement that made Deane the limited guardian and conservator of Saylor's out-of-state property and Tim the conservator of Saylor's Montana property. Saylor and Deane subsequently moved to remove Tim as conservator based on his failure to disclose certain financial documents relating to his administration of the estate. Tim had entered a grazing lease on Saylor's property that Saylor contended provided no material benefit to the estate. The District Court found no good cause to remove Tim as conservator and dismissed the petition for removal. On appeal, the Supreme Court noted that conservators are under the same duties as trustees and held that Tim exercised reasonable judgment regarding the lease arrangement and did not breach his duty as conservator so as to require his removal. Saylor's proposed substitute model lease was unrealistic. However, as a matter of equity, the Supreme Court remanded with instructions that the District Court order an audit of the lease arrangement to ensure that the figures attached to the lease conform to actualities and to allow the District Court to revise its prior determinations should the audit reveal facts that would require revision. In re Guardianship & Conservatorship of Saylor, 2005 MT 236, 328 M 415, 121 P3d 532 (2005).

No Power of Guardian to Bring Dissolution Proceeding on Behalf of Incapacitated Person: When George's health began to fail, his daughter Judy was appointed temporary guardian. George subsequently filed for divorce from Agnes, but the District Court ultimately found that George lacked the capacity to bring a dissolution action. Judy requested and was granted permanent guardianship and conservatorship over George and filed an amended dissolution petition on George's behalf. The petition was granted, and Agnes appealed. The Supreme Court noted that under this section, a guardian of an incapacitated person has the same powers, rights, and duties respecting the ward that a parent has respecting an unemancipated child. The court also cited former Rule 17(c), M.R.Civ.P. (now superseded), as authority for a guardian to litigate on the behalf of a ward. However, the specific provisions of this section control over the general provisions of former Rule 17(c), so the only proceedings that the guardian of an incapacitated person may bring on behalf of the ward are those types of proceedings that a parent may bring on behalf of an unemancipated minor child, and this does not include the right to bring a dissolution proceeding. Therefore, because nothing in this section grants a guardian of an incapacitated person the authority to bring a dissolution action on behalf of a ward, the District Court committed reversible error in holding otherwise. In re Marriage of Denowh, 2003 MT 244, 317 M 314, 78 P3d 63 (2003). However, see In re J.A.L., 2014 MT 196, 376 Mont. 18, 329 P.3d 1273, holding that a guardian may influence a ward's marital relationship if it is in the ward's best interest.

72-5-322. Petition of guardian for treatment of ward.

Compiler's Comments

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in (2) after "entitled to" deleted "an appointment" and inserted "the assignment" and after "counsel" inserted reference to Montana Public Defender Act; and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

1997 Amendment: Chapter 490 in (2), after "guaranteed", substituted "to a person with a mental disorder and who requires commitment" for "seriously mentally ill persons"; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 40, Ch. 490, L. 1997, was a saving clause.

Section Not Part of Uniform Act: This section is not part of the Uniform Probate Code as promulgated by the National Conference of Commissioners on Uniform State Laws.

Case Notes

Commitment of Ward — Due Process Rights — Notice, Hearing, and Counsel: District Court order committing ward to Montana State Hospital for a 72-hour evaluation upon a request made by the ward's guardian was reversed where ward was not given notice of the impending commitment, an attorney, or a hearing prior to the commitment. The ward's statutory and constitutional due process rights were violated. Two days after the first order the County Attorney, at guardian's request, filed a petition for a 90-day commitment. The guardian consented and waived ward's rights to notice, counsel, and hearing prior to commitment. The petition was granted, which also violated ward's statutory and constitutional rights to due process. He had the right to notice, hearing, and counsel, and only the person to be committed, or if he is unable, his attorney and guardian acting in concert, may waive those rights. The ward had no attorney at the time of the guardian's waiver. In re Simons, 215 M 463, 698 P2d 850, 42 St. Rep. 544 (1985).

72-5-324. Termination of appointment — how effected — certain liabilities and obligations not affected.

Compiler's Comments

2015 Amendment: Chapter 381 in (1)(b) substituted "72-5-321(7)" for "72-5-321(6)". Amendment effective January 1, 2016.

2003 Amendment: Chapter 238 in (1)(a) at beginning inserted exception clause; inserted (1)(b) providing that the guardian's authority and responsibility for an incapacitated person who dies while a ward is terminated when the guardian provides for the final disposition of the ward's physical remains and personal effects; and made minor changes in style. Amendment effective October 1, 2003.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-306 (5-310 in 1982 version of UPC).

Changes From Uniform Act: The Montana enactment added the last sentence of this section.

72-5-325. Petition for removal or resignation of guardian — termination of incapacity — appointment of successor guardian.

Official Comments

The ward's incapacity is a question that may usually be reviewed at any time. However, provision is made for a discretionary restriction on review. In all review proceedings, the welfare of the ward is paramount.

Compiler's Comments

1989 Amendment: In (1), in two places after "court", inserted "after hearing", after "remove a guardian" deleted "and appoint a successor", and at end, after "resignation", deleted "and make any other order which may be appropriate"; in first sentence of (2) reduced maximum period during which incapacity may not be challenged without special leave from 1 year to 6 months, at end of second sentence substituted "for termination of the guardianship" for "for removal or resignation of the guardian", and in third sentence substituted "made informally to the court" for "made by informal letter to the court or judge" and after "request" deleted "to the court or judge"; in (3) substituted language relating to appointment of successor guardian and termination of incapacity for "Before removing a guardian, accepting the resignation of a guardian, or ordering that a ward's incapacity has terminated, the court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian, may send a visitor to the residence of the present guardian and to the place where the ward resides or is detained, to observe conditions and report in writing to the court"; and made minor changes in phraseology.

1989 Editorial Comment: The changes result from an amendment proposed by the Joint Editorial Board of the national Uniform Probate Code in 1987. The changes meet a recommendation of the American Bar Association Commission on the Mentally Disabled. See corresponding national Uniform Probate Code section 5-311.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-307 (5-311 of 1982 version of UPC).

Case Notes

Guardian's Actions in Best Interests of Ward — No Good Cause for Removal of Guardian: When the father died, the mother was placed in an extended care facility and an independent guardian was appointed to manage her affairs. The guardian determined that the mother's estate was running short of funds to defray the cost of extended care and sought return of the property in possession of the son. The son refused to return the property and sought to remove the guardian on grounds of mismanagement of the mother's estate. The District Court found that there was not reasonable cause for removal. Evidence showed that all the children and the mother's physicians agreed that the mother should be placed in extended care, that the guardian agreed that placement was in the mother's best interests, and that the guardian thoroughly investigated and accounted for the mother's real and personal property for the purpose of sustaining her ongoing care and treatment. Thus, removal of the guardian was not warranted, and on appeal, the Supreme Court affirmed. In re Guardianship & Conservatorship of Gilroy, 2004 MT 267, 323 M 149, 99 P3d 205 (2004).

Appointment Not Terminated — Duties of Guardian Appropriately Performed: Gali contended that his son and daughter did not meet their duties to act in his best interests as his coguardians and conservators. The District Court found that although some personal conflicts had arisen between Gali and his children, such as the placement of financial limits on Gali's spending, the children had generally managed Gali's business and financial affairs well and appropriately performed their guardianship duties. Absent a showing of clear error, the Supreme Court affirmed the District Court's refusal to remove the children as guardians and to appoint new ones. In re Guardianship & Conservatorship of Gali, 2000 MT 83, 299 M 178, 998 P2d 541, 57 St. Rep. 361 (2000).

Part 4
Protection of Property of Minors and Persons Under Disability

Part Case Notes

Appointment of GAL and Conservator — Inability of Parents to Choose Counsel for Child: The custodial parents of a minor child appealed the District Court's order denying their motion to disqualify counsel for their child in a personal injury matter, arguing that they had the right to choose counsel over the opposition of the guardian ad litem (GAL) and conservator, that 37-61-403 and 72-5-427 were unconstitutional, and that 37-61-403 conflicts with the Montana Rules of Professional Conduct. The Supreme Court affirmed, concluding that once the parents consented to the appointment of a GAL and conservator, they divested themselves of the right to choose who would represent their child's personal injury claims. Assuming that the parents were clients under 37-61-403, their failure to comply with the statute by not securing consent of the attorney of record or applying to the District Court to change the attorney of record did not render the statute unconstitutional. Because the parents voluntarily consented to the appointment of the GAL and conservator and, thus, divested themselves of control over the child's legal action, their unhappiness with the decisions of the GAL and conservator did not render 72-5-427 unconstitutional. Rule 1.16, Montana Rules of Professional Conduct, and 37-61-403 work in conjunction: Rule 1.16 provides that an attorney shall withdraw from representation if discharged by a client and 37-61-403 provides the method for how discharge can be accomplished. In re Estate of C.K.O., 2013 MT 72, 369 Mont. 297, 297 P.3d 1217.

72-5-401. Original petition for appointment or protective order — who may petition.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-404(a).

Changes From Uniform Act: Montana codified section 5-404 of the Uniform Probate Code as 72-5-401 and 72-5-402.

Case Notes

Standing of Any Interested Third Party to Petition for Appointment of Conservator: An attorney for an adverse party in a related case discovered that 97-year-old widow Kloss's estate had been significantly depleted under the management of her 71-year-old nephew and petitioned for a conservatorship for Kloss. Kloss objected on grounds that the attorney could not be considered to be interested in Kloss's welfare under this section and thus lacked standing to petition for a conservatorship on her behalf. The District Court concluded that the attorney's representation of Kloss's adversary in a separate action did not preclude the attorney from acting in Kloss's best interests and dismissed Kloss's objection to the appointment. On appeal, Kloss contended that "any person who is interested" in this section be interpreted as "interested person" as used in the general definitions of the Uniform Probate Code, which would limit persons who may petition for a conservatorship to those who have a property right in or claim against the estate. The Supreme Court declined Kloss's interpretation, noting the Legislature's intent to broadly define those who have standing to petition on behalf of another under the statute. Kloss failed to demonstrate that the attorney had a conflict of interest or would benefit from the appointment. Rather, the attorney was requesting that Kloss and her estate be protected from further alleged exploitation. The District Court was affirmed. In re Conservatorship of Kloss, 2005 MT 39, 326 M 117, 109 P3d 205 (2005).

72-5-402. Contents of petition.

Compiler's Comments

2011 Amendment: Chapter 329 inserted (3) concerning mental health care advance directive. Amendment effective October 1, 2011.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-404(b).

Changes From Uniform Act: Montana codified section 5-404 of the Uniform Probate Code as 72-5-401 and 72-5-402.

72-5-403. Notice — waiver.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-405.

Case Notes

Issue of Notice of Conservatorship and Guardianship Proceedings Not Raised at Trial — No Appeal: At the request of her doctor, Myrtle Mae Tennant (Mae) was declared an incompetent by the District Court so that a conservator and guardian could be appointed for her. Thereafter, the conservator filed an action to recover from appellants Evans and Williams funds that they had received from Mae. On appeal, appellants claimed that the District Court erred by not giving Mae any notice of the conservatorship and guardianship proceedings and that therefore the appointments made during the proceedings were void ab initio. The Supreme Court found that the issue of notice to Mae was not previously raised or presented to the trial court and that therefore the issue could not be properly raised on appeal. Consequently, the appellants' claim of error was disregarded. In re Tennant, 220 M 78, 714 P2d 122, 43 St. Rep. 189 (1986).

72-5-404. Request for notice — interested person.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-406 (5-104 in 1982 version of UPC).

72-5-405. Exclusive and concurrent jurisdiction of particular court after petition and notice.

Official Comments

While the bulk of all judicial proceedings involving the conservator will be in the court supervising the conservatorship third parties may bring suit against the conservator or the protected person on some matters in other courts. Claims against the conservator after his appointment are dealt with by [72-5-433].

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-402.

Case Notes

Conservator's Exercise of Reasonable Judgment Regarding Lease of Estate Property — Remand for Audit of Leasing Arrangement: The District Court appointed Saylor's stepson, Tim, as temporary guardian. Saylor and her brother, Deane, both filed written objections to the appointment, and the District Court then approved an agreement that made Deane the limited guardian and conservator of Saylor's out-of-state property and Tim the conservator of Saylor's Montana property. Saylor and Deane subsequently moved to remove Tim as conservator based on his failure to disclose certain financial documents relating to his administration of the estate. Tim had entered a grazing lease on Saylor's property that Saylor contended provided no material benefit to the estate. The District Court found no good cause to remove Tim as conservator and dismissed the petition for removal. On appeal, the Supreme Court noted that conservators are under the same duties as trustees and held that Tim exercised reasonable judgment regarding the lease arrangement and did not breach his duty as conservator so as to require his removal. Saylor's proposed substitute model lease was unrealistic. However, as a matter of equity, the Supreme Court remanded with instructions that the District Court order an audit of the lease arrangement to ensure that the figures attached to the lease conform to actualities and to allow the District Court to revise its prior determinations should the audit reveal facts that would require revision. In re Guardianship & Conservatorship of Saylor, 2005 MT 236, 328 M 415, 121 P3d 532 (2005).

72-5-406. Consent to jurisdiction by acceptance of appointment as conservator.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-413 (5-412 in 1982 version of UPC).

72-5-407. Venue.

Official Comments

Venue for protective proceedings lies in the county of residence (rather than domicile) or, in the case of the nonresident, where his property is located. Unitary management of the property is obtainable through easy transfer of proceedings ([72-1-203(2)]) and easy collection of assets by foreign conservators ([72-5-439]).

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-403.

72-5-408. Procedure concerning hearing and order on original petition.

Official Comments

The section establishes a framework within which professionals, including the judge, attorney and physician, if any, may be expected to exercise good judgment in regard to the minor or disabled person who is the subject of the proceeding. The National Conference accepts that it is desirable to rely on professionals rather than to attempt to draft detailed standards or conditions for appointment. [Montana provides for exercise of judgment by a professional person other than a physician in case of alleged mental illness or disability. See 1985 amendment note under compiler's comments to this section in the MCA.]

Compiler's Comments

2017 Amendment: Chapter 358 in (1) in last sentence substituted "2-15-1029" for "47-1-201"; in (2) in second sentence after "defender" deleted "provided for in 47-1-201"; and made minor changes in style. Amendment effective July 1, 2017.

Severability: Section 48, Ch. 358, L. 2017, was a severability clause.

2007 Amendment: Chapter 184 in (1) deleted former third sentence that read: "Counsel assigned to represent a minor also has the powers and duties of a guardian ad litem"; and in (2) deleted former third sentence that read: "Assigned counsel has the powers and duties of a guardian ad litem." Amendment effective April 10, 2007.

Applicability: Section 4, Ch. 184, L. 2007, provided: "[This act] applies to appointments on or after [the effective date of this act]." Effective April 10, 2007.

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in (1) in second sentence after "may" deleted "appoint an attorney" and inserted reference to ordering office of state public defender to assign counsel and after "minor" deleted "giving consideration to the choice of the minor if 14 years of age or older" and in third sentence at beginning deleted "A lawyer appointed by the court" and inserted "Counsel assigned"; in (2) in second sentence after "court" deleted "must appoint a lawyer" and inserted language requiring court to order office of state public defender to assign counsel and near end inserted reference to Montana Public Defender Act; and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

1985 Amendments — Composite Section: Chapter 208 in (2) substituted third, fourth, and fifth sentences relating to types of alleged disabilities and designation of physician for former third sentence that read: "If the alleged disability is mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, or chronic intoxication, the court may direct that the person to be protected be examined by a physician designated by the court, preferably a physician who is not connected with any institution in which the person is a patient or is detained", thus allowing professional person other than physician to be designated to make examination if alleged disability is mental illness or mental deficiency.

Chapter 362 inserted (3) relating to appointment pursuant to 72-5-410.

In preparing the composite of the Ch. 208 and Ch. 362 amendments to this section, the Code Commissioner set out in a separate subsection (3) the amendatory language in Ch. 362 which requires the court to direct that a person be examined as set forth in subsection (2) in the case of an appointment under 72-5-410(1)(h). The language had been inserted by Ch. 362 in subsection (2). The Code Commissioner renumbered former subsection (3) as (4).

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-407 (5-406 in 1982 version of UPC).

72-5-409. Cause for appointment of conservator or issuance of protective order.

Official Comments

This is the basic section of this part providing for protective proceedings for minors and disabled persons. "Protective proceedings" is a generic term used to describe proceedings to establish conservatorships and obtain protective orders. "Disabled persons" is used in this section to include a broad category of persons who, for a variety of different reasons, may be unable to manage their own property. Since the problems of property management are generally the same for minors and disabled persons, it was thought undesirable to treat these problems in two separate parts. Where there are differences, these have been separately treated in specific sections.

The Comment to [72-5-316], supra, points up the different meanings of incapacity (warranting guardianship), and disability.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-401.

Case Notes

Appointment of Joint Conservators — Limitation on Powers — No Abuse of Discretion: In a conservatorship proceeding, the District Court appointed three joint conservators for the protected person, two of the protected person's sons and an attorney. One of the appointed sons challenged the appointment of his brother and the attorney, arguing that he had priority over the other two joint conservators because the protected person had signed an affidavit in which she expressed her desire that the son control her assets and because the attorney did not have statutory priority over adult children under 72-5-410. The same son also argued that the District Court erred by not allowing the joint conservators to act in the protected person's elected corporate roles. On appeal, the Supreme Court affirmed the appointment, concluding that although an adult child of a protected person has priority under 72-5-410 to be appointed conservator, the District Court for good cause can pass over a person having priority. The distrust among the siblings and the complexity of the estate provided good cause for the District Court to appoint the three joint conservators. In addition, the District Court correctly rejected the protected person's affidavit as evidence of her wishes because the protected person lacked the capacity to contract and nominate her own conservator at the time she signed the affidavit. Finally, the plain language of 72-5-430 allowed the District Court to limit the power of the joint conservators. In re Guardianship of A.M.M., 2015 MT 250, 380 Mont. 451, 356 P.3d 474.

Second Cousin/Caretaker Not Interested Person Entitled to Notice of Removal as Transfer on Death Investment Account Beneficiary: The District Court has the power to remove or change a beneficiary designation under a conservatee's investment account because the conservator is not the alter ego of the conservatee and the decision to change a beneficiary right is a purely personal elective right of the conservatee. To do so, the court must follow statutory procedures that govern the exercise of that power, which includes notice to all interested persons and a hearing. Interested persons include heirs, devisees, children, spouses, creditors, beneficiaries, and any other person having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. In this case, Anderson's second cousin/caretaker did not qualify as an interested person for purposes of a conservatorship hearing absent a present property right or interest in Anderson's investment account while Anderson was alive, nor did the second cousin/caretaker have a claim against Anderson's estate without a present interest to protect. Thus, the second cousin/caretaker was not entitled to notice and had no standing to be heard or to present objections to removal as a beneficiary if Anderson changed the investment account on her own, or standing to object to Anderson's conservator's request that the District Court order the beneficiary change while Anderson was alive. In re Guardianship & Conservatorship of Anderson, 2009 MT 344, 353 M 139, 218 P3d 1220 (2009). See also In re Estate of Miles v. Miles, 2000 MT 41, 298 M 312, 994 P2d 1139 (2000).

Required Showing of Future Waste of Property if Conservator Not Appointed: A showing that a person is physically incapacitated is not sufficient basis for the appointment of a conservator under this section since subsection (2) requires that there also be a showing that the person has property "that will be wasted or dissipated unless proper management is provided". In re Swandal, 210 M 167, 681 P2d 701, 41 St. Rep. 986 (1984), followed in In re Conservatorship of Kovatch, 271 M 323, 896 P2d 444, 52 St. Rep. 465 (1995).

72-5-410. Who may be appointed conservator — priorities.

Official Comments

A flexible system of priorities for appointment as conservator has been provided. A parent may name a conservator for his minor children in his will if he deems this desirable.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1985 Amendment: Inserted (1)(h) relating to a conservator corporation; and inserted (1)(i) relating to the public administrator.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-410 (5-409 of 1982 version of UPC).

Case Notes

Appointment of Joint Conservators — Limitation on Powers — No Abuse of Discretion: In a conservatorship proceeding, the District Court appointed three joint conservators for the protected person, two of the protected person's sons and an attorney. One of the appointed sons challenged the appointment of his brother and the attorney, arguing that he had priority over the other two joint conservators because the protected person had signed an affidavit in which she expressed her desire that the son control her assets and because the attorney did not have statutory priority over adult children under 72-5-410. The same son also argued that the District Court erred by not allowing the joint conservators to act in the protected person's elected corporate roles. On appeal, the Supreme Court affirmed the appointment, concluding that although an adult child of a protected person has priority under 72-5-410 to be appointed conservator, the District Court for good cause can pass over a person having priority. The distrust among the siblings and the complexity of the estate provided good cause for the District Court to appoint the three joint conservators. In addition, the District Court correctly rejected the protected person's affidavit as evidence of her wishes because the protected person lacked the capacity to contract and nominate her own conservator at the time she signed the affidavit. Finally, the plain language of 72-5-430 allowed the District Court to limit the power of the joint conservators. In re Guardianship of A.M.M., 2015 MT 250, 380 Mont. 451, 356 P.3d 474.

Appointment of Mother Married to Manager of Ranch That Might Be Sued for Her Children's Injuries — No Conflict of Interest: The mother's four children were injured in a one-vehicle accident while an employee of the ranch that her husband managed was, at the mother's request, driving the children home to the ranch after school. The parties agreed that the employee was acting in the course and scope of his employment, that the ranch owned the pickup, that the ranch had about $800,000 of available insurance coverage, that the damages could exceed the limits of the insurance, and that a suit against the ranch was a possibility. The mother's ex-husband petitioned for his appointment as the children's guardian ad litem and conservator. The mother cross-petitioned that she be appointed. The District Court did not err in appointing the mother and deciding that she did not suffer from a conflict of interest that precluded her from serving as guardian ad litem and conservator of the children. The District Court found that she "would fulfill her fiduciary duties to her children tenaciously", that she would consider their emotional needs and future financial security, and that the evidence showed that she was an extremely involved and protective mother who gave much time, love, and attention to the children. In re Watson, 283 M 57, 939 P2d 982, 54 St. Rep. 492 (1997).

72-5-411. Bond — court may require — amount.

Official Comments

The bond requirements for conservators are somewhat more strict than the requirements for personal representatives. Cf. [72-3-513].

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-411 (5-410 in 1982 version of UPC).

72-5-412. Terms and requirements of bond.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-412 (5-411 in 1982 version of UPC).

72-5-413. Petitions for orders subsequent to appointment — interested persons.

Official Comments

Once a conservator has been appointed, the court supervising the trust acts only upon the request of some moving party.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-416 (5-415 in 1982 version of UPC).

Changes From Uniform Act: The Montana enactment added the provision designated as subsection (4).

Case Notes

Definition of "Interested Person" to Be Read More Expansively, Not More Restrictively: The respondent was the conservator for his permanently disabled brother, whose will includes the petitioners, the sons of the respondent, as devisees. The petitioners filed an action seeking to remove their father as their uncle's conservator. The District Court granted the respondent's motion for summary judgment on grounds that the petitioners lacked standing because they were not interested persons under 72-5-413. On appeal, the Supreme Court reversed the District Court and remanded for further proceedings. Relying on the definitions in 72-1-103, the court determined first that the petitioners were devisees and then determined that devisees are interested persons. Looking then to the definition language in 72-5-413(4), the court concluded this definition was an additional definition in the Uniform Probate Code and was meant to expand the definition of "interested person" in 72-1-103, not supplant it. In re Estate of Engellant, 2017 MT 100, 387 Mont. 313, 400 P.3d 218, following In re Estates of Esterbrook, Simmons, & Simmons, 2003 MT 317, 318 Mont. 275, 80 P.3d 419.

Standing of Any Interested Third Party to Petition for Appointment of Conservator: An attorney for an adverse party in a related case discovered that 97-year-old widow Kloss's estate had been significantly depleted under the management of her 71-year-old nephew and petitioned for a conservatorship for Kloss. Kloss objected on grounds that the attorney could not be considered to be interested in Kloss's welfare under 72-5-401 and thus lacked standing to petition for a conservatorship on her behalf. The District Court concluded that the attorney's representation of Kloss's adversary in a separate action did not preclude the attorney from acting in Kloss's best interests and dismissed Kloss's objection to the appointment. On appeal, Kloss contended that "any person who is interested" in 72-5-401 be interpreted as "interested person" as used in the general definitions of the Uniform Probate Code, which would limit persons who may petition for a conservatorship to those who have a property right in or claim against the estate. The Supreme Court declined Kloss's interpretation, noting the Legislature's intent to broadly define those who have standing to petition on behalf of another under the statute. Kloss failed to demonstrate that the attorney had a conflict of interest or would benefit from the appointment. Rather, the attorney was requesting that Kloss and her estate be protected from further alleged exploitation. The District Court was affirmed. In re Conservatorship of Kloss, 2005 MT 39, 326 M 117, 109 P3d 205 (2005).

Grandparents Properly Included as Parties to Future Matters Involving Grandchildren's Conservatorships: The grandparents were court-appointed guardians for their three grandchildren. Following a train derailment and chlorine spill, the grandparents negotiated settlements with two railroads for personal injuries and damages to the children and then sought appointment of a guardian ad litem to manage and protect the settlements. The children's mother did not object to the settlement amounts but opposed a proposed plan for administering the trust and asked to be substituted for the grandparents as petitioner. Just prior to a hearing approving the settlements, the grandparents' guardianships were dissolved and the children began living with their mother. The settlements were approved, and the District Court appointed an attorney as conservator of the estates. The court also included the grandparents as parties to future matters involving the conservatorship of the children, including requiring the grandparents' consent to stipulations for disbursement of settlement money. The mother appealed on grounds that the grandparents' interest terminated with the dissolution of their guardianships. The Supreme Court disagreed. By definition, the grandparents remained interested persons in terms of the conservatorships, and they were properly included as parties to future matters involving the conservatorship of the children, including disbursement of settlement money. In re Estates of Esterbrook, Simmons, & Simmons, 2003 MT 317, 318 M 275, 80 P3d 419 (2003).

Inventory Requirement Mandatory — Verifiable Accountings Required — Audit: The 90-day inventory requirement in 72-5-424 is not discretionary for Montana courts and conservators as a matter of law, even when liabilities exceed assets. The requirement is mandatory because: (1) the overall purpose of a conservatorship is to preserve the property of the protected person, and a conservator will likely be appointed only when there are assets that should be managed; (2) the plain language of 72-5-424 requires that every conservator prepare and file with the appointing court a complete inventory of the estate; and (3) the purpose of the statutory inventory requirement is to furnish a means by which the conservator's management may be checked and accounts verified. In constructing the inventory, the conservator has discretion to decide what to include and how to value the items in the estate, but that discretion must be verifiable. Pursuant to the court's duty to ensure that a conservator is acting in the best interests of the protected person, verification must consist of a means by which a trial court can independently determine whether accountings are generally complete and accurate, and credibility is not sufficient as documentation of accountings. In the present case, the record did not contain a complete, accurate, and verifiable accounting to show that the conservator properly accounted for the estate, so the Supreme Court remanded for an audit pursuant to 72-5-438. Once the conservator meets the burden of showing proper management and accounting, such as the example in 72-34-128 (now repealed), the burden shifts to the protected person to show that the inventory is incorrect. Redies v. Cosner & Uerling, 2002 MT 86, 309 M 315, 48 P3d 697 (2002). See also In re Allard Guardianship, 49 M 219, 141 P 661 (1914), and In re Estate of Clark, 237 M 179, 772 P2d 299 (1989).

72-5-414. Resignation or removal of conservator for cause — successor conservator.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-415 (5-414 in 1982 version of UPC).

Case Notes

Guardian's Actions in Best Interests of Ward — No Good Cause for Removal of Guardian: When the father died, the mother was placed in an extended care facility and an independent guardian was appointed to manage her affairs. The guardian determined that the mother's estate was running short of funds to defray the cost of extended care and sought return of the property in possession of the son. The son refused to return the property and sought to remove the guardian on grounds of mismanagement of the mother's estate. The District Court found that there was not reasonable cause for removal. Evidence showed that all the children and the mother's physicians agreed that the mother should be placed in extended care, that the guardian agreed that placement was in the mother's best interests, and that the guardian thoroughly investigated and accounted for the mother's real and personal property for the purpose of sustaining her ongoing care and treatment. Thus, removal of the guardian was not warranted, and on appeal, the Supreme Court affirmed. In re Guardianship & Conservatorship of Gilroy, 2004 MT 267, 323 M 149, 99 P3d 205 (2004).

72-5-415. Public administrator as conservator when no other appropriate person.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-5-421. Powers of court as to property and affairs of protected persons generally — temporary conservatorship.

Official Comments

The court, which is supervising a conservatorship, is given all the powers which the individual would have if he were of full capacity. These powers are given to the court that is managing the protected person's property since the exercise of these powers has important consequences with respect to the protected person's property.

Compiler's Comments

2007 Amendment: Chapter 42 in (1) inserted second through fifth sentences regarding appointment of a temporary conservator; and made minor changes in style. Amendment effective March 22, 2007.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-408 (5-407 in 1982 version of UPC).

Case Notes

Second Cousin/Caretaker Not Interested Person Entitled to Notice of Removal as Transfer on Death Investment Account Beneficiary: The District Court has the power to remove or change a beneficiary designation under a conservatee's investment account because the conservator is not the alter ego of the conservatee and the decision to change a beneficiary right is a purely personal elective right of the conservatee. To do so, the court must follow statutory procedures that govern the exercise of that power, which includes notice to all interested persons and a hearing. Interested persons include heirs, devisees, children, spouses, creditors, beneficiaries, and any other person having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. In this case, Anderson's second cousin/caretaker did not qualify as an interested person for purposes of a conservatorship hearing absent a present property right or interest in Anderson's investment account while Anderson was alive, nor did the second cousin/caretaker have a claim against Anderson's estate without a present interest to protect. Thus, the second cousin/caretaker was not entitled to notice and had no standing to be heard or to present objections to removal as a beneficiary if Anderson changed the investment account on her own, or standing to object to Anderson's conservator's request that the District Court order the beneficiary change while Anderson was alive. In re Guardianship & Conservatorship of Anderson, 2009 MT 344, 353 M 139, 218 P3d 1220 (2009). See also In re Estate of Miles v. Miles, 2000 MT 41, 298 M 312, 994 P2d 1139 (2000).

No Evidence of Incompetence of Protected Person to Sign Documents: The conservator of an estate sought to cancel several transactions and recover funds transferred from a joint bank account on grounds that his mother was incompetent to effect the transactions. The District Court disagreed and held that at the time that the transactions were made, the mother was competent. On appeal, the Supreme Court found that the son failed to prove his mother's incompetence. Although the mother was later diagnosed with Alzheimer's disease, the fact that she suffered from an early form of the disease did not render her incompetent per se, nor did the fact that a conservator had been appointed mean that she lacked the capacity to make certain decisions. The District Court heard credible evidence and expert testimony that, although conflicting, indicated that the mother was competent to execute the documents that effected the transactions, and the Supreme Court declined to disturb the District Court's determination regarding the strength and weight of the testimony. Stave v. Estate of Rutledge, 2005 MT 332, 330 M 28, 127 P3d 365 (2005). See also In re Estate of West, 269 M 83, 887 P2d 222 (1994).

Failure to Establish Special Needs Trust in Children's Catastrophic Personal Injury Case — Remand: Three children were injured in a train derailment and chlorine spill, and their grandparents negotiated settlements with the railroads for the children's personal injuries and damages. The District Court rejected a special needs trust and instead appointed an attorney as conservator of the estates, with the authority to choose the investment firm to hold the money, and provided that the money could be removed only by court order. The children's mother contended that the District Court erred by ordering the attorney to put the money in interest-bearing accounts without specifying the terms of special needs trusts. Although the mother provided no evidence supporting the need for special needs trusts and cited no authority under which it would be error not to establish special needs trusts in this case, nevertheless, the Supreme Court was concerned that the children's best interests may not have been properly protected by the District Court's rejection of special needs trusts and remanded for further consideration. In re Estates of Esterbrook, Simmons, & Simmons, 2003 MT 317, 318 M 275, 80 P3d 419 (2003).

No Presumption of Competency in Transactions Between Conservator and Protected Persons: The lower court ruled that the protected persons, the elderly parents of the conservator, were competent. The Supreme Court reversed and remanded, stating that although the establishment of conservatorship is not an adjudication of incompetency and the protected person is presumed to have the capacity to contract with third persons, the presumption shifts with respect to transactions with the conservator. In such cases, the conservator has the burden of proving that the protected persons were at all times capable of understanding the nature of any transaction in which the conservator obtained a benefit. In re Estate of Clark, 237 M 179, 772 P2d 299, 46 St. Rep. 718 (1989), followed in Luke v. Gager, 2000 MT 377, 303 M 474, 16 P3d 377, 57 St. Rep. 1599 (2000).

Personal Guardianship and Property Conservatorship No Bar to Trust Revocation — Construction Against Party Supplying Trust Form: A trustee appealed from a declaratory ruling of the District Court holding that a personal guardianship and a property conservatorship did not prevent the trustor from revoking the trust. The trustee, also a beneficiary, argued in effect that the trustor had been legally incapacitated from revoking the trust because she was under a personal guardianship and her property was under a conservatorship and because the trust provided that it was irrevocable upon the "incompetency" of the trustor. However, the conservatorship and guardianship did not begin before revocation of the trust. Further, a conservatorship would not affect the power to revoke under 72-5-421. The guardianship had been appointed because the trustor had become physically incapable of caring for herself, not because of mental incapacitation. Construing the term "incompetency" strictly against the trustee because it had supplied the trust form and was a beneficiary, the Supreme Court upheld the trial court's holding that the trust revocation was valid. Mont. Conference of the Seventh-Day Adventist Church v. Estate of Miller, 192 M 468, 628 P2d 1100, 38 St. Rep. 846 (1981), followed in In re Estate of West, 269 M 83, 887 P2d 222, 51 St. Rep. 1409 (1994).

72-5-422. Power of court to authorize particular protective arrangements or transactions without appointing conservator.

Official Comments

It is important that the provision be made for the approval of single transactions or the establishment of protective arrangements as alternatives to full conservatorship. Under present law, a guardianship often must be established simply to make possible a valid transfer of land or securities. This section eliminates the necessity of the establishment of long-term arrangements in this situation.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-409 (5-408 in 1982 version of UPC).

Case Notes

Second Cousin/Caretaker Not Interested Person Entitled to Notice of Removal as Transfer on Death Investment Account Beneficiary: The District Court has the power to remove or change a beneficiary designation under a conservatee's investment account because the conservator is not the alter ego of the conservatee and the decision to change a beneficiary right is a purely personal elective right of the conservatee. To do so, the court must follow statutory procedures that govern the exercise of that power, which includes notice to all interested persons and a hearing. Interested persons include heirs, devisees, children, spouses, creditors, beneficiaries, and any other person having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. In this case, Anderson's second cousin/caretaker did not qualify as an interested person for purposes of a conservatorship hearing absent a present property right or interest in Anderson's investment account while Anderson was alive, nor did the second cousin/caretaker have a claim against Anderson's estate without a present interest to protect. Thus, the second cousin/caretaker was not entitled to notice and had no standing to be heard or to present objections to removal as a beneficiary if Anderson changed the investment account on her own, or standing to object to Anderson's conservator's request that the District Court order the beneficiary change while Anderson was alive. In re Guardianship & Conservatorship of Anderson, 2009 MT 344, 353 M 139, 218 P3d 1220 (2009). See also In re Estate of Miles v. Miles, 2000 MT 41, 298 M 312, 994 P2d 1139 (2000).

72-5-423. Fiduciary duty of conservator.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-417 (5-416 in 1982 version of UPC).

Case Notes

Sanctions Against Conservator Proper: In a guardianship and conservatorship proceeding, a conservator appealed a District Court order that required him to personally pay the guardian's reasonable fees for preparing for hearings at which the conservator challenged the fees of one of his joint conservators. The Supreme Court affirmed, concluding that the District Court did not abuse its discretion in imposing sanctions because the conservator's objections to the joint conservator's fees lacked substance and were filed for an improper purpose. In re Guardianship of A.M.M., 2015 MT 250, 380 Mont. 451, 356 P.3d 474.

Conservator With Special Skills Held to Higher Standard of Care: If a conservator is appointed in reliance on special skills, an alleged breach of fiduciary duty involving those special skill requires expert testimony to establish the standard of care for exercise of those skills, whether that standard was breached, and whether any breach caused injury and damages. In re Conservatorship of J.R., 2011 MT 62, 360 Mont. 30, 252 P.3d 163.

Second Cousin/Caretaker Not Interested Person Entitled to Notice of Removal as Transfer on Death Investment Account Beneficiary: The District Court has the power to remove or change a beneficiary designation under a conservatee's investment account because the conservator is not the alter ego of the conservatee and the decision to change a beneficiary right is a purely personal elective right of the conservatee. To do so, the court must follow statutory procedures that govern the exercise of that power, which includes notice to all interested persons and a hearing. Interested persons include heirs, devisees, children, spouses, creditors, beneficiaries, and any other person having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. In this case, Anderson's second cousin/caretaker did not qualify as an interested person for purposes of a conservatorship hearing absent a present property right or interest in Anderson's investment account while Anderson was alive, nor did the second cousin/caretaker have a claim against Anderson's estate without a present interest to protect. Thus, the second cousin/caretaker was not entitled to notice and had no standing to be heard or to present objections to removal as a beneficiary if Anderson changed the investment account on her own, or standing to object to Anderson's conservator's request that the District Court order the beneficiary change while Anderson was alive. In re Guardianship & Conservatorship of Anderson, 2009 MT 344, 353 M 139, 218 P3d 1220 (2009). See also In re Estate of Miles v. Miles, 2000 MT 41, 298 M 312, 994 P2d 1139 (2000).

Conservator's Exercise of Reasonable Judgment Regarding Lease of Estate Property — Remand for Audit of Leasing Arrangement: The District Court appointed Saylor's stepson, Tim, as temporary guardian. Saylor and her brother, Deane, both filed written objections to the appointment, and the District Court then approved an agreement that made Deane the limited guardian and conservator of Saylor's out-of-state property and Tim the conservator of Saylor's Montana property. Saylor and Deane subsequently moved to remove Tim as conservator based on his failure to disclose certain financial documents relating to his administration of the estate. Tim had entered a grazing lease on Saylor's property that Saylor contended provided no material benefit to the estate. The District Court found no good cause to remove Tim as conservator and dismissed the petition for removal. On appeal, the Supreme Court noted that conservators are under the same duties as trustees and held that Tim exercised reasonable judgment regarding the lease arrangement and did not breach his duty as conservator so as to require his removal.

Saylor's proposed substitute model lease was unrealistic. However, as a matter of equity, the Supreme Court remanded with instructions that the District Court order an audit of the lease arrangement to ensure that the figures attached to the lease conform to actualities and to allow the District Court to revise its prior determinations should the audit reveal facts that would require revision. In re Guardianship & Conservatorship of Saylor, 2005 MT 236, 328 M 415, 121 P3d 532 (2005).

Misrepresentation of Value of Estate Constituting Breach of Fiduciary Duty — Incomplete Inventory: A conservator knew, but failed to mention, that an estate included annuities and jointly held property that was not included in the final estate inventory. The District Court concluded that the conservator breached the fiduciary duty by acting in the conservator's best interest by failing to disclose all financial information regarding the estate. The Supreme Court affirmed. The conservator was required to make a full disclosure in order to meet the statutory duties of conservatorship, and failure to do so constituted a breach of fiduciary duty to preserve the protected person's property and provide a means by which the conservator's work could be independently verified by a court. Further, the District Court's finding that the conservatorship accountings and inventories were incomplete was also affirmed in that the final inventory made no reference to annuities and jointly held property. The District Court's conclusion that the conservator misrepresented the value of the estate was supported by substantial evidence and was affirmed. In re Estate of Stukey, 2004 MT 279, 323 M 241, 100 P3d 114 (2004). See also In re Estate of Clark, 237 M 179, 772 P2d 299 (1989).

Conservator Who Benefits From Dealings Not Excused Due to Similar Actions Prior to Establishment of Trust: The lower court accepted the dealings of a son acting as conservator for his parents on the basis that, prior to the establishment of the trust, he had acted in the same self-serving manner and his parents had promised to give him the farm. The Supreme Court reversed, stating that once the trust had been set up, the conservator must perform his duties only in the best interests of the protected persons. In re Estate of Clark, 237 M 179, 772 P2d 299, 46 St. Rep. 718 (1989).

Professional Misconduct — Lawyer Disbarred: The Supreme Court found substantial credible evidence supporting the findings of the Commission on Practice that the respondent violated 72-5-423, 72-20-201 (now repealed), 72-20-203 (now repealed), 72-20-204 (now repealed), 72-20-207 (now repealed), and various disciplinary rules and that he engaged in deceitful conduct for which he could be guilty of a misdemeanor in accordance with 37-61-406. The respondent was ordered disbarred and required to make restitution of $22,127.74. In re Reno, 187 M 262, 609 P2d 704, 37 St. Rep. 688 (1980).

72-5-424. Inventory and records.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-418 (5-417 in 1982 version of UPC).

Case Notes

Inventory Requirement Mandatory — Verifiable Accountings Required — Audit: The 90-day inventory requirement in this section is not discretionary for Montana courts and conservators as a matter of law, even when liabilities exceed assets. The requirement is mandatory because: (1) the overall purpose of a conservatorship is to preserve the property of the protected person, and a conservator will likely be appointed only when there are assets that should be managed; (2) the plain language of this section requires that every conservator prepare and file with the appointing court a complete inventory of the estate; and (3) the purpose of the statutory inventory requirement is to furnish a means by which the conservator's management may be checked and accounts verified. In constructing the inventory, the conservator has discretion to decide what to include and how to value the items in the estate, but that discretion must be verifiable. Pursuant to the court's duty to ensure that a conservator is acting in the best interests of the protected person, verification must consist of a means by which a trial court can independently determine whether accountings are generally complete and accurate, and credibility is not sufficient as documentation of accountings. In the present case, the record did not contain a complete, accurate, and verifiable accounting to show that the conservator properly accounted for the estate, so the Supreme Court remanded for an audit pursuant to 72-5-438. Once the conservator meets the burden of showing proper management and accounting, such as the example in 72-34-128 (now repealed), the burden shifts to the protected person to show that the inventory is incorrect. Redies v. Cosner & Uerling, 2002 MT 86, 309 M 315, 48 P3d 697 (2002). See also In re Allard Guardianship, 49 M 219, 141 P 661 (1914), and In re Estate of Clark, 237 M 179, 772 P2d 299 (1989).

72-5-425. Title by appointment as conservator — appointment not transfer for certain purposes.

Official Comments

This section permits independent administration of the property of protected persons once the appointment of a conservator had [has] been obtained. Any interested person may require the conservator to account in accordance with [72-5-438]. As a trustee, a conservator holds title to the property of the protected person. The appointment of a conservator is a serious matter and the court must select him with great care. Once appointed, he is free to carry on his fiduciary responsibilities. If he should default in these in any way, he may be made to account to the court.

Unlike a situation involving appointment of a guardian, the appointment of a conservator has no bearing on the capacity of the disabled person to contract or engage in other transactions.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-420 (5-419 of 1982 version of UPC).

72-5-426. Letters as evidence of transfer of assets — recording.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-421 (5-420 of 1982 version of UPC).

72-5-427. Powers of conservator in administration.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-424 (5-423 of 1982 version of UPC).

Case Notes

Appointment of GAL and Conservator — Inability of Parents to Choose Counsel for Child: The custodial parents of a minor child appealed the District Court's order denying their motion to disqualify counsel for their child in a personal injury matter, arguing that they had the right to choose counsel over the opposition of the guardian ad litem (GAL) and conservator, that 37-61-403 and 72-5-427 were unconstitutional, and that 37-61-403 conflicts with the Montana Rules of Professional Conduct. The Supreme Court affirmed, concluding that once the parents consented to the appointment of a GAL and conservator, they divested themselves of the right to choose who would represent their child's personal injury claims. Assuming that the parents were clients under 37-61-403, their failure to comply with the statute by not securing consent of the attorney of record or applying to the District Court to change the attorney of record did not render the statute unconstitutional. Because the parents voluntarily consented to the appointment of the GAL and conservator and, thus, divested themselves of control over the child's legal action, their unhappiness with the decisions of the GAL and conservator did not render 72-5-427 unconstitutional. Rule 1.16, Montana Rules of Professional Conduct, and 37-61-403 work in conjunction: Rule 1.16 provides that an attorney shall withdraw from representation if discharged by a client and 37-61-403 provides the method for how discharge can be accomplished. In re Estate of C.K.O., 2013 MT 72, 369 Mont. 297, 297 P.3d 1217.

Attorney Fees Payable From Conservatorship Assets: J.R.'s daughter requested removal of a conservator and alleged that the conservator's attorney fees should not be paid because the fees were used to defend the conservator in the removal action. The Supreme Court, however, held that the conservator's fees and those of his attorney were attributable to the failure of J.R.'s children to cooperate with or even recognize the conservatorship. In re Conservatorship of J.R., 2011 MT 62, 360 Mont. 30, 252 P.3d 163.

Second Cousin/Caretaker Not Interested Person Entitled to Notice of Removal as Transfer on Death Investment Account Beneficiary: The District Court has the power to remove or change a beneficiary designation under a conservatee's investment account because the conservator is not the alter ego of the conservatee and the decision to change a beneficiary right is a purely personal elective right of the conservatee. To do so, the court must follow statutory procedures that govern the exercise of that power, which includes notice to all interested persons and a hearing. Interested persons include heirs, devisees, children, spouses, creditors, beneficiaries, and any other person having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. In this case, Anderson's second cousin/caretaker did not qualify as an interested person for purposes of a conservatorship hearing absent a present property right or interest in Anderson's investment account while Anderson was alive, nor did the second cousin/caretaker have a claim against Anderson's estate without a present interest to protect. Thus, the second cousin/caretaker was not entitled to notice and had no standing to be heard or to present objections to removal as a beneficiary if Anderson changed the investment account on her own, or standing to object to Anderson's conservator's request that the District Court order the beneficiary change while Anderson was alive. In re Guardianship & Conservatorship of Anderson, 2009 MT 344, 353 M 139, 218 P3d 1220 (2009). See also In re Estate of Miles v. Miles, 2000 MT 41, 298 M 312, 994 P2d 1139 (2000).

Unreasonable and Vexatious Multiplication of Court Proceedings — Sanctions Proper: First Interstate Bank was Bayers' court-appointed conservator. McGimpsey claimed to be Bayers' private attorney and began expressing an interest in matters involving Bayers' estate, at which point the conservator became concerned about the extent of McGimpsey's involvement in Bayers' affairs and requested in writing copies of any legal documents that McGimpsey had that may have been executed by Bayers. McGimpsey ignored the request. The conservator moved in District Court to compel production of the requested information and included a request for attorney fees necessitated by the motion. McGimpsey responded with a letter threatening the conservator's counsel with sanctions and listing complaints and criticisms of the conservator's handling of Bayers' estate. McGimpsey then moved to strike scandalous, immaterial, and irrelevant content in the conservator's motion and brief, but the motion was denied. The court instead granted the conservator's motion to compel and for attorney fees. McGimpsey filed another motion to alter or amend the order granting attorney fees. That motion was also denied, and the court ordered a hearing on the amount of sanctions to be awarded unless the parties agreed to the amount of attorney fees being assessed. The conservator agreed to the court's suggestion, but McGimpsey did not, so a hearing on the amount of fees was scheduled. McGimpsey filed another motion to vacate the hearing and to establish a discovery schedule regarding attorney fees. That motion was denied at the beginning of the hearing, and the conservator's counsel testified as to reasonable attorney fees incurred because of McGimpsey's conduct. The court issued an order requiring McGimpsey to pay Bayers' estate $1,500 in attorney fees pursuant to 37-61-421, but McGimpsey filed another motion to alter or amend the order. That motion was also denied, and McGimpsey appealed to the Supreme Court, arguing that in a civil action such as this, all discovery and discovery disputes, including sanctions, should be governed by the Montana Rules of Civil Procedure and not by 37-61-421. Former Rules 34 and 37, M.R.Civ.P. (now superseded), anticipate the existence of a dispute between opposing parties, but the underlying conservatorship proceeding in this case was not an adversarial proceeding. Formal discovery proceedings were not required for the conservator to obtain documents considered relevant to Bayers' estate. McGimpsey could have provided a straightforward answer as to whether he had any of the requested documents, but instead he chose to force a needless multiplication of proceedings and the pointless involvement of the District Court in the dispute. The court's conclusion that McGimpsey unreasonably and vexatiously prolonged the litigation was not in error. Because McGimpsey continued to force the matter to the Supreme Court, he was also held responsible under 37-61-421 for the conservator's expenses and attorney fees incurred in the appeal. In re Estate of Bayers, 2001 MT 49, 304 M 296, 21 P3d 3 (2001).

Conservator as Interested Person: A conservator is an "interested person", under the definition in 72-1-103, and has the right to oppose or contest the probate of a will. In re Tennant, 220 M 78, 714 P2d 122, 43 St. Rep. 189 (1986).

72-5-428. Distributive powers and duties of conservator generally.

Official Comments

[Sections 72-5-428 and 72-5-429 set] out those situations wherein the conservator may distribute property or disburse funds during the continuance of or on termination of the trust. [Section 72-5-413(2)] makes it clear that a conservator may seek instructions from the Court on questions arising under this section. [Section 72-5-429(3)] is derived in part from § 11.80.150 Revised Code of Washington (RCWA 11.80.150).

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-425(a), (b) (5-424(a), (b) in 1982 version of UPC).

Changes From Uniform Act: Montana codified section 5-425 of the Uniform Probate Code (5-424, 1982 version) as 72-5-428 and 72-5-429. The Official Comments appearing under 72-5-428 are the comments of the National Conference of Commissioners on Uniform State Laws for section 5-425 (5-424, 1982 version) of the Uniform Probate Code.

Case Notes

Attorney Fees Incurred in Seeking Guardianship Payable From Estate: A law firm requested $30,000 in fees from the conservator of an incapacitated person's estate for services requested by the attorney-in-fact in appointing a guardian for the incapacitated person. The District Court ordered payment of the fees out of the conservator estate. An appointing court's discretionary power encompasses the approval of attorney fees incurred by a guardian within the scope of the guardianship. Further, under this section, the conservator of the estate of an incapacitated person is authorized to distribute funds necessary for the support, education, care, or benefit of the protected person. The cost of initiating a good faith petition for the appointment of a guardian, when the appointment is determined to be in the best interests of the ward, constitutes a necessary expenditure on behalf of the ward and is therefore compensable out of the guardianship estate. The District Court did not abuse its discretion in ordering payment of the attorney fees, and the Supreme Court declined to disturb the order on appeal. In re Estate of Bayers, 1999 MT 154, 295 M 89, 983 P2d 339, 56 St. Rep. 607 (1999), following In re Allard Guardianship, 49 M 219, 141 P 661 (1914).

72-5-429. Distribution upon attainment of majority, termination of disability, or death of protected person.

Official Comments

[Sections 72-5-428 and 72-5-429 set] out those situations wherein the conservator may distribute property or disburse funds during the continuance of or on termination of the trust. [Section 72-5-413(2)] makes it clear that a conservator may seek instructions from the Court on questions arising under this section. [Section 72-5-429(3)] is derived in part from § 11.80.150 Revised Code of Washington (RCWA 11.80.150).

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-425(c), (d), (e) (5-424(c), (d), (e) in 1982 version of UPC).

Changes From Uniform Act: Montana codified section 5-425 of the Uniform Probate Code (5-424, 1982 version) as 72-5-428 and 72-5-429. The Official Comments appearing under 72-5-429 are the comments of the National Conference of Commissioners on Uniform State Laws for section 5-425 (5-424, 1982 version) of the Uniform Probate Code.

Case Notes

No Personal Representative Appointed — Protection by Conservator of Estate Upon Death of Protected Person: Appellants argued that upon the death of Mae, the protected person in this case, her conservatorship should have been terminated by the District Court and that the conservator had no standing to pursue a cause of action on behalf of Mae's estate. The Supreme Court held that under 72-5-429, a conservator must continue to protect the ward's estate until a personal representative is duly appointed by the District Court. Here, no personal representative was appointed; therefore, the conservator had to act to protect Mae's estate, which included filing a lawsuit against the appellants. In re Tennant, 220 M 78, 714 P2d 122, 43 St. Rep. 189 (1986).

72-5-430. Enlargement or limitation of powers of conservator by court.

Official Comments

This section makes it possible to appoint a fiduciary whose powers are limited to part of the estate or who may conduct important transactions, such as sales and mortgages of land, only with special court authorization. In the latter case, a conservator would be in much the position of a guardian of property under the law currently in force in most states, except that he would have title to the property. The purpose of giving conservators title as trustees is to ensure that the provisions for protection of third parties have full effect. The Veterans Administration [now Department of Veterans Affairs] may insist that, when it is paying benefits to a minor or disabled, the letters of conservatorship limit powers to those of a guardian under the Uniform Veteran's Guardianship Act [section 91-4801, et seq., R.C.M. 1947, repealed effective July 1, 1975] and require the conservator to file annual accounts.

The court may not only limit the powers of the conservator but may expand his powers so as to make it possible for him to act as the court itself might act.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-426 (5-425 in 1982 version of UPC).

Case Notes

Appointment of Joint Conservators — Limitation on Powers — No Abuse of Discretion: In a conservatorship proceeding, the District Court appointed three joint conservators for the protected person, two of the protected person's sons and an attorney. One of the appointed sons challenged the appointment of his brother and the attorney, arguing that he had priority over the other two joint conservators because the protected person had signed an affidavit in which she expressed her desire that the son control her assets and because the attorney did not have statutory priority over adult children under 72-5-410. The same son also argued that the District Court erred by not allowing the joint conservators to act in the protected person's elected corporate roles. On appeal, the Supreme Court affirmed the appointment, concluding that although an adult child of a protected person has priority under 72-5-410 to be appointed conservator, the District Court for good cause can pass over a person having priority. The distrust among the siblings and the complexity of the estate provided good cause for the District Court to appoint the three joint conservators. In addition, the District Court correctly rejected the protected person's affidavit as evidence of her wishes because the protected person lacked the capacity to contract and nominate her own conservator at the time she signed the affidavit. Finally, the plain language of 72-5-430 allowed the District Court to limit the power of the joint conservators. In re Guardianship of A.M.M., 2015 MT 250, 380 Mont. 451, 356 P.3d 474.

Failure to Establish Special Needs Trust in Children's Catastrophic Personal Injury Case — Remand: Three children were injured in a train derailment and chlorine spill, and their grandparents negotiated settlements with the railroads for the children's personal injuries and damages. The District Court rejected a special needs trust and instead appointed an attorney as conservator of the estates, with the authority to choose the investment firm to hold the money, and provided that the money could be removed only by court order. The children's mother contended that the District Court erred by ordering the attorney to put the money in interest-bearing accounts without specifying the terms of special needs trusts. Although the mother provided no evidence supporting the need for special needs trusts and cited no authority under which it would be error not to establish special needs trusts in this case, nevertheless, the Supreme Court was concerned that the children's best interests may not have been properly protected by the District Court's rejection of special needs trusts and remanded for further consideration. In re Estates of Esterbrook, Simmons, & Simmons, 2003 MT 317, 318 M 275, 80 P3d 419 (2003).

72-5-431. Preservation of estate plan — right to inspect will.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-427 (5-426 in 1982 version of UPC).

72-5-432. Compensation and expenses.

Compiler's Comments

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-414 (5-413 in 1982 version of UPC).

Case Notes

Fees Awarded to Attorney Conservator Reasonable: When a court appoints a conservator with special skills, the court intends for the conservator to use those special skills in the administration of the estate. It logically follows that an attorney who is specifically appointed as a conservator, rather than one hired by a conservator, is entitled to reasonable fees for legal work done in administering or protecting the estate. In re Guardianship of A.M.M., 2015 MT 250, 380 Mont. 451, 356 P.3d 474.

Sanctions Against Conservator Proper: In a guardianship and conservatorship proceeding, a conservator appealed a District Court order that required him to personally pay the guardian's reasonable fees for preparing for hearings at which the conservator challenged the fees of one of his joint conservators. The Supreme Court affirmed, concluding that the District Court did not abuse its discretion in imposing sanctions because the conservator's objections to the joint conservator's fees lacked substance and were filed for an improper purpose. In re Guardianship of A.M.M., 2015 MT 250, 380 Mont. 451, 356 P.3d 474.

72-5-433. Claims against protected person — presentment, allowance, and payment — priorities.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-428 (5-427(a), (b) in 1982 version of UPC).

72-5-434. Transaction involving conflict of interest — voidable — exceptions.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-422 (5-421 in 1982 version of UPC).

72-5-435. Persons dealing with conservator — protection.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: In (2) substituted "any procedural irregularity or jurisdictional defect occurring" for "instances in which some procedural irregularity or jurisdictional defect occurred" and at end inserted clause relating to protection provided by laws concerning commercial transactions and transfers of securities by fiduciaries; and made minor changes in phraseology.

1989 Editorial Comment: The changes result from an amendment proposed by the Joint Editorial Board of the national Uniform Probate Code in 1987. See corresponding national Uniform Probate Code section 5-435.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-423 (5-422 in 1982 version of UPC).

72-5-436. Claims arising during conservatorship — individual liability of conservator.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-429 (5-428 in 1982 version of UPC).

72-5-437. Termination of conservatorship.

Official Comments

The persons entitled to notice of a petition to terminate a conservatorship are identified by [72-5-403].

Any interested person may seek the termination of a conservatorship when there is some question as to whether the trust is still needed. In some situations (e.g., the individual who returns after being missing) it may be perfectly clear that he is no longer in need of a conservatorship.

An order terminating a conservatorship may be recorded as evidence of the transfer of title from the estate. See [72-5-426].

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-430 (5-429 in 1982 version of UPC).

72-5-438. Accounts — final and intermediate.

Official Comments

The persons who are to receive notice of intermediate and final accounts will be identified by court order as provided in [72-5-403(2)]. Notice is given as described in [72-1-301]. In other respects, procedures applicable to accountings will be as provided in court rule. [The Montana version contains more specific requirements concerning when accounting must be made and to whom notice must be given. See 1983 amendment note under compiler's comments to this section in the MCA.]

Compiler's Comments

1989 Amendment: In (1) substituted language of first sentence relating to conservator's accounting to the court for "Unless waived by the court, every conservator must account to the court for his administration of the trust annually for the preceding year and also upon his resignation or removal", deleted second sentence that read: "A copy of the account must be served upon the protected person's parent, guardian, child, or sibling if that person has made an effective request under 72-5-404" and at end substituted "a conservator shall account to the court or to the formerly protected person or the successors of that person" for "a conservator may account to the court or he may account to the former protected person or his personal representative"; in (3), after "estate", deleted "in his control"; deleted former (4) that read: "(4) Upon failure, as determined by the clerk of court, of the conservator to file an annual account, the court shall order the conservator to file the account and give good cause for his failure to file a timely account"; and made minor changes in phraseology and punctuation.

1989 Editorial Comment: The changes result from an amendment proposed by the Joint Editorial Board of the national Uniform Probate Code in 1987. The changes meet a recommendation of the American Bar Association Commission on the Mentally Disabled. See corresponding national Uniform Probate Code section 5-418.

1983 Amendment: In (1), at beginning inserted "Unless waived by the court,", inserted "annually for the preceding year and also" before "upon his resignation", deleted "and at other times as the court may direct" after "resignation or removal", and inserted second sentence relating to service of the account; and inserted (4) requiring court to order an account to be filed.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-419 (5-418 in 1982 version of UPC).

Case Notes

Inventory Requirement Mandatory — Verifiable Accountings Required — Audit: The 90-day inventory requirement in 72-5-424 is not discretionary for Montana courts and conservators as a matter of law, even when liabilities exceed assets. The requirement is mandatory because: (1) the overall purpose of a conservatorship is to preserve the property of the protected person, and a conservator will likely be appointed only when there are assets that should be managed; (2) the plain language of 72-5-424 requires that every conservator prepare and file with the appointing court a complete inventory of the estate; and (3) the purpose of the statutory inventory requirement is to furnish a means by which the conservator's management may be checked and accounts verified. In constructing the inventory, the conservator has discretion to decide what to include and how to value the items in the estate, but that discretion must be verifiable. Pursuant to the court's duty to ensure that a conservator is acting in the best interests of the protected person, verification must consist of a means by which a trial court can independently determine whether accountings are generally complete and accurate, and credibility is not sufficient as documentation of accountings. In the present case, the record did not contain a complete, accurate, and verifiable accounting to show that the conservator properly accounted for the estate, so the Supreme Court remanded for an audit pursuant to this section. Once the conservator meets the burden of showing proper management and accounting, such as the example in 72-34-128 (now repealed), the burden shifts to the protected person to show that the inventory is incorrect. Redies v. Cosner & Uerling, 2002 MT 86, 309 M 315, 48 P3d 697 (2002). See also In re Allard Guardianship, 49 M 219, 141 P 661 (1914), and In re Estate of Clark, 237 M 179, 772 P2d 299 (1989).

Approval of Final Accounting Bar to Subsequent Litigation by Res Judicata: In 1976, Caleb and Viola Heath executed wills creating a trust and appointed Norwest as trustee. In 1978, they both executed second wills, appointed First Trust as trustee, and revoked the first wills, trusts, and appointments. Norwest and First Trust litigated the efficacy of the respective wills and appointments until several years after Caleb's death, at which time they entered into a settlement agreement to resolve all pending litigation between Norwest, First Trust, and Caleb's and Viola's heirs. The District Court dismissed all pending litigation with prejudice, approved Norwest's final accounting, and distributed Caleb's assets pursuant to the 1976 will and trust. Six months later, Tisher and Schleve, relatives of Caleb and Viola, sought to probate Viola's 1978 will and filed an action against Norwest. The District Court concluded that the action was barred by res judicata and found for Norwest on a motion for summary judgment. The Supreme Court affirmed, holding that the four prerequisites for application of res judicata were satisfied because Tisher and Schleve are privies of Caleb and Viola and because the subject matter and issues of the two legal actions were the same in that both dealt with the efficacy of the 1978 wills and trusts. The Supreme Court also concluded that even though the District Court had characterized Tisher and Schleve's claim as a breach of a trustee's fiduciary duty rather than a breach of a conservator's fiduciary duty, the conclusion did not constitute reversible error because the result reached by the District Court, that the claim was barred by res judicata in light of a failure to object to the previous final accounting, was correct. Tisher v. Norwest Capital Management & Trust Co., Inc., 260 M 143, 859 P2d 984, 50 St. Rep. 960 (1993).

72-5-439. Payment of debt and delivery of property to foreign conservator without local proceedings.

Official Comments

Section [72-5-410(1)(a)] gives a foreign conservator or guardian of property, appointed by the state where the disabled person resides, first priority for appointment as conservator in this state. A foreign conservator may easily obtain any property in this state and take it to the residence of the protected person for management.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 5-431 (5-430 in 1982 version of UPC).

72-5-444. Petition to authorize proposed action — substituted judgment.

Compiler's Comments

Effective Date: Section 163, Ch. 264, L. 2013, provided: "[This act] is effective October 1, 2013."

Severability: Section 161, Ch. 264, L. 2013, was a severability clause.

Application to Existing Relationships: Section 164, Ch. 264, L. 2013, provided: "(1) Except as otherwise provided in [this act], on [the effective date of this act]:

(a) [this act] applies to all trusts created before, on, or after [the effective date of this act];

(b) [this act] applies to all judicial proceedings concerning trusts commenced on or after [the effective date of this act];

(c) [this act] applies to judicial proceedings concerning trusts commenced before [the effective date of this act] unless the court finds that application of a particular provision of [this act] would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of [this act] does not apply and the superseded law applies;

(d) any rule of construction or presumption provided in [this act] applies to trust instruments executed before [the effective date of this act] unless there is a clear indication of a contrary intent in the terms of the trust; and

(e) an act done before [the effective date of this act] is not affected by [this act].

(2) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before [the effective date of this act], that statute continues to apply to the right even if it has been repealed or superseded." Effective October 1, 2013.

72-5-445. Notice of hearing.

Compiler's Comments

Effective Date: Section 163, Ch. 264, L. 2013, provided: "[This act] is effective October 1, 2013."

Severability: Section 161, Ch. 264, L. 2013, was a severability clause.

Application to Existing Relationships: Section 164, Ch. 264, L. 2013, provided: "(1) Except as otherwise provided in [this act], on [the effective date of this act]:

(a) [this act] applies to all trusts created before, on, or after [the effective date of this act];

(b) [this act] applies to all judicial proceedings concerning trusts commenced on or after [the effective date of this act];

(c) [this act] applies to judicial proceedings concerning trusts commenced before [the effective date of this act] unless the court finds that application of a particular provision of [this act] would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of [this act] does not apply and the superseded law applies;

(d) any rule of construction or presumption provided in [this act] applies to trust instruments executed before [the effective date of this act] unless there is a clear indication of a contrary intent in the terms of the trust; and

(e) an act done before [the effective date of this act] is not affected by [this act].

(2) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before [the effective date of this act], that statute continues to apply to the right even if it has been repealed or superseded." Effective October 1, 2013.

72-5-446. Consent or lack of capacity of protected person — adequate provision for protected person and dependents.

Compiler's Comments

2015 Amendment: Chapter 55 near beginning substituted "72-5-444 through 72-5-450" for "72-38-444 through "72-38-450". Amendment effective October 1, 2015.

Effective Date: Section 163, Ch. 264, L. 2013, provided: "[This act] is effective October 1, 2013."

Severability: Section 161, Ch. 264, L. 2013, was a severability clause.

Application to Existing Relationships: Section 164, Ch. 264, L. 2013, provided: "(1) Except as otherwise provided in [this act], on [the effective date of this act]:

(a) [this act] applies to all trusts created before, on, or after [the effective date of this act];

(b) [this act] applies to all judicial proceedings concerning trusts commenced on or after [the effective date of this act];

(c) [this act] applies to judicial proceedings concerning trusts commenced before [the effective date of this act] unless the court finds that application of a particular provision of [this act] would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of [this act] does not apply and the superseded law applies;

(d) any rule of construction or presumption provided in [this act] applies to trust instruments executed before [the effective date of this act] unless there is a clear indication of a contrary intent in the terms of the trust; and

(e) an act done before [the effective date of this act] is not affected by [this act].

(2) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before [the effective date of this act], that statute continues to apply to the right even if it has been repealed or superseded." Effective October 1, 2013.

72-5-447. Circumstances to be considered in determining whether to authorize or require proposed action.

Compiler's Comments

Effective Date: Section 163, Ch. 264, L. 2013, provided: "[This act] is effective October 1, 2013."

Severability: Section 161, Ch. 264, L. 2013, was a severability clause.

Application to Existing Relationships: Section 164, Ch. 264, L. 2013, provided: "(1) Except as otherwise provided in [this act], on [the effective date of this act]:

(a) [this act] applies to all trusts created before, on, or after [the effective date of this act];

(b) [this act] applies to all judicial proceedings concerning trusts commenced on or after [the effective date of this act];

(c) [this act] applies to judicial proceedings concerning trusts commenced before [the effective date of this act] unless the court finds that application of a particular provision of [this act] would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of [this act] does not apply and the superseded law applies;

(d) any rule of construction or presumption provided in [this act] applies to trust instruments executed before [the effective date of this act] unless there is a clear indication of a contrary intent in the terms of the trust; and

(e) an act done before [the effective date of this act] is not affected by [this act].

(2) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before [the effective date of this act], that statute continues to apply to the right even if it has been repealed or superseded." Effective October 1, 2013.

72-5-448. Order.

Compiler's Comments

Effective Date: Section 163, Ch. 264, L. 2013, provided: "[This act] is effective October 1, 2013."

Severability: Section 161, Ch. 264, L. 2013, was a severability clause.

Application to Existing Relationships: Section 164, Ch. 264, L. 2013, provided: "(1) Except as otherwise provided in [this act], on [the effective date of this act]:

(a) [this act] applies to all trusts created before, on, or after [the effective date of this act];

(b) [this act] applies to all judicial proceedings concerning trusts commenced on or after [the effective date of this act];

(c) [this act] applies to judicial proceedings concerning trusts commenced before [the effective date of this act] unless the court finds that application of a particular provision of [this act] would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of [this act] does not apply and the superseded law applies;

(d) any rule of construction or presumption provided in [this act] applies to trust instruments executed before [the effective date of this act] unless there is a clear indication of a contrary intent in the terms of the trust; and

(e) an act done before [the effective date of this act] is not affected by [this act].

(2) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before [the effective date of this act], that statute continues to apply to the right even if it has been repealed or superseded." Effective October 1, 2013.

72-5-449. No duty to propose action.

Compiler's Comments

Effective Date: Section 163, Ch. 264, L. 2013, provided: "[This act] is effective October 1, 2013."

Severability: Section 161, Ch. 264, L. 2013, was a severability clause.

Application to Existing Relationships: Section 164, Ch. 264, L. 2013, provided: "(1) Except as otherwise provided in [this act], on [the effective date of this act]:

(a) [this act] applies to all trusts created before, on, or after [the effective date of this act];

(b) [this act] applies to all judicial proceedings concerning trusts commenced on or after [the effective date of this act];

(c) [this act] applies to judicial proceedings concerning trusts commenced before [the effective date of this act] unless the court finds that application of a particular provision of [this act] would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of [this act] does not apply and the superseded law applies;

(d) any rule of construction or presumption provided in [this act] applies to trust instruments executed before [the effective date of this act] unless there is a clear indication of a contrary intent in the terms of the trust; and

(e) an act done before [the effective date of this act] is not affected by [this act].

(2) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before [the effective date of this act], that statute continues to apply to the right even if it has been repealed or superseded." Effective October 1, 2013.

72-5-450. Production of protected person's other relevant estate plan documents.

Compiler's Comments

Effective Date: Section 163, Ch. 264, L. 2013, provided: "[This act] is effective October 1, 2013."

Severability: Section 161, Ch. 264, L. 2013, was a severability clause.

Application to Existing Relationships: Section 164, Ch. 264, L. 2013, provided: "(1) Except as otherwise provided in [this act], on [the effective date of this act]:

(a) [this act] applies to all trusts created before, on, or after [the effective date of this act];

(b) [this act] applies to all judicial proceedings concerning trusts commenced on or after [the effective date of this act];

(c) [this act] applies to judicial proceedings concerning trusts commenced before [the effective date of this act] unless the court finds that application of a particular provision of [this act] would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of [this act] does not apply and the superseded law applies;

(d) any rule of construction or presumption provided in [this act] applies to trust instruments executed before [the effective date of this act] unless there is a clear indication of a contrary intent in the terms of the trust; and

(e) an act done before [the effective date of this act] is not affected by [this act].

(2) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before [the effective date of this act], that statute continues to apply to the right even if it has been repealed or superseded." Effective October 1, 2013.

Part 5
Powers of Attorney

72-5-501. When health care power of attorney not affected by disability.

Official Comments

[The first sentence of subsection (1)], derived from the first sentence of UPC 5-501 (1969) (1975), is a definitional section that supports use of the term "durable power of attorney" in the sections that follow. The second quoted expression was designed to emphasize that a durable power with postponed effectiveness is permitted. Some UPC critics have been bothered by the reference here to a later condition of "disability or incapacity," a circumstance that may be difficult to ascertain if it can be established without a court order. The answer, of course, is that draftsmen of durable powers are not limited in their choice of words to describe the later time when the principal wishes the authority of the agent in fact to become operative. For example, a durable power might be framed to confer authority commencing when two or more named persons, possibly including the principal's lawyer, physician or spouse, concur that the principal has become incapable of managing his affairs in a sensible and efficient manner and deliver a signed statement to that effect to the attorney in fact.

In this and following sections, it is assumed that the principal is competent when the power of attorney is signed. If this is not the case, nothing in this Act is intended to alter the result that would be reached under general principles of law. [The second sentence of subsection (1)] is derived from the second sentence of UPC 5-501 (1969) (1975) modified by deleting reference to the effect on a durable power of the principal's death, a matter that is now covered in Section [4] [5-504] which provides a single standard for durable and non-durable powers. [Note: the Montana version does not have this deletion, and retains both standards.]

The words "any period of disability or incapacity of the principal" are intended to include periods during which the principal is legally incompetent, but are not intended to be limited to such periods. In the Uniform Probate Code, the word "disability" is defined, and the term "incapacitated person" is defined. In the context of this section, however, the important point is that the terms embrace "legal incompetence," as well as less grievous disadvantages.

[The first two sentences of subsection (2)] closely [resemble] the last two sentences of UPC § 5-501 (1969) (1975); most of the changes are stylistic. One change going beyond style states that an agent in fact is accountable both to the principal and a conservator or guardian if a court has appointed a fiduciary; the earlier version described accountability only to the fiduciary.

The purpose of [the last two sentences of subsection (2)] is to emphasize that agencies under durable powers and guardians or conservators may co-exist. It is not the purpose of the act to encourage resort to court for a fiduciary appointment that should be largely unnecessary when an alternative regime has been provided via a durable power. Indeed, the best reason for permitting a principal to use a durable power to express his preference regarding any future court appointee charged with the care and protection of his person or estate may be to secure the authority of the attorney in fact against upset by arranging matters so that the likely appointee in any future protective proceedings will be the attorney in fact or another equally congenial to the principal and his plans. However, the evolution of a free-standing durable power act increases the prospects that UPC-type statutes covering protective proceedings will not apply when a protective proceeding is commenced for one who has created a durable power. This means that a court receiving a petition for a guardian or conservator may not be governed by standards like those in UPC § 5-304 (personal guardians) and § 5-401(2) and related sections which are designed to deter unnecessary protective proceedings. Finally, attorneys and others may find various good uses for a regime in which a conservator directs exercise of an agent's authority under a durable power. For example, the combination would confer jurisdiction on the court handling the protective proceeding to approve or ratify a desirable transaction that might not be possible without the protection of a court order. The alternative of a declaratory judgment proceeding might be difficult or impossible in some states. . . .

Discussion of [subsection (2)] in NCCUSL's Committee of the Whole involved the question of whether an agent's accountability, as described here, might be effectively countermanded by appropriate language in a power of attorney. The response was negative. The reference is to basic accountability like that owed by every fiduciary to his beneficiary and that distinguishes a fiduciary relationship from those involving gifts or general powers of appointment. The section is not intended to describe a particular form of accounting. Hence, the context differs from those involving statutory duties to account in court, or with specified frequency, where draftsmen of controlling instruments may be able to excuse statutory details relating to accountings without affecting the general principle of accountability.

Compiler's Comments

2011 Amendment: Chapter 109 in (1) in three places and in (2) in three places before "power of attorney" inserted "health care"; in (1) deleted last two sentences that read: "All acts done by the attorney-in-fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and the principal's successors in interest as if the principal were alive, competent, and not disabled. Unless the instrument states a time of termination, the power is exercisable notwithstanding the lapse of time since the execution of the instrument"; in (2) in three places substituted "guardian" for "conservator" and near middle of third sentence after "by a durable health care power of attorney, the" deleted "conservator of the principal's estate or"; and made minor changes in style. Amendment effective October 1, 2011.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: In (1), in second sentence after "attorney-in-fact", deleted "or agent", substituted "pursuant to a durable power of attorney" for "pursuant to the power", after "disability or incapacity" substituted "of the principal" for "or uncertainty as to whether the principal is dead or alive", and inserted last sentence relating to exercise of power notwithstanding lapse of time from execution of the instrument; and made minor changes in phraseology.

1989 Editorial Comment: The changes result from an amendment proposed by the Joint Editorial Board of the national Uniform Probate Code in 1987. See corresponding national Uniform Probate Code section 5-502.

1985 Amendment: Substituted entire section (see 1985 Session Law for text) for former text that read: "(1) Whenever a principal designates another his attorney-in-fact or agent by a power of attorney in writing and the writing contains the words, "This power of attorney shall not be affected by disability of the principal" or "This power of attorney shall become effective upon the disability of the principal" or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his disability, the authority of the attorney-in-fact or agent is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. All acts done by the attorney-in-fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his heirs, devisees, and personal representative as if the principal were alive, competent, and not disabled.

(2) If a conservator thereafter is appointed for the principal, the attorney-in-fact or agent, during the continuance of the appointment, shall account to the conservator rather than the principal. The conservator has the same power the principal would have had if he were not disabled or incompetent to revoke, suspend, or terminate all or any part of the power of attorney or agency."

Source: This section is derived from sections 1 through 3 of the Uniform Durable Power of Attorney Act, 8A U.L.A. 275, which in turn are a restatement of section 5-501 of the (1975) Uniform Probate Code.

72-5-502. Health care power of attorney not revoked until notice.

Official Comments

UPC §§ 5-501 and 5-502 (1969) (1975) are flawed by different standards for durable and non-durable powers vis a vis the protection of an attorney in fact who purports to exercise a power after the principal has died. Section 5-501 (1969) (1975), applicable only to durable powers, expresses a most unsatisfactory standard; i.e., the attorney in fact is protected if the exercise occurs "during any period of uncertainty as to whether the principal is dead or alive. . . ." Section 5-502 (1969) (1975), applicable only to non-durable powers, protects the agent who "without actual knowledge of the death . . . of the principal, acts in good faith under the power of attorney . . . ." Section [4] [5-504] (a) expresses as a single test the standard now contained in § 5-502 (1969) (1975). [Note: the Montana version retains both standards.]

Subsection [2], applicable only to non-durable powers that are controlled by the traditional view that a principal's loss of capacity ends the authority of his agents, embodies the substance of UPC § 5-502 (1969) (1975).

The discussion in the Committee of the Whole established that the language "or other person" in subsections [(1) and (2)] is intended to refer to persons who transact business with the attorney in fact under the authority conferred by the power. Consequently, persons in this category who act in good faith and without the actual knowledge described in the subsections are protected by the statute.

Also, there was discussion of possible conflict between the actual knowledge test here prescribed for protection of persons relying on the continuance of a power and constructive notice concepts under statutes governing the recording of instruments affecting real estate. The view was expressed in the Committee of the Whole that the recording statutes would continue to control since those statutes are specifically designed to encourage public recording of documents affecting land titles. It was also suggested that "good faith," as required by this section, might be lacking in the unlikely case of one who, without actual knowledge of the principal's death or incompetency, accepted a conveyance executed by an attorney in fact without checking the public record where he would have found an instrument disclosing the principal's death or incompetency. If so, there would be no conflict between this act and recording statutes.

It is to be noted, also, that [subsections (1) and (2) deal] only with the effect of a principal's death or incompetency as a revocation of a power of attorney; [they do] not relate to an express revocation of a power or to the expiration of a power according to its terms. Further, since a durable power is not revoked by incapacity, the section's coverage of revocation of powers of attorney by the principal's incapacity is restricted to powers that are not durable. The only effect of the Act on rules governing express revocations of powers of attorney is as described in Section [5] [5-505].

[Subsections (3) and (4)], embodying the substance and form of UPC 5-502(b) (1969) (1975), [have] been extended to apply to durable powers. It is unclear whether UPC 5-502(b) (1969) (1975) applies to durable powers. Affidavits protecting persons dealing with attorneys in fact extend the utility of powers of attorney and plainly should be available for use by all attorneys in fact.

The matters stated in an affidavit that are strengthened by [subsections (3) and (4)] are limited to the revocation of a power by the principal's voluntary act, his death, or, in the case of non-durable power, by his incompetence. With one possible exception, other matters, including circumstances made relevant by the terms of the instrument to the commencement of the agency or to its termination by other circumstances, are not covered. The exception concerns the case of a power created to begin on "incapacity." The affidavit of the agent in fact that all conditions necessary to the valid exercise of the power might be aided by the statute in relation to the fact of incapacity. An affidavit as to the existence or non-existence of facts and circumstances not covered by [subsections (3) and (4)] nonetheless may be useful in establishing good faith reliance.

Compiler's Comments

2011 Amendment: Chapter 109 deleted former (1) that read: "(1) The death of a principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney-in-fact, agent, or other person who, without actual knowledge of the death of the principal, acts in good faith under the power of attorney or agency. Any action taken, unless otherwise invalid or unenforceable, binds the successors in interest of the principal"; in (1) in two places, (2), and (3) before "power" inserted "health care"; in (1) deleted last sentence that read: "Any action taken, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest"; in (2) near end of first sentence after "by revocation or of the principal's" deleted "death" and after "incapacity is" deleted "conclusive"; and made minor changes in style. Amendment effective October 1, 2011.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1985 Amendment: Substituted entire section (see 1985 Session Law for text) for former text that read: "(1) The death, disability, or incompetence of any principal who has executed a power of attorney in writing other than a power as described by 72-5-501 does not revoke or terminate the agency as to the attorney-in-fact, agent, or other person who, without actual knowledge of the death, disability, or incompetence of the principal, acts in good faith under the power of attorney or agency. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his heirs, devisees, and personal representatives.

(2) An affidavit executed by the attorney-in-fact or agent stating that he did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the revocation or termination of the power of attorney by death, disability, or incompetence is, in the absence of fraud, conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record is likewise recordable.

(3) This section shall not be construed to alter or affect any provision for revocation or termination contained in the power of attorney."

Source: This section is derived from sections 4 and 5 of the Uniform Durable Power of Attorney Act, 8A U.L.A. 275, which in turn are a restatement of section 5-502 of the (1975) Uniform Probate Code.

Part 6
Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

Part Official Comments

PREFATORY NOTE

The Uniform Guardianship and Protective Proceedings Act (UGPPA), which was last revised in 1997, is a comprehensive act addressing all aspects of guardianships and protective proceedings for both minors and adults. The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) has a much narrower scope, dealing only with jurisdiction and related issues in adult proceedings. Drafting of the UAGPPJA began in 2005. The Act had its first reading at the Uniform Law Commission 2006 Annual Meeting, and was approved at the 2007 Annual Meeting.

States may enact the UAGPPJA either separately or as part of the broader UGPPA or the even broader Uniform Probate Code (UPC), of which the UGPPA forms a part. Conforming amendments to the UGPPA and UPC are expected to be approved in 2009 that will facilitate enactment of the UAGPPJA by states that have enacted the UGPPA or UPC.

The Problem of Multiple Jurisdiction

Because the United States has 50 plus guardianship systems, problems of determining jurisdiction are frequent. Questions of which state has jurisdiction to appoint a guardian or conservator can arise between an American state and another country. But more frequently, problems arise because the individual has contacts with more than one American state.

In nearly all American states, a guardian may be appointed by a court in a state in which the individual is domiciled or is physically present. In nearly all American states, a conservator may be appointed by a court in a state in which the individual is domiciled or has property. Contested cases in which courts in more than one state have jurisdiction are becoming more frequent. Sometimes these cases arise because the adult is physically located in a state other than the adult's domicile. Sometimes the case arises because of uncertainty as to the adult's domicile, particularly if the adult owns a second home in another state. There is a need for an effective mechanism for resolving multi-jurisdictional disputes. Article 2 of the UAGPPJA [72-5-611 through 72-5-619] is intended to provide such a mechanism.

The Problem of Transfer

Oftentimes, problems arise even absent a dispute. Even if everyone is agreed that an already existing guardianship or conservatorship should be moved to another state, few states have streamlined procedures for transferring a proceeding to another state or for accepting such a transfer. In most states, all of the procedures for an original appointment must be repeated, a time consuming and expensive prospect. Article 3 of the UAGPPJA [72-5-624 and 72-5-625] is designed to provide an expedited process for making such transfers, thereby avoiding the need to relitigate incapacity and whether the guardian or conservator appointed in the first state was an appropriate selection.

The Problem of Out-of-State Recognition

The Full Faith and Credit Clause of the United States Constitution requires that court orders in one state be honored in another state. But there are exceptions to the full faith and credit doctrine, of which guardianship and protective proceedings is one. Sometimes, guardianship or protective proceedings must be initiated in a second state because of the refusal of financial institutions, care facilities, and the courts to recognize a guardianship or protective order issued in another state. Article 4 of the UAGPPJA [72-5-629 through 72-5-631] creates a registration procedure. Following registration of the guardianship or protective order in the second state, the guardian may exercise in the second state all powers authorized in the original state's order of appointment except for powers that cannot be legally exercised in the second state.

The Proposed Uniform Law and the Child Custody Analogy

Similar problems of jurisdiction existed for many years in the United States in connection with child custody determinations. If one parent lived in one state and the other parent lived in another state, frequently courts in more that [than] one state had jurisdiction to issue custody orders. But the Uniform Law Conference has approved two uniform acts that have effectively minimized the problem of multiple court jurisdiction in child custody matters; the Uniform Child Custody Jurisdiction Act (UCCJA), approved in 1968, succeeded by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) [see Title 40, ch. 7], approved in 1997. The drafters of the UAGPPJA have elected to model Article 2 [72-5-611 through 72-5-619] and portions of Article 1 [72-5-601 through 72-5-606] of their Act after these child custody analogues. However, the UAGPPJA applies only to adult proceedings. The UAGPPJA is limited to adults in part because most jurisdictional issues involving guardianships for minors are subsumed by the UCCJEA.

The Objectives and Key Concepts of the Proposed UAGPPJA

The UAGPPJA is organized into five articles. Article 1 [72-5-601 through 72-5-606] contains definitions and provisions designed to facilitate cooperation between courts in different states. Article 2 [72-5-611 through 72-5-619] is the heart of the Act, specifying which court has jurisdiction to appoint a guardian or conservator or issue another type of protective order and contains definitions applicable only to that article. Its principal objective is to assure that an appointment or order is made or issued in only one state except in cases of emergency or in situations where the individual owns property located in multiple states. Article 3 [72-5-624 and 72-5-625] specifies a procedure for transferring a guardianship or conservatorship proceedings from one state to another state. Article 4 [72-5-629 through 72-5-631] deals with enforcement of guardianship and protective orders in other states. Article 5 [72-5-636 through 72-5-638] contains an effective date provision, a place to list provisions of existing law to be repealed or amended, and boilerplate provisions common to all uniform acts.

Key Definitions (Section 201) [72-5-611]

To determine which court has primary jurisdiction under the UAGPPJA, the key factors are to determine the individual's "home state" and "significant-connection state." A "home state" (Section 201(a)(2) [72-5-611(1)(b)]) is the state in which the individual was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a protective order or appointment of a guardian. If the respondent was not physically present in a single state for the six months immediately preceding the filing of the petition, the home state is the place where the respondent was last physically present for at least six months as long a[s] such presence ended within the six months prior to the filing of the petition. Section 201(a)(2) [72-5-611(1)(b)]. Stated another way, the ability of the home state to appoint a guardian or enter a protective order for an individual continues for up to six months following the individual's physical relocation to another state.

A "significant-connection state," which is a potentially broader concept, means the state in which the individual has a significant connection other than mere physical presence, and where substantial evidence concerning the individual is available. Section 201(a)(3) [72-5-611(1)(c)]. Factors that may be considered in deciding whether a particular respondent has a significant connection include:

the location of the respondent's family and others required to be notified of the guardianship or protective proceeding;

the length of time the respondent was at any time physically present in the state and the duration of any absences;

the location of the respondent's property; and

the extent to which the respondent has other ties to the state such as voting registration, filing of state or local tax returns, vehicle registration, driver's license, social relationships, and receipt of services. Section 201(b) [72-5-611(2)].

A respondent in a guardianship or protective proceeding may have multiple significant-connection states but will have only one home state.

Jurisdiction (Article 2) [72-5-611 through 72-5-619]

Section 203 [72-5-613] is the principal provision governing jurisdiction, creating a three-level priority; the home state, followed by a significant-connection state, followed by other jurisdictions:

Home State: The home state has primary jurisdiction to appoint a guardian or conservator or issue another type of protective order.

Significant-connection State: A significant-connection state has jurisdiction to appoint a guardian or conservator or issue another type of protective order if on the date the petition was filed:

the respondent does not have a home state or the home state has declined jurisdiction on the basis that the significant-connection state is a more appropriate forum; or

the respondent has a home state, a petition for an appointment or order is not pending in a court of that state or another significant-connection state, and, before the court makes the appointment or issues the order (i) a petition for an appointment or order is not filed in the respondent's home state; (ii) an objection to the court's jurisdiction is not filed by a person required to be notified of the proceeding; and (iii) the court in this state concludes that it is an appropriate forum under the factors set forth in Section 206 [72-5-616].

Another State: A court in another state has jurisdiction if the home state and all significant-connection states have declined jurisdiction because the court in the other state is a more appropriate forum, or the respondent does not have a home state or significant-connection state.

Section 204 [72-5-614] addresses special cases. Regardless of whether it has jurisdiction under the general principles stated in Section 203 [72-5-613], a court in the state where the respondent is currently physically present has jurisdiction to appoint a guardian in an emergency, and a court in a state where a respondent's real or tangible personal property is located has jurisdiction to appoint a conservator or issue another type of protective order with respect to that property. In addition, a court not otherwise having jurisdiction under Section 203 [72-5-613] has jurisdiction to consider a petition to accept the transfer of an already existing guardianship or conservatorship from another state as provided in Article 3 [72-5-624 and 72-5-625].

The remainder of Article 2 [72-5-611 through 72-5-619] elaborates on these core concepts. Section 205 [72-5-615] provides that once a guardian or conservator is appointed or other protective order is issued, the court's jurisdiction continues until the proceeding is terminated or transferred or the appointment or order expires by its own terms. Section 206 [72-5-616] authorizes a court to decline jurisdiction if it determines that the court of another state is a more appropriate forum, and specifies the factors to be taken into account in making this determination. Section 207 [72-5-617] authorizes a court to decline jurisdiction or fashion another appropriate remedy if jurisdiction was acquired because of unjustifiable conduct. Section 208 [72-5-618] prescribes additional notice requirements if a proceeding is brought in a state other than the respondent's home state. Section 209 [72-5-619] specifies a procedure for resolving jurisdictional issues if petitions are pending in more than one state. The UAGPPJA also includes provisions regarding communication between courts in different states, requests for assistance made by a court to a court of another state, and the taking of testimony in another state. Sections 104-106 [72-5-604 through 72-5-606].

Transfer to Another State (Article 3) [72-5-624 and 72-5-625]

Article 3 [72-5-624 and 72-5-625] specifies a procedure for transferring an already existing guardianship or conservatorship to another state. To make the transfer, court orders are necessary from both the court transferring the case and from the court accepting the case. The transferring court must find that the incapacitated or protected person is physically present in or is reasonably expected to move permanently to the other state, that adequate arrangements have been made for the person or the person's property in the other state, and that the court is satisfied the case will be accepted by the court in the other state. To assure continuity, the court in the transferring state cannot dismiss the local proceeding until the order from the state accepting the case is filed with the transferring court. To expedite the transfer process, the court in the accepting state must give deference to the transferring court's finding of incapacity and selection of the guardian or conservator. Much of Article 3 [72-5-624 and 72-5-625] is based on the pioneering work of the National Probate Court Standards, a 1993 joint project of the National College of Probate Judges and the National Center for State Courts.

Out of State Enforcement (Article 4) [72-5-629 through 72-5-631]

To facilitate enforcement of guardianship and protective orders in other states, Article 4 [72-5-629 through 72-5-631] authorizes a guardian or conservator to register these orders in other states. Upon registration, the guardian or conservator may exercise in the registration state all powers authorized in the order except as prohibited by the laws of the registration state.

International Application (Section 103) [72-5-603]

Section 103 [72-5-603] addresses application of the Act to guardianship and protective orders issued in other countries. A foreign order is not enforceable pursuant to the registration procedures under Article 4 [72-5-629 through 72-5-631], but a court in the United State may otherwise apply the Act as if the foreign country were an American state.

The Problem of Differing Terminology

States differ on terminology for the person appointed by the court to handle the personal and financial affairs of a minor or incapacitated adult. Under the UGPPA and in a majority of American states, a "guardian" is appointed to make decisions regarding the person of an "incapacitated person;" a "conservator" is appointed in a "protective proceeding" to manage the property of a "protected person." But in many states, only a "guardian" is appointed, either a guardian of the person or guardian of the estate, and in a few states, the terms guardian and conservator are used but with different meanings. The UAGPPJA adopts the terminology used in the UGPPA and in a majority of the states. An enacting state that uses a different term than "guardian" or "conservator" for the person appointed by the court or that defines either of these terms differently than does the UGPPA may, but is not encouraged to, substitute its own term or definition. Use of common terms and definitions by states enacting the Act will facilitate resolution of cases involving multiple jurisdictions.

The Drafting Committee was assisted by numerous officially designated advisors and observers, representing an array of organizations. In addition to the American Bar Association advisors listed above, important contributions were made by Sally Hurme of AARP, Terry W. Hammond of the National Guardianship Association, Kathleen T. Whitehead and Shirley B. Whitenack of the National Academy of Elder Law Attorneys, Catherine Anne Seal of the Colorado Bar Association, Kay Farley of the National Center for State Courts, and Robert G. Spector, the Reporter for the Joint Editorial Board for Uniform Family Laws and the Reporter for the Uniform Child Custody Jurisdiction and Enforcement Act (1997).

ARTICLE 1 [72-5-601 through 72-5-606]
General Comment

Article 1 [72-5-601 through 72-5-606] contains definitions and general provisions used throughout the Act. Definitions applicable only to Article 2 [72-5-611 through 72-5-619] are found in Section 201 [72-5-611]. Section 101 [72-5-601] is the title, Section 102 [72-5-602] contains the definitions, and Sections 103-106 [72-5-603 through 72-5-606] the general provisions. Section 103 [72-5-603] provides that a court of an enacting state may treat a foreign country as a state for the purpose of applying all portions of the Act other than Article 4 [72-5-629 through 72-5-631], Section 104 [72-5-604] addresses communication between courts, Section 105 [72-5-605] requests by a court to a court in another state for assistance, and Section 106 [72-5-606] the taking of testimony in other states. These Article 1 [72-5-601 through 72-5-606] provisions relating to court communication and assistance are essential tools to assure the effectiveness of the provisions of Article 2 [72-5-611 through 72-5-619] determining jurisdiction and in facilitating transfer of a proceeding to another state as authorized in Article 3 [72-5-624 and 72-5-625].

ARTICLE 2 [72-5-611 through 72-5-619]
JURISDICTION
General Comment

The jurisdictional rules in Article 2 [72-5-611 through 72-5-619] will determine which state's courts may appoint a guardian or conservator or issue another type of protective order. Section 201 [72-5-611] contains definitions of "emergency," "home state," and "significant-connection state," terms used only in Article 2 [72-5-611 through 72-5-619] that are key to understanding the jurisdictional rules under the Act. Section 202 [72-5-612] provides that Article 2 [72-5-611 through 72-5-619] is the exclusive jurisdictional basis for a court of the enacting state to appoint a guardian or issue a protective order for an adult. Consequently, Article 2 [72-5-611 through 72-5-619] is applicable even if all of the respondent's significant contacts are in-state. Section 203 [72-5-613] is the principal provision governing jurisdiction, creating a three-level priority; the home state, followed by a significant-connection state, followed by other jurisdictions. But there are circumstances under Section 203 [72-5-613] where a significant-connection state may have jurisdiction even if the respondent also has a home state, or a state that is neither a home or significant-connection state may be able to assume jurisdiction even though the particular respondent has both a home state and one or more significant-connection states. One of these situations is if a state declines to exercise jurisdiction under Section 206 [72-5-616] because a court of that state concludes that a court of another state is a more appropriate forum. Another is Section 207 [72-5-617], which authorizes a court to decline jurisdiction or fashion another appropriate remedy if jurisdiction was acquired because of unjustifiable conduct. Section 205 [72-5-615] provides that once an appointment is made or order issued, the court's jurisdiction continues until the proceeding is terminated or the appointment or order expires by its own terms.

Section 204 [72-5-614] addresses special cases. Regardless of whether it has jurisdiction under the general principles stated in Section 203 [72-5-613], a court in the state where the individual is currently physically present has jurisdiction to appoint a guardian in an emergency, and a court in a state where an individual's real or tangible personal property is located has jurisdiction to appoint a conservator or issue another type of protective order with respect to that property. In addition, a court not otherwise having jurisdiction under Section 203 [72-5-613] has jurisdiction to consider a petition to accept the transfer of an already existing guardianship or conservatorship from another state as provided in Article 3 [72-5-624 and 72-5-625].

The remainder of Article 2 [72-5-611 through 72-5-619] address procedural issues. Section 208 [72-5-618] prescribes additional notice requirements if a proceeding is brought in a state other than the respondent's home state. Section 209 [72-5-619] specifies a procedure for resolving jurisdictional issues if petitions are pending in more than one state.

ARTICLE 3 [72-5-624 AND 72-5-625]
TRANSFER OF GUARDIANSHIP OR CONSERVATORSHIP
General Comment

While this article consists of two separate sections, they are part of one integrated procedure. Article 3 [72-5-624 and 72-5-625] authorizes a guardian or conservator to petition the court to transfer the guardianship or conservatorship proceeding to a court of another state. Such a transfer is often appropriate when the incapacitated or protected person has moved or has been placed in a facility in another state, making it impossible for the original court to adequately monitor the proceeding. Article 3 [72-5-624 and 72-5-625] authorizes a transfer of a guardianship, a conservatorship, or both. There is no requirement that both categories of proceeding be administered in the same state.

Section 301 [72-5-624] addresses procedures in the transferring state. Section 302 [72-5-625] addresses procedures in the accepting state.

A transfer begins with the filing of a petition by the guardian or conservator as provided in Section 301(a) [72-5-624(1)]. Notice of this petition must be given to the persons who would be entitled to notice were the petition a petition for an original appointment. Section 301(b) [72-5-624(2)]. A hearing on the petition is required only if requested or on the court's own motion. Section 301(c) [72-5-624(3)]. Assuming the court in the transferring state is satisfied that the grounds for transfer stated in Section 301(d) [72-5-624(4)] (guardianship) or 301(e) [72-5-624(5)] (conservatorship) have been met, one of which is that the court is satisfied that the court in the other state will accept the case, the court must issue a provisional order approving the transfer. The transferring court will not issue a final order dismissing the case until, as provided in Section 301(f) [72-5-624(6)], it receives a copy of the provisional order from the accepting court accepting the transferred proceeding.

Following issuance of the provisional order by the transferring court, a petition must be filed in the accepting court as provided in Section 302(a) [72-5-625(1)]. Notice of that petition must be given to those who would be entitled to notice of an original petition for appointment in both the transferring state and in the accepting state. Section 302(b) [72-5-625(2)]. A hearing must be held only if requested or on the court's own motion. Section 302(c) [72-5-625(3)]. The court must issue a provisional order accepting the case unless it is established that the transfer would be contrary to the incapacitated or protected person's interests or the guardian or conservator is ineligible for appointment in the accepting state. Section 302(d) [72-5-625(4)]. The term "interests" as opposed to "best interests" was chosen because of the strong autonomy values in modern guardianship law. Should the court decline the transfer petition, it may consider a separately brought petition for the appointment of a guardian or issuance of a protective order only if the court has a basis for jurisdiction under Sections 203 [72-5-613] or 204 [72-5-614] other than by reason of the provisional order of transfer. Section 302(h) [72-5-625(8)].

The final steps are largely ministerial. Pursuant to Section 301(f) [72-5-624(6)], the provisional order from the accepting court must be filed in the transferring court. The transferring court will then issue a final order terminating the proceeding, subject to local requirements such as filing of a final report or account and the release of any bond. Pursuant to Section 302(e) [72-5-625(5)], the final order terminating the proceeding in the transferring court must then be filed in the accepting court, which will then convert its provisional order accepting the case into a final order appointing the petitioning guardian or conservator as guardian or conservator in the accepting state.

Because guardianship and conservatorship law and practice will likely differ between the two states, the court in the accepting state must within 90 days after issuance of a final order determine whether the guardianship or conservatorship needs to be modified to conform to the law of the accepting state. Section 302(f) [72-5-625(6)]. The number "90" is placed in brackets to encourage states to coordinate this time limit with the time limits for other required filings such as guardianship or conservatorship plans. This initial period in the accepting state is also an appropriate time to change the guardian or conservator if there is a more appropriate person to act as guardian or conservator in the accepting state. The drafters specifically did not try to design the procedures in Article 3 [72-5-624 and 72-5-625] for the difficult problems that can arise in connection with a transfer when the guardian or conservator is ineligible to act in the second state, a circumstance that can occur when a financial institution is acting as conservator or a government agency is acting as guardian. Rather, the procedures in Article 3 [72-5-624 and 72-5-625] are designed for the typical case where the guardian or conservator is legally eligible to act in the second state. Should that particular guardian or conservator not be the best person to act in the accepting state, a change of guardian or conservator can be initiated once the transfer has been secured.

The transfer procedure in this article responds to numerous problems that have arisen in connection with attempted transfers under the existing law of most states. Sometimes a court will dismiss a case on the assumption a proceeding will be brought in another state, but such proceeding is never filed. Sometimes a court will refuse to dismiss a case until the court in the other state accepts the matter, but the court in the other state refuses to consider the petition until the already existing guardianship or conservatorship has been terminated. Oftentimes the court will conclude that it is without jurisdiction to make an appointment until the respondent is physically present in the state, a problem which Section 204(a)(3) [72-5-614(1)(c)] addresses by granting a court special jurisdiction to consider a petition to accept a proceeding from another state. But the most serious problem is the need to prove the case in the second state from scratch, including proving the respondent's incapacity and the choice of guardian or conservator. Article 3 [72-5-624 and 72-5-625] eliminates this problem. Section 302(g) [72-5-625(7)] requires that the court accepting the case recognize a guardianship or conservatorship order from the other state, including the determination of the incapacitated or protected person's incapacity and the appointment of the guardian or conservator, if otherwise eligible to act in the accepting state.

ARTICLE 4 [72-5-629 through 72-5-631]
REGISTRATION AND RECOGNITION OF ORDERS FROM OTHER STATES
General Comment

Article 4 [72-5-629 through 72-5-631] is designed to facilitate the enforcement of guardianship and protective orders in other states. This article does not make distinctions among the types of orders that can be enforced. This article is applicable whether the guardianship or conservatorship is full or limited. While some states have expedited procedures for sales of real estate by conservators appointed in other states, few states have enacted statutes dealing with enforcement of guardianship orders, such as when a care facility questions the authority of a guardian appointed in another state. Sometimes, these sorts of refusals necessitate that the proceeding be transferred to the other state or that an entirely new petition be filed, problems that could often be avoided if guardianship and protective orders were entitled to recognition in other states.

Article 4 [72-5-629 through 72-5-631] provides for such recognition. The key concept is registration. Section 401 [72-5-629] provides for registration of guardianship orders, and Section 402 [72-5-630)] for registration of protective orders. Following registration of the order in the appropriate county of the other state, and after giving notice to the appointing court of the intent to register the order in the other state, Section 403 [72-5-631] authorizes the guardian or conservator to thereafter exercise all powers authorized in the order of appointment except as prohibited under the laws of the registering state.

The drafters of the Act concluded that the registration of certified copies provides sufficient protection and that it was not necessary to mandate the filing of authenticated copies.

Part Compiler's Comments

Effective Date: This part is effective October 1, 2009.

72-5-601. Short title.

Official Comments

The title to the Act succinctly describes the Act's scope. The Act applies only to court jurisdiction and related topics for adults for whom the appointment of a guardian or conservator or other protective order is being sought or has been issued.

The drafting committee elected to limit the Act to adults for two reasons. First, jurisdictional issues concerning guardians for minors are subsumed by the Uniform Child Custody Jurisdiction and Enforcement Act (1997) [see Title 40, ch. 7]. Second, while the UCCJEA does not address conservatorship and other issues involving the property of minors, all of the problems and concerns that led the Uniform Law Commission to appoint a drafting committee involved adults.

72-5-602. Definitions.

Official Comments

The definition of "adult" (paragraph (1)) would exclude an emancipated minor. The Act is not designed to supplant the local substantive law on guardianship. States whose guardianship law treats emancipated minors as adults may wish to modify this definition.

Three of the other definitions are standard uniform law terms. These are the definitions of "person" (paragraph (8)), "record" (paragraph (12)), and "state" (paragraph (14)). Two are common procedural terms. The individual for whom a guardianship or protective order is sought is a "respondent" (paragraph (13)). A person who may participate in a guardianship or protective proceeding is referred to as a "party" (paragraph (7)).

The remaining definitions refer to standard guardianship terminology used in a majority of states. A "guardian" (paragraph (3)) is appointed in a "guardianship order" (paragraph (4)) which is issued as part of a "guardianship proceeding" (paragraph (5)) and which authorizes the guardian to make decisions regarding the person of an "incapacitated person" (paragraph (6)). A "conservator" (paragraph (2)) is appointed pursuant to a "protective order" (paragraph (10)) which is issued as part of a "protective proceeding" (paragraph (11)) and which authorizes the conservator to manage the property of a "protected person" (paragraph (9)).

In most states, a protective order may be issued by the court without the appointment of a conservator. For example, under the Uniform Guardianship and Protective Proceedings Act, the court may authorize a so-called single transaction for the security, service, or care meeting the foreseeable needs of the protected person, including the payment, delivery, deposit, or retention of property; sale, mortgage, lease, or other transfer of property; purchase of an annuity; making a contract for life care, deposit contract, or contract for training and education; and the creation of or addition to a suitable trust. UGPPA (1997) § 412(1). It is for this reason that the Act contains frequent references to the broader category of protective orders. Where the Act is intended to apply only to conservatorships, such as in Article 3 [72-5-624 and 72-5-625] dealing with transfers of proceedings to other states, the Act refers to conservatorship and not to the broader category of protective proceeding.

The Act does not limit the types of conservatorships or guardianships to which the Act applies. The Act applies whether the conservatorship or guardianship is denominated as plenary, limited, temporary or emergency. The Act, however, would not ordinarily apply to a guardian ad litem, who is ordinarily appointed by the court to represent a person or conduct an investigation in a specified legal proceeding.

Section 102 [72-5-602] is not the sole definitional section in the Act. Section 201 [72-5-611] contains definitions of important terms used only in Article 2 [72-5-611 through 72-5-619]. These are the definitions of "emergency" (Section 201(1) [72-5-611(1)(a)]), "home state" (Section 201(2) [72-5-611(1)(b)]), and "significant-connection state" (Section 201(3) [72-5-611(1)(c)]).

72-5-603. International application.

Official Comments

This section addresses application of the Act to guardianship and protective orders issued in other countries. A foreign order is not enforceable pursuant to the registration procedures of Article 4 [72-5-629 through 72-5-631], but a court in this country may otherwise apply this Act to a foreign proceeding as if the foreign country were an American state. Consequently, a court may conclude that the court in the foreign country has jurisdiction because it constitutes the respondent's "home state" or "significant-connection state" and may therefore decline to exercise jurisdiction on the ground that the court of the foreign country has a higher priority under Section 203 [72-5-613]. Or the court may treat the foreign country as if it were a state of the United States for purposes of applying the transfer provisions of Article 3 [72-5-624 and 72-5-625].

This section addresses similar issues to but differs in result from Section 105 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997) [see Title 40, ch. 7]. Under the UCCJEA, the United States court must honor a custody order issued by the court of a foreign country if the order was issued under factual circumstances in substantial conformity with the jurisdictional standards of the UCCJEA. Only if the child custody law violates fundamental principles of human rights is enforcement excused. Because guardianship regimes vary so greatly around the world, particularly in civil law countries, it was concluded that under this Act a more flexible approach was needed. Under this Act, a court may but is not required to recognize the foreign order.

The fact that a guardianship or protective order of a foreign country cannot be enforced pursuant to the registration procedures of Article 4 [72-5-629 through 72-5-631] does not preclude enforcement by the court under some other provision or rule of law.

72-5-604. Communication between courts.

Official Comments

This section emphasizes the importance of communications among courts with an interest in a particular matter. Most commonly, this would include communication between courts of different states to resolve an issue of which court has jurisdiction to proceed under Article 2 [72-5-611 through 72-5-619]. It would also include communication between courts of different states to facilitate the transfer of a guardianship or conservatorship to a different state under Article 3 [72-5-624 and 72-5-625]. Communication can occur in a variety of ways, including by electronic means. This section does not prescribe the use of any particular means of communication.

The court may authorize the parties to participate in the communication. But the Act does not mandate participation or require that the court give the parties notice of any communication. Communication between courts is often difficult to schedule and participation by the parties may be impractical. Phone calls or electronic communications often have to be made after-hours or whenever the schedules of judges allow. When issuing a jurisdictional or transfer order, the court should set forth the extent to which a communication with another court may have been a factor in the decision.

This section includes brackets around the language relating to whether a record must be made of any communication with the court of the other state. As indicated by the Legislative Note to this section, the language is bracketed because of a concern in some states that a legislative enactment directing when a court must make a record in a judicial proceeding may violate the doctrine on separation of powers. The language is not bracketed because the drafters concluded that the making of a record is not important. Rather, if concerns about separation of powers leads to the deletion of the bracketed language, the enacting state is encouraged to achieve the objectives of the bracketed language by promulgating a comparable provision by judicial rule.

This section does not prescribe the extent of the record that the court must make, leaving that issue to the court. A record might include notes or transcripts of a court reporter who listened to a conference call between the courts, an electronic recording of a telephone call, a memorandum summarizing a conversation, and email communications. No record need be made of relatively inconsequential matters such as scheduling, calendars, and court records.

Section 110 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997) [see Title 40, ch. 7] addresses similar issues as this section but is more detailed. As is the case with several other provisions of this Act, the drafters of this Act concluded that the more varied circumstances of adult guardianship and protective proceedings suggested a need for greater flexibility.

72-5-605. Cooperation between courts.

Official Comments

Subsection (a) [(1)] of this section is similar to Section 112(a) of the Uniform Child Custody Jurisdiction and Enforcement Act (1997) [see Title 40, ch. 7], although modified to address issues of concern in adult guardianship and protective proceedings and with the addition of subsection (a)(7) [(1)(g)], which addresses the release of health information protected under HIPAA. Subsection (b) [(2)], which clarifies that a court has jurisdiction to respond to requests for assistance from courts in other states even though it might otherwise not have jurisdiction over the proceeding, is not found in although probably implicit in the UCCJEA.

Court cooperation is essential to the success of this Act. This section is designed to facilitate such court cooperation. It provides mechanisms for courts to cooperate with each other in order to decide cases in an efficient manner without causing undue expense to the parties. Courts may request assistance from courts of other states and may assist courts of other states. Typically, such assistance will be requested to resolve a jurisdictional issue arising under Article 2 [72-5-611 through 72-5-619] or an issue concerning a transfer proceeding under Article 3 [72-5-624 and 72-5-625].

This section does not address assessment of costs and expenses, leaving that issue to local law. Should a court have acquired jurisdiction because of a party's unjustifiable conduct, Section 207(b) [72-5-617(2)] authorizes the court to assess against the party all costs and expenses, including attorney's fees.

72-5-606. Taking testimony in another state.

Official Comments

This section is similar to Section 111 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997) [see Title 40, ch. 7]. That section was in turn derived from Section 316 of the Uniform Interstate Family Support Act (1992) and the much earlier and now otherwise obsolete Uniform Interstate and International Procedure Act (1962).

This section is designed to fill the vacuum that often exists in cases involving an adult with interstate contacts when much of the essential information about the individual is located in another state.

Subsection (a) [(1)] empowers the court to initiate the gathering of out-of-state evidence, including depositions, written interrogatories and other discovery devices. The authority granted to the court in no way precludes the gathering of out-of-state evidence by a party, including the taking of depositions out-of-state.

Subsections (b) [(2)] and (c) [(3)] clarify that modern modes of communication are permissible for the taking of depositions and receipt of documents into evidence. A state that has adequate exceptions to its best evidence rule to permit the introduction of evidence transmitted by facsimile or in electronic form should delete subsection (c) [3)], which has been placed in brackets for this reason.

This section is consistent with and complementary to the Uniform Interstate Depositions and Discovery Act (2007), which specifies the procedure for taking depositions in other states.

72-5-611. Definitions — significant connection factors.

Official Comments

The terms "emergency," "home state," and "significant-connection state" are defined in this section and not in Section 102 [72-5-602] because they are used only in Article 2 [72-5-611 through 72-5-619].

The definition of "emergency" (subsection (a)(1) [(1)(a)]) is taken from the emergency guardianship provision of the Uniform Guardianship and Protective Proceedings Act (1997), Section 312.

Pursuant to Section 204 [72-5-614] of this Act, a court has jurisdiction to appoint a guardian in an emergency for a period of up to 90 days even though it does not otherwise have jurisdiction. However, the emergency appointment is subject to the direction of the court in the respondent's home state. Pursuant to Section 204(b) [72-5-614(2)], the emergency proceeding must be dismissed at the request of the court in the respondent's home state.

Appointing a guardian in an emergency should be an unusual event. Although most states have emergency guardianship statutes, not all states do, and in those states that do have such statutes, there is great variation on whether and how an emergency is defined. To provide some uniformity on when a court acquires emergency jurisdiction, the drafters of this Act concluded that adding a definition of emergency was essential. The definition does not preclude an enacting jurisdiction from appointing a guardian under an emergency guardianship statute with a different or broader test of emergency if the court otherwise has jurisdiction to make an appointment under Section 203 [72-5-613].

Pursuant to Section 203 [72-5-613], a court in the respondent's home state has primary jurisdiction to appoint a guardian or issue a protective order. A court in a significant-connection state has jurisdiction if the respondent does not have a home state and in other circumstances specified in Section 203 [72-5-613]. The definitions of "home state" and "significant-connection state" are therefore important to an understanding of the Act.

The definition of "home state" (subsection (a)(2) [(1)(b)]) is derived from but differs in a couple of respects from the definition of the same term in Section 102 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997) [see Title 40, ch. 7]. First, unlike the definition in the UCCJEA, the definition in this Act clarifies that actual physical presence is necessary. The UCCJEA definition instead focuses on where the child has "lived" for the prior six months. Basing the test on where someone has "lived" may imply that the term "home state" is similar to the concept of domicile. Domicile, in an adult guardianship context, is a vague concept that can easily lead to claims of jurisdiction by courts in more than one state. Second, under the UCCJEA, home state jurisdiction continues for six months following physical removal from the state and the state has ceased to be the actual home. Under this Act, the six-month tail is incorporated directly into the definition of home state. The place where the respondent was last physically present for six months continues as the home state for six months following physical removal from the state. This modification of the UCCJEA definition eliminates the need to refer to the six-month tail each time home state jurisdiction is mentioned in the Act.

The definition of "significant-connection state" (subsection (a)(3) [(1)(c)]) is similar to Section 201(a)(2) of the Uniform Child Custody Jurisdiction and Enforcement Act (1997) [see Title 40, ch. 7]. However, subsection (b) [(2)] of this Section adds a list of factors relevant to adult guardianship and protective proceedings to aid the court in deciding whether a particular place is a significant-connection state. Under Section 301(e)(1) [72-5-624(5)(a)], the significant connection factors listed in the definition are to be taken into account in determining whether a conservatorship may be transferred to another state.

72-5-612. Exclusive basis.

Official Comments

Similar to Section 201(b) of the Uniform Child Custody Jurisdiction and Enforcement Act (1997) [see Title 40, ch. 7], which provides that the UCCJEA is the exclusive basis for determining jurisdiction to issue a child custody order, this section provides that this article is the exclusive jurisdictional basis for determining jurisdiction to appoint a guardian or issue a protective order for an adult. An enacting jurisdiction will therefore need to repeal any existing provisions addressing jurisdiction in guardianship and protective proceedings cases. A Legislative Note to Section 503 provides guidance on which provisions need to be repealed or amended. The drafters of this Act concluded that limiting the Act to "interstate" cases was unworkable. Such cases are hard to define, but even if they could be defined, overlaying this Act onto a state's existing jurisdictional rules would leave too many gaps and inconsistencies. In addition, if the particular case is truly local, the local court would likely have jurisdiction under both this Act as well as under prior law.

72-5-613. Jurisdiction.

Official Comments

Similar to the Uniform Child [Custody] Jurisdiction and Enforcement Act (1997) [see Title 40, ch. 7], this Act creates a three-level priority for determining which state has jurisdiction to appoint a guardian or issue a protective order; the home state (defined in Section 201(a)(2) [72-5-611(1)(b)]), followed by a significant-connection state (defined in Section 201(a)(3) [72-5-611(1)(c)]), followed by other jurisdictions. The principal objective of this section is to eliminate the possibility of dual appointments or orders except for the special circumstances specified in Section 204 [72-5-614].

While this section is the principal provision for determining whether a particular court has jurisdiction to appoint a guardian or issue a protective order, it is not the only provision. As indicated in the cross-reference in Section 203(4) [72-5-613(4)], a court that does not otherwise have jurisdiction under Section 203 [72-5-613] may have jurisdiction under the special circumstances specified in Section 204 [72-5-614].

Pursuant to Section 203(1) [72-5-613(1)], the home state has primary jurisdiction to appoint a guardian or conservator or issue another type of protective order. This jurisdiction terminates if the state ceases to be the home state, if a court of the home state declines to exercise jurisdiction under Section 206 [72-5-616] on the basis that another state is a more appropriate forum, or, as provided in Section 205 [72-5-615], a court of another state has appointed a guardian or issued a protective order consistent with this Act. The standards by which a home state that has enacted the Act may decline jurisdiction on the basis that another state is a more appropriate forum are specified in Section 206 [72-5-616]. Should the home state not have enacted the Act, Section 203(1) [72-5-613(1)] does not require that the declination meet the standards of Section 206 [72-5-616].

Once a petition is filed in a court of the respondent's home state, that state does not cease to be the respondent's home state upon the passage of time even though it may be many months before an appointment is made or order issued and during that period the respondent is physically located. Only upon dismissal of the petition can the court cease to be the home state due to the passage of time. Under the definition of "home state," the six-month physical presence requirement is fulfilled or not on the date the petition is filed. See Section 201(a)(2) [72-5-611(1)(b)].

A significant-connection state has jurisdiction under two possible bases; Section 203(2)(A) [72-5-613(2)(a)] and Section 203(2)(B) [72-5-613(2)(b)]. Under Section 203(2)(A) [72-5-613(2)(a)], a significant-connection state has jurisdiction if the individual does not have a home state or if the home state has declined jurisdiction on the basis that the significant-connection state is a more appropriate forum.

Section 203(2)(B) [72-5-613(2)(b)] is designed to facilitate consideration of cases where jurisdiction is not in dispute. Section 203(2)(B) [72-5-613(2)(b)] allows a court in a significant-connection state to exercise jurisdiction even though the respondent has a home state and the home state has not declined jurisdiction. The significant-connection state may assume jurisdiction under these circumstances, however, only in situations where the parties are not in disagreement concerning which court should hear the case. Jurisdiction may not be exercised by a significant-connection state under Section 203(2)(B) [72-5-613(2)(b)] if (1) a petition has already been filed and is still pending in the home state or other significant-connection state; or (2) prior to making the appointment or issuing the order, a petition is filed in the respondent's home state or an objection to the court's jurisdiction is filed by a person required to be notified of the proceeding. Additionally, the court in the significant-connection state must conclude that it is an appropriate forum applying the factors listed in Section 206 [72-5-616].

There is nothing comparable to Section 203(2)(B) in the Uniform Child Custody Jurisdiction and Enforcement Act (1997) [see Title 40, ch. 7]. Under Section 201 of the UCCJEA a court in a significant-connection state acquires jurisdiction only if the child does not have a home state or the court of that state has declined jurisdiction. The drafters of this Act concluded that cases involving adults differed sufficiently from child custody matters that a different rule is appropriate for adult proceedings in situations where jurisdiction is uncontested.

Pursuant to Section 203(3) [72-5-613(3)], a court in a state that is neither the home state or a significant-connection state has jurisdiction if the home state and all significant-connection states have declined jurisdiction or the respondent does not have a home state or significant-connection state. The state must have some connection with the proceeding, however. As Section 203(a)(3) [72-5-613(a)(3)] clarifies, jurisdiction in the state must be consistent with the state and United States constitutions.

72-5-614. Special jurisdiction.

Official Comments

This section lists the special circumstances where a court without jurisdiction under the general rule of Section 203 [72-5-613] has jurisdiction for limited purposes. The three purposes are (1) the appointment of a guardian in an emergency for a term not exceeding 90 days for a respondent who is physically located in the state (subsection (a)(1) [(1)(a)]); (2) the issuance of a protective order for a respondent who owns an interest in real or tangible personal property located in the state (subsection (a)(2) [(1)(b)]); and (3) the grant of jurisdiction to consider a petition requesting the transfer of a guardianship or conservatorship proceeding from another state (subsection (a)(3) [(1)(c)]). If the court has jurisdiction under Section 203 [72-5-613], reference to Section 204 [72-5-614] is unnecessary. The general jurisdiction granted under Section 203 [72-5-613] includes within it all of the special circumstances specified in this section.

When an emergency arises, action must often be taken on the spot in the place where the respondent happens to be physically located at the time. This place may not necessarily be located in the respondent's home state or even a significant-connection state. Subsection (a)(1) [(1)(a)] assures that the court where the respondent happens to be physically located at the time has jurisdiction to appoint a guardian in an emergency but only for a limited period of 90 days. The time limit is placed in brackets to signal that enacting states may substitute the time period under their existing emergency guardianship procedures. As provided in subsection (b) [(2)], the emergency jurisdiction is also subject to the authority of the court in the respondent's home state to request that the emergency proceeding be dismissed. The theory here is that the emergency appointment in the temporary location should not be converted into a de facto permanent appointment through repeated temporary appointments.

"Emergency" is specifically defined in Section 201(a)(1) [72-5-611(1)(a)]. Because of the great variation among the states on how an emergency is defined and its important role in conferring jurisdiction, the drafters of this Act concluded that adding a uniform definition of emergency was essential. The definition does not preclude an enacting jurisdiction from appointing a guardian under an emergency guardianship statute with a different or broader test of emergency if the court otherwise has jurisdiction to make an appointment under Section 203 [72-5-613].

Subsection (a)(2) [(1)((b)] grants a court jurisdiction to issue a protective order with respect to real and tangible personal property located in the state even though the court does not otherwise have jurisdiction. Such orders are most commonly issued when a conservator has been appointed but the protected person owns real property located in another state. The drafters specifically rejected using a general reference to any property located in the state because of the tendency of some courts to issue protective orders with respect to intangible personal property such as a bank account where the technical situs of the asset may have little relationship to the protected person.

Subsection (a)(3) [(1)(c)] is closely related to and is necessary for the effectiveness of Article 3 [72-5-624 and 72-5-625], which addresses transfer of a guardianship or conservatorship to another state. A "Catch-22" arises frequently in such cases. The court in the transferring state will not allow the incapacitated or protected person to move and will not terminate the case until the court in the transferee state has accepted the matter. But the court in the transferee state will not accept the case until the incapacitated or protected person has physically moved and presumably become a resident of the transferee state. Subsection (a)(3) [(1)(c)], which grants the court in the transferee state limited jurisdiction to consider a petition requesting transfer of a proceeding form another state, is intended to unlock the stalemate.

Not included in this section but a provision also conferring special jurisdiction on the court is Section 105(b) [72-5-605(2)], which grants the court jurisdiction to respond to a request for assistance from a court of another state.

72-5-615. Exclusive and continuing jurisdiction.

Official Comments

While this Act relies heavily on the Uniform Child [Custody] Jurisdiction and Enforcement Act (1997) [see Title 40, ch. 7] for many basic concepts, the identity is not absolute. Section 202 of the UCCJEA specifies a variety of circumstances whereby a court can lose jurisdiction based on loss of physical presence by the child and others, loss of a significant connection, or unavailability of substantial evidence. Section 203 of the UCCJEA addresses the jurisdiction of the court to modify a custody determination made in another state. Nothing comparable to either UCCJEA section is found in this Act. Under this Act, a guardianship or protective order may be modified only upon request to the court that made the appointment or issued the order, which retains exclusive and continuing jurisdiction over the proceeding. Unlike child custody matters, guardianships and protective proceedings are ordinarily subject to continuing court supervision. Allowing the court's jurisdiction to terminate other than by its own order would open the possibility of competing guardianship or conservatorship appointments in different states for the same person at the same time, the problem under current law that enactment of this Act is designed to avoid. Should the incapacitated or protected person and others with an interest in the proceeding relocate to a different state, the appropriate remedy is to seek transfer of the proceeding to the other state as provided in Article 3 [72-5-624 and 72-5-625].

The exclusive and continuing jurisdiction conferred by this section only applies to guardianship orders made and protective orders issued under Section 203 [72-5-613]. Orders made under the special jurisdiction conferred by Section 204 [72-5-614] are not exclusive. And as provided in Section 204(b) [72-5-614(2)], the jurisdiction of a court in a state other than the home state to appoint a guardian in an emergency is subject to the right of a court in the home state to request that the proceeding be dismissed and any appointment terminated.

Article 3 [72-5-624 and 72-5-625] authorizes a guardian or conservator to petition to transfer the proceeding to another state. Upon the conclusion of the transfer, the court in the accepting state will appoint the guardian or conservator as guardian or conservator in the accepting state and the court in the transferring estate will terminate the local proceeding, whereupon the jurisdiction of the transferring court terminates and the court in the accepting state acquires exclusive and continuing jurisdiction as provided in Section 205 [72-5-615].

72-5-616. Appropriate forum.

Official Comments

This section authorizes a court otherwise having jurisdiction to decline jurisdiction on the basis that a court in another state is in a better position to make a guardianship or protective order determination. The effect of a declination of jurisdiction under this section is to rearrange the priorities specified in Section 203 [72-5-613]. A court of the home state may decline in favor of a court of a significant-connection or other state and a court in a significant-connection state may decline in favor of a court in another significant-connection or other state. The court declining jurisdiction may either dismiss or stay the proceeding. The court may also impose any condition the court considers just and proper, including the condition that a petition for the appointment of a guardian or issuance of a protective order be filed promptly in another state.

This section is similar to Section 207 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997) [see Title 40, ch. 7] except that the factors in Section 206(c) [72-5-616(c)] of this Act have been adapted to address issues most commonly encountered in adult guardianship and protective proceedings as opposed to child custody determinations.

Under Section 203(2)(B) [72-5-613(2)(b)], the factors specified in subsection (c) [(3)] of this section are to be employed in determining whether a court of a significant-connection state may assume jurisdiction when a petition has not been filed in the respondent's home state or in another significant-connection state. Under Section 207(a)(3)(B) [72-5-617(1)(c)(ii)], the court is to consider these factors in deciding whether it will retain jurisdiction when unjustifiable conduct has occurred.

72-5-617. Jurisdiction declined by reason of conduct.

Official Comments

This section is similar to the Section 208 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997) [see Title 40, ch. 7]. Like the UCCJEA, this Act does not attempt to define "unjustifiable conduct," concluding that this issue is best left to the courts. However, a common example could include the unauthorized removal of an adult to another state, with that state acquiring emergency jurisdiction under Section 204 [72-5-614] immediately upon the move and home state jurisdiction under Section 203 [72-5-613] six months following the move if a petition for a guardianship or protective order is not filed during the interim in the soon-to-be former home state. Although child custody cases frequently raise different issues than do adult guardianship matters, the element of unauthorized removal is encountered in both types of proceedings. For the caselaw on unjustifiable conduct under the predecessor Uniform Child Custody Jurisdiction Act (1968), see David Carl Minneman, *Parties' Misconduct as Grounds for Declining Jurisdiction Under § 8 of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 16 A.L.R. 5th 650 (1993).

Subsection (a) [(1)] gives the court authority to fashion an appropriate remedy when it has acquired jurisdiction because of unjustifiable conduct. The court may decline to exercise jurisdiction; exercise jurisdiction for the limited purpose of fashioning an appropriate remedy to ensure the health, safety, and welfare of the respondent or the protection of the respondent's property or prevent a repetition of the unjustifiable conduct; or continue to exercise jurisdiction after considering several specified factors. Under subsection (a) [(1)], the unjustifiable conduct need not have been committed by a party.

Subsection (b) [(2)] authorizes a court to assess costs and expenses, including attorney's fees, against a party whose unjustifiable conduct caused the court to acquire jurisdiction. Subsection (b) [(2)] applies only if the unjustifiable conduct was committed by a party and allows for costs and expenses to be assessed only against that party. Similar to Section 208 of the UCCJEA, the court may not assess fees, costs, or expenses of any kind against this state or a governmental subdivision, agency, or instrumentality of the state unless authorized by other law.

72-5-618. Notice of proceeding.

Official Comments

While this Act tries not to interfere with a state's underlying substantive law on guardianship and protective proceedings, the issue of notice is fundamental. Under this section, when a proceeding is brought other than in the respondent's home state, the petitioner must give notice in the method provided under local law not only to those entitled to notice under local law but also to the persons required to be notified were the proceeding brought in the respondent's home state. Frequently, the respective lists of persons to be notified will be the same. But where the lists are different, notice under this section will assure that someone with a right to assert that the home state has a primary right to jurisdiction will have the opportunity to make that assertion.

72-5-619. Proceedings in more than one state.

Official Comments

Similar to Section 206 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997) [see Title 40, ch. 7], this section addresses the issue of which court has the right to proceed when proceedings for the same respondent are brought in more than one state. The provisions of this section, however, have been tailored to the needs of adult guardianship and protective proceedings and the particular jurisdictional provisions of this Act. Emergency guardianship appointments and protective proceedings with respect to property in other states (Sections 204(a)(1) and (a)(2) [72-5-614(1)(a) and (1)(b)]) are excluded from this section because the need for dual appointments is frequent in these cases; for example, a petition will be brought in the respondent's home state but emergency action will be necessary in the place where the respondent is temporarily located, or a petition for the appointment of a conservator will be brought in the respondent's home state but real estate located in some other state needs to be brought under management.

Under the Act only one court in which a petition is pending will have jurisdiction under Section 203 [72-5-613]. If a petition is brought in the respondent's home state, that court has jurisdiction over that of any significant-connection or other state. If the petition is first brought in a significant-connection state, that jurisdiction will be lost if a petition is later brought in the home state prior to an appointment or issuance of an order in the significant-connection state. Jurisdiction will also be lost in the significant-connection state if the respondent has a home state and an objection is filed in the significant-connection state that jurisdiction is properly in the home state. If petitions are brought in two significant-connection states, the first state has a right to proceed over that of the second state, and if a petition is brought in any other state, any claim to jurisdiction of that state is subordinate to that of the home state and all significant-connection states.

Under this section, if the court has jurisdiction under Section 203 [72-5-613], it has the right to proceed unless a court of another state acquires jurisdiction prior to the first court making an appointment or issuing a protective order. If the court does not have jurisdiction under Section 203 [72-5-613], it must defer to the court with jurisdiction unless that court determines that the court in this state is the more appropriate forum and it thereby acquires jurisdiction. While the rules are straightforward, factual issues can arise as to which state is the home state or significant-connection state. Consequently, while under Section 203 [72-5-613] there will almost always be a court having jurisdiction to proceed, reliance on the communication, court cooperation, and evidence gathering provisions of Sections 104-106 [72-5-104 through 72-5-106] will sometimes be necessary to determine which court that might be.

72-5-638. Transitional provision.

Official Comments

This Act applies retroactively to guardianships and conservatorships in existence on the effective date. The guardian or conservator appointed prior to the effective date of the Act may petition to transfer the proceeding to another state under Article 3 [72-5-624 and 72-5-625] and register and enforce the order in other states pursuant to Article 4 [72-5-629 through 72-5-631]. The jurisdictional provisions of Article 2 [72-5-611 through 72-5-619] also apply to proceedings begun on or after the effective date. What the Act does not do is change the jurisdictional rules midstream for petitions filed prior to the effective date for which an appointment has not been made or order issued as of the effective date. Jurisdiction in such cases is governed by prior law. Nor does the Act affect the validity of already existing appointments even though the court might not have had jurisdiction had this Act been in effect at the time the appointment was made.

CHAPTER 6
NONPROBATE TRANSFERS ON DEATH

Chapter Official Comments

PREFATORY NOTE

This amendment of Uniform Probate Code Article VI (nonprobate transfers) replaces former Article VI with a revised article. Part 1 (provisions relating to effect of death) of the revised article is amended and relocated from former Part 2. Part 2 (multiple-person accounts) of the revised article is amended and relocated from former Part 1. Part 3 (Uniform TOD Security Registration Act) of the revised article is new. This reorganization allows for general provisions at the beginning of the article, and permits parts to be divided into subparts that group related provisions together.

Multiple-Person Accounts

The amendment of Part 2 (multiple-person accounts) of the revised article simplifies drafting and terminology. It consolidates treatment of POD accounts and trust accounts so that the same rules apply to both, since both types of account operate identically and serve the same function of passing property to a beneficiary at the death of the account owner. The amendment likewise eliminates references to "joint" accounts, since the statute treats joint tenancy accounts and tenancy in common accounts the same for all purposes other than survivorship. Other terminological and drafting simplifications and standardizations are made throughout the statute. Treatment of existing accounts is included.

The amendment makes a few substantive changes in rules previously established in the multiple-person account statute. The changes include recognition of checks issued by an account owner before death and presented for payment after death, revision of the creditor rights procedure to enable a survivor or beneficiary to spread the burden among survivors and beneficiaries of other accounts of the decedent and to provide a uniform one-year limitation period for creditors, and a provision that a financial institution must have received notice at the appropriate office and have had a reasonable time to act before it is charged with knowledge that any change in account circumstances has occurred. A provision is also added that on the death of a married person, beneficial ownership of the decedent's share in a survivorship account passes to the surviving spouse who is an account party in preference to other surviving account parties.

The amendment includes a number of important improvements designed to make multiple-person accounts more useful. An agency designation is authorized to enable an account owner to add another person to the account as a convenience in making withdrawals without creating any ownership or survivorship interest in the person identified as an agent. Optional statutory forms for multiple-person accounts are provided for the convenience and protection of financial institutions. Payment to a minor who is an account beneficiary is authorized pursuant to the Uniform Transfers to Minors Act. A provision is added to make clear that marital funds deposited in an account retain any community property incidents, and the law governing tenancy by the entireties is preserved where applicable.

The drafting committee believes that this amendment of the multiple-person account statute is a substantial improvement in an already successful law. This part of the Uniform Probate Code is one of the most broadly accepted, having been adopted either as part of the code or independently by over half the states. This amendment draws on useful improvements made by various states that have enacted the statute, and should make the statute even more attractive.

Uniform TOD Security Registration Act

The purpose of Part 3 (Uniform TOD Security Registration Act) of the revised article is to allow the owner of securities to register the title in transfer-on-death (TOD) form. Mutual fund shares and accounts maintained by brokers and others to reflect a customer's holdings of securities (so-called "street accounts") are also covered. The legislation enables an issuer, transfer agent, broker, or other such intermediary to transfer the securities directly to the designated transferee on the owner's death. Thus, TOD registration achieves for securities a certain parity with existing TOD and pay-on-death (POD) facilities for bank deposits and other assets passing at death outside the probate process.

The TOD registration under this part is designed to give the owner of securities who wishes to arrange for a nonprobate transfer at death an alternative to the frequently troublesome joint tenancy form of title. Because joint tenancy registration of securities normally entails a sharing of lifetime entitlement and control, it works satisfactorily only so long as the co-owners cooperate. Difficulties arise when co-owners fall into disagreement, or when one becomes afflicted or insolvent.

Use of the TOD registration form encouraged by this legislation has no effect on the registered owner's full control of the affected security during his or her lifetime. A TOD designation and any beneficiary interest arising under the designation ends whenever the registered asset is transferred, or whenever the owner otherwise complies with the issuer's conditions for changing the title form of the investment. The part recognizes, in Section 6-302 [72-6-302], that co-owners with right of survivorship may be registered as owners together with a TOD beneficiary designated to take if the registration remains unchanged until the beneficiary survives the joint owners. In such a case, the survivor of the joint owners has full control of the asset and may change the registration form as he or she sees fit after the other's death.

Implementation of the part is wholly optional with issuers. The drafting committee received the benefit of considerable advice and assistance from representatives of the mutual fund and stock transfer industries during the course of its three years of preparatory work. Accordingly, it is believed that this part takes full account of the practical requirements for efficient transfer within the securities industry.

Section 6-303 [72-6-303] invites application of the legislation to locally owned securities though the statute may not have been locally enacted, so long as the part or similar legislation is in force in a jurisdiction of the issuer or transfer agent. Thus, if the principal jurisdictions in which securities issuers and transfer agents are sited enact the measure, its benefits will become generally available to persons domiciled in states that do not at once enact the statute.

The legislation has been drafted as a separate part, hence not interpolated as an expansion of the former UPC Article VI, Part 1, treating bank accounts ("multiple-party accounts"). Securities merit a distinct statutory regime, because a different principle has governed concurrent ownership of securities. By virtue either of statute or of account terms (contract), multiple-party bank accounts allow any one cotenant to consume or transfer account balances. See R. Brown, The Law of Personal Property § 65, at 217 (2d ed. 1955); Langbein, The Nonprobate Revolution and the Future of the Law of Succession, 97 Harv. L. Rev. 1108, 1112 (1984). The rule for securities, however, has been the rule that applies to real property: all cotenants must act together in transferring the securities. This difference in the legal regime reflects differences in function among the types of assets. Multiple-party bank accounts typically arise as convenience accounts, to facilitate frequent small transactions, often on an agency basis (as when spouses or relatives share an account). Securities resemble real estate in that the values are typically large and the transactions relatively infrequent, which is why the legal regime requires the concurrence of all concurrent owners for transfers affecting such assets.

Recently, of course, this distinction between bank accounts and securities has begun to crumble. Banks are offering certificates of deposit of large value under the same account forms that were devised for low-value convenience accounts. Meanwhile, brokerage houses with their so-called cash management accounts and mutual funds with their money market accounts have rendered securities subject to small recurrent transactions. In the latest developments, even the line between real estate and bank accounts is becoming indistinct, as the "home equity line of credit" creates a check-writing conduit to real estate values.

Nevertheless, even though new forms of contract have rendered the boundaries between securities and bank accounts less firm, the distinction seems intuitively correct for statutory default rules. True co-owners of securities, like owners of realty, should act together in transferring the asset.

The joint bank account and the Totten trust originated in ambiguous lifetime ownership forms, which required former UPC § 6-103 [72-6-211] or comparable state legislation to clarify that an inter vivos transfer was not intended. In the securities field, by contrast, we start with unambiguous lifetime ownership rules. The sole purpose of the present statute is to facilitate a nonprobate TOD mechanism as an option for those owners.

For a comprehensive discussion of the issues entailed in this legislation, see Wellman, Transfer-on-Death Securities Registration: A New Title Form, 21 Ga. L. Rev. 789 (1987).

Chapter Case Notes

Trust Properly Ruled as Nonprobate Asset: A man and his first wife executed a revocable living trust. One-half of the trust became irrevocable on the death of the wife. The man remarried and executed a codicil to his will to include his new wife and child and devised all tangible personal property to his new wife. Litigation followed the man's death. The Supreme Court found after extensive discussion of trust statutes that the District Court correctly concluded that trust assets were nonprobate assets and could only be used to satisfy the new wife's statutory allowances when and to the extent the probate estate was insufficient. In re Estate of Dower, 2021 MT 245, 405 Mont. 443, 495 P.3d 1083.

Part 1
Provisions Relating to Effect of Death

72-6-111. Nonprobate transfers on death.

Official Comments

This section is a revised version of former Section 6-201 [72-1-110, repealed 1993] of the original Uniform Probate Code, which authorized a variety of contractual arrangements that had sometimes been treated as testamentary in prior law. For example, most courts treated as testamentary a provision in a promissory note that if the payee died before making payment, the note should be paid to another named person; or a provision in a land contract that if the seller died before completing payment, the balance should be canceled and the property should belong to the vendee. These provisions often occurred in family arrangements. The result of holding such provisions testamentary was usually to invalidate them because not executed in accordance with the statute of wills. On the other hand, the same courts for years upheld beneficiary designations in life insurance contracts. The drafters of the original Uniform Probate Code declared in the Comment that they were unable to identify policy reasons for continuing to treat these varied arrangements as testamentary. The drafters said that the benign experience with such familiar will substitutes as the revocable inter vivos trust, the multiple-party bank account, and United States government bonds payable on death to named beneficiaries all demonstrated that the evils envisioned if the statute of wills were not rigidly enforced simply do not materialize. The Comment also observed that because these provisions often are part of a business transaction and are evidenced by a writing, the danger of fraud is largely eliminated.

Because the modes of transfer authorized by an instrument under this section are declared to be nontestamentary, the instrument does not have to be executed in compliance with the formalities for wills prescribed under Section 2-502 [72-2-522]; nor does the instrument have to be probated, nor does the personal representative have any power or duty with respect to the assets.

The sole purpose of this section is to prevent the transfers authorized here from being treated as testamentary. This section does not invalidate other arrangements by negative implication. Thus, this section does not speak to the phenomenon of the oral trust to hold property at death for named persons, an arrangement already generally enforceable under trust law.

The reference to a "marital property agreement" in the introductory portion of subsection (a) of Section 6-101 [72-6-111(1)] includes an agreement made during marriage as well as a premarital contract.

The term "or other written instrument of a similar nature" in the introductory portion of subsection (a) [72-6-111(1)] replaces the former language "or any other written instrument effective as a contract, gift, conveyance or trust" in the original Section 6-201 [72-1-110, repealed 1993]. The Supreme Court of Washington read that language to relieve against the delivery requirement of the law of deeds, a result that was not intended. *Estate of O'Brien v. Woodhouse,* 109 Wash. 2d 913, 749 P.2d 154 (1988). The point was correctly decided in *First National Bank in Minot v. Bloom,* 264 N.W.2d 208, 212 (N.D. 1978), in which the Supreme Court of North Dakota held that "nothing in [former Section 6-201] [72-1-110, repealed 1993] of the Uniform Probate Code . . . eliminates the necessity of delivery of a deed to effectuate a conveyance from one living person to another."

Compiler's Comments

2021 Amendment: Chapter 130 in (1) in first sentence of introductory text near end after "marital property agreement" inserted "beneficiary designation, as provided in 61-3-226"; and made minor changes in style. Amendment effective October 1, 2021.

2019 Amendment: Chapter 313 in (1) near end of first sentence substituted "transfer on death deed, as defined in 72-6-402" for "beneficiary deed, as defined in 72-6-121". Amendment effective October 1, 2019.

2007 Amendment: Chapter 258 in (1) near end after "gift" inserted "beneficiary deed, as defined in 72-6-121"; and made minor changes in style. Amendment effective October 1, 2007.

Applicability: Section 5, Ch. 258, L. 2007, provided: "[This act] applies to a beneficiary deed filed by an owner, as both are defined in [section 1] [72-6-121], who dies after October 1, 2007."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-101.

Case Notes

"Payable on Death" Designation Negates Joint Tenancy Language on CD Form: The deceased's personal representative was his granddaughter, who was also the person named as the payable on death (POD) beneficiary of the deceased on several certificates of deposit (CDs). The granddaughter obtained a ruling from the District Court that she was a joint tenant with the right of survivorship with respect to the CDs, based upon the language on the CD forms specifically stating that the persons named on the CD were joint tenants. The Supreme Court held that a joint tenancy must be created by specific unambiguous language and that the POD designation on the CDs created an ambiguity negating the joint tenancy language. The Supreme Court further held that the POD language meant that the granddaughter could not have a present interest in the CDs at the time that the CDs were obtained by the deceased and that they could not pass to her under the principles of joint tenancy. The Supreme Court ruled that the POD designation acted to transfer the CDs to the granddaughter outside of the probate estate as a nontestamentary transfer. In re Estate of Lahren, 268 M 284, 886 P2d 412, 51 St. Rep. 1311 (1994), following In re Estate of Shaw, 259 M 117, 855 P2d 105 (1993).

72-6-112. Liability of nonprobate transferees for creditor claims and statutory allowances.

Compiler's Comments

Effective Date: This section is effective October 1, 2019.

Part 2
Multiple-Party Accounts

72-6-201. Definitions.

Official Comments

This and the sections that follow are designed to reduce certain questions concerning many forms of multiple-person accounts (including the so-called Totten trust account). A "payable on death" designation and an "agency" designation are also authorized for both single-party and multiple-party accounts. The POD designation is a more direct means of achieving the same purpose as a Totten trust account; this part therefore discourages creation of a Totten trust account and treats existing Totten trust accounts as POD designations.

An agent (paragraph (2)) [72-6-201(2)] may not be a party. The agency designation must be signed by all parties, and the agent is the agent of all parties. See Section 6-205 [72-6-205] (designation of agent).

A "beneficiary" of a party (paragraph (3)) [72-6-201(3)] may be either a POD beneficiary or the beneficiary of a Totten trust; the two types of designations in an account serve the same function and are treated the same under this part. See paragraph (8) ("POD designation" defined) [72-6-201(8)]. The definition of "beneficiary" refers to a "person," who may be an individual, corporation, organization, or other legal entity. Section 1-201(29) [(35) in 1990 version] [72-1-103(36)]. Thus a church, trust company, family corporation, or other entity, as well as any individual, may be designated as a beneficiary.

The term "multiple-party account" (paragraph (5)) [72-6-201(5)] is used in this part in a broad sense to include any account having more than one owner with a present interest in the account. Thus an account may be a "multiple-party account" within the meaning of this part regardless of whether the terms of the account refer to it as "joint tenancy" or as "tenancy in common," regardless of whether the parties named are coupled by "or" or "and," and regardless of whether any reference is made to survivorship rights, whether expressly or by abbreviation such as JTWROS or JT TEN. Survivorship rights in a multiple-party account are determined by the terms of the account and by statute, and survivorship is not a necessary incident of a multiple-party account. See Section 6-212 (rights at death) [72-6-212].

Under paragraph (6) [72-6-201(6)], a "party" is a person with a present right to payment from an account. Therefore, present owners of a multiple-party account are parties, as is the present owner of an account with a POD designation. The beneficiary of an account with a POD designation is not a party, but is entitled to payment only on the death of all parties. The trustee of a Totten trust is a party but the beneficiary is not. An agent with the right of withdrawal on behalf of a party is not itself a party. A person claiming on behalf of a party such as a guardian or conservator, or claiming the interest of a party such as a creditor, is not itself a party, and the right of such a person to payment is governed by general law other than this part.

Various signature requirements may be involved in order to meet the payment requirements of the account. A "request" (paragraph (10)) [72-6-201(10)] involves compliance with these requirements. A party is one to whom an account is presently payable without regard to whose signature may be required for a "request."

Compiler's Comments

1995 Amendment: Chapter 592 in definition of terms of account, after "conditions", inserted "of the contract of deposit", after "including" inserted "the type of account, the parties to the account, and", and at end deleted "of deposit".

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-201.

72-6-202. Limitation on scope of part.

Official Comments

This part [Title 72, chapter 6, part 2] applies to accounts in this State. Section 1-301(4) [72-1-201, subsection (4) not adopted in Montana].

The reference to a fiduciary or trust account in item (iii) [72-6-202(3)] includes a regular trust account under a testamentary trust or a trust agreement that has significance apart from the account, and a fiduciary account arising from a fiduciary relation such as attorney-client.

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-202.

72-6-203. Types of account — existing accounts.

Official Comments

In the case of an account established before (or after) the effective date of this part that is not in substantially the form provided in Section 6-204 [72-6-204], the account is governed by the provisions of this part applicable to the type of account that most nearly conforms to the depositor's intent. See Section 6-204 (forms) [72-6-204].

Thus, a tenancy in common account established before or after the effective date of this part would be classified as a "multiple-party account" for purposes of this part. See Section 6-201(5) ("multiple-party account" defined) [72-6-201(5)]. On death of a party there would not be a right of survivorship since the tenancy in common title would be treated as a multiple-party account without right of survivorship. See Section 6-212(c) [72-6-212(3)]. It should be noted that a POD designation may not be made in a multiple-party account without right of survivorship. See Sections 6-201(8) ("POD designation" defined) [72-6-201(8)], 6-204 (forms) [72-6-204], and 6-212 (rights at death) [72-6-212].

Under this section, a Totten trust account established before, on, or after the effective date of this part is governed by the provisions of this part applicable to an account with a POD designation. See Section 6-201(8) ("POD designation" defined) [72-6-201(8)] and the Comment to Section 6-201 [72-6-201].

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-203.

72-6-204. Forms.

Official Comments

This section provides short forms for single- and multiple-party accounts which, if used, bring the accounts within the terms of this part. A financial institution that uses the statutory form language in its accounts is protected in acting in reliance on the form of the account. See also Section 6-226 (discharge) [72-6-226].

The forms provided in this section enable a person establishing a multiple-party account to state expressly in the account whether there are to be survivorship rights between the parties. The account forms permit greater flexibility than traditional account designations. It should be noted that no separate form is provided for a Totten trust account, since the POD designation serves the same function.

An account that is not substantially in the form provided in this section is nonetheless governed by this part. See Section 6-203 (types of account; existing accounts) [72-6-203].

Compiler's Comments

1997 Amendment: Chapter 279 in middle of form in (1) substituted language authorizing a change in the terms in a multiple-party account by a single party or by agreement of all parties for language that read: "Further, any one party may change the type of account."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-204.

72-6-205. Designation of agent.

Official Comments

An agent has no beneficial interest in the account. See Section 6-211 (ownership during lifetime) [72-6-211]. The agency relationship is governed by the general law of agency of the state, except to the extent this part provides express rules, including the rule that the agency survives the disability or incapacity of a party.

A financial institution may make payments at the direction of an agent notwithstanding disability, incapacity, or death of the party, subject to receipt of a stop notice. Section 6-226 (discharge) [72-6-226]; see also Section 6-224 (payment to designated agent) [72-6-224].

The rule of subsection (b) [72-6-205(2)] applies to agency designations on all types of accounts, including nonsurvivorship as well as survivorship forms of multiple-party accounts.

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-205.

72-6-206. Applicability of beneficial ownership provisions.

Compiler's Comments

2013 Amendment: Chapter 264 substituted "72-6-111 through 72-6-214 and 72-6-216" for "72-6-211 through 72-6-216". Amendment effective October 1, 2013.

Severability: Section 161, Ch. 264, L. 2013, was a severability clause.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-206.

Case Notes

No Theft Prosecution for Removal of Funds From Joint Account: Kane was charged with theft for purposely or knowingly obtaining or exerting unauthorized control over funds and other items belonging to Hilger. Kane filed a motion to dismiss, which the District Court granted on grounds that as a joint tenant on a checking account with Hilger, Kane could not, as a matter of law, be prosecuted for theft of funds taken from the joint account. The state contended that 72-6-211 governed the joint account and permitted prosecution for theft in such cases. The Supreme Court affirmed, holding that the statute did not apply to controversies between cotenants. Absent evidence that Kane had threatened or deceived Hilger into establishing the joint tenant arrangement, Kane's actions did not make out the elements of criminal theft. St. v. Kane, 1999 MT 337, 297 M 421, 992 P2d 1283, 56 St. Rep. 1343 (1999), following St. v. Haack, 220 M 141, 713 P2d 1001 (1986), and distinguishing St. v. Curtis, 241 M 288, 787 P2d 306, 47 St. Rep. 277 (1990).

72-6-211. Ownership during lifetime.

Official Comments

This section reflects the assumption that a person who deposits funds in an account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, the person usually intends no present change of beneficial ownership. The section permits parties to accounts to be as definite, or as indefinite, as they wish in respect to the matter of how beneficial ownership should be apportioned between them.

The assumption that no present change of beneficial ownership is intended may be disproved by showing that a gift was intended. For example, under subsection (c) [72-6-211(3)] it is presumed that the beneficiary of a POD designation has no present ownership interest during lifetime. However, it is possible that in the case of a POD designation in trust form an irrevocable gift was intended.

It is important to note that the section is limited to ownership of an account while parties are alive. Section 6-212 [72-6-212] prescribes what happens to beneficial ownership on the death of a party.

The section does not undertake to describe the situation between parties if one party withdraws more than that party is then entitled to as against the other party. Sections 6-221 [72-6-221] and 6-226 [72-6-226] protect a financial institution in that circumstance without reference to whether a withdrawing party may be entitled to less than that party withdraws as against another party. Rights between parties in this situation are governed by general law other than this part.

"Net contribution" as defined by subsection (a) [72-6-211(1)] has no application to the financial institution-depositor relationship. Rather, it is relevant only to controversies that may arise between parties to a multiple-party account.

The last sentence of subsection (b) [72-6-211(2)] provides a clear rule concerning the amount of "net contribution" in a case where the actual amount cannot be established as between spouses. This part otherwise contains no provision dealing with a failure of proof. The omission is deliberate. The theory of these sections is that the basic relationship of the parties is that of individual ownership of values attributable to their respective deposits and withdrawals, and not equal and undivided ownership that would be an incident of joint tenancy.

In a state that recognizes tenancy by the entireties for personal property, this section would not change the rule that parties who are married to each other own their combined net contributions to an account as tenants by the entireties. See Section 6-216 (community property and tenancy by the entireties) [72-6-216].

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-211.

Case Notes

No Theft Prosecution for Removal of Funds From Joint Account: Kane was charged with theft for purposely or knowingly obtaining or exerting unauthorized control over funds and other items belonging to Hilger. Kane filed a motion to dismiss, which the District Court granted on grounds that as a joint tenant on a checking account with Hilger, Kane could not, as a matter of law, be prosecuted for theft of funds taken from the joint account. The state contended that this section governed the joint account and permitted prosecution for theft in such cases. The Supreme Court affirmed, holding that the statute did not apply to controversies between cotenants. Absent evidence that Kane had threatened or deceived Hilger into establishing the joint tenant arrangement, Kane's actions did not make out the elements of criminal theft. St. v. Kane, 1999 MT 337, 297 M 421, 992 P2d 1283, 56 St. Rep. 1343 (1999), following St. v. Haack, 220 M 141, 713 P2d 1001 (1986), and distinguishing St. v. Curtis, 241 M 288, 787 P2d 306, 47 St. Rep. 277 (1990).

72-6-212. Rights at death.

Official Comments

The effect of subsection (a) [72-6-212(1)] is to make an account payable to one or more of two or more parties a survivorship arrangement unless a nonsurvivorship arrangement is specified in the terms of the account. This rule applies to community property as well as other forms of marital property. See Section 6-216 (community property and tenancy by the entireties) [72-6-216]. The section also applies to various forms of multiple-party accounts that may be in use at the effective date of the legislation. See Sections 6-203 (type of account; existing accounts) [72-6-203] and 6-204 (forms) [72-6-204].

By technical amendment effective August 5, 1991, the word "part" was substituted for "section" in the first sentence of subsection (a) [72-6-212(1)]. [Montana adopted the version that incorporated the 1991 technical amendment.] The amendment clarified the original purpose of the drafters and Commissioners to permit a court to implement the intentions of parties to a joint account governed by Section 6-204(b) [72-6-204(2)] if it finds that the account was opened solely for the convenience of a party who supplied all funds reflected by the account and intended no present gift or death benefit for the other party. In short, the account characteristics described in this section must be determined by reference to the form of the account *and* the impact of Sections 6-203[72-6-203] and 6-204 [72-6-204] on the admissibility of extrinsic evidence tending to confirm or contradict intention as signalled by the form.

Subsection (b) [72-6-212(2)] applies to both POD and Totten trust beneficiaries. See Section 6-201(8) ("POD designation" defined) [72-6-201(8)]. It accepts the New York view that an account opened by "A" in A's name as "trustee for B" usually is intended by A to be an informal will of any balance remaining on deposit at A's death.

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-212.

72-6-213. Alteration of rights.

Official Comments

Under this section, rights of parties and beneficiaries are determined by the type of account at the time of death. It is to be noted that only a "party" may give notice blocking the provisions of Section 6-212 (rights at death) [72-6-212]. "Party" is defined by Section 6-201(6) [72-6-201(6)]. Thus if there is an account with a POD designation in the name of A and B with C as beneficiary, C cannot change the right of survivorship because C has no present right to payment and hence is not a party.

Compiler's Comments

1997 Amendment: Chapter 279 at beginning of (2) inserted exception clause; inserted (3) authorizing a financial institution to refuse to honor a request for alteration of rights resulting in a change in the institution's rights under contract of deposit or in parties to a multiple-party account unless signed by all parties; and made minor changes in style.

1995 Amendment: Chapter 592 in (1), in three places, substituted "terms" for "type"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-213.

72-6-214. Accounts and transfers nontestamentary.

Official Comments

The purpose of classifying the transactions contemplated by this part as nontestamentary is to bolster the explicit statement that their validity as effective modes of transfers on death is not to be determined by the requirements for wills. The section is consistent with Part 1 of Article VI (provisions relating to effect of death) [72-6-111].

Compiler's Comments

2013 Amendment: Chapter 264 substituted "72-6-228" for "72-6-215". Amendment effective October 1, 2013.

Severability: Section 161, Ch. 264, L. 2013, was a severability clause.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-214.

72-6-216. Community property and tenancy by entireties.

Official Comments

Section 6-216 [72-6-216] does not affect or limit the right of the financial institution to make payments pursuant to Subpart 3 (protection of financial institutions) [72-6-221 through 72-6-227] and the deposit agreement. See Section 6-206 (applicability of part) [72-6-206]. For this reason, Section 6-216 [72-6-216] does not affect the definiteness and certainty that the financial institution must have in order to be induced to make payments from the account and, at the same time, the section preserves the rights of the parties, creditors, and successors that arise out of the nature of the funds in the account — community or separate, or tenancy by the entireties.

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-216.

72-6-221. Authority of financial institution.

Official Comments

The provisions of this subpart [72-6-221 through 72-6-227] relate only to protection of a financial institution that makes payment as provided in the subpart. Nothing in this subpart affects the beneficial rights of persons to sums on deposit or paid out. Ownership as between parties, and others, is governed by Subpart 2 [72-6-211 through 72-6-216]. See Section 6-206 (applicability of part) [72-6-206].

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-221.

72-6-222. Payment on multiple-party account.

Official Comments

A financial institution that makes payment on proper request under this section is protected unless the financial institution has received written notice not to. Section 6-226 (discharge) [72-6-226]. Paragraph (1) [72-6-222(1)] applies to both a multiple-party account with right of survivorship and a multiple-party account without right of survivorship (including an account in tenancy in common form). Paragraph (2) [72-6-222(2)] is limited to a multiple-party account with right of survivorship; payment to the personal representative or heirs or devisees of a deceased party to an account without right of survivorship is governed by the general law of the state relating to the authority of such persons to collect assets alleged to belong to a decedent.

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-222.

72-6-223. Payment on POD designation.

Official Comments

A financial institution that makes payment on proper request under this section is protected unless the financial institution has received written notice not to. Section 6-226 (discharge) [72-6-226]. Payment to the personal representative or heirs or devisees of a deceased beneficiary who would be entitled to payment under paragraph (2) [72-6-223(2)] is governed by the general law of the state relating to the authority of such persons to collect assets alleged to belong to a decedent.

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-223.

72-6-224. Payment to designated agent.

Official Comments

This section is intended to protect a financial institution that makes a payment pursuant to an account with an agency designation even though the agency may have terminated at the time of the payment due to disability, incapacity, or death of the principal. The protection does not apply if the financial institution has received notice under Section 6-226 [72-6-226] not to make payment or that the agency has terminated. This section applies whether or not the agency survives the party's disability or incapacity under Section 6-205 (designation of agent) [72-6-205].

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-224.

72-6-225. Payment to minor.

Official Comments

Section 6-225 [72-6-225] is intended to avoid the need for a guardianship or other protective proceeding in situations where the Uniform Transfers to Minors Act [Title 72, chapter 26] may be used.

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-225.

72-6-226. Discharge.

Official Comments

The provision of subsection (a) [72-6-226(1)] protecting a financial institution for payments made after the death, disability, or incapacity of a party is a specific elaboration of the general protective provisions of this section and is drawn from Uniform Commercial Code Section 4-405 [30-4-405].

Knowledge of disability, incapacity, or death of a party does not affect payment on request of an agent, whether or not the agent's authority survives disability or incapacity. See Section 6-224 (payment to designated agent) [72-6-224]. But under subsection (b) [72-6-226(2)], the financial institution may not make payments on request of an agent after it has received written notice not to, whether because the agency has terminated or otherwise.

Compiler's Comments

1997 Amendment: Chapter 279 throughout section, after "payment" or "payments", inserted "or alteration" or "or alterations"; in first sentence in (1), after "account", inserted "or honoring a request for alteration of rights made in accordance with 72-6-213" and after "amounts so paid" inserted "or alterations so made"; in first sentence in (2), after "account", substituted "or alteration of rights, including payments or alterations relating to an account" for "including one" and at end inserted "or the alteration is requested"; at end of (3) inserted "or to honor a request for alterations"; and at end of (4) inserted "or regarding whether a request for an alteration of rights to an account was improper between the parties".

1995 Amendment: Chapter 592 in (1), near beginning, substituted "terms" for "type"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-226.

72-6-227. Setoff.

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-227.

72-6-228. Liability of nonprobate transferees for creditor claims and statutory allowances.

Compiler's Comments

Severability: Section 161, Ch. 264, L. 2013, was a severability clause.

Effective Date: Section 163, Ch. 264, L. 2013, provided: "[This act] is effective October 1, 2013."

Application to Existing Relationships: Section 164, Ch. 264, L. 2013, provided: "(1) Except as otherwise provided in [this act], on [the effective date of this act]:

(a) [this act] applies to all trusts created before, on, or after [the effective date of this act];

(b) [this act] applies to all judicial proceedings concerning trusts commenced on or after [the effective date of this act];

(c) [this act] applies to judicial proceedings concerning trusts commenced before [the effective date of this act] unless the court finds that application of a particular provision of [this act] would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of [this act] does not apply and the superseded law applies;

(d) any rule of construction or presumption provided in [this act] applies to trust instruments executed before [the effective date of this act] unless there is a clear indication of a contrary intent in the terms of the trust; and

(e) an act done before [the effective date of this act] is not affected by [this act].

(2) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before [the effective date of this act], that statute continues to apply to the right even if it has been repealed or superseded." Effective October 1, 2013.

Part 3
Uniform TOD Security Registration Act

Part Case Notes

Provisions in Will Superseded by Transfer of Death Designations of Financial Accounts — Transfer Not Testamentary: The decedent executed transfers on death (TOD) of financial accounts to four beneficiaries. Later, the decedent created a living trust and will as a part of estate planning; however, he never transferred the financial accounts into the trust. After his death, the financial accounts were distributed according to the terms of the TOD, and the trustee filed a complaint seeking an injunction to bar the dissipation of the distribution. The District Court denied the injunction and granted the defendant's motion to dismiss, ruling that the financial accounts were not a part of the probate assets. On appeal, the Supreme Court affirmed, agreeing that the TOD designation controlled the distribution of the financial accounts. Darty v. Grauman, 2018 MT 129, 391 Mont. 393, 419 P.3d 116.

72-6-301. Definitions.

Official Comments

"Security" is defined as provided in UCC § 8-102 [30-8-102, now repealed] and includes shares of mutual funds and other investment companies. The defined term "security account" is not intended to include securities held in the name of a bank or similar institution as nominee for the benefit of a trust.

"Survive" is not defined. No effort is made in this part to define survival as it is for purposes of intestate succession in UPC § 2-104 [72-1-114] which requires survival by an heir of the ancestor for 120 hours. For purposes of this part, survive is used in its common law sense of outliving another for any time interval no matter how brief. The drafting committee sought to avoid imposition of a new and unfamiliar meaning of the term on intermediaries familiar with the meaning of "survive" in joint tenancy registrations.

Compiler's Comments

2005 Amendment: Chapter 76 in definition of security account in (a) near middle after "cash" inserted "cash equivalents" and inserted (c) concerning investment management or custody account with a trust company or trust division; and made minor changes in style. Amendment effective March 24, 2005.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-301.

72-6-302. Registration in beneficiary form — sole or joint tenancy ownership.

Official Comments

This section is designed to prevent co-owners from designating any death beneficiary other than one who is to take only upon survival of *all* co-owners. It coerces co-owning registrants to signal whether they hold as joint tenants with right of survivorship (JT TEN), as tenants by the entireties (T ENT), or as owners of community property. Also, it imposes survivorship on co-owners holding in a beneficiary form that fails to specify a survivorship form of holding. Tenancy in common and community property otherwise than in a survivorship setting is negated for registration in beneficiary form because persons desiring to signal independent death beneficiaries for each individual's fractional interest in a co-owned security normally will split their holding into separate registrations of the number of units previously constituting their fractional share. Once divided, each can name his or her own choice of death beneficiary.

The term "individuals," as used in this section, limits those who may register as owner or co-owner of a security in beneficiary form to natural persons. However, the section does not restrict individuals using this ownership form as to their choice of death beneficiary. The definition of "beneficiary form" in Section 6-301 [72-6-301] indicates that any "person" may be designated beneficiary in a registration in beneficiary form. "Person" is defined so that a church, trust company, family corporation, or other entity, as well as any individual, may be designated as a beneficiary. Section 1-201(29) [(35) in 1990 version] [72-1-103(36)].

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-302.

72-6-303. Registration in beneficiary form — applicable law.

Official Comments

This section encourages registrations in beneficiary form to be made whenever a state with which either of the parties to a registration has contact has enacted this or a similar statute. Thus, a registration in beneficiary form of X Company shares might rely on an enactment of this Act in X Company's state of incorporation, or in the state of incorporation of X Company's transfer agent. Or, an enactment by the state of the issuer's principal office, the transfer agent's principal office, or of the issuer's office making the registration also would validate the registration. An enactment of the state of the registering owner's address at time of registration also might be used for validation purposes.

The last sentence of this section is designed, as is UPC § 6-101 [72-6-111], to establish a statutory presumption that a general principle of law is available to achieve a result like that made possible by this part.

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-303.

72-6-304. Origination of registration in beneficiary form.

Official Comments

As noted above in commentary to Section 6-302 [72-6-302], this part [Title 72, chapter 6, part 3] places no restriction on who may be designated beneficiary in a registration in beneficiary form.

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-304.

72-6-305. Form of registration in beneficiary form.

Official Comments

The abbreviation POD is included for use without regard for whether the subject is a money claim against an issuer, such as its own note or bond for money loaned, or is a claim to securities evidenced by conventional title documentation. The use of POD in a registration in beneficiary form of shares in an investment company should not be taken as a signal that the investment is to be sold or redeemed on the owner's death so that the sums realized may be "paid" to the death beneficiary. Rather, only a transfer on death, not a liquidation on death, is indicated. The committee would have used only the abbreviation TOD except for the familiarity, rooted in experience with certificates of deposit and other deposit accounts in banks, with the abbreviation POD as signalling a valid nonprobate death benefit or transfer on death.

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-305.

72-6-306. Effect of registration in beneficiary form.

Official Comments

This section simply affirms the right of a sole owner, or the right of all multiple owners, to end a TOD beneficiary registration without the assent of the beneficiary. The section says nothing about how a TOD beneficiary designation may be canceled, meaning that the registering entity's terms and conditions, if any, may be relevant. See Section 6-310 [72-6-310]. If the terms and conditions have nothing on the point, cancellation of a beneficiary designation presumably would be effected by a reregistration showing a different beneficiary or omitting reference to a TOD beneficiary.

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-306.

72-6-307. Ownership on death of owner.

Official Comments

Even though multiple owners holding in the beneficiary form here authorized hold with right of survivorship, no survivorship rights attend the positions of multiple beneficiaries who become entitled to securities by reason of having survived the sole owner or the last to die of multiple owners. Issuers (and registering entities) who decide to accept registrations in beneficiary form involving more than one primary beneficiary also should provide by rule whether fractional shares will be registered in the names of surviving beneficiaries where the number of shares held by the deceased owner does not divide without remnant among the survivors. If fractional shares are not desired, the issuer may wish to provide for sale of odd shares and division of proceeds, for an uneven distribution with the first or last named to receive the odd share, or for other resolution. Section 6-308 [72-6-308] deals with whether intermediaries have any obligation to offer beneficiary registrations of any sort; Section 6-310 [72-6-310] enables issuers to adopt terms and conditions controlling the details of applications for registrations they decide to accept and procedures for implementing such registrations after an owner's death.

The reference to surviving, multiple TOD beneficiaries as tenants in common is not intended to suggest that a registration form specifying unequal shares, such as "TOD A (20%), B (30%), C (50%)," would be improper. Though not included in the beneficiary forms described for illustrative purposes in Section 6-310 [72-6-310], the part enables a registering entity to accept and implement a TOD beneficiary designation like the one just suggested. If offered, such a registration form should be implemented by registering entity terms and conditions providing for disposition of the share of a beneficiary who predeceases the owner when two or more of a group of multiple beneficiaries survive the owner. For example, the terms might direct the share of the predeceased beneficiary to the survivors in the proportion that their original shares bore to each other. Unless unequal shares are specified in a registration in beneficiary form designating multiple beneficiaries, the shares of the beneficiaries would, of course, be equal.

The statement that a security registered in beneficiary form is in the deceased owner's estate when no beneficiary survives the owner is not intended to prevent application of any anti-lapse statute that might direct a nonprobate transfer on death to the surviving issue of a beneficiary who failed to survive the owner. Rather, the statement is intended only to indicate that the registering entity involved should transfer or reregister the security as directed by the decedent's personal representative.

See the Comment to Section 6-301 [72-6-301] regarding the meaning of "survive" for purposes of this part.

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-307.

72-6-308. Protection of registering entity.

Official Comments

It is to be noted that the "request" for a registration in beneficiary form may be in any form chosen by a registering entity. This part does not prescribe a particular form and does not impose record-keeping requirements. Registering entities' business practices, including any industry standards or rules of transfer agent associations, will control.

The written notice referred to in subsection (c) [72-6-308(3)] would qualify as a notice under UCC § 8-403 [30-8-403, now repealed].

"Good faith" as used in this section is intended to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade," as specified in UCC § 2-103(1)(b) [30-2-103(1)(b)].

The protections described in this section are designed to meet any questions regarding registering entity protection that may not be foreclosed by issuer protections provided in the Uniform Commercial Code [Title 30, chapters 1 through 8 and 9A]. Because persons interested in this part may wish to be reminded of relevant UCC provisions, a brief summary follows.

"U.C.C. § 8-403 [30-8-403, now repealed], 'Issuer's Duty as to Adverse Claims' contains detailed provisions regarding duties of inquiry by an issuer of a certificated or uncertificated security who is requested to effect a transfer, and the availability and use of 30 day notices to force adverse claimants to start litigation if further delay in transfer is desired. U.C.C. § 8-201's [30-8-201, now repealed] definition of 'issuer' for purposes of 'registration of transfer...' is simply 'a person on whose behalf transfer books are maintained'. U.C.C. § 8-403 [30-8-403, now repealed] is among the sections dealing with registration of transfers.

"U.C.C. sections 8-308 [30-8-308, now repealed] and 8-404(1) [30-8-404(1), now repealed] appear to exonerate an issuer who acts in response to transfer directions signalled by the 'necessary indorsement' on or with a certificated security or in response to 'an instruction originated by an appropriate person' in the case of an uncertificated security. Section 8-308 [30-8-308, now repealed] describes the meaning of 'appropriate person' in the case of a certificated security as 'the person specified by the certificated security . . . to be entitled to the security.' U.C.C. § 8-308(6) (1978) [30-8-308(6), now repealed]. In the case of an uncertificated security, 'appropriate person' means the 'registered owner.' *Id.* § 8-308(7) [30-8-308(7), now repealed]. The survivor of owners listed as joint tenants with right of survivorship is specifically defined as an authorized person. *Id.* § 8-308(8)(d) [30-8-308(8)(d), now repealed]. The U.C.C. aspect of the problem could be met by an additional sub-paragraph to section 8-308(8) [30-8-308(8), now repealed] that would include a TOD beneficiary as an 'appropriate person' when the beneficiary has survived the owner.

"No U.C.C. addition would be necessary if a TOD beneficiary designation were viewed as a contingent order for transfer at the owner's death that may be safely implemented as a direction from the owner as an 'authorized person.' The owner's death before completion of the transfer would not pose U.C.C. problems because section 8-308(10) [30-8-308(10), now repealed] provides: 'Whether the person signing is appropriate is determined as of the date of signing and an indorsement made by or an instruction originated by him does not become unauthorized for the purposes of this Article by virtue of any subsequent change of circumstances.'

"It might be questioned whether a TOD direction, which may be revoked before it is carried into effect and is also contingent on the beneficiary's survival of the registrant, is within the transfer directions contemplated by the U.C.C. framers for purposes of issuer protection. However, since section 8-202 [30-8-202, now repealed] explicitly protects issuers against problems arising because of restrictions or conditions on transfers, only the novelty of revocable directions for transfer on death gives pause.

"In general, article 8 of the U.C.C. [Title 30, chapter 8] reflects a careful attempt to protect implementation of a wide range of transfer instructions so long as the signatures are genuine and are those of owners acting in conformity with duly imposed rules of the issuer organization. . . . Hence, existing U.C.C. protections should be adequate, . . ."

Wellman, Transfer-On-Death Securities Registration: A New Title Form, 21 Ga. L. Rev. 789, 823 n.90 (1987).

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-308.

72-6-309. Nontestamentary transfer on death.

Official Comments

Subsection (a) [72-6-309(1)] is comparable to UPC § 6-214 [72-6-214]. Subsection (b) [72-6-309(2)] is similar to UPC § 6-101(b) [72-6-111(2)].

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-309.

72-6-310. Terms, conditions, and forms for registration.

Official Comments

Use of "and" or "or" between the names of persons registered as co-owners is unnecessary under this part [Title 72, chapter 6, part 3] and should be discouraged. If used, the two words should have the same meaning insofar as concerns a title form; *i.e.*, that of "and" to indicate that both named persons own the asset.

Descendants of a named beneficiary who take by virtue of a "LDPS" designation appended to a beneficiary's name take as TOD beneficiaries rather than as intestate successors. If no descendant of a predeceased primary beneficiary survives the owner, the security passes as a part of the owner's estate as provided in Section 6-307 [72-6-307].

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-310.

72-6-311. Application of part.

Official Comments

Section 6-311 [72-6-311] is an optional provision that may be particularly useful in a state that has previously enacted the Uniform Probate Code, since the general effective date and transitional provisions of UPC § 8-101 [not adopted in Montana] are not expressly adapted for the addition of this part. A state newly enacting the Uniform Probate Code, including this part [Title 72, chapter 6, part 3], may find that general Section 8-101 [not adopted in Montana] is adequate for this purpose and addition of optional Section 6-311 [72-6-311] unnecessary.

Compiler's Comments

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

UPC Section: The corresponding section in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 6-311.

Part 4
Uniform Real Property Transfer on Death Act

Part Compiler's Comments

Effective Date: This part is effective October 1, 2019.

Applicability: Section 85, Ch. 313, L. 2019, provided that this part applies to a transfer on death deed made before, on, or after October 1, 2019, by a transferor dying on or after October 1, 2019.

72-6-412. Effect of transfer on death deed at transferor's death.

Compiler's Comments

2021 Amendment: Chapter 143 in (1) after "the transfer on death deed, in" inserted "72-2-712, 72-2-716, 72-2-813, 72-2-814". Amendment effective October 1, 2021.

72-6-415. Optional form of transfer on death deed.

Compiler's Comments

2021 Amendment: Chapter 143 in front of form near end and above "Signature" deleted "[(SEAL)]" in two places. Amendment effective October 1, 2021.

72-6-416. Optional form of revocation.

Compiler's Comments

2021 Amendment: Chapter 143 in front of form near end and above "Signature" deleted "[(SEAL)]" in two places. Amendment effective October 1, 2021.

CHAPTER 7
UNIFORM POWERS OF APPOINTMENT ACT

Chapter Official Comments

PREFATORY NOTE

Professor W. Barton Leach described the power of appointment as "the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out." 24 A.B.A. J. 807 (1938). Powers of appointment are routinely included in trusts to add flexibility to the arrangement.

A power of appointment is the authority, acting in a nonfiduciary capacity, to designate recipients of beneficial ownership interests in, or powers of appointment over, the appointive property. An owner, of course, has this authority with respect to the owner's property. By creating a power of appointment, the owner typically confers this authority on someone else.

The power of appointment is a staple of modern estate-planning practice. However, many jurisdictions within the United States have very little statutory or case law on powers of appointment.

A comprehensive restatement of the law of powers of appointment was approved in 2010 and published in 2011 by the American Law Institute. See chapters 17-23 of the Restatement Third of Property: Wills and Other Donative Transfers.

This act draws heavily on that Restatement. The aim of this act is to codify the law of powers of appointment, or at least the portions of the law that are most amenable to codification.

The act is divided into six articles. Article 1 [Title 72, ch. 7, pt. 1] contains general provisions. Article 2 [Title 72, ch. 7, pt. 2] contains provisions concerning the creation, revocation, and amendment of a power of appointment. Article 3 [Title 72, ch. 7, pt. 3] addresses the exercise of a power of appointment. Article 4 [Title 72, ch. 7, pt. 4] contains provisions on the disclaimer or release of a power of appointment and on contracts to appoint or not to appoint. Article 5 [Title 72, ch. 7, pt. 5] concerns the rights of the powerholder's creditors in appointive property. Article 6 [Title 72, ch. 7, pt. 6] contains miscellaneous provisions.

After each section, there is a detailed Comment. The Comments explain, and should be read in conjunction with, the statutory text. The Comments also provide information and guidance about best practices in creating and exercising powers of appointment.

Chapter Compiler's Comments

Effective Date: This chapter is effective October 1, 2015.

Part 1
General Provisions

72-7-101. Short title.

Official Comments

Paragraph (1) [72-7-102(1)] defines an appointee as the person to which a powerholder makes an appointment of appointive property. For the definition of the related term, "permissible appointee," see paragraph 11 [72-7-102(11)].

Paragraph (2) [72-7-102(2)] defines appointive property as the property or property interest subject to a power of appointment. The effective creation of a power of appointment requires that there be appointive property. See Section 201 [72-7-201].

Paragraphs (3) [72-7-102(3)] and (17) [72-7-102(16)] introduce the distinction between blanket-exercise and specific-exercise clauses. A specific-exercise clause exercises and specifically refers to the particular power of appointment in question, using language such as the following: "I exercise the power of appointment conferred upon me by my father's will as follows: I appoint [fill in details of appointment]." In contrast, a blanket-exercise clause exercises "any" power of appointment the powerholder may have, appoints "any" property over which the powerholder may have a power of appointment, or disposes of all property subject to disposition by the powerholder. The use of specific-exercise clauses is encouraged; the use of blanket-exercise clauses is discouraged. See Section 301 [72-7-301] and the accompanying Comment.

Paragraphs (4) and (14) [72-7-102(4) and (14)] define the donor and the powerholder. The donor is the person who created the power of appointment. The powerholder is the person in whom the power of appointment was conferred or in whom the power was reserved. The traditional, but potentially confusing, term for powerholder is "donee." See Restatement of Property § 319 (1940); Restatement Second of Property: Donative Transfers § 11.2 (1986); Restatement Third of Property: Wills and Other Donative Transfers § 17.2 (2011). In the case of a reserved power, the same person is both the donor and the powerholder.

Paragraph (5) [72-7-102(5)] introduces the distinction between exclusionary and nonexclusionary powers of appointment. An exclusionary power is one in which the donor has authorized the powerholder to appoint to any one or more of the permissible appointees to the exclusion of the other permissible appointees. For example, a power to appoint "to such of my descendants as the powerholder may select" is exclusionary, because the powerholder may appoint to any one or more of the donor's descendants to the exclusion of the other descendants. In contrast, a nonexclusionary power is one in which the powerholder cannot make an appointment that excludes any permissible appointee, or one or more designated permissible appointees, from a share of the appointive property. An example of a nonexclusionary power is a power "to appoint to all and every one of my children in such shares and proportions as the powerholder shall select." Here, the powerholder is not under a duty to exercise the power; but, if the powerholder does exercise the power, the appointment must abide by the power's nonexclusionary nature. See Sections 301 and 305 [72-7-301 and 72-7-305]. An instrument creating a power of appointment is construed as creating an exclusionary power unless the terms of the instrument manifest a contrary intent. See Section 203 [72-7-203]. The typical power of appointment is exclusionary. And in fact, only a power of appointment whose permissible appointees are "defined and limited" can be nonexclusionary. For elaboration of the well-accepted term of art "defined and limited," see Section 205 [72-7-205] and the accompanying Comment.

Paragraphs (6) and (10) [72-7-102(6) and (10)] explain the distinction between general and nongeneral powers of appointment. A general power of appointment enables the powerholder to exercise the power in favor of one or more of the following: the powerholder, the powerholder's estate, the creditors of the powerholder, or the creditors of the powerholder's estate, regardless of whether the power is also exercisable in favor of others. A nongeneral power of appointment—sometimes called a "special" power of appointment—cannot be exercised in favor of the powerholder, the powerholder's estate, the creditors of the powerholder, or the creditors of the powerholder's estate. Estate planners often classify nongeneral powers as being either "broad" or "limited," depending on the range of permissible appointees. A power to appoint to anyone in the world except the powerholder, the powerholder's estate, and the creditors of either would be an example of a broad nongeneral power. In contrast, a power in the donor's spouse to appoint among the donor's descendants would be an example of a limited nongeneral power.

An instrument creating a power of appointment is construed as creating a general power unless the terms of the instrument manifest a contrary intent. See Section 203 [72-7-203]. A power to revoke, amend, or withdraw is a general power of appointment if it is exercisable in favor of the powerholder, the powerholder's estate, or the creditors of either. If the settlor of a trust empowers a trustee or another person to change a power of appointment from a general power into a nongeneral power, or vice versa, the power is either general or nongeneral depending on the scope of the power at any particular time.

Paragraph (7) [72-7-102(7)] defines the gift-in-default clause. In an instrument creating a power of appointment, the clause that identifies the taker in default is called the gift-in-default clause. A gift-in-default clause is not mandatory but is included in a well-drafted instrument.

Paragraphs (8) and (11) [72-7-102(8) and (11)] explain the distinction between impermissible and permissible appointees. The permissible appointees—known at common law as the "objects"—of a power of appointment may be narrowly defined (for example, "to such of the powerholder's descendants as the powerholder may select"), broadly defined (for example, "to such persons as the powerholder may select, except the powerholder, the powerholder's estate, the powerholder's creditors, or the creditors of the powerholder's estate"), or unlimited (for example, "to such persons as the powerholder may select"). A permissible appointee of a power of appointment does not, in that capacity, have a property interest that can be transferred to another. Otherwise, a permissible appointee could transform an impermissible appointee into a permissible appointee, exceeding the intended scope of the power and thereby violating the donor's intent. An appointment cannot benefit an impermissible appointee. See Section 307 [72-7-307].

Paragraph (9) [72-7-102(9)] defines the term "instrument" as either a writing or a record, depending on the choice made by the enacting jurisdiction. The drafting committee had no clear preference between the two options. Interestingly, there is no pre-existing Uniform Law definition of "instrument" outside the commercial context. See Uniform Commercial Code §§ 3-104(b), 9-102(a)(47) [30-3-104(2), 30-9A-102(1)(uu)(i) and (ii)]. The term is used without definition in, for example, the Uniform Probate Code, the Uniform Trust Code, and the Uniform Power of Attorney Act.

Paragraphs (12) [72-7-102(12)] and (16) [not adopted in Montana] contain the definitions of "person" and "record". With one exception, these are standard definitions approved by the Uniform Law Commission. The exception is that the word "trust" has been added to the definition of "person". Trust law in the United States is moving in the direction of viewing the trust as an entity, see Restatement Third of Trusts Introductory Note to Chapter 21, but does not yet do so.

Paragraph (13) [72-7-102(13)] defines a power of appointment. A power of appointment is a power enabling the powerholder, acting in a nonfiduciary capacity, to designate recipients of ownership interests in or powers of appointment over the appointive property. (Powers held in a fiduciary capacity, such a trustee's power to "decant" property from one trust to another, are the subject of other uniform legislation.)

A power to revoke or amend a trust or a power to withdraw income or principal from a trust is a power of appointment, whether the power is reserved by the transferor or conferred on another. See Restatement Third of Trusts § 56, Comment b. A power to withdraw income or principal subject to an ascertainable standard is a postponed power, exercisable upon the satisfaction of the ascertainable standard. See the Comment to paragraph (15) [72-7-102(15)], below.

A power to direct a trustee to distribute income or principal to another is a power of appointment.

In this act, a fiduciary distributive power is not a power of appointment. Fiduciary distributive powers include a trustee's power to distribute principal to or for the benefit of an income beneficiary, or for some other individual, or to pay income or principal to a designated beneficiary, or to distribute income or principal among a defined group of beneficiaries. Unlike the exercise of a power of appointment, the exercise of a fiduciary distributive power is subject to fiduciary standards. Unlike a power of appointment, a fiduciary distributive power does not lapse upon the death of the fiduciary, but survives in a successor fiduciary. Nevertheless, a fiduciary distributive power, like a power of appointment, cannot be validly exercised in favor of or for the benefit of someone who is not a permissible appointee.

A power over the management of property, sometimes called an administrative power, is not a power of appointment. For example, a power of sale coupled with a power to invest the proceeds of the sale, as commonly held by a trustee of a trust, is not a power of appointment but is an administrative power. A power of sale merely authorizes the person to substitute money for the property sold but does not authorize the person to alter the beneficial interests in the substituted property.

A power to designate or replace a trustee or other fiduciary is not a power of appointment. A power to designate or replace a trustee or other fiduciary involves property management and is a power to designate only the nonbeneficial holder of property.

A power of attorney is not a power of appointment. See Restatement of Property § 318, Comment h: "A power of attorney, in the commonest sense of that term, creates the relationship of principal and agent ... and is terminated by the death of the [principal]. In both of these characteristics such a power differs from a power of appointment. The latter does not create an agency relationship and, except in the case of a power reserved in the donor, it is usually expected that it will be exercised after the donor's death." The distinction is carried forward in Restatement Third of Property: Wills and Other Donative Transfers § 17.1, Comment j. See also Uniform Power of Attorney Act §§ 102(7) [72-31-302(7)] (defining the holder of a power of attorney as an agent), 110(a)(1) [72-31-310(1)(a)] (providing that the principal's death terminates a power of attorney).

A power to create or amend a beneficiary designation, for example with respect to the proceeds of a life insurance policy or of a pension plan, is not a power of appointment. An instrument creating a power of appointment must, among other things, transfer the appointive property. See Section 201 [72-7-201]; Restatement Third of Property: Wills and Other Donative Transfers § 18.1.

On the authority of a powerholder to exercise the power of appointment by creating a new power of appointment, see Section 305 [72-7-305]. If a powerholder exercises a power by creating another power, the powerholder of the first power is the donor of the second power, and the powerholder of the second power is the appointee of the first power.

Paragraph (15) [72-7-102(15)] introduces the distinctions among powers of appointment based upon when the power can be exercised. (A power is exercised when the instrument of exercise is effective. Thus, a power exercised by deed is exercised when the deed is effective. The law of deeds typically requires, among other things, intent, delivery, and acceptance. A power exercised by will is exercised when the will is effective—at the testator's death, not when the will is executed.)

There are three categories here: a power of appointment is presently exercisable, postponed, or testamentary.

A power of appointment is presently exercisable if it is exercisable at the time in question. Typically, a presently exercisable power of appointment is exercisable at the time in question during the powerholder's life and also at the powerholder's death, e.g., by the powerholder's will. Thus, a power of appointment that is exercisable "by deed or will" is a presently exercisable power. To take another example, a power of appointment exercisable by the powerholder's last unrevoked instrument in writing is a presently exercisable power, because the powerholder can make a present exercise irrevocable by explicitly so providing in the instrument exercising the power. See Restatement Third of Property: Wills and Other Donative Transfers § 17.4, Comment a.

A power of appointment is presently exercisable even though, at the time in question, the powerholder can only appoint an interest that is revocable or subject to a condition. For example, suppose that a trust directs the trustee to pay the income to the powerholder for life, then to distribute the principal by representation to the powerholder's surviving descendants. The trust further provides that, if the powerholder leaves no surviving descendants, the principal is to be distributed "to such individuals as the powerholder shall appoint." The powerholder has a presently exercisable power of appointment, but the appointive property is a remainder interest that is conditioned on the powerholder leaving no surviving descendants.

A power is a postponed power—sometimes known as a deferred power—if it is not yet exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified time. A postponed power becomes presently exercisable upon the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified time. The second sentence in paragraph (15) [72-7-102(15)] is modeled on Uniform Power of Attorney Act § 102(8).

A power is testamentary if it is not exercisable during the powerholder's life but only in the powerholder's will or in a nontestamentary instrument that is functionally similar to the powerholder's will, such as the powerholder's revocable trust that remains revocable until the powerholder's death. On the ability of a powerholder to exercise a testamentary power of appointment in such a revocable trust, see Section 304 [72-7-304] and the accompanying Comment. See also Restatement Third of Property: Wills and Other Donative Transfers § 19.9, Comment b.

Paragraph (18) [72-7-102(17)] defines a taker in default of appointment. A taker in default of appointment—often called the "taker in default" —has a property interest that can be transferred to another. If a taker in default transfers the interest to another, the transferee becomes a taker in default.

Paragraph (19) [72-7-102(18)] defines the "terms of the instrument" as the manifestation of the intent of the maker of the instrument regarding the instrument's provisions as expressed in the instrument or as may be established by other evidence that would be admissible in a legal proceeding. The maker of an instrument creating a power of appointment is the donor. The maker of an instrument exercising a power of appointment is the powerholder. This definition is a slightly modified version of the definition of "terms of a trust" in Uniform Trust Code § 103(18) [72-38-103(21)].

The definitions in this section are substantially consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 17.1 to 17.5 and the accompanying Commentary.

72-7-103. Governing law.

Official Comments

This section provides default rules for determining the law governing the creation and exercise of, and related matters concerning, a power of appointment.

Unless the terms of the instrument creating the power provide otherwise, the actions of the donor—the creation, revocation, or amendment of the power—are governed by the law of the donor's domicile; and the actions of the powerholder—the exercise, release, or disclaimer, or the revocation or amendment thereof—are governed by the law of the powerholder's domicile.

In each case, the domicile is determined at the relevant time. For example, a donor's creation of a power is governed by the law of the donor's domicile at the time of the power's creation; and a donor's amendment of a power is governed by the law of the donor's domicile at the time of the amendment. Similarly, a powerholder's exercise of a power is governed by the law of the powerholder's domicile at the time of the exercise.

The standard "public policy" rules of choice of law naturally continue to apply. See, for example, Restatement Second of Conflict of Laws § 187.

Paragraph (2) [72-7-103(2)] is a departure from older law. The older position was that the law of the donor's domicile governs acts both of the donor (such as the creation of the power) and of the powerholder (such as the exercise of the power). See, e.g., Beals v. State Street Bank & Trust Co., 326 N.E.2d 896 (Mass. 1975); Bank of New York v. Black, 139 A.2d 393 (N.J. 1958).

Paragraph (2) [72-7-103(2)] adopts the modern view that acts of the powerholder should be governed by the law of the powerholder's domicile, because that is the law the powerholder (or the powerholder's lawyer) is likely to know. This approach is supported by Restatement Third of Property: Wills and Other Donative Transfers § 19.1, Comment e; Restatement Second of Conflict of Laws § 275, Comment c. It is also supported by Estate of McMullin, 417 A.2d 152 (Pa. 1980); White v. United States, 680 F.2d 1156 (7th Cir. 1982).

See generally, Restatement Third of Property: Wills and Other Donative Transfers § 19.1, Comment e; Restatement Second of Conflict of Laws § 275, Comment c.

72-7-104. Common law and principles of equity.

Official Comments

This act codifies those portions of the law of powers of appointment that are most amenable to codification. The act is supplemented by the common law and principles of equity. To determine the common law and principles of equity in a particular state, a court might look first to prior case law in the state and to more general sources, such as the Restatement Third of Property: Wills and Other Donative Transfers. The common law is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. It also includes the traditional and broad equitable jurisdiction of the court, which the act in no way restricts.

The statutory text of the act is also supplemented by these Comments, which, like the Comments to any Uniform Act, may be relied on as a guide for interpretation. See Stern Oil Co. v. Brown, 817 N.W.2d 395 (S.D. 2012) (interpreting Uniform Commercial Code); Isbell v. Commercial Investment Associates, Inc., 644 S.E.2d 72 (Va. 2007) (interpreting Uniform Residential Landlord Tenant Act); Yale University v. Blumenthal, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act); GMAC v. Anaya, 703 P.2d 169, 172 (N.M. 1985) (interpreting Uniform Commercial Code and describing the Comments as "persuasive" though "not binding"); Jack Davies, Legislative Law and Process in a Nutshell § 59-4 (3d ed. 2007).

The text of and Comment to this section are based on Uniform Trust Code § 106 [72-38-106] and its accompanying Comment.

Part 2
Creation, Revocation, and Amendment of Power of Appointment

72-7-201. Creation of power of appointment.

Official Comments

An instrument can only create a power of appointment if, under applicable law, the instrument itself is valid (or partially valid, see the next paragraph). Thus, for example, a will creating a power of appointment must be valid under the law—including choice of law (see Section 103 [72-7-103])—applicable to wills. An inter vivos trust creating a power of appointment must be valid under the law—including choice of law (see Section 103 [72-7-103])—applicable to inter vivos trusts. In part, this requirement of validity means that the instrument must be properly executed to the extent other law imposes requirements of execution. In addition, the creator of the instrument must have the capacity to execute the instrument and be free from undue influence and other wrongdoing. On questions of capacity, see Restatement Third of Property: Wills and Other Donative Transfers §§ 8.1 (Mental Capacity) and 8.2 (Minority). On freedom from undue influence and other wrongdoing, see, e.g., Restatement Third of Property §§ 8.3 (Undue Influence, Duress, or Fraud). The ability of an agent or guardian to create a power of appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act [Title 72, ch. 31, pt. 3] or the Uniform Guardianship and Protective Proceedings Act [Title 72, ch. 5, pt. 6].

The instrument need not be entirely valid. A partially valid instrument creates a power of appointment if the provisions creating the power are valid.

In addition to being valid in the relevant provisions, an instrument creating a power of appointment must transfer the appointive property. The creation of a power of appointment—unlike the creation of a power of attorney—requires a transfer. See Restatement Third of Property: Wills and Other Donative Transfers § 18.1 ("A power of appointment is created by a transfer that manifests an intent to create a power of appointment."). The term "transfer" includes a declaration by an owner of property that the owner holds the property as trustee. Such a declaration necessarily entails a transfer of legal title from the owner-as-owner to the owner-as-trustee; it also entails a transfer of all or some of the equitable interests in the property from the owner to the trust's beneficiaries. See Restatement Third of Property: Wills and Other Donative Transfers § 7.1, Comment a.

The requirement of a transfer presupposes that the donor has the right to transfer the property. An ordinary individual cannot create a power of appointment over the Brooklyn Bridge. Less fancifully, a donor cannot create a power of appointment if doing so would circumvent a valid restriction on the transfer of the property. For example, interests in unincorporated business organizations may have transfer restrictions arising from statute, contract, or both. A donor cannot use the creation of a power of appointment to circumvent a valid restriction on transfer.

The one exception to the requirement of a transfer is stated in subsection (b) [72-7-201(2)]: by necessity, the requirement of a transfer does not apply to the creation of a power of appointment by the exercise of a power of appointment. On the ability of a powerholder to exercise the power by creating a new power of appointment, see Section 305 [72-7-305].

In addition to the aforementioned requirements, an instrument creating a power of appointment must manifest the donor's intent to create in one or more powerholders a power of appointment over appointive property. This manifestation of intent does not require the use of particular words or phrases (such as "power of appointment"), but careful drafting should leave no doubt about the transferor's intent.

Sometimes the instrument is poorly drafted, raising the question whether the donor intended to create a power of appointment. In such a case, determining the donor's intent is a process of construction. On construction generally, see Chapters 10, 11, and 12 of the Restatement Third of Property: Wills and Other Donative Transfers. See also, more specifically, Restatement Third of Property: Wills and Other Donative Transfers § 18.1, Comments b-g, containing many illustrations of language ambiguous about whether a power of appointment was intended and, for each illustration, offering guidance about how to construe the language.

The creation of a power of appointment requires that there be a donor, a powerholder (who may be the same as the donor), and appointive property. There must also be one or more permissible appointees, though these need not be restricted; a powerholder can be authorized to appoint to anyone. A donor is not required to designate a taker in default of appointment, although a well-drafted instrument will specify one or more takers in default.

Subsection (c) [72-7-201(3)] states the well-accepted rule that a power of appointment cannot be created in an individual who is deceased. If the powerholder dies before the effective date of an instrument purporting to confer a power of appointment, the power is not created, and an attempted exercise of the power is ineffective. (The effective date of a power of appointment created in a donor's will is the donor's death, not when the donor executes the will. The effective date of a power of appointment created in a donor's inter vivos trust is the date the trust is established, even if the trust is revocable. See Restatement Third of Property: Wills and Other Donative Transfers § 19.11, Comments b and c.)

Nor is a power of appointment created if all the possible permissible appointees of the power are deceased when the transfer that is intended to create the power becomes legally operative. If all the possible permissible appointees of a power die after the power is created and before the powerholder exercises the power, the power terminates.

A power of appointment is not created if the permissible appointees are so indefinite that it is impossible to identify any person to whom the powerholder can appoint. If the description of the permissible appointees is such that one or more persons are identifiable, but it is not possible to determine whether other persons are within the description, the power is validly created, but an appointment can only be made to persons who can be identified as within the description of the permissible appointees.

Subsection (d) [72-7-201(4)] explains that a power of appointment can be conferred on an unborn or unascertained powerholder, subject to any applicable rule against perpetuities. This is a postponed power. The power arises on the powerholder's birth or ascertainment. The language creating the power as well as other factors such as the powerholder's capacity under applicable law determine whether the power is then presently exercisable, postponed, or testamentary.

The rules of this section are consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 18.1 and 19.9 and the accompanying Commentary.

72-7-202. Nontransferability.

Official Comments

A power of appointment is nontransferable. The powerholder may not transfer the power to another person. (On the ability of the powerholder to exercise the power by conferring on a permissible appointee a new power of appointment over the appointive property, see Section 305 [72-7-305].) If the powerholder dies without exercising or releasing the power, the power lapses. (If a power is held by multiple powerholders, which is rare, on the death of one powerholder that individual's power lapses but the power continues to be held by the surviving powerholders.) If the powerholder partially releases the power and dies without exercising the remaining part, the unexercised part of the power lapses. The power does not pass through the powerholder's estate to the powerholder's successors in interest.

The ability of an agent or guardian to create, revoke, exercise, or revoke the exercise of a power of appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act [Title 72, ch. 31, pt. 3] or the Uniform Guardianship and Protective Proceedings Act [Title 72, ch. 5, pt. 6].

The rule of this section is consistent with, and this Comment draws on, the Restatement Third of Property: Wills and Other Donative Transfers § 17.1, Comment b.

72-7-203. Presumption of unlimited authority.

Official Comments

In determining which type of power of appointment is created, the general principle of construction, articulated in this section, is that a power falls into the category giving the powerholder the maximum discretionary authority except to the extent the terms of the instrument creating the power restrict the powerholder's authority. Maximum discretion confers on the powerholder the flexibility to alter the donor's disposition in response to changing conditions.

In accordance with this presumption of unlimited authority, a power is general unless the terms of the creating instrument specify that the powerholder cannot exercise the power in favor of the powerholder, the powerholder's estate, or the creditors of either. A power is presently exercisable unless the terms of the creating instrument specify that the power can only be exercised at some later time or in some document such as a will that only takes effect at some later time. A power is exclusionary unless the terms of the creating instrument specify that a permissible appointee must receive a certain amount or portion of the appointive assets if the power is exercised.

This general principle of construction applies, unless the terms of the instrument creating the power of appointment provide otherwise. A well-drafted instrument intended to create a nongeneral or testamentary or nonexclusionary power will use clear language to achieve the desired objective. Not all instruments are well-drafted, however. A court may have to construe the terms of the instrument to discern the donor's intent. For principles of construction applicable to the creation of a power of appointment, see Restatement Third of Property: Wills and Other Donative Transfers Chapters 17 and 18, and the accompanying Commentary, containing many examples.

72-7-204. Exception to presumption of unlimited authority.

Official Comments

This section is designed to remedy a recurring drafting mistake. A testamentary power of appointment created in a defined and limited class that happens to include the powerholder is usually intended to be a nongeneral power. For example, a testamentary power created in one of the donor's descendants (such as the donor's child or grandchild) to appoint among the donor's "descendants" or "issue" is typically intended to be a nongeneral power. See, for example, PLR 201229005 (stating the ruling of the Internal Revenue Service that a testamentary power of appointment in the donor's son, exercisable in favor of the donor's "issue," is a nongeneral power for purposes of 26 U.S.C. § 2041). Accordingly, the presumption of this Section is that such a power is nongeneral.

On the meaning of the well-accepted term of art "defined and limited," see the Comment to Section 205 [72-7-205]. See also Restatement Third of Property: Wills and Other Donative Transfers § 17.5, Comment c.

72-7-205. Rules of classification.

Official Comments

Subsection (b) [72-7-205(2)] states a well-accepted and mandatory exception to the presumption of unlimited authority articulated in Section 203 [72-7-203]. If a power of appointment can be exercised only with the consent or joinder of an adverse party, the power is not a general power. An adverse party is an individual who has a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power in favor of the powerholder, the powerholder's estate, or the creditors of either. In this context, the word "substantial" is not subject to precise definition but must be determined in light of all the facts and circumstances. Consider the following examples.

Example 1. D transferred property in trust, directing the trustee "to pay the income to D's son S for life, remainder in corpus to such person or persons as S, with the joinder of X, shall appoint; in default of appointment, remainder to X." S's power is not a general power because X meets the definition of an adverse party.

Example 2. Same facts as Example 1, except that S's power is exercisable with the joinder of Y rather than with the joinder of X. Y has no property interest that could be adversely affected by the exercise of the power. Because Y is not an adverse party, S's power is general.

Whether the party whose consent or joinder is required is adverse or not is determined at the time in question. Consider the following example.

Example 3. Same facts as Example 2, except that, one month after D's creation of the trust, X transfers the remainder interest to Y. Before the transfer, Y is not an adverse party and S's power is general. After the transfer, Y is an adverse party and S's power is nongeneral.

Subsection (c) [72-7-205(3)] also states a longstanding mandatory rule. Only a power of appointment whose permissible appointees are defined and limited can be nonexclusionary. "Defined and limited" in this context is a well-accepted term of art. For elaboration and examples, see Restatement Third of Property: Wills and Other Donative Transfers § 17.5, Comment c. In general, permissible appointees are "defined and limited" if they are defined and limited to a reasonable number. Typically, permissible appointees who are defined and limited are described in class-gift terms: a single-generation class such as "children," "grandchildren," "brothers and sisters," or "nieces and nephews," or a multiple-generation class such as "issue" or "descendants" or "heirs." Permissible appointees need not be described in class-gift terms to be defined and limited, however. The permissible appointees are also defined and limited if one or more permissible appointees are designated by name or otherwise individually identified.

If the permissible appointees are not defined and limited, the power is exclusionary irrespective of the donor's intent. A power exercisable, for example, in favor of "such person or persons other than the powerholder, the powerholder's estate, the creditors of the powerholder, and the creditors of the powerholder's estate" is an exclusionary power. An attempt by the donor to require the powerholder to appoint at least $X to each permissible appointee of the power is ineffective, because the permissible appointees of the power are so numerous that it would be administratively impossible to carry out the donor's expressed intent. The donor's expressed restriction is disregarded, and the powerholder may exclude any one or more of the permissible appointees in exercising the power.

In contrast, a power to appoint only to the powerholder's creditors or to the creditors of the powerholder's estate is a power in favor of a defined and limited class. Such a power could be nonexclusionary if, for example, the terms of the instrument creating the power provide that the power is a power to appoint "to such of the powerholder's estate creditors as the powerholder shall by will appoint, but if the powerholder exercises the power, the powerholder must appoint $X to a designated estate creditor or must appoint in full satisfaction of the powerholder's debt to a designated estate creditor."

If a power is determined to be nonexclusionary, it is to be inferred that the donor intends to require an appointment to confer a reasonable benefit upon each mandatory appointee. An appointment under which a mandatory appointee receives nothing, or only a nominal sum, violates this requirement and is forbidden. This doctrine is known as the doctrine forbidding illusory appointments. For elaboration, see Restatement Third of Property: Wills and Other Donative Transfers § 17.5, Comment j.

The terms of the instrument creating a power of appointment sometimes provide that no appointee shall receive any share in default of appointment unless the appointee consents to allow the amount of the appointment to be taken into account in calculating the fund to be distributed in default of appointment. This "hotchpot" language is used to minimize unintended inequalities of distribution among permissible appointees. Such a clause does not make the power nonexclusionary, because the terms do not prevent the powerholder from making an appointment that excludes a permissible appointee. See Restatement Third of Property: Wills and Other Donative Transfers § 17.5, Comment k.

The rules of this section are consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 17.3 to 17.5 and the accompanying Introductory Note and Commentary.

72-7-206. Power to revoke or amend.

Official Comments

The donor of a power of appointment has the authority to revoke or amend the power only to the extent the instrument creating the power is revocable by the donor or the donor reserves a power of revocation or amendment in the instrument creating the power.

For example, the donor's power to revoke or amend a revocable inter vivos trust carries with it the authority to revoke or amend any power of appointment created in the trust. However, to the extent an exercise of the power removes appointive property from the trust, the donor's authority to revoke or amend the power is eliminated, unless the donor expressly reserved authority to revoke or amend any transfer from the trust after the transfer is completed.

If an irrevocable inter vivos trust confers a presently exercisable power on someone who is not the settlor of the trust (the settlor being the donor of the power), the donor lacks authority to revoke or amend the power, except to the extent the donor reserved the authority to do so. If the donor did reserve the authority to revoke or amend the power, that authority is only effective until the powerholder irrevocably exercises the power.

If the same individual is both the donor and the powerholder, the donor in his or her capacity as powerholder can indirectly revoke or amend the power by a partial or total release of the power. See Section 402 [72-7-402]. After the power has been irrevocably exercised, however, the donor as donor is in no different position in regard to revoking or amending the exercise of the power than the donor would be if the donor and powerholder were different individuals.

The ability of an agent or guardian to revoke or amend a power of appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act [Title 72, ch. 31, pt. 3] or the Uniform Guardianship and Protective Proceedings Act [Title 72, ch. 5, pt. 6]. Other law of the state may permit the reformation of an otherwise irrevocable instrument. See, for example, Uniform Probate Code § 2-805 [not adopted in Montana]; Uniform Trust Code § 415 [72-38-415].

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 18.2 and the accompanying Commentary.

Part 3
Exercise of Power of Appointment

72-7-301. Requisites for exercise of power of appointment.

Official Comments

Paragraph (1) [72-7-301(1)(a)] states the fundamental principle that an instrument can only exercise a power of appointment if the instrument, under applicable law, is valid (or partially valid, see the next paragraph). Thus, for example, a will exercising a power of appointment must be valid under the law—including choice of law (see Section 103 [72-7-103])—applicable to wills. An inter vivos trust exercising a power of appointment must be valid under the law—including choice of law (see Section 103 [72-7-103])—applicable to inter vivos trusts. In part, this means that the instrument must be properly executed to the extent other law imposes requirements of execution. In addition, the creator of the instrument must have the capacity to execute the instrument and be free from undue influence and other wrongdoing. On questions of capacity, see Restatement Third of Property: Wills and Other Donative Transfers §§ 8.1 (Mental Capacity) and 8.2 (Minority). On freedom from undue influence and other wrongdoing, see, e.g., Restatement Third of Property §§ 8.3 (Undue Influence, Duress, or Fraud). The ability of an agent or guardian to exercise a power of appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act [Title 72, ch. 31, pt. 3] or the Uniform Guardianship and Protective Proceedings Act [Title 72, ch. 5, pt. 6].

The instrument need not be entirely valid. A partially valid instrument can exercise a power of appointment if the provisions exercising the power are valid.

Paragraph (2) [72-7-301(1)(b)] requires the terms of the instrument exercising the power of appointment to manifest the powerholder's intent to exercise the power of appointment. Whether a powerholder has manifested an intent to exercise a power of appointment is a question of construction. See generally Restatement Third of Property: Wills and Other Donative Transfers § 19.2. For example, a powerholder's disposition of appointive property may manifest an intent to exercise the power even though the powerholder does not refer to the power. See Restatement Third of Property: Wills and Other Donative Transfers § 19.3. Paragraph (2) [72-7-301(1)(b)] also requires that the terms of the instrument exercising the power must, subject to Section 304 [72-7-304], satisfy the requirements of exercise, if any, imposed by the donor.

Language expressing an intent to exercise a power is clearest if it makes a specific reference to the creating instrument and exercises the power in unequivocal terms and with careful attention to the requirements of exercise, if any, imposed by the donor.

The recommended method for exercising a power of appointment is by a specific-exercise clause, using language such as the following: "I exercise the power of appointment conferred upon me by [my father's will] as follows: I appoint [fill in details of appointment]."

Not recommended is a blanket-exercise clause, which purports to exercise "any" power of appointment the powerholder may have, using language such as the following: "I exercise any power of appointment I may have as follows: I appoint [fill in details of appointment]." Although a blanket-exercise clause does manifest an intent to exercise any power of appointment the powerholder may have, such a clause raises the often-litigated question of whether it satisfies the requirement of specific reference imposed by the donor in the instrument creating the power.

A blending clause purports to blend the appointive property with the powerholder's own property in a common disposition. The exercise portion of a blending clause can take the form of a specific exercise or, more commonly, a blanket exercise. For example, a clause providing "All the residue of my estate, including the property over which I have a power of appointment under my mother's will, I devise as follows" is a blending clause with a specific exercise. A clause providing "All the residue of my estate, including any property over which I may have a power of appointment, I devise as follows" is a blending clause with a blanket exercise.

This act aims to eliminate any significance attached to the use of a blending clause. A blending clause has traditionally been regarded as significant in the application of the doctrines of "selective allocation" and "capture." This act eliminates the significance of such a clause under those doctrines. See Sections 308 [72-7-308] (selective allocation) and 309 [72-7-309] (capture). The use of a blending clause is more likely to be the product of the forms used by the powerholder's lawyer than a deliberate decision by the powerholder to facilitate the application of the doctrines of selective allocation or capture.

If the powerholder decides not to exercise a specific power or any power that the powerholder might have, it is important to consider whether to depend on mere silence to produce a nonexercise or to take definitive action to assure a nonexercise. Definitive action can take the form of a release during life (see Section 402 [72-7-402]) or a nonexercise clause in the powerholder's will or other relevant instrument. A nonexercise clause can take the form of a specific-nonexercise clause (for example, "I do not exercise the power of appointment conferred on me by my father's trust") or the form of a blanket-nonexercise clause (for example, "I do not exercise any power of appointment I may have").

In certain circumstances, different consequences depend on the powerholder's choice. Under Section 302 [72-7-302], a residuary clause in the powerholder's will is treated as manifesting an intent to exercise a general power in certain limited circumstances if the powerholder silently failed to exercise the power, but not if the powerholder released the power or refrained in a record from exercising it. Under Section 310 [72-7-310], unappointed property passes to the powerholder's estate in certain limited circumstances if the powerholder silently failed to exercise a general power, but passes to the donor or to the donor's successors in interest if the powerholder released the power.

Paragraph (3) [72-7-301(1)(c)] provides that the exercise is valid only to the extent the exercise is permissible. On permissible and impermissible exercise, see Sections 305 to 307 [72-7-305 through 72-7-307]. The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 19.1, 19.8, and 19.9 and the accompanying Commentary.

72-7-302. Intent to exercise — determining intent from residuary clause.

Official Comments

This section addresses a question arising under Section 301(2)(A) [72-7-301(1)(b)(i)]—namely, whether the powerholder's intent to exercise a power of appointment is manifested by a garden-variety residuary clause such as "All the residue of my estate, I devise to ..." or "All of my estate, I devise to ...." (The section also applies to a comparable provision in the powerholder's revocable trust, such as a provision providing for the distribution of the trust corpus.) This section does not address the effect of a residuary clause that contains a blanket exercise or a specific exercise of a power of appointment. On blanket-exercise and specific-exercise clauses, see the Comment to Section 301 [72-7-301].

The rule of this section is that in most circumstances a garden-variety residuary clause does not manifest an intent to exercise a power of appointment.

Such a clause manifests an intent to exercise a power of appointment only in the rare circumstance when (1) the terms of the instrument containing the residuary clause do not manifest a contrary intent, (2) the power in question is a general power exercisable in favor of the powerholder's estate, (3) there is no gift-in-default clause or it is ineffective, and (4) the powerholder did not release the power.

In a well-planned estate, a power of appointment, whether general or nongeneral, is accompanied by a gift in default. In a less carefully planned estate, on the other hand, there may be no gift-in-default clause. Or, if there is such a clause, the clause may be wholly or partly ineffective. To the extent the donor did not provide for takers in default or the gift-in-default clause is ineffective, it is more efficient to attribute to the powerholder the intent to exercise a general power in favor of the powerholder's residuary devisees. The principal benefit of attributing to the powerholder the intent to exercise a general power is that it allows the property to pass under the powerholder's will instead of as part of the donor's estate. Because the donor's death would normally have occurred before the powerholder died, some of the donor's successors might themselves have predeceased the powerholder. It is more efficient to avoid tracing the interest through multiple estates to determine who are the present successors. Moreover, to the extent the donor did not provide for takers in default, it is also more in accord with the donor's probable intent for the powerholder's residuary clause to be treated as exercising the power.

A gift-in-default clause can be ineffective or partially ineffective for a variety of reasons. The clause might cover only part of the appointive property. The clause might be invalid because it violates a rule against perpetuities or some other rule, or it might be ineffective because it conditioned the interest of the takers in default on an uncertain event that did not happen, the most common of which is an unsatisfied condition of survival.

Under no circumstance does a residuary clause manifest an intent to exercise a nongeneral power. A residuary clause disposes of the powerholder's own property, and a nongeneral power is not an ownership-equivalent power. Similarly, a residuary clause does not manifest an intent to exercise a general power which is general only because it is exercisable in favor of the creditors of the powerholder or the creditors of the powerholder's estate.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.4 and the accompanying Commentary.

72-7-303. Intent to exercise — after-acquired power.

Official Comments

Nothing in the law prevents a powerholder from exercising an after-acquired power—in other words, from exercising a power in an instrument executed before acquiring the power. The only question is one of construction: whether the powerholder intended by the earlier instrument to exercise the after-acquired power. (The term "after-acquired power" in this section refers only to an after-acquired power acquired before the powerholder's death. A power of appointment cannot be conferred on a deceased powerholder. See Section 201 [72-7-201].)

If the instrument of exercise specifically identifies the power to be exercised, then the question of construction is readily answered: the specific-exercise clause expresses an intent to exercise the power, whether the power is after-acquired or not. However, if the instrument of exercise uses only a blanket-exercise clause, the question of whether the powerholder intended to exercise an after-acquired power is often harder to answer. The presumptions in this section provide default rules of construction on the powerholder's likely intent.

Paragraph (1) [72-7-303(1)] states the general rule of this section. Unless the terms of the instrument indicate that the powerholder had a different intent, a blanket-exercise clause extends to a power of appointment acquired after the powerholder executed the instrument containing the blanket-exercise clause. General references to then-present circumstances, such as "all the powers I have" or similar expressions, are not a sufficient indication of an intent to exclude an after-acquired power. In contrast, more precise language, such as "all powers I have at the date of execution of this will," does indicate an intent to exclude an after-acquired power.

It is important to remember that even if the terms of the instrument manifest an intent to exercise an after-acquired power, the intent may be ineffective, for example if the terms of the donor's instrument creating the power manifest an intent to preclude such an exercise. In the absence of an indication to the contrary, however, it is inferred that the time of the execution of the powerholder's exercising instrument is immaterial to the donor. Even if the donor declares that the property shall pass to such persons as the powerholder "shall" or "may" appoint, these terms do not suffice to indicate an intent to exclude exercise by an instrument previously executed, because these words may be construed to refer to the time when the exercising document becomes effective.

Paragraph (2) [72-7-303(2)] states an exception to the general rule of paragraph (1) [72-7-303(1)]. If the powerholder is also the donor, a blanket-exercise clause in a preexisting instrument is rebuttably presumed not to manifest an intent to exercise a power later reserved in another donative transfer, unless the donor/powerholder did not provide for a taker in default of appointment or the gift-in-default clause is ineffective.

The black-letter of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.6 and the accompanying Commentary.

72-7-304. Substantial compliance with donor-imposed formal requirement.

Official Comments

This section adopts a substantial-compliance rule for donor-imposed formal requirements. This section only applies to formal requirements imposed by the donor. It does not apply to formal requirements imposed by law, such as the requirement that a will must be signed and attested. The section also does not apply to substantive requirements imposed by the donor, for example a requirement that the powerholder attain a certain age before the power is exercisable.

Whenever the donor imposes formal requirements with respect to the instrument of appointment that exceed the requirements imposed by law, the donor's purpose in imposing the additional requirements is relevant to whether the powerholder's attempted exercise satisfies the rule of this section. To the extent the powerholder's failure to comply with the additional requirements will not impair the accomplishment of a material purpose of the donor, the powerholder's attempted appointment in a manner that substantially complies with a donor-imposed requirement does not fail for lack of perfect compliance with that requirement.

For example, a donor's formal requirement that the power of appointment is exercisable "by will" may be satisfied by the powerholder's attempted exercise in a nontestamentary instrument that is functionally similar to a will, such as the powerholder's revocable trust that remains revocable until the powerholder's death. See Restatement Third of Property: Wills and Other Donative Transfers § 19.9, Comment b ("Because a revocable trust operates in substance as a will, a power of appointment exercisable "by will" can be exercised in a revocable-trust document, as long as the revocable trust remained revocable at the [powerholder]'s death.").

A formal requirement commonly imposed by the donor is that, in order to be effective, the powerholder's attempted exercise must make specific reference to the power. Specific-reference clauses were a pre-1942 invention designed to prevent an inadvertent exercise of a general power. The federal estate tax law then provided that the value of property subject to a general power was included in the powerholder's gross estate if the general power was exercised. The idea of requiring specific reference was designed to thwart unintended exercise and, hence, estate taxation.

The federal estate tax law has changed. For a general power created after October 21, 1942, estate tax consequences do not depend on whether the power is exercised.

Nevertheless, donors continue to impose specific-reference requirements. Because the original purpose of the specific-reference requirement was to prevent an inadvertent exercise of the power, it seems reasonable to presume that this is still the donor's purpose in doing so. Consequently, a specific-reference requirement still overrides any applicable state law that presumes that an ordinary residuary clause was intended to exercise a general power. Put differently: An ordinary residuary clause may manifest the powerholder's intent to exercise (under Section 301(2)(A) [72-7-301(1)(b)(i)]) but does not satisfy the requirements of exercise if the donor imposed a specific-reference requirement (this section and Section 301(2)(B) [72-7-301(1)(b)(ii)]).

A more difficult question is whether a blanket-exercise clause satisfies a specific-reference requirement. If it could be shown that the powerholder had knowledge of and intended to exercise the power, the blanket-exercise clause would be sufficient to exercise the power, unless it could be shown that the donor's intent was not merely to prevent an inadvertent exercise of the power but instead that the donor had a material purpose in insisting on the specific-reference requirement. In such a case, the possibility of applying Uniform Probate Code § 2-805 [not adopted in Montana] or Restatement Third of Property: Wills and Other Donative Transfers § 12.1 to reform the powerholder's attempted appointment to insert the required specific reference should be explored.

This rule of this section is consistent with, but an elaboration of, Uniform Probate Code § 2-704 [not adopted in Montana]: "If a governing instrument creating a power of appointment expressly requires that the power be exercised by a reference, an express reference, or a specific reference, to the power or its source, it is presumed that the donor's intent, in requiring that the [powerholder] exercise the power by making reference to the particular power or to the creating instrument, was to prevent an inadvertent exercise of the power."

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.10 and the accompanying Commentary.

72-7-305. Permissible appointment.

Official Comments

When a donor creates a general power under which an appointment can be made outright to the powerholder or the powerholder's estate, the necessary implication is that the powerholder may accomplish by an appointment to others whatever the powerholder could accomplish by first appointing to himself and then disposing of the property, including a disposition in trust or in the creation of a further power of appointment.

A general power to appoint only to the powerholder (even though it says "and to no one else") does not prevent the powerholder from exercising the power in favor of others. There is no reason to require the powerholder to transform the appointive assets into owned property and then, in a second step, to dispose of the owned property. Likewise, a general power to appoint only to the powerholder's estate (even though it says "and to no one else") does not prevent an exercise of the power by will in favor of others. There is no reason to require the powerholder to transform the appointive assets into estate property and then, in a second step, to dispose of the estate property by will.

Similarly, a general power to appoint to the powerholder may purport to allow only one exercise of the power, but such a restriction is ineffective and does not prevent multiple partial exercises of the power. To take another example, a general power to appoint to the powerholder or to the powerholder's estate may purport to restrict appointment to outright interests not in trust, but such a restriction is ineffective and does not prevent an appointment in trust.

An additional example will drive home the point. A general power to appoint to the powerholder or to the powerholder's estate may purport to forbid the powerholder from imposing conditions on the enjoyment of the property by the appointee. Such a restriction is ineffective and does not prevent an appointment subject to such conditions.

As stated in subsection (b) [72-7-305(2)], however, a general power to appoint only to the powerholder's creditors or the creditors of the powerholder's estate permits an appointment only to those creditors.

Except to the extent the terms of the instrument creating the power manifest a contrary intent, the powerholder of a nongeneral power has the same breadth of discretion in appointment to permissible appointees that the powerholder has in the disposition of the powerholder's owned property to permissible appointees of the power.

Thus, unless the terms of the instrument creating the power manifest a contrary intent, the powerholder of a nongeneral power has the authority to exercise the power by an appointment in trust. In order to manifest a contrary intent, the terms of the instrument creating the power must specifically prohibit an appointment in trust. So, for example, a power to appoint "to" the powerholder's descendants includes the authority to appoint in trust for the benefit of one or more of those descendants.

Similarly, unless the terms of the instrument creating the power manifest a contrary intent, the powerholder of a nongeneral power has the authority to exercise the power by creating a general power in a permissible appointee. The rationale for this rule is a straightforward application of the maxim that the greater includes the lesser. A powerholder of a nongeneral power may appoint outright to a permissible appointee, so the powerholder may instead create in a permissible appointee a general power.

And finally, unless the terms of the instrument creating the power manifest a contrary intent, the powerholder of a nongeneral power may exercise the power by creating a new nongeneral power in any person, whether or not a permissible appointee, to appoint to some or all of the permissible appointees of the original nongeneral power. In order to manifest a contrary intent, the terms of the instrument creating the power must prohibit the creation of such powers. Language merely conferring the power of appointment on the powerholder does not suffice.

The rules of subsection (c) [72-7-305(3)] are default rules. The terms of the instrument creating the power may manifest a contrary intent. For example, a donor may choose to loosen the restriction in subsection (c)(3) [72-7-305(3)(c)] by authorizing the powerholder of a nongeneral power to create a new nongeneral power with broader permissible appointees. Consider the following examples.

Example 1. D creates a nongeneral power in D's child, P1, to appoint among D's descendants. Under the default rule of subsection (c)(3) [72-7-305(3)(c)], P1 may exercise this power to create a new nongeneral power in D's child, P2. Unless the terms of D's instrument manifest a contrary intent, however, the permissible appointees of P2's nongeneral power cannot be broader than the permissible appointees of P1's nongeneral power.

Example 2. Same facts as in Example 1, except that D's instrument states: "The nongeneral power of appointment granted to P1 may be exercised to create in one or more of my descendants a new nongeneral power. This new nongeneral power may have permissible appointees as broad as P1 sees fit." On these facts, the default rule of subsection (c)(3) [72-7-305(3)(c)] is overridden by the terms of D's instrument. The permissible appointees of P2's nongeneral power may be broader than the permissible appointees of P1's nongeneral power.

The rules of this section are consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 19.13 and 19.14 and the accompanying Commentary.

Compiler's Comments

2019 Amendment: Chapter 200 inserted (3)(d) regarding creation of a nongeneral power in a permissible appointee to appoint one or more persons; and made minor changes in style. Amendment effective October 1, 2019.

72-7-306. Appointment to deceased appointee or permissible appointee's descendant.

Official Comments

Just as property cannot be transferred to an individual who is deceased (see Restatement Third of Property: Wills and Other Donative Transfers § 1.2), a power of appointment cannot be effectively exercised in favor of a deceased appointee.

However, an antilapse statute may apply to trigger the substitution of the deceased appointee's descendants (or other substitute takers), unless the terms of the instrument creating or exercising the power of appointment manifest a contrary intent. Antilapse statutes typically provide, as a default rule of construction, that devises to certain relatives who predecease the testator pass instead to specified substitute takers, usually the descendants of the predeceased devisee who survive the testator. See generally Restatement Third of Property: Wills and Other Donative Transfers § 5.5.

When an antilapse statute does not expressly address whether it applies to the exercise of a power of appointment, a court should construe it to apply to such an exercise. See Restatement Third of Property: Wills and Other Donative Transfers § 5.5, Comment l. The rationale underlying antilapse statutes, that of presumptively attributing to the testator the intent to substitute the descendants of a predeceased devisee, applies equally to the exercise of a power of appointment.

The substitute takers provided by an antilapse statute (typically the descendants of the deceased appointee) are treated as permissible appointees even if the description of permissible appointees provided by the donor does not expressly cover them. This rule corresponds to the rule applying antilapse statutes to class gifts. Antilapse statutes substitute the descendants of deceased class members, even if the class member's descendants are not members of the class. See Restatement Third of Property: Wills and Other Donative Transfers § 19.12, Comment e.

The donor of a power, general or nongeneral, can prohibit the application of an antilapse statute to the powerholder's appointment and, in the case of a nongeneral power, can prohibit an appointment to the descendants of a deceased permissible appointee, but must manifest an intent to do so in the terms of the instrument creating the power of appointment. A traditional gift-in-default clause does not manifest a contrary intent in either case, unless the clause provides that it is to take effect instead of the descendants of a deceased permissible appointee.

Subsection (b) [72-7-306(2)] provides that the descendants of a deceased permissible appointee are treated as permissible appointees of a nongeneral power of appointment. This rule is a logical extension of the application of antilapse statutes to appointments. If an antilapse statute can substitute the descendants of a deceased appointee, the powerholder should be allowed to appoint in favor of, or to create a new power of appointment in, a descendant (meaning, one or more descendants; the Uniform Law Commission uses the singular to include the plural) of a deceased permissible appointee.

Who qualifies as a "descendant" is defined by state law. See, for example, Uniform Probate Code §§ 1-201(9) [72-1-103(10)], 2-103 [72-2-113], 2-115 to 2-122 [see 72-2-124], 2-705 [not adopted in Montana].

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.12 and the accompanying Commentary.

72-7-307. Impermissible appointment.

Official Comments

The rules of this section apply to the extent the powerholder attempts to confer a beneficial interest in the appointive property on an impermissible appointee. For example, a nongeneral power may not be exercised in favor of the powerholder. And a nongeneral power in favor of the donor's descendants may not be exercised in favor of the donor's spouse (assuming the usual scenario wherein the spouse is not also a descendant).

To the extent an appointment is ineffective, it is invalid. But it bears emphasizing that an appointment that is partially valid remains partially valid. Partial invalidity does not doom the entire appointment.

The rules of this section do not apply to an appointment of a nonbeneficial interest—for example, the appointment of legal title to a trustee—if the beneficial interest is held by permissible appointees.

Nor do the rules of this section prohibit beneficial appointment to an impermissible appointee if the intent to benefit the impermissible appointee is not the powerholder's but rather is the intent of a permissible appointee in whose favor the powerholder has decided to exercise the power. In other words, if the powerholder makes a decision to exercise the power in favor of a permissible appointee, the permissible appointee may request the powerholder to transfer the appointive assets directly to an impermissible appointee. The appointment directly to the impermissible appointee in this situation is effective, being treated for all purposes as an appointment first to the permissible appointee followed by a transfer by the permissible appointee to the impermissible appointee.

The donor of a power of appointment sets the range of permissible appointees by designating the permissible appointees of the power. The rules of this section are concerned with attempts by the powerholder to exceed that authority. Such an attempt is called a fraud on the power and is ineffective. The term "fraud on the power" is a well-accepted term of art. See Restatement Third of Property: Wills and Other Donative Transfers §§ 19.15 and 19.16.

Among the most common devices employed to commit a fraud on the power are: an appointment conditioned on the appointee conferring a benefit on an impermissible appointee; an appointment subject to a charge in favor of an impermissible appointee; an appointment upon a trust for the benefit of an impermissible appointee; an appointment in consideration of a benefit to an impermissible appointee; and an appointment primarily for the benefit of the permissible appointee's creditor if the creditor is an impermissible appointee. Each of these appointments is impermissible and ineffective.

The rules of this section are consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 19.15 and 19.16 and the accompanying Commentary.

72-7-308. Selective allocation doctrine.

Official Comments

The rule of this section is commonly known as the doctrine of selective allocation. This doctrine applies if the powerholder uses the same instrument to exercise a power of appointment and to dispose of property that the powerholder owns. For purposes of this section, the powerholder's will, any codicils to the powerholder's will, and any revocable trust created by the powerholder that did not become irrevocable before the powerholder's death are treated as the same instrument.

The doctrine of selective allocation provides that the owned property and the appointive property shall be allocated in the permissible manner that best carries out the powerholder's intent.

One situation that often calls for selective allocation is when the powerholder disposes of property to permissible and impermissible appointees. By allocating owned assets to the dispositions favoring impermissible appointees and allocating appointive assets to permissible appointees, the appointment is rendered effective. Consider the following example, drawn from the Restatement Third of Property: Wills and Other Donative Transfers.

Example. D died, leaving a will that devised property worth $100,000 to T in trust. T is directed to pay the net income to S (Donor's son) for life and then "to pay the principal to S's descendants as S shall by will appoint, and in default of appointment to pay the principal by representation to S's descendants then living, and if no descendant of S is then living, to pay the principal to X-Charity." S dies. The property over which S has the nongeneral power is worth $200,000 at his death. S's owned property at his death is worth $800,000. S's will provides as follows: "All property I own or over which I have any power of appointment shall be used first to pay my debts, expenses of administration, and death taxes, and the balance I give outright to my daughters." S's debts plus the death taxes payable on S's death plus the expenses of administering S's estate total $200,000. If S's owned property is allocated ratably to the payment of such $200,000, one-fifth of the $200,000 would be an ineffective appointment, because it would be to impermissible appointees. That one-fifth of $200,000 ($40,000 of the appointive assets) would pass in default of appointment, and the owned property would have to pick up the full payment of the debts, taxes, and expenses of administration. A selective allocation in the first instance of owned assets to the payment of debts, taxes, and expenses of administration leaves the appointive assets appointed only to permissible appointees of the nongeneral power and nothing passes in default of appointment.

The result of applying selective allocation is always one that the powerholder could have provided for in specific language, and one that the powerholder most probably would have provided for had he or she been aware of the difficulties inherent in the dispositive scheme. By the rule of selective allocation, courts undertake to prevent the dispositive plan from being frustrated by the ineptness of the powerholder or the powerholder's lawyer. For an early case adopting selective allocation, see Roe v. Tranmer, 2 Wils. 75, 95 Eng. Rep. 694 (C.P. 1757).

For further discussion of selective allocation, and illustrations of its application to various fact-patterns, see Restatement Third of Property: Wills and Other Donative Transfers § 19.19 and the accompanying Commentary. This rule of this Section is consistent with, and this Comment draws on, that Restatement.

On the distinction between selective allocation (a rule of construction based on the assumed intent of the powerholder) and the process sometimes known as "marshaling" (an outgrowth of general equitable principles), see the Restatement Second of Property: Donative Transfers, especially the Introductory Note to Chapter 22.

72-7-309. Capture doctrine — disposition of ineffectively appointed property under general power.

Official Comments

This section applies when the powerholder of a general power makes an ineffective appointment. This section does not apply when the powerholder of a general power fails to exercise or releases the power. (On such fact-patterns, see instead Section 310 [72-7-310].)

Nor does this section apply to an ineffective exercise of a power of revocation, amendment, or withdrawal—in each case, a power pertaining to a trust. To the extent a powerholder of one of these types of powers makes an ineffective appointment, the ineffectively appointed property remains in the trust.

The central rule of this section—in paragraph (1) [72-7-309(1)] and subparagraph (2)(A) [72-7-309(2)(a)]—is a modern variation of the so-called "capture doctrine" adopted by a small body of case law and followed in Restatement Second of Property: Donative Transfers § 23.2. Under that doctrine, the ineffectively appointed property passed to the powerholder or the powerholder's estate, but only if the ineffective appointment manifested an intent to assume control of the appointive property "for all purposes" and not merely for the limited purpose of giving effect to the attempted appointment. If the ineffective appointment manifested such an intent, the ineffective appointment was treated as an implied alternative appointment to the powerholder or the powerholder's estate, and thus took effect even if the donor provided for takers in default and one or more of the takers in default were otherwise entitled to take.

The capture doctrine was developed at a time when the donor's gift-in-default clause was considered an afterthought, inserted just in case the powerholder failed to exercise the power. Today, the donor's gift-in-default clause is typically carefully drafted and intended to take effect, unless circumstances change that would cause the powerholder to exercise the power. Consequently, if the powerholder exercises the power effectively, the exercise divests the interest of the takers in default. But if the powerholder makes an ineffective appointment, the powerholder's intent regarding the disposition of the ineffectively appointed property is problematic.

Whether or not the ineffective appointment manifested an intent to assume control of the appointive property "for all purposes" often depended on nothing more than whether the ineffective appointment was contained in a blending clause. The use of a blending clause rather than a direct-exercise clause, however, is typically the product of the drafting lawyer's forms rather than a deliberate choice of the powerholder.

This section alters the traditional capture doctrine in two ways: (1) the gift-in-default clause takes precedence over any implied alternative appointment to the powerholder or the powerholder's estate deduced from the use of a blending clause or otherwise; and (2) the ineffectively appointed property passes to the powerholder or the powerholder's estate only if there is no gift-in-default clause or to the extent the gift-in-default clause is ineffective. Nothing turns on whether the powerholder used a blending clause or somehow otherwise manifested an intent to assume control of the appointive property "for all purposes."

Subparagraph (2)(B) [72-7-309(2)(b)] addresses the special case of a power of appointment that is general only because it is exercisable in favor of creditors, but not exercisable in favor of the powerholder or the powerholder's estate. This type of general power is sometimes used in generation-skipping transfer tax planning. However, this type of general power should not trigger the capture doctrine, because the powerholder and the powerholder's estate are impermissible appointees. Instead, ineffectively appointed property should pass under the gift-in-default clause (paragraph (1) [72-7-309(1)]) or, if there is no gift-in-default clause or it is ineffective, under a reversionary interest to the donor or the donor's transferee or successor in interest (subparagraph (2)(B) [72-7-309(2)(b)]).

The rule of this section is essentially consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.21 and the accompanying Commentary.

72-7-310. Disposition of unappointed property under released or unexercised general power.

Official Comments

The rules of this section apply to unappointed property under a general power of appointment. The rules do not apply to unappointed property under a power of revocation, amendment, or withdrawal—powers pertaining to a trust. If the powerholder releases or dies without exercising a power of revocation or amendment, the power to revoke expires and, unless someone else continues to have a power of revocation or amendment, the trust becomes irrevocable and unamendable. If the powerholder releases or dies without exercising a power to withdraw principal of a trust, the principal that the powerholder could have withdrawn, but did not, remains part of the trust.

The rationale for the rules of this section runs as follows. The gift-in-default clause controls the disposition of unappointed property to the extent the clause is effective. To the extent the gift-in-default clause is nonexistent or ineffective, the disposition of the unappointed property depends on whether the powerholder merely failed to exercise the power or whether the powerholder released the power. If the powerholder merely failed to exercise the power, the unappointed property passes to the powerholder or to the powerholder's estate (if these are permissible appointees). The rationale is the same as when the powerholder makes an ineffective appointment. If, however, the powerholder released the power, the powerholder has affirmatively chosen to reject the opportunity to gain ownership of the property, hence the unappointed property passes under a reversionary interest to the donor or to the donor's transferee or successor in interest.

These rules are illustrated by the following examples.

Example 1. D transfers property to T in trust, directing T to pay the income to S (D's son) for life, with a general testamentary power in S to appoint the principal of the trust, and in default of appointment the principal is to be distributed "to S's descendants who survive S, by representation, and if none, to X-Charity." S dies leaving a will that does not exercise the power. The principal passes under the gift-in-default clause to S's descendants who survive S, by representation.

Example 2. Same facts as Example 1, except that D's gift-in-default clause covered only half of the principal, and S died intestate. Half of the principal passes under the gift-in-default clause. The other half of the principal passes to S's estate for distribution to S's intestate heirs.

Example 3. Same facts as Example 2, except that S released the power before dying intestate. Half of the principal passes under the gift-in-default clause. The other half of the principal passes to D or to D's transferee or successor in interest.

In addition to governing a released general power, subparagraph (2)(B) [72-7-310(2)(b)] also applies to the special case of an unexercised general power that is general only because it is exercisable in favor of creditors, but not exercisable in favor of the powerholder or the powerholder's estate. This type of general power is sometimes used in generation-skipping transfer tax planning. In such a case, unappointed property passes under the gift-in-default clause (paragraph (1) [72-7-310(1)]) or, if there is no gift-in-default clause or to the extent it is ineffective, under a reversionary interest to the donor or the donor's transferee or successor in interest (subparagraph (2)(B) [72-7-310(2)(b)]).

The rules of this section are essentially consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.22 and the accompanying Commentary.

72-7-311. Disposition of unappointed property under released or unexercised nongeneral power.

Official Comments

To the extent the powerholder of a nongeneral power releases, ineffectively exercises, or fails to exercise the power, thus causing the power to lapse, the gift-in-default clause controls the disposition of the unappointed property to the extent the gift-in-default clause is effective.

To the extent the gift-in-default clause is nonexistent or ineffective, the unappointed property passes to the permissible appointees of the power—including those who are substituted for permissible appointees under an antilapse statute (see Section 306 [72-7-306])—if the permissible appointees are "defined and limited" (on the meaning of this term of art, see the Comment to Section 205 [72-7-205]) and the donor has not manifested an intent that the permissible appointees shall receive the appointive property only so far as the powerholder elects to appoint it to them. This rule of construction is based on the assumption that the donor intends the permissible appointees of the power to have the benefit of the property. The donor focused on transmitting the appointive property to the permissible appointees through an appointment, but if the powerholder fails to carry out this particular method of transfer, the donor's underlying intent to pass the appointive property to the defined and limited class of permissible appointees should be carried out. Subparagraph (2)(A) [72-7-311(2)(a)] effectuates the donor's underlying intent by implying a gift in default of appointment to the defined and limited class of permissible appointees.

If the defined and limited class of permissible appointees is a multigenerational class, such as "descendants," "issue," "heirs," or "relatives," the default rule of construction is that they take by representation. See Restatement Third of Property: Wills and Other Donative Transfers § 14.3, Comment b. If the defined and limited class is a single-generation class, the default rule of construction is that the eligible class members take equally. See Restatement Third of Property: Wills and Other Donative Transfers § 14.2.

No implied gift in default of appointment to the permissible appointees arises if the permissible appointees are identified in such broad and inclusive terms that they are not defined and limited. In such an event, the donor has no underlying intent to pass the appointive property to such permissible appointees. Similarly, if the donor manifests an intent that the defined and limited class of permissible appointees is to receive the appointive property only by appointment, the donor's manifestation of intent eliminates any implied gift in default to the permissible appointees. Subparagraph (2)(B) [72-7-311(2)(b)] responds to these possibilities by providing for a reversionary interest to the donor or the donor's transferee or successor in interest.

The rules are illustrated by the following examples.

Example 1. D died, leaving a will devising property to T in trust. T is directed to pay the income to S (D's son) for life, and then to pay the principal "to such of S's descendants who survive S as S may appoint by will." D's will contains no gift-in-default clause. S dies without exercising the nongeneral power. The permissible appointees of the power constitute a defined and limited class. Accordingly, the principal of the trust passes at S's death to S's descendants who survive S, by representation.

Example 2. Same facts as Example 1, except that the permissible appointees of S's power of appointment are "such one or more persons, other than S, S's estate, S's creditors, or creditors of S's estate." The permissible appointees do not constitute a defined and limited class. Accordingly, the principal of the trust passes, at S's death, under a reversionary interest to D or D's transferee or successor in interest.

The rules of this section are consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.23 and the accompanying Commentary.

72-7-312. Disposition of unappointed property if partial appointment to taker in default.

Official Comments

If a powerholder makes a valid partial appointment to a taker in default, leaving some property unappointed, there is a question about whether that taker in default may also fully share in the unappointed property. In the first instance, the intent of the donor controls. In the absence of any indication of the donor's intent, it is assumed that the donor intends that the taker can take in both capacities. This rule presupposes that the donor contemplated that the taker in default who is an appointee could receive more of the appointive assets than a taker in default who is not an appointee. The donor can defeat this rule by manifesting a contrary intent in the instrument creating the power of appointment, thereby restricting the powerholder's freedom to benefit an appointee who is also a taker in default in both capacities. If the donor has not so manifested a contrary intent, the powerholder is free to exercise the power in favor of a taker in default who is a permissible appointee. Unless the powerholder manifests a contrary intent in the terms of the instrument exercising the power, it is assumed that the powerholder does not intend to affect in any way the disposition of any unappointed property.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.24 and the accompanying Commentary.

72-7-313. Appointment to taker in default.

Official Comments

This section articulates the rule that, to the extent an appointee would have taken appointed property as a taker in default, the appointee takes under the gift-in-default clause rather than under the appointment.

Takers in default have future interests that may be defeated by an exercise of the power of appointment. To whatever extent the powerholder purports to appoint an interest already held in default of appointment, the powerholder does not exercise the power to alter the donor's disposition but merely declares an intent not to alter it. To the extent, however, that the appointed property is different from (e.g., is a lesser estate) or exceeds the total of the property the appointee would receive as a taker in default, the property passes under the appointment.

Usually it makes no difference whether the appointee takes as appointee or as taker in default. The principal difference arises in jurisdictions that follow the rule that the estate creditors of the powerholder of a general testamentary power that was conferred on the powerholder by another have no claim on the appointive property unless the powerholder has exercised the power. Although this act does not follow that rule regarding creditors' rights (see Section 502 [72-7-502]), some jurisdictions do.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.25 and the accompanying Commentary.

72-7-314. Powerholder's authority to revoke or amend exercise.

Official Comments

This section recognizes that a powerholder lacks the authority to revoke or amend an exercise of the power of appointment, except to the extent (1) the powerholder reserved a power of revocation or amendment in the instrument exercising the power of appointment and the terms of the instrument creating the power of appointment do not effectively prohibit the reservation, or (2) the donor provided that the exercise is revocable or amendable.

A powerholder who exercises a power of appointment is like any other transferor of property in regard to authority to revoke or amend the transfer. Hence, unless the powerholder (or the donor) in some appropriate manner manifests an intent that an appointment is revocable or amendable, the appointment is irrevocable.

The ability of an agent or guardian to revoke or amend the exercise of a power of appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act [Title 72, ch. 31, pt. 3] or the Uniform Guardianship and Protective Proceedings Act [Title 72, ch. 5, pt. 6].

Other law of the state may permit the reformation of an otherwise irrevocable instrument. See, for example, Uniform Probate Code § 2-805 [not adopted in Montana]; Uniform Trust Code § 415 [72-38-415].

The rule of this section is essentially consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.7 and the accompanying Commentary.

Part 4

Disclaimer on Release — Contract to Appoint or Not to Appoint

72-7-401. Disclaimer.

Official Comments

A prospective powerholder cannot be compelled to accept the power of appointment, just as the prospective donee of a gift cannot be compelled to accept the gift.

A disclaimer is to be contrasted with a release. A release occurs after the powerholder accepts the power. A disclaimer prevents acquisition of the power, and consequently a powerholder who has accepted a power can no longer disclaim.

Disclaimer statutes frequently specify the time within which a disclaimer must be made. The Uniform Disclaimer of Property Interests Act (1999) (UDPIA) [see 72-2-811 (now repealed) and official comment] does not specify a time limit, but allows a disclaimer until a disclaimer is barred (see UDPIA § 13).

Disclaimer statutes customarily specify the methods for filing a disclaimer. UDPIA § 12 provides that the statutory methods must be followed. In the absence of such a requirement, statutory formalities for making a disclaimer of a power are not construed as exclusive, and any manifestation of the powerholder's intent not to accept the power may also suffice.

A partial disclaimer of a power of appointment leaves the powerholder possessed of the part of the power not disclaimed.

Just as an individual who would otherwise be a powerholder can avoid acquiring the power by disclaiming it, a person who otherwise would be a permissible appointee, appointee, or taker in default of appointment can avoid acquiring that status by disclaiming it.

The ability of an agent or guardian to disclaim on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act [Title 72, ch. 31, pt. 3] or the Uniform Guardianship and Protective Proceedings Act [Title 72, ch. 5, pt. 6].

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 20.4 and the accompanying Commentary.

Compiler's Comments

2019 Amendment: Chapter 313 at end of introductory clause substituted "72-2-825 and 72-2-826" for "72-2-811". Amendment effective October 1, 2019.

72-7-402. Authority to release.

Official Comments

Whether a power of appointment is general or nongeneral, presently exercisable or testamentary, the powerholder has the authority to release the power in whole or in part, in the absence of an effective restriction on release imposed by the donor. A partial release is a release that narrows the freedom of choice otherwise available to the powerholder but does not eliminate the power. A partial release may relate either to the manner of exercising the power or to the persons in whose favor the power may be exercised.

If the powerholder did not create the power, so that the powerholder and donor are different individuals, the donor can effectively impose a restraint on release, but the donor must manifest an intent in the terms of the creating instrument to impose such a restraint.

If the powerholder created the power, so that the powerholder is also the donor, the donor/powerholder cannot effectively impose a restraint on release. A self-imposed restraint on release resembles a self-imposed restraint on alienation, which is ineffective. See, for example, Restatement Third of Trusts § 58.

If the exercise of a power of appointment requires the action of two or more individuals, each powerholder has a power of appointment. If one but not the other joint powerholder releases the power, the power survives in the hands of the nonreleasing powerholder, unless the continuation of the power is inconsistent with the donor's purpose in creating the joint power. See Restatement Third of Property: Wills and Other Donative Transfers § 20.1, Comment f.

The ability of an agent or guardian to release a power of appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act [Title 72, ch. 31, pt. 3] or the Uniform Guardianship and Protective Proceedings Act [Title 72, ch. 5, pt. 6].

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 20.1 and 20.2 and the accompanying Commentary.

72-7-403. Method of release.

Official Comments

A powerholder may release the power of appointment by substantial compliance with the method specified in the terms of the instrument creating the power or any other method manifesting clear and convincing evidence of the powerholder's intent. Only if the method specified in the terms of the creating instrument is made exclusive is use of the other methods prohibited. Even then, a failure to comply with a technical requirement, such as required notarization, may be excused as long as compliance with the method specified in the terms of the creating instrument is otherwise substantial.

Examples of methods manifesting clear and convincing evidence of the powerholder's intent to release include: (1) delivering (by the same method of delivery that would make an instrument of transfer effective, see Restatement Third of Property: Wills and Other Donative Transfers § 20.3, Comment b) an instrument declaring the extent to which the power is released to an individual who could be adversely affected by an exercise of the power; (2) joining with some or all of the takers in default in making an otherwise effective transfer of an interest in the appointive property, in which case the power is released to the extent a subsequent exercise of the power would defeat the interest transferred; (3) contracting with an individual who could be adversely affected by an exercise of the power not to exercise the power, in which case the power is released to the extent a subsequent exercise of the power would violate the terms of the contract; and (4) communicating in a record an intent to release the power, in which case the power is released to the extent a subsequent exercise of the power would be contrary to manifested intent.

The black-letter of this section is based on Uniform Trust Code § 602(c) [72-38-602(3)]. The rule of this section is fundamentally consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 20.3 and the accompanying Commentary.

72-7-404. Revocation or amendment of release.

Official Comments

A release is typically irrevocable. If a powerholder wishes to retain the power to revoke 43 or amend the release, the powerholder should so indicate in the instrument executing the release.

The ability of an agent or guardian to revoke or amend the release of a power of appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act [Title 72, ch. 31, pt. 3] or the Uniform Guardianship and Protective Proceedings Act [Title 72, ch. 5, pt. 6]. Other law of the state may permit the reformation of an otherwise irrevocable instrument. See, for example, Uniform Probate Code § 2-805 [not adopted in Montana]; Uniform Trust Code § 415 [72-38-415]. The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 20.1 and 20.2 and the accompanying Commentary.

72-7-405. Power to contract — presently exercisable power of appointment.

Official Comments

A powerholder of a presently exercisable power may contract to make, or not to make, an appointment if the contract does not confer a benefit on an impermissible appointee. The rationale is that the power is presently exercisable, so the powerholder can presently enter into a contract concerning the appointment.

The contract may not confer a benefit on an impermissible appointee. Recall that a general power presently exercisable in favor of the powerholder or the powerholder's estate has no impermissible appointees. See Section 305(a) [72-7-305(1)]. In contrast, a presently exercisable nongeneral power, or a general power presently exercisable only in favor of one or more of the creditors of the powerholder or the powerholder's estate, does have impermissible appointees. See Section 305(b)-(c) [72-7-305(2) and (3)].

A contract not to appoint assures that the appointive property will pass to the taker in default. A contract to appoint to a taker in default, if enforceable, has the same effect as a contract not to appoint.

The ability of an agent or guardian to contract on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act [Title 72, ch. 31, pt. 3] or the Uniform Guardianship and Protective Proceedings Act [Title 72, ch. 5, pt. 6].

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 21.1 and the accompanying Commentary.

72-7-406. Power to contract — power of appointment not presently exercisable.

Official Comments

Except in the case of a power reserved by the donor in a revocable inter vivos trust, a contract to exercise, or not to exercise, a power of appointment that is not presently exercisable is unenforceable, because the powerholder does not have the authority to make a current appointment. If the powerholder was also the donor of the power and created the power in a revocable inter vivos trust, however, a contract to appoint is enforceable, because the donor-powerholder could have revoked the trust and recaptured ownership of the trust assets or could have amended the trust to change the power onto one that is presently exercisable.

In all other cases, the donor of a power not presently exercisable has manifested an intent that the selection of the appointees and the determination of the interests they are to receive are to be made in the light of the circumstances that exist on the date that the power becomes exercisable. Were a contract to be enforceable, the donor's intent would be defeated.

The ability of an agent or guardian to contract on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act [Title 72, ch. 31, pt. 3] or the Uniform Guardianship and Protective Proceedings Act [Title 72, ch. 5, pt. 6].

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 21.2 and the accompanying Commentary.

72-7-407. Remedy for breach of contract to appoint or not to appoint.

Official Comments

This section sets forth a rule on remedy. The remedy for a powerholder's breach of an enforceable contract to appoint, or not to appoint, is limited to damages payable out of the appointive property or, if appropriate, specific performance. The powerholder's owned assets are not available to satisfy a judgment for damages. For elaboration and discussion, see Restatement Third of Property: Wills and Other Donative Transfers §§ 21.1 and 21.2, and especially id., § 21.1, Comments c and d. This section does not address the amount of damages, which is determined by other law of the state, such as contract law.

Part 5
Rights of Powerholder's Creditors in Appointive Property

72-7-501. Creditor claim — general power created by powerholder.

Official Comments

Subsection (b) [72-7-501(2)] states a well-settled rule: a donor of a power of appointment cannot use a fraudulent transfer to avoid creditors. If a donor fraudulently transfers appointive property, retaining a power of appointment, the donor/powerholder's creditors and the creditors of the donor/powerholder's estate may reach the appointive property as provided in the law of fraudulent transfers.

Subsection (c) [72-7-501(3)] also states a well-settled rule: if there is no fraudulent transfer, and the donor/powerholder has made an irrevocable appointment to a third party of the appointive property, the appointed property is beyond the reach of the donor/powerholder's creditors or the creditors of the donor/powerholder's estate. In other words, an irrevocable and nonfraudulent exercise of the general power by the donor/powerholder in favor of someone other than the powerholder or the powerholder's estate eliminates the ability of the powerholder's creditors or the creditors of the powerholder's estate to reach those assets.

Subsection (d) [72-7-501(4)] establishes rules governing the remaining fact-pattern: the donor has retained a general power of appointment but has made neither a fraudulent transfer nor an irrevocable appointment. In such a case, the following rules apply. If the donor retains a presently exercisable general power of appointment, the appointive property is subject to a claim of—and is reachable by—a creditor of the powerholder to the same extent as if the powerholder owned the appointive property. If the donor retains a general power of appointment exercisable at death, the appointive property is subject to a claim of—and is reachable by—a creditor of the donor/powerholder's estate (defined with reference to other law, but including costs of administration, expenses of the funeral and disposal of remains, and statutory allowances to the surviving spouse and children) to the extent the estate is insufficient, subject to the decedent's right to direct the source from which liabilities are paid. For the same rules in the context of a retained power to revoke a revocable trust, see Uniform Trust Code § 505(a) [72-38-505(1)]. The application of these rules is not affected by the presence of a spendthrift provision or by whether the claim arose before or after the creation of the power of appointment. See Restatement Third of Property: Wills and Other Donative Transfers § 22.2, Comment a.

Subsection (a) [72-7-501(1)] enables all of these rules to apply even if the general power was not created in a transfer made by the powerholder. The rules will apply to the extent the powerholder contributed value to the transfer. See Restatement Third of Property: Wills and Other Donative Transfers § 22.2, Comment d. Consider the following examples, drawn from the Restatement.

Example 1. D purchases Blackacre from A. Pursuant to D's request, A transfers Blackacre "to D for life, then to such person as D may by will appoint." The rule of subsection (d) [72-7-501(4)] applies to D's general testamentary power, though in form A created the power.

Example 2. A by will transfers Blackacre "to D for life, then to such persons as D may by will appoint." Blackacre is subject to mortgage indebtedness in favor of X in the amount of $10,000. The value of Blackacre is $20,000. D pays the mortgage indebtedness. The rule of subsection (d) [72-7-501(4)] applies to half of the value of Blackacre, though in form A's will creates the general power in D.

Example 3. D, an heir of A, contests A's will on the ground of undue influence on A by the principal beneficiary under A's will. The contest is settled by transferring part of A's estate to Trustee in trust. Under the trust, Trustee is directed "to pay the net income to D for life and, on D's death, the principal to such persons as D shall by will appoint." The rule of subsection (d) [72-7-501(4)] applies to the transfer in trust, though in form D did not create the general power.

The provisions of this section are designed to be consistent with Uniform Trust Code § 505(a) [72-38-505(1)]. The provisions and this Comment also rely in part on Restatement Third of Property: Wills and Other Donative Transfers § 22.2 and the accompanying Commentary.

72-7-502. Creditor claim — general power not created by powerholder.

Official Comments

Subsection (a) [72-7-502(1)] reaffirms the fundamental principle that a presently exercisable general power of appointment is an ownership-equivalent power. Consequently, subsection (b) [72-7-502(2)] provides that property subject to a presently exercisable general power of appointment is subject to the claims of the powerholder's creditors, to the extent the powerholder's property is insufficient. Furthermore, upon the powerholder's death, property subject to a general power of appointment is subject to creditors' claims against the powerholder's estate (defined with reference to other law, but including costs of administration, expenses of the funeral and disposal of remains, and statutory allowances to the surviving spouse and children) to the extent the estate is insufficient, subject to the decedent's right to direct the source from which liabilities are paid. In each case, whether the powerholder has or has not purported to exercise the power is immaterial.

Subsection (b) [72-7-502(2)] states an important exception. If the power is subject to an ascertainable standard within the meaning of 26 U.S.C. § 2041(b)(1)(A) or 26 U.S.C. § 2514(c)(1), the power is treated for purposes of this article as a nongeneral power, and the rights of the powerholder's creditors in the appointive property are governed by Sections 504(a) and (b) [72-7-504(1) and (2)].

Compiler's Comments

2019 Amendment: Chapter 200 in (1) substituted current text regarding property subject to a general or nongeneral power of appointment created by a person other than the powerholder for former text that read: "Except as otherwise provided in subsection (2), appointive property subject to a general power of appointment created by a person other than the powerholder is subject to a claim of a creditor of:

(a) the powerholder, to the extent the powerholder's property is insufficient, if the power is presently exercisable; and

(b) the powerholder's estate, to the extent the estate is insufficient, subject to the right of a decedent to direct the source from which liabilities are paid." Amendment effective October 1, 2019.

72-7-503. Power to withdraw.

Official Comments

Subsection (a) [72-7-503(1)] treats a power of withdrawal as the equivalent of a presently exercisable general power of appointment, because the two are ownership-equivalent powers. Upon the lapse, release, or waiver of the power of withdrawal, subsection (b) [72-7-503(2)] follows the lead of Uniform Trust Code § 505(b)(2) [72-38-505(2)(b)] in creating an exception for property subject to a Crummey or five and five power: the holder of the power of withdrawal is treated as a powerholder of a presently exercisable general power of appointment only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Internal Revenue Code §§ 2041(b)(2) and 2514(e) [greater of 5% or $5,000] or § 2503(b) [$13,000 in 2012].

72-7-504. Creditor claim — nongeneral power.

Official Comments

Subsection (a) [72-7-504(1)] states the general rule of this section. Appointive property subject to a nongeneral power of appointment is exempt from a claim of a creditor of the powerholder or the powerholder's estate. The rationale for this general rule is that a nongeneral power of appointment is not an ownership-equivalent power, so the powerholder's creditors have no claim to the appointive assets.

Subsection (b) [72-7-504(2)] addresses an important exception: the fraudulent transfer. A fraudulent 50 transfer arises if the powerholder formerly owned the appointive property covered by the nongeneral power and transferred the property in fraud of creditors, reserving the nongeneral power. In such a case, the creditors can reach the appointive property under the rules relating to fraudulent transfers.

Subsection (c) [72-7-504(3)] also addresses an important exception, arising when the initial gift in default of appointment is to the powerholder or the powerholder's estate. In such a case, the power of appointment, though in form a nongeneral power, is in substance a general power, and the rights of the powerholder's creditors in the appointive property are governed by Sections 501 [72-7-501] and 502 [72-7-502].

The rules of this section are consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 22.1 and the accompanying Commentary.

Part 6
Miscellaneous Provisions

72-7-603. Application to existing relationships.

Official Comments

This act is intended to have the widest possible effect within constitutional limitations. Specifically, the act applies to all powers of appointment whenever created, to judicial proceedings concerning powers of appointment commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the act apply to preexisting instruments unless there is a clear indication of a contrary intent in the instruments' terms. By applying the act to preexisting instruments, the need to know two bodies of law will quickly lessen.

This legislation cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights that became irrevocable prior to the effective date. Also, rights already barred under former law are not revived by a possibly more liberal rule under this act. Nor, except as otherwise provided in paragraphs (1) through (4) of subsection (a) [72-7-603(1)(a) through (1)(d)], is an action done before the effective date of the act affected by the act's enactment. For comparable Uniform Law provisions, see Uniform Trust Code § 1106 [not adopted in Montana] and Uniform Probate Code § 8-101 [not adopted in Montana].

CHAPTER 9
DISPOSITION OF COMMUNITY PROPERTY RIGHTS AT DEATH

Part 1
Uniform Disposition of Community Property Rights at Death

72-9-101. Short title.

Compiler's Comments

Source: The corresponding section of the Uniform Disposition of Community Property Rights at Death Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 11.

72-9-102. Application.

Official Comments

This section [72-9-102] defines property subject to the Act.

Subsection (1): Personal Property

Subsection (1) is designed to cover all personal property which was acquired while the spouses were domiciled in a community property state, to the extent that it would have been treated as community property by that state at the time of acquisition and that no further action terminated the community character of the property. It also includes any property which was not originally community property but became such by agreement and, further, brings within the Act any personal property which can be traced back to a community source. Again, the Act only applies if there was no severance of the community interests [Section 8] [72-9-115]. [While Section 3 [72-9-107] applies to the dispositive rights of persons domiciled in the enacting state, the Act, as a practical matter, may be effective as to property located outside the state only to the extent that the state of the situs of the property is willing to recognize the policy of the domiciliary state.]

Example 1. H and W, while domiciled in California, purchased 100 shares each of A Co., B Co. and C Co. stock with community property (earnings of H). H and W were transferred to a common law state which had not enacted this Act; while domiciled there H sold the 100 shares of A stock and with the proceeds purchased 100 shares of D stock. Subsequently H and W became domiciled in Michigan which had enacted this Act; H sold the B stock and 50 shares of D Co. stock and purchased 150 shares of E stock. H died domiciled in Michigan with 100 shares of C Co., 50 shares of D Co. and 150 shares of E Co. stock; all of the stock had always been registered in H's name. All of the shares, traceable to community property or the proceeds therefrom, constitute property subject to this Act.

Subsection (2): Real Property

Subsection (2) deals with real property and is confined to real property located within the enacting state (since presumably the law of the situs of the property will govern dispositive rights). The policy and operation of this subsection are intended to be the same as those set forth in subsection (1).

Example 2. H and W, while domiciled in California, purchased a residence in California. They retained the residence in California when they were transferred to Wisconsin. After becoming domiciled in Wisconsin they used community funds, drawn from a bank account in California, to purchase a Wisconsin cottage. H and W subsequently became domiciled in Michigan; they then purchased a condominium in Michigan for $20,000 using $15,000 of community property funds drawn from their bank account in California and $5,000 earned by H after the move to Michigan. H died domiciled in Michigan; title to all of the real property was in H's name. Assuming Michigan had enacted this Act, three-fourths of the Michigan condominium would be property subject to this Act; the Michigan statute would not, however, apply to either the Wisconsin or California real estate. If Wisconsin had enacted this Act, the Wisconsin statute would apply to the Wisconsin cottage.

Subsections (1) and (2):
Apportionment

In both subsections (1) and (2) an apportionment is required by the phrase "all or the proportionate part" where personal property, or real property situated in the enacting state, has been acquired partly with property described as subject to the Act and partly with other (separate) property. To put it succinctly, the phrase represents a condensation of an area covered by many pages in a prior draft and is simply a statement of policy; it leaves to the courts the difficult task of working out the precise interest which will be treated as the "proportionate part" of the property subject to the dispositive formula of Section 3 [72-9-107]. Simply by way of illustration, assume that a single man (domiciled in a community property state) purchased a life insurance policy with a face amount of $100,000 and an annual premium of $1,000. Assume further that he paid three premiums and then entered into marriage. Further assume that the next seven premiums were paid with his earnings while domiciled in the community property state and that he and his wife then moved to a common law state where the next ten premiums were paid from his earnings in that common law state; he then died after the payment of the twenty premiums. Under one interpretation of the law of Texas the contract would remain the separate property of the insured; the community would have a claim for community funds advanced to pay premiums and, ignoring interest, it would appear that $7,000 of the proceeds would be treated as community property and the remaining $93,000 would be treated as the separate property of the deceased spouse. On the other hand, a state like California would probably treat the proceeds as being 65% separate and 35% community (basing the allocation of proceeds upon the percentage of separate and community funds contributed). Further variations could be mentioned. The illustration is one of the simpler problems. Much more difficult problems are encountered where benefits under a qualified pension and profit-sharing plan are involved and the employee has been domiciled in both community property and common law jurisdictions during the period in which benefits have accrued. Attempts at defining the various types of situations which could arise and the varying approaches which could be taken, depending upon the state, suggest that the matter simply be left to court decision as to what portion would, under applicable choice of law rules, be treated as community property. The principle suggested is that at least a portion should be treated as community, if the appropriate law so treated it. Ordinarily, such questions should not arise if the problem is foreseen and effective planning takes place prior to death of a spouse.

Compiler's Comments

Source: The corresponding section of the Uniform Disposition of Community Property Rights at Death Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 1.

72-9-103. Rebuttable presumptions.

Official Comments

The purposes of the rebuttable presumptions are simply to assist a court in applying the definitions in Section 1 [72-9-102], through a process of tracing the property to a community property origin.

Subsection (1)

Subsection (1) of Section 2 [72-9-103] deals with property acquired by the spouses while domiciled in a community property state. It thus provides that if one of the spouses acquired property while so domiciled, such property is "presumed" (a rebuttable presumption) to have been and remained community. It may be shown, of course, that such property was the separate property of the spouse and the law of the state of domicile may furnish the rule. For example the law of community domicile may provide the rule that property acquired in the name of the wife shall be deemed to be her separate property or that a particular subsequent act effectively severed the community property interests.

Example 1. H, married to W and domiciled in California, acquired stock; later H and W became domiciled in Michigan. Such property, if retained, is presumed to be property subject to this Act. By operation of Section 1 [72-9-102] the proceeds of sale or exchange of such stock, and property acquired with the proceeds or income of such stock, would be deemed subject to the Act. If, however, upon the death of H, H's personal representative rebutted the presumption by evidence that the stock was acquired by H with his separate property (or by inheritance) neither the stock nor property acquired with that property or the income therefrom (unless the income itself would be subject to the Act because, under the applicable law, income from separate property is deemed to be community property) would be subject to this Act. Similarly the presumption may be rebutted by showing that such property, though originally community property, was effectively severed by an act of the spouses. It should be emphasized that the presumption is simply one of procedural convenience and neither changes the nature of the property interests nor prevents an interested person from showing the separate nature of the property.

Subsection (2)

Subsection (2) sets up a rebuttable presumption that where a domiciliary of a common law state acquired property in such form as to indicate that title was in joint tenancy, tenancy by the entireties, or some other form of joint ownership with right of survivorship, it will be presumed that the property is not subject to the Act. This presumption was deemed appropriate as expressing the normal expectations of the spouses and to facilitate ascertainment of title to real property located in the enacting state, as well as personal property wherever located.

Example 2. John and Mary Jones, formerly domiciled in California, became domiciled in Illinois and purchased a residence, taking title in the names of "John and Mary Jones as joint tenants, and not as tenants in common, with right of survivorship." Regardless of the source of the funds, the Illinois residence would be presumed to be held in joint tenancy and not subject to this Act.

Compiler's Comments

Source: The corresponding section of the Uniform Disposition of Community Property Rights at Death Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 2.

72-9-107. Disposition upon death.

Official Comments

This section [72-9-107] deals with the dispositive rights, at death, of (l) a married person domiciled in the enacting state as to personal property and (2) of any married person, including a nondomiciliary of the enacting state, as to real property located in the enacting state; it also sets forth rules for intestate succession to property subject to this Act.

Testate Disposition

The dispositive pattern is the usual one encountered in the community property states; the deceased spouse may dispose of his one-half of the community property, subject to the provisions of Section 9 [72-9-116].

Example. H and W were formerly domiciled in California and are now domiciled in Michigan. All of their property was community property prior to the move from California to Michigan. At H's death he held title to a home in Michigan which had been purchased with the proceeds of the sale of a home in California which had been community property. Stock acquired as community property in California was held in his name in safety deposit boxes located in Illinois and Michigan. H and W had acquired a cottage in California as community property, held in H's name, and it was so held at the time of his death. H and W acquired a Michigan resort condominium, taking title as tenants by the entireties. H acquired bonds issued by his employer with earnings in Michigan and held title in his own name.

The Michigan residence and the stock would be deemed property subject to this Act and H would have the right under Section 3 [72-9-107] to dispose of half of that property by his will. The remaining property would not be deemed subject to this Act.

Intestate Succession

If the property subject to this Act passes by intestate succession, the law of the enacting state applies to the decedent's one-half, again subject to Section 9 [72-9-116]. If under the law of the enacting state, a surviving spouse is entitled to one-third of the decedent's property by intestate succession, the result of the Act is to give to her two-thirds of the property subject to the Act. For example, if the spouses had recently moved to a common law state and owned $300,000 of property (all being personal property held in the husband's name and acquired as community property), the wife would be entitled to one-half of the property ($150,000) and would receive a 1/3 share of the husband's half ($50,000) for a total of $200,000. It is clearly within the power of the enacting state to prescribe any pattern of intestate succession deemed appropriate, and views may differ. In some community property states, the surviving spouse receives all of the decedent's community property upon intestate succession; in another, she would receive none. Similarly, the common law state may alter the pattern to fit its own policy determination.

Dower, Curtesy, Elective Share

Dower and curtesy do not exist in community property and have been abolished in many common law states; policy considerations suggest that no such interest should exist in property subject to this Act, since the surviving spouse already has a one-half interest in such property. Similar reasons suggest a denial of any right in the surviving spouse to elect a statutory share in the one-half of the property over which the decedent had a power of disposition.

Compiler's Comments

Source: The corresponding section of the Uniform Disposition of Community Property Rights at Death Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 3.

Changes From Uniform Act: Montana enactment omitted the following language from the end of the last sentence, after "to elect against the will": "[and no estate of dower or curtesy exists in the property of the decedent]".

72-9-108. Perfection of title of surviving spouse.

Official Comments

This section [72-9-108] simply provides for perfection of title interests of the surviving spouse (e.g. where title was in the name of the deceased spouse) by orders of the court of appropriate jurisdiction (e.g. the probate court) in the enacting state. This section [72-9-108] is designed to eliminate any liability of the personal representative for a breach of his fiduciary duty by failing to search for or to discover whether property held by the decedent is property defined in Section 1 [72-9-102], unless a written demand is made by the surviving spouse or the spouse's successor in interest. In several states the Court administering a decedent's estate has a duty or undertakes to advise parties in interest of their legal and equitable rights, and this section [72-9-108] is similarly designed to eliminate such Court's liability for failing to discover the community rights and to advise the interested party of his rights. Nothing contained in this section [72-9-108] is to be construed to interfere with the Court's jurisdiction in a proper proceeding to perfect the title of the surviving spouse in and to property to which this Act applies.

Compiler's Comments

Source: The corresponding section of the Uniform Disposition of Community Property Rights at Death Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 4.

72-9-109. Perfection of title of personal representative, heir, or devisee.

Official Comments

This section [72-9-109] is a corollary to Section 4 [72-9-108]. Since title is apparently in the surviving spouse, the section simply provides for an action by the personal representative, heirs, or devisees and is again designed to eliminate any liability of the personal representative for a breach of his fiduciary duty by failing to discover or to attempt to discover whether property held by the surviving spouse is property subject to this Act, absent a written demand by an heir, devisee or creditor of the decedent.

Compiler's Comments

Source: The corresponding section of the Uniform Disposition of Community Property Rights at Death Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 5.

Changes From Uniform Act: Montana enactment inserted the statutory reference to the definition section.

72-9-110. Purchaser for value or lender.

Official Comments

This section [72-9-110] is designed to protect purchasers and lenders taking a security interest, who acquire such interest for value, after the death of the decedent, from a person who appears to have title to property to which this Act applies. The only requirement is that the purchaser or lender have acquired his interest for value; there is no requirement of good faith absence of notice. The purpose of the section is to permit reliance upon apparent title and facilitate both ascertainment of title and disposition of assets where adequate consideration is paid. Since, during the joint lives of the spouses, the spouse with apparent title would have been able to convey title (at least as to community property) though being held accountable to the other spouse for an appropriate allocation of the proceeds or any breach of fiduciary obligation, the Act simply extends this treatment to disposition of the assets after the death of a spouse.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Source: The corresponding section of the Uniform Disposition of Community Property Rights at Death Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 6.

Changes From Uniform Act: Montana enactment in (1) inserted the statutory reference to the definition section.

72-9-114. Creditor's rights.

Compiler's Comments

Source: The corresponding section of the Uniform Disposition of Community Property Rights at Death Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 7.

72-9-115. Acts of married persons.

Official Comments

The rights, and procedures, with respect to severance of community property vary markedly among the community property states. The Act simply makes clear that nothing in the Act itself in any way limits the rights of the spouses to sever community property or to create a form of ownership not subject to this Act.

Compiler's Comments

Source: The corresponding section of the Uniform Disposition of Community Property Rights at Death Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 8.

72-9-116. Limitations on testamentary disposition.

Compiler's Comments

Source: The corresponding section of the Uniform Disposition of Community Property Rights at Death Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 9.

72-9-120. Uniformity of application and construction.

Compiler's Comments

Source: The corresponding section of the Uniform Disposition of Community Property Rights at Death Act as adopted by the National Conference of Commissioners on Uniform State Laws is section 10.

Changes From Uniform Act: Montana enactment before "to make uniform the law" substituted the lead-in phrase for "This Act shall be so applied and construed as to effectuate its general purpose".

CHAPTER 11
INTESTATE SUCCESSION

Chapter Case Notes

Living Trust — Definitions — Classification of Property Subject to Trust: Clifford and his wife Mary established a living trust for the benefit of their family. The trust classified property as either "marital" or "separate". Marital property transferred to the trust would become part of the marital trust estate and would go to the surviving spouse on the death of either Clifford or Mary. Separate property of either Clifford or Mary would become part of the separate trust estate and would be distributed according to the trust, with the residue going to the family bypass trust. The trust required the trustee to distribute $10,000 from Clifford's separate trust to each of his children. In order to determine whether joint bank account and certain certificates of deposit were available for distribution by the separate trust, the Supreme Court examined the terms of the trust and definitions used in the trust. Because the trust was silent as to the treatment of jointly held personal property and the definitions in the trust were ambiguous as to the terms "marital property" and "separate property", the Supreme Court relied upon external evidence to determine the intent of Clifford and Mary. The Supreme Court found that the circumstances concerning the creation and use of the accounts and certificates during their lifetime indicated an intent that the accounts and certificates were joint and not separate property, in that Clifford and Mary placed money generated by their mutual efforts into the accounts and certificates and, for at least one of the accounts, the bank had issued the passbook and statements of account in both their names. The Supreme Court held that the District Court had properly characterized Clifford and Mary's joint bank account and certificates of deposit as part of the marital trust estate and therefore not available for distribution from Clifford's separate trust estate. In re Estate of Dern, 279 M 138, 928 P2d 123, 53 St. Rep. 1087 (1996).

Part 1
Intestate Succession

72-11-101. Degrees of kinship — how computed.

Compiler's Comments

1993 Amendment: Chapter 494 near beginning substituted "kinship" for "kindred".

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

72-11-102. Types of kinship — lineal and collateral.

Compiler's Comments

1993 Amendment: Chapter 494 substituted current text concerning lineal and collateral kinship for former text that read: "The series of degrees forms the line; the series of degrees between persons who descend from one another is called direct or lineal consanguinity; and the series of degrees between persons who do not descend from one another but spring from a common ancestor is called the collateral line or collateral consanguinity."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

72-11-103. Computation of degrees in lineal kinship.

Compiler's Comments

1993 Amendment: Chapter 494 substituted current text concerning the method of computing the degrees in lineal kinship for former text that read: "The direct line is divided into a direct line descending and a direct line ascending. The first is that which connects an ancestor with those who descend from him. The second is that which connects a person with those from whom he descends."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

1987 Amendment: Near end of second sentence substituted "an ancestor" for "the ancestors".

72-11-104. Computation of degrees in collateral kinship.

Compiler's Comments

1993 Amendment: Chapter 494 substituted current text concerning the computation of the degrees in collateral kinship for former text that read: "In the direct line there are as many degrees as there are generations. Thus, the son is with regard to the father in the first degree; the grandson in the second; and vice versa with regard to the father and grandfather toward the sons and grandsons."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

CHAPTER 12
PROBATE AND ADMINISTRATION SUPPLEMENTARY PROVISIONS

Part 2
Will Contest — Procedure

72-12-206. Fees and expenses — by whom paid.

Compiler's Comments

1993 Amendment: Chapter 494 near middle of first sentence substituted "attorney fees and costs as provided in 25-10-201, incurred in defending the validity or probate of the will" for "fees and expenses"; near middle of second sentence, after "costs", inserted "as provided in 25-10-201, but not attorney fees"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

Case Notes

Defending Will's Validity — Representative Entitled to Fees and Costs: Litigants sought to reopen an estate, invalidate a will, and have the prior will probated. The estate's personal representative successfully defended against this challenge and sought attorney fees. The District Court did not address attorney fees, and the representative appealed. The Supreme Court remanded for an award of attorney fees, finding the personal representative entitled to fees and costs as provided in 72-12-206 as a matter of law. In re Estate of Swanberg, 2020 MT 153, 400 Mont. 247, 465 P.3d 1165.

Litigation to Modify or Vacate Final Probate Order — Will Confirmed — Attorney Fees and Costs Awarded: The personal representative of a decedent's estate was entitled to both attorney fees and costs under this section because he defended the probate of a contested will and the will was confirmed. Although the decedent's wife argued that she did not contest the probate of the will, she sought to have the final probate order modified or vacated based on a document purportedly having testamentary intent. In re Estate of Erickson, 2017 MT 260, 389 Mont. 147, 406 P.3d 1.

Petition to Probate 13 Years After Death — Decedent Died Intestate: Prior to his death, the decedent dictated a will to his niece and her husband. The couple did not petition to probate the will until 13 years after his death. The decedent's nephew challenged the will. The District Court ultimately held that the decedent died intestate. On appeal, the Supreme Court affirmed, holding that none of the statutory exceptions to the 3-year time bar in 72-3-122 applied, that the estate's motion to amend its pleadings was properly denied, that the nephew's motion to amend his pleadings was properly granted because it was timely and based on newly discovered evidence, that the decedent died intestate, and that the District Court properly awarded costs under 72-12-206. In re Estate of Kurth, 2016 MT 188, 384 Mont. 261, 378 P.3d 1151.

Attorney Fees:

Following the resolution of a will contest, the personal representatives claimed attorney fees and costs pursuant to this section. The will contestants argued that under 25-10-501 and pursuant to Craver v. Waste Management Partners of Bozeman, 265 M 37, 874 P2d 1, 51 St. Rep. 268 (1994), a party claiming attorney fees and costs must file a bill of costs within 5 days of the verdict or notice of the court's decision, which the personal representatives did not do. The District Court concluded that 25-10-501 did not apply and that attorney fees and costs were not waived by the failure to file a timely memorandum. The Supreme Court disagreed in part, overruling Craver, and held that under the plain language of 25-10-501 and pursuant to Cook v. Harrington, 203 M 479, 661 P2d 1287, 40 St. Rep. 580 (1983), and Schillinger v. Brewer, 215 M 333, 697 P2d 919, 42 St. Rep. 408 (1985), the 5-day filing requirement for filing a memorandum of costs does not apply to attorney fees to which a party is entitled by statute. However, the filing requirement does apply to the personal representatives' claim for costs. As a result, the case was remanded for modification of judgment to delete costs awarded in error. In re Estate of Lande, 1999 MT 179, 295 M 277, 983 P2d 316, 56 St. Rep. 701 (1999).

It was not error for the District Court to award attorney fees to the personal representatives in a will contest pursuant to this section, despite the fact that the issue of attorney fees was not included in the pretrial order. The purposes of pretrial orders are to prevent surprise, simplify the issues, and permit the parties to prepare for trial. However, in the case of a stand-alone, statutorily mandated award of fees to the prevailing party, as contained in this section, requiring inclusion in the pretrial order would accomplish none of these purposes and thus is not required.

In re Estate of Lande, 1999 MT 179, 295 M 277, 983 P2d 316, 56 St. Rep. 701 (1999), distinguishing Naftco Leasing Ltd. Partnership 301 v. Finalco, Inc., 254 M 89, 835 P2d 729, 49 St. Rep. 644 (1992), and Simmons Oil Corp. v. Wells Fargo Bank, 1998 MT 129, 289 M 119, 960 P2d 291 (1998).

In a probate contest, the validity of the will in probate was confirmed. The respondent was therefore statutorily entitled to her fees and expenses. The Supreme Court held that "expenses" as used in 72-12-206 encompasses attorney fees as part of the expense of the proceeding to confirm the probate of a will. In re the Estate of Weidner, 192 M 421, 628 P2d 285, 38 St. Rep. 747 (1981).

If contest of a will previously admitted to probate is successful, costs may be chargeable against the executor who resisted revocation or, in the discretion of the court, may be taken from the assets of the estate, but attorneys' fees for services in defense of a will contest are not included within the term "costs", and hence such fees cannot be recovered from the estate. In re Kesl's Estate, 117 M 377, 161 P2d 641 (1945).

Attorneys' fees incurred by a devisee under a will to defend a contest thereof are not allowable as costs and disbursements within the purview of this section and 72-10-111 (now repealed), out of the assets of the estate. In re Baxter's Estate, 94 M 257, 22 P2d 182 (1933), explained in In re Mickich's Estate, 114 M 258, 136 P2d 223 (1943).

Award of Attorney Fees for Unsuccessful Defense of Will Contest: As a significant part of a will contest, Seright unsuccessfully defended the will for which he was a personal representative. The District Court granted Seright attorney fees and costs. Hauck asserted error in the award and contended that under this section, attorney fees are not included within the term "costs". However, under 72-3-632, Seright was entitled to reasonable fees for defending the will contest, whether or not the defense was successful. Hauck v. Seright, 1998 MT 198, 290 M 309, 964 P2d 749, 55 St. Rep. 838 (1998).

Living Trust — Costs and Attorney Fees Awarded to Trustee From Trust — Judicial Construction of Trust Documents: Clifford Dern and his wife Mary established a living trust for the benefit of their family. Derril Dern, a cotrustee, refused to sign a quitclaim deed conveying various properties left to the trust beneficiaries, and Mary brought an action to determine the beneficiaries' rights. The District Court relied upon 25-10-103 for its determination that payment of costs was discretionary with the court. The Supreme Court held that 25-10-103 applies only in those situations in which costs are not otherwise provided for. In this case, article 3 of the trust documents states that the trustee may pay "expenses of administration" from the trust. In reliance on that language and on 72-33-631 (now repealed), the Supreme Court held that the fees were a necessary expense of the trust, given Derril's refusal to sign the deed. The Supreme Court also noted that 72-33-631 (now repealed) allows repayment of expenditures incurred by the trustee in administration of the trust, that that provision was patterned after a section of the California probate code, and that California decisions interpreting that section of the California probate code hold that reasonable attorney fees are considered necessary expenses of trust administration. The Supreme Court also pointed out that its decision to allow fees is further buttressed by decisions interpreting this section. Finally, because the trust documents provided that only expenses of the trust were to be paid from the "trust estate", without further delineation of what constitutes the "trust estate", the Supreme Court interpreted those words to mean the entire trust estate, and because the marital trust estate was the only remaining source of funding for the entire estate, the fees were to be paid from the marital trust estate. In re Estate of Dern, 279 M 138, 928 P2d 123, 53 St. Rep. 1087 (1996).

New Trial Granted Regarding Validity of Will — Award of Attorney Fees Reversed: In light of the Supreme Court's decision to grant a new trial on the issue of the validity of a will and an instrument of revocation, the award of attorney fees to the prevailing party in the first trial was reversed. In re Estate of DeCock, 278 M 437, 925 P2d 488, 53 St. Rep. 992 (1996).

Section Inapplicable When Validity or Probate Not at Issue: Attorney fees are not payable under this section when the validity or probate of a will is not involved. In re Estate of Morris, 254 M 368, 838 P2d 402, 49 St. Rep. 739 (1992).

Persons or Property Liable for Costs:

When probate is revoked on the ground of undue influence by the person who resisted revocation, the costs must be paid by that party even though he was administrator under the will and would not, under section 91-1105, R.C.M. 1947 (since repealed), be liable for good faith acts during his administration. In re Hardy's Estate, 133 M 443, 325 P2d 694 (1958).

Under this section, the Trial Court may in its discretion order that the costs incident to the revocation of the probate of a will be paid out of the property of the decedent if the revocation was resisted in good faith and upon substantial grounds, or, in case of bad faith and without justification, tax them against the party who resisted revocation. In re Carroll's Estate, 59 M 403, 196 P 996 (1921).

Former Law — This Statute as Controlling General Statute: In matters relating to a will contest after probate this section controls over the general statute, section 91-3405, R.C.M. 1947 (since repealed), with respect to expenses and costs. In re Kesl's Estate, 117 M 377, 161 P2d 641 (1945).

Will Revocation — Liability Only for Costs: Under this section the Legislature intended that, when the will is revoked, no liability should attach other than the costs, as judicially determined and defined by the Supreme Court. In re Kesl's Estate, 117 M 377, 161 P2d 641 (1945).

Persons or Property Liable for Costs — Executors: When executors would have been remiss in the performance of their duty had they not made defense against the attack upon the will sought to be set aside and there was ample justification for the defense, the District Court abused its discretion in taxing the costs against executors individually. In re Carroll's Estate, 59 M 403, 196 P 996 (1921).

Part 4
Handwriting Analysis

72-12-401. Petition for handwriting analysis.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-12-403. Clerk to mail will to expert — notice.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-12-404. Expert to return will to clerk.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-12-405. Expert to mail report to petitioner.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

72-12-407. Report property of petitioner unless interested party shares fees.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

CHAPTER 14
ESCHEATED ESTATES

Part 1
General Provisions

72-14-102. When title to escheated property vests in state.

Compiler's Comments

1997 Amendment: Chapter 124 at end of (2) deleted "as provided in 70-9-203". Amendment effective July 1, 1997.

Severability: Section 33, Ch. 124, L. 1997, was a severability clause.

1993 Amendment: Chapter 263 inserted (2) providing that Title 72, chapter 14, does not apply to certain unclaimed patronage refunds made by a cooperative; and made minor changes in style.

Case Notes

Alien Heirs: In a proceeding to determine heirship of personal property where it was determined that Romanian heirs were the sole heirs at law and entitled to the distribution of the estate, but proof of reciprocity had not been shown to exist, the estate escheated to the state. In re Stoian's Estate, 138 M 384, 357 P2d 41 (1960).

72-14-103. Duty of attorney general — employment of special assistant.

Case Notes

Title to Escheated Property — Attorney General Action Required: While under the common law only the real property of an intestate decedent leaving no heirs competent to take escheated to the state, title vesting in the state immediately, under this section however, all property, real, personal, and every right of property of whatever nature, is subject to escheat, but title thereto does not vest in the state until institution by the Attorney General of an action to reduce the property to the possession of the state, and favorable judicial determination thereof. St. v. Kearns, 79 M 299, 257 P 1002 (1927), distinguished in Kelly v. Kelly, 89 M 229, 297 P 470 (1931).

Part 2

Procedure for State Acquisition of Escheatable Property

72-14-201. Discovery to determine existence of escheatable property.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-14-202. Public administrator to deposit money with county treasurer — disbursement for administration — accounts.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-14-204. Order directing sale of property upon final settlement of estate.

Compiler's Comments

2001 Amendment: Chapter 34 at end of third sentence before "trust fund" substituted "private purpose trust fund" for "expendable trust fund". Amendment effective July 1, 2001.

1995 Amendment: Chapter 5 near end of third sentence substituted reference to expendable trust fund for reference to agency fund; and made minor changes in style. Amendment effective January 26, 1995.

Retroactive Applicability: Section 11, Ch. 5, L. 1995, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to July 1, 1994."

72-14-205. Unsold intangible personal property — how disposed of — auction sale.

Compiler's Comments

2001 Amendment: Chapter 34 in (3) at end substituted "private purpose trust fund" for "expendable trust fund". Amendment effective July 1, 2001.

1995 Amendment: Chapter 5 at end of (3) substituted reference to expendable trust fund for reference to agency fund; and made minor changes in style. Amendment effective January 26, 1995.

Retroactive Applicability: Section 11, Ch. 5, L. 1995, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to July 1, 1994."

72-14-206. Unsold real property — how disposed of — auction sale.

Compiler's Comments

2001 Amendment: Chapter 34 in (4) at end of first sentence substituted "private purpose trust fund" for "expendable trust fund". Amendment effective July 1, 2001.

1995 Amendment: Chapter 5 at end of first sentence of (4) substituted reference to expendable trust fund for reference to agency fund; and made minor changes in style. Amendment effective January 26, 1995.

Retroactive Applicability: Section 11, Ch. 5, L. 1995, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to July 1, 1994."

72-14-207. Unsold tangible personal property — how disposed of — auction sale.

Compiler's Comments

2001 Amendment: Chapter 34 at end of (3) substituted "private purpose trust fund" for "expendable trust fund"; and made minor changes in style. Amendment effective July 1, 2001.

1995 Amendment: Chapter 5 near end of (3) substituted reference to expendable trust fund for reference to agency fund; and made minor changes in style. Amendment effective January 26, 1995.

Retroactive Applicability: Section 11, Ch. 5, L. 1995, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to July 1, 1994."

72-14-209. Deposit of all sums escheated — private purpose trust fund.

Compiler's Comments

2001 Amendment: Chapter 34 at end substituted "private purpose trust fund" for "expendable trust fund". Amendment effective July 1, 2001.

1995 Amendment: Chapter 5 near end substituted reference to expendable trust fund for reference to agency fund; and made minor changes in style. Amendment effective January 26, 1995.

Retroactive Applicability: Section 11, Ch. 5, L. 1995, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to July 1, 1994."

72-14-210. Private purpose trust fund money to be held in trust — deposit in public school permanent fund.

Compiler's Comments

2001 Amendment: Chapter 34 in first sentence near beginning after "placed in the" substituted "private purpose trust fund" for "expendable trust fund" and near end after "school" substituted "permanent fund" for "nonexpendable trust fund" and at beginning of second sentence substituted "private purpose trust" for "expendable trust". Amendment effective July 1, 2001.

1995 Amendment: Chapter 5 near beginning of first sentence substituted reference to expendable trust fund for reference to agency fund; and made minor changes in style. Amendment effective January 26, 1995.

Retroactive Applicability: Section 11, Ch. 5, L. 1995, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to July 1, 1994."

1983 Amendment: Substituted "public school nonexpendable trust fund" for "public school subfund in the trust and legacy fund".

Part 3
Actions for Claim of Escheated Property

72-14-302. Statute of limitations.

Compiler's Comments

1983 Amendment: In middle of section, changed "infants" to "minors".

Case Notes

Strict Construction — Period — Reciprocity: Exceptions to this section in favor of persons under disability must be strictly construed, and the Courts will not read into Statutes of Limitation, which begin to run upon the death of the decedent, an exemption or disability which has not been embodied therein, and although a treaty may accord foreign nationals the same right to inherit as American citizens, this section makes an exception of the 2-year period for American nationals living abroad, which exception is not affected by the treaty because this section affects the remedy to assert the right to inherit and not the right itself. Levc (nee O'Blak) v. Connors, 171 M 1, 555 P2d 750 (1976).

Part 4
Fiduciary Deposit in Certain Cases
Claims — Escheat

72-14-401. Fiduciary deposit of money when interested person under disability or similar circumstances — receipt as voucher.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-14-402. Claim for money deposited in county treasury.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-14-403. Deposit of unclaimed property in state treasury — escheat.

Compiler's Comments

2001 Amendment: Chapter 34 in (1) near middle after "deposited" deleted "before or after July 1, 1947", near end after "deposit in the" substituted "private purpose trust fund" for "expendable trust fund", and at end after "fund" deleted "by the county treasurer"; and in (2) at end substituted "permanent fund" for "nonexpendable trust fund". Amendment effective July 1, 2001.

1995 Amendment: Chapter 5 near end of (1) substituted reference to expendable trust fund for reference to agency fund; and made minor changes in style. Amendment effective January 26, 1995.

Retroactive Applicability: Section 11, Ch. 5, L. 1995, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to July 1, 1994."

1983 Amendment: Near end of (2), substituted "public school nonexpendable trust fund" for "public school subfund of the trust and legacy fund".

CHAPTER 15
PUBLIC ADMINISTRATOR

Part 1
Powers and Duties in Acquisition of Estates

Part Case Notes

Compromise of Claims: A Public Administrator has the same power to compromise claims as an administrator or executor. Mulville v. Pac. Mut. Life Ins. Co., 19 M 95, 47 P 650 (1897).

72-15-101. Other provisions to supplement chapter.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-15-102. When public administrator to take charge of estate.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Father's Priority Over Public Administrator — Fourteen-Month Delay in Opening Estate: Fourteen months after the death of his son in a traffic accident, the father applied to be personal representative of his son's estate in response to a proceeding to appoint a public administrator so that the estate could be sued for insurance money on behalf of another who had died in the accident. No prior application for personal representative was required because the son left no estate to be administered. The father has priority to be personal representative under 72-3-502, notwithstanding speculation that in the accident trial he might be accorded more sympathy as father of the deceased than a public administrator would be accorded. The requirement of 72-15-102 that a public administrator may not file a petition for letters until after 30 days has elapsed does not raise a burden of justifying the delay on some other person applying for letters later than 30 days after a death. In re Estate of Karst, 200 M 254, 650 P2d 792, 39 St. Rep. 1723 (1982).

Jurisdiction of District Court to Appoint: The District Court has jurisdiction to make an order appointing the Public Administrator as administrator of an estate, although no petition for his appointment has been filed. State ex rel. Lancaster v. Woody, 20 M 413, 51 P 975 (1898).

72-15-103. Requirement to procure letters of administration — bond and oath.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Letters of Administration Required: A Public Administrator does not become ex officio administrator of any estate, but must procure letters of administration in like manner as any other applicant for letters. O'Rourke v. Harper, 35 M 346, 89 P 65 (1907).

Official Bond — Liability of Sureties: The sureties on the official bond of a Public Administrator for his second term of office are not liable for a conversion of funds of an estate where his letters were issued during his first term of office, although it appears that the conversion occurred during his second term. O'Rourke v. Harper, 35 M 346, 89 P 65 (1907).

Effect of Application for Letters as Against Successor: A Public Administrator, by applying for letters of administration, does not acquire a vested right, as against his successor in office, to administer upon the estate or to the fees pertaining thereto. State ex rel. Lancaster v. Woody, 20 M 413, 51 P 975 (1898); In re Dewar's Estate, 10 M 426, 25 P 1026 (1891).

72-15-105. Duty of persons in whose house stranger dies — notification to public administrator.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-15-107. Power to require persons controlling property to furnish statement describing property.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-15-109. Order to examine person in possession or charged with misappropriation of estate.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-15-110. Refusal to be examined — civil contempt.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 2
Powers and Duties in Administration

Part Case Notes

Compromise of Claims: A Public Administrator has the same power to compromise claims as an administrator or executor. Mulville v. Pac. Mut. Life Ins. Co., 19 M 95, 47 P 650 (1897).

72-15-201. Duty to make out inventory, administer, and account.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-15-202. Duty to deliver up estate when letters granted to another.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-15-203. Power of court to order account and delivery of estate at any time.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

72-15-204. Duty to keep register.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-15-205. Deposit of money with county treasurer — withdrawals for administrative costs — investment.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Mingling of Funds as Conversion: The mingling of all funds received by a Public Administrator from different estates in his charge in one general deposit in a bank, contrary to the provisions of this section, constitutes a conversion. Funds so mingled lose their identity, and cannot be said to belong to any particular estate. Raban v. Cascade Bank, 33 M 413, 84 P 72 (1906).

72-15-206. Monthly settlement of accounts.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-15-207. Annual account of condition of all estates.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Publication of Report — Cost — Proper Charge Against County: The expense incident to the publication of the semiannual (prior to 1939 amendment) report of the Public Administrator required by this section is a proper charge against the county, and not against the commissions received by that officer. Gavigan v. Silver Bow County, 99 M 58, 41 P2d 409 (1935).

72-15-208. Power of court to require additional report or bond.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-15-210. Fees — how paid.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-15-211. Conflict of interest prohibited — affidavit.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-15-213. Wrongful failure of public administrator to deposit money — action on bond.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 3
Compensation — Termination of Office

72-15-301. Compensation of public administrator.

Compiler's Comments

2019 Amendment: Chapter 313 in (1) at end substituted "the amount provided for in 72-3-631" for "including attorney fees, the amounts provided for in 72-3-631 and 72-3-633". Amendment effective October 1, 2019.

1999 Amendment: Chapter 235 in (2) in last sentence substituted "may not be less than $100" for "may not exceed 2 ½% of the annual periodic payments or $100, whichever is less"; and made minor changes in style. Amendment effective October 1, 1999.

1985 Amendment: In (1) after "services", inserted "under this chapter"; and inserted (2) relating to reimbursement of public administrator when appointed as conservator of the estate of a protected person.

72-15-302. Retiring public administrator may close pending estates.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-15-303. Accounting and surrender of pending estates on retirement of public administrator.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-15-304. Adjustment of compensation.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

CHAPTER 16
ESTATE AND GENERATION-SKIPPING TAXES

Chapter Case Notes

DECISIONS UNDER FORMER LAW

Annuity Contract Considered Investment, Not Life Insurance: Miles invested $30,000 in a tax-deferred variable annuity contract. After Mile's death, the plaintiffs demanded one-half of the annuity investment on grounds that the annuity was life insurance that they were entitled to under Miles' will. The District Court denied their demand, holding that the annuity contract did not constitute insurance under Montana law. On appeal, the heirs cited In re Fligman's Estate, 113 M 505, 129 P2d 627 (1942), for the proposition that because annuity contracts were considered insurance for inheritance tax purposes in that case, it followed that annuity contracts have to be considered insurance for all purposes. The Supreme Court held that because the annuity contract in Miles' case did not involve indemnification, loss, damage, liability, or contingent events, it was an investment, not insurance, and the District Court did not err in so holding. In re Estate of Miles v. Miles, 2000 MT 41, 298 M 312, 994 P2d 1139, 57 St. Rep. 191 (2000).

Definition of Farm for Purposes of Eminent Domain — Use of Otherwise Inapplicable Definition — Use of Ordinary Meaning of Undefined Term: The Richters brought an action in District Court to condemn an easement across the land of a neighbor that surrounded their property on three sides. The District Court held that the definition of farm in 72-16-331(7) (now repealed) applied to the use of that term in 70-30-102(6), reasoning that because the term "farm" was undefined in Title 70, ch. 30, the definition in 72-16-331(7) (now repealed) should be applied because 1-2-107 provides that a definition contained in one section of law should be used for the purposes of other sections of law unless "a contrary intention plainly appears". The District Court then entered a preliminary condemnation order in favor of the Richters. The Supreme Court held that a contrary intention did in fact appear because the Legislature had, by use of the phrase "as used in 72-16-331 through 72-16-349" (all now repealed), limited the application of the terms defined in 72-16-331 (now repealed) to only 72-16-331 through 72-16-349 (all now repealed). Because farm was then left undefined for the purposes of Title 70, ch. 30, the Supreme Court applied the definition found in the American Heritage Dictionary and held that the Richters' property did not qualify as a farm, as defined in that dictionary, because the Richters had not prepared, fertilized, or tilled the soil on their property nor had they cited any authority for the Supreme Court to hold that naturally occurring timber on the property was a crop. The Supreme Court therefore reversed the condemnation order of the District Court. Richter v. Rose, 1998 MT 165, 289 M 379, 962 P2d 583, 55 St. Rep. 663 (1998), followed in Myers v. Dee, 2011 MT 244, 362 Mont. 178, 261 P.3d 1054.

Taxation of Joint Tenancies to Be Based on Full Value of Tenancies — Law to Be Determined at Time of Death — Finding of Ownership of Tenancies Clearly Erroneous: More than 3 years before his death in 1991, Emelio created 18 joint tenancies in his personal property with members of his extended family. As a joint tenant, Emelio retained a joint interest in the items of personal property until his death. Upon Emelio's death, all of the property was transferred to the other joint tenants. Emelio's estate paid taxes on the full value of the joint tenancies but challenged the Department of Revenue's calculation, claiming that the tax should be based on only 50% of each joint tenancy. The District Court agreed, finding that some of the joint tenants had contributed to the tenancies. Citing Burr v. Dept. of Revenue, 175 M 473, 575 P2d 45 (1978), the Supreme Court held that the law must be applied as of the date of Emelio's death and that it was therefore erroneous for the District Court to apply both the 1987 version of 72-16-303 (now repealed) and the rationale in Dept. of Revenue v. Dwyer, 236 M 405, 771 P2d 93 (1989), rather than the 1989 version of the statute. The later version of the statute requires the tax to be paid on the full value of the tenancy unless the surviving joint tenant can prove that the surviving tenant provided consideration or that the surviving tenant previously owned the property. The Supreme Court held that the District Court erroneously treated all Emelio's joint tenancy estates created more than 3 years before 1991 as a gift and that treatment is not contemplated by the statute nor were the tenancies intended as a gift because Emelio retained a joint interest for himself in all the property. The Supreme Court also held that the findings of the District Court that several of the other joint tenants contributed to the tenancies were not supported by the evidence and were therefore clearly erroneous and that the full value of the joint tenancy was therefore to be taxed. In re Estate of Parini, 279 M 85, 926 P2d 741, 53 St. Rep. 1062 (1996).

Gift Made in Contemplation of Death Held Taxable — Decedent Required to File Federal Gift Tax Return: Langendorf gifted real property worth $128,000 to Dean and Teresa Hayden 2 years before his death. The personal representative subtracted $20,000 ($10,000 per donee) from the value of the property as an "annual gift exclusion" on a Department of Revenue form. The Department disallowed the exclusion and determined inheritance taxes on a value of $128,000. The District Court upheld the exclusion. The Supreme Court noted that 72-16-301 (now repealed) provides that transfers in contemplation of death are generally taxable and noted that the gift is also taxable because the Internal Revenue Code provision cited in 72-16-301 (now repealed) requires the filing of a federal gift tax return. The Supreme Court also analyzed the 1989 editorial comment to 72-16-301 (now repealed) and found that the Legislature did intend to conform 72-16-301 (now repealed) to federal estate tax statutes rather than gift tax statutes. The Supreme Court noted that nothing in the comment indicates that the Legislature intended to incorporate federal gift tax exemptions into the state statute. The reference to the gift tax provisions merely provides a trigger to determine whether a transfer is taxable under Montana inheritance tax law. Estate of Langendorf, 262 M 123, 863 P2d 434, 50 St. Rep. 1474 (1993).

Department of Revenue — Rule Conflicting With Statutory Law Invalid: More than 3 years prior to his death, decedent created a joint tenancy with an individual not his spouse or issue, using property solely his. The Department's regulations relating to statutory law require a tax levy on the full value of the joint tenancy property when the survivor made no contribution. The Supreme Court held that the Department's interpretation of statutory law was incorrect and that only one-half of the property value was subject to taxation. The Department regulations conflicting with statutory law are of no effect. Dept. of Revenue v. Estate of Dwyer, 236 M 405, 771 P2d 93, 46 St. Rep. 463 (1989).

Joint Tenancy Created Three Years Prior to Death — No Contribution by Survivor: More than 3 years prior to his death, decedent created a joint tenancy with an individual not his spouse or issue, using only his property. Upon his death, the Department of Revenue argued that the total value of the property transferred to the survivor was taxable. The Supreme Court affirmed the lower court's ruling that only one-half of the value was taxable because, pursuant to 72-16-301(3) (now repealed), no transfer made more than 3 years prior to death "shall be treated as having been made in contemplation of death". The court also held that 72-2-303(2) (now repealed) did not apply to subject transfers to nonspouses or nonissue for full value taxation if the transfer was made 3 years prior to transferor's death. Dept. of Revenue v. Estate of Dwyer, 236 M 405, 771 P2d 93, 46 St. Rep. 463 (1989), distinguished in In re Estate of Parini, 279 M 85, 926 P2d 741, 53 St. Rep. 1062 (1996).

Withdrawal From Joint Bank Account Within Three Years of Death: All of the funds in a joint tenancy bank account were withdrawn by one tenant within 3 years of the death of the other tenant. Regardless of the first tenant's intentions, she did not become the alter ego or agent of the deceased tenant. A transfer in contemplation of death did not occur. In re Sinclair, 197 M 29, 640 P2d 918, 39 St. Rep. 331 (1982).

Dower Subject to Inheritance Tax: A widow who takes property under statutory dower allowance takes under the intestate laws, and the property will be subject to inheritance tax. Stovall v. Dept. of Revenue, 165 M 180, 527 P2d 62 (1974).

Tenants in Common: When husband died after he and his wife had conveyed land owned as tenants in common to sons, reserving a life estate with right of survivorship, the wife, who obtained deceased husband's one-half interest in land, was subject to inheritance tax on husband's interest under 72-16-303 (now repealed) but sons' interests were not taxable until termination of the mother's life estate. In re Hess' Estate, 145 M 552, 403 P2d 748 (1965).

Possession Postponed: When husband and wife held real property as tenants in common, but transferred one half of the property to one son, and the other half to the other son, reserving a life estate in each piece of property with right of survivorship, on father's death sons were not subject to inheritance tax until termination of the mother's intervening life estate. In re Hess' Estate, 145 M 552, 403 P2d 748 (1965).

Intangible Personal Property: Intangible personal property situated in Pennsylvania, but which was owned by a resident decedent in Montana, is subject to inheritance tax in Montana. In re Maher's Estate, 140 M 476, 373 P2d 520 (1962).

Life Insurance Proceeds: Section 72-16-304 (now repealed) was adopted in order that insurance proceeds above $50,000 might be brought within the general provisions of 72-16-301 (now repealed). In re Holland's Estate, 136 M 324, 347 P2d 473 (1959).

Burden of Proof — Contemplation of Death: Burden of proof is upon the transferee to overcome the presumption that the gift was made in contemplation of death if the transfer was made within 3 years prior to the death of the donor. But, if the gift were made more than 3 years prior to the death of the grantor, the burden of proof is upon the state to show that in fact the gift was made in contemplation of death. In re Ludington's Estate, 134 M 384, 333 P2d 873 (1958).

Gift to Daughter: Sometime prior to May 3, 1949, deceased made a gift of $10,000 to his daughter, who was seeking a loan rather than a gift, but was informed by her father that he preferred to make a gift outright, which was explained in his will. Decedent died on May 4, 1954, at the age of 72 years. This amount was properly excluded from his estate for the purpose of inheritance tax. In re Ludington's Estate, 134 M 384, 333 P2d 873 (1958).

Satisfaction of Mortgage: Forgiveness of debt, which was not made by will, but made by a duly executed and recorded satisfaction of mortgage made and recorded more than 3 years prior to the death of the decedent, was properly excluded from his estate for the purpose of inheritance tax. In re Ludington's Estate, 134 M 384, 333 P2d 873 (1958).

Gifts Not Subject to Tax: Gifts by decedent to his son and daughter were not subject to inheritance tax where the only effect of the mention of these gifts in the will was to explain why the decedent did not give them more and to show that they were not overlooked. The transferees took nothing by virtue of the will. The gifts had been made before the will was made and had been completed and the transfer vested title to the property in the donees without reference to the will. In re Ludington's Estate, 134 M 384, 333 P2d 873 (1958).

Family Partnership: Decedent, who died intestate on November 12, 1952, at age 78, on December 10, 1951, gave undivided one-seventh interest in his ranch, livestock, and equipment used in its operation to each of his five children and his wife, retaining an undivided one-seventh interest for himself, and the family then organized a partnership to continue operations. Donor paid federal gift tax thereon. At the time of the transfers donor was in good health and making preparations for a trip to Africa. District Court properly held that the transfers were not made in contemplation of death and were not taxable. In re Keating's Estate, 134 M 372, 332 P2d 906 (1958).

Correction of Deed: In a proceeding by wife to terminate joint tenancy and determine inheritance tax, decedent having died on December 11, 1954, at age 74 from injuries sustained in an automobile accident, the Court properly excluded one-half the value of the farm land from the inheritance tax, where transfer of title was made by decedent to himself and his wife to correct error in deed to him alone in 1938, on December 9, 1952, while decedent was in good health and was not contemplating death. St. v. Rice, 134 M 265, 329 P2d 451 (1958).

Presumption of Gift in Contemplation of Death: The transfer of one-half interest in farm land to wife, having been made within 3 years prior to the death of the grantor, is presumed to have been made in contemplation of death, unless shown to the contrary. St. v. Rice, 134 M 265, 329 P2d 451 (1958).

Intangible Property: The interest of a vendor in a contract to sell real estate is intangible property. In re Briebach's Estate, 132 M 437, 318 P2d 223 (1957).

Test to Determine Whether or Not Gift Is in Contemplation of Death: Generally, the test to be applied is to ascertain the dominant motive of the donor in the light of his bodily and mental condition, and "the best evidence of the decedent's state of mind at the time and the reasons for making the transfers are the statements and expressions of the decedent himself". In re Warren's Estate, 128 M 395, 275 P2d 843 (1954).

Transfer of Farm Corporate Stock Not in Contemplation of Death: When decedent after forming a corporation for the operation of his farm transferred some of the stock to members of his family who had been working on the farm and evidence disclosed that it was because he had offered them a share in the business if they worked in it, the gifts were not in contemplation of death and were made for purposes associated with life rather than with death. In re Warren's Estate, 128 M 395, 275 P2d 843 (1954).

Effect of Owner of Real Property Being a Resident of a Community Property State: When the decedent was a resident of California and had used community property funds to purchase land in Montana, there was still an inheritance tax due on the whole of the land value in Montana when it was devised to his wife. She did not have an undivided one-half interest in the Montana land by virtue of the California community property laws, since the effect of the community property laws does not vest title in her automatically but it does enlarge her "bundle of right". In re Hunter's Estate, 125 M 315, 236 P2d 94 (1951).

At or After Death:

For there to be an absolute inter vivos gift and not taxable as a transfer in contemplation of death, there must be the expiration of the presumptive period and an absence of proof to the contrary. If there is no delivery to the cotenant, the transfer is one to take effect at or after death and is taxable as such. In re Marsh's Estate, 125 M 239, 234 P2d 459 (1951).

When person with her own funds purchased Series G United States savings bonds payable to her or in the alternative to another person named on the bonds, and she retained control of the bonds, they were not "held in the joint names of two or more persons" within the meaning of 72-16-303 (now repealed), and they amounted to a transfer to take effect at or after death taxable at their full market value under 72-16-301 (now repealed). St. Bd. of Equalization v. Cole, 122 M 9, 195 P2d 989 (1948), distinguished in In re Kuhr's Estate, 123 M 593, 220 P2d 83 (1950) and Petition of Hanson, 125 M 174, 232 P2d 342 (1951).

Deed in Escrow: When deed to hotel property was deposited in escrow and the agreement required the grantee, a stranger, to pay certain specified amounts monthly for a period of 3 years after which he was to pay a certain amount monthly for the remainder of the lifetime of the grantor which amount was not disproportionately less than the value of the property, and the grantee was to have immediate possession, make repairs, and carry insurance on the property, there was not a taxable transfer of property in contemplation of death. In re Sebree's Estate, 122 M 509, 206 P2d 553 (1949).

Joint Bank Account: When money, solely the property of one person, was deposited in a joint bank account payable either to her or the other person without consideration, and such deposit was made within 3 years of the death of the person, half of the account was a gift in contemplation of death and taxable under 72-16-301 (now repealed) and after the death of the person the half then received by right of survivorship is taxable under 72-16-303 (now repealed). St. Bd. of Equalization v. Cole, 122 M 9, 195 P2d 989 (1948), distinguished in In re Kuhr's Estate, 123 M 593, 220 P2d 83 (1950), and Petition of Hanson, 125 M 174, 232 P2d 342 (1951).

Property Held in Trust Not Subject to Tax: When the owner of property placed it in the name of his wife in trust with the understanding that she would reconvey to him at his request and she about 5 months before her death did so, the deed being properly recorded, the husband was at all times the owner and therefore did not acquire the property by inheritance, thus rendering the retransfer from wife to husband nontaxable. The husband would not acquire it by inheritance upon termination of the trusteeship by death, since the decedent merely held the record title to the property in trust for another. In re Mayer's Estate, 110 M 66, 99 P2d 209 (1940).

Insufficiency of Evidence to Show Transfer in Contemplation of Death: Evidence that ranch lands were deeded by husband to wife and the deeds placed of record and the two used their lands together and had a joint bank account in which all proceeds of the ranching operations were placed, each being free to draw checks against the account, was insufficient to show that the transfers were intended to take effect at or after the grantor's death, even though it also appeared that the lands were assessed to grantor and he alone made an income tax return, including income from the deeded lands. State ex rel. Blankenbaker v. District Court, 109 M 331, 96 P2d 936 (1939), overruled on another point, State ex rel. Reid v. District Court, 126 M 489, 255 P2d 693 (1953).

Statute Not Retroactive: There is nothing in the amendment of subsection 3 of sec. 1, Ch. 105, L. 1927, by subsection 3 of sec. 1, Ch. 186, L. 1935, which changed the word "two" to "three" preceding the word "years" to indicate that the act was intended to operate retroactively, and it has no application to transfers made in 1934 before its enactment. It is a general rule that statutes are intended to operate prospectively only, unless otherwise expressly stated or clearly and necessarily implied; the presumption is against retroactive operation. (See 1-2-109.) State ex rel. Blankenbaker v. District Court, 109 M 331, 96 P2d 936 (1939), overruled on another point, State ex rel. Reid v. District Court, 126 M 489, 255 P2d 693 (1953).

Transfers or Gifts Taxable:

A voluntary transfer of property made "in contemplation of death" and as such taxable under the inheritance tax law, as amended (Ch. 105, L. 1927), is one the making of which is induced by the same consideration which leads to a testamentary disposition thereof and as a substitute therefor, i.e., the thought of death, irrespective of whether or not death is believed to be near or imminent. In re Wadsworth's Estate, 92 M 135, 11 P2d 788 (1932).

When a transfer or gift is not to take effect in possession or enjoyment until after the death of the transferor or donor, whether made in contemplation of death or not, it is subject to inheritance tax. In re Oppenheimer's Estate, 75 M 186, 243 P 589, 44 ALR 1470 (1926).

For a gift or transfer to escape the imposition of an inheritance tax, it must have been made for a valuable consideration in praesenti. In re Oppenheimer's Estate, 75 M 186, 243 P 589, 44 ALR 1470 (1926).

Mortgages Subject to Tax: By enacting Ch. 150, L. 1925, amending 72-16-301 (now repealed), the Legislature intended to impose an inheritance tax on the succession or devolution of all real and personal property of every kind and description within the jurisdiction of the state and upon any interest therein (inter alia, upon mortgages), whether owned by a resident or nonresident at the time of his death. State ex rel. Walker v. Jones, 80 M 574, 261 P 356, 60 ALR 551 (1927).

Antenuptial Agreement: When under an antenuptial agreement certain sums of money were to be paid to the wife after the death of the husband in certain annual installments by his executors, in consideration of her relinquishment of her right of dower and any other claims she might be entitled to assert against his estate as his widow or next of kin, the total amount of such gifts was subject to inheritance tax. In re Oppenheimer's Estate, 75 M 186, 243 P 589, 44 ALR 1470 (1926).

Nature of Tax — Power of the State:

The beneficiary of an estate has no claim by right of blood or otherwise to the estate of a decedent, except as the law gives it to him, and the state may impose such taxes or conditions on distributive shares as it considers proper. In re Oppenheimer's Estate, 75 M 186, 243 P 589, 44 ALR 1470 (1926).

The inheritance tax is imposed upon the right to transfer, not upon the estate. In re Oppenheimer's Estate, 75 M 186, 243 P 589, 44 ALR 1470 (1926).

An inheritance tax is not one on property and there is no natural right to receive property by will or inheritance, it being within power of the state to impose such conditions to succession to property within its jurisdiction as it may consider appropriate, the term "jurisdiction" in this connection meaning power over the particular res or subject. State ex rel. Bankers' Trust Co. v. Walker, 70 M 484, 226 P 894 (1924).

Stock of Foreign Corporation:

Under 72-16-301 (now repealed), providing for a tax on direct and collateral inheritances, the state may not lawfully collect an inheritance tax upon the right of a nonresident legatee to succeed to shares of the capital stock of a foreign corporation doing business in the state, bequeathed to him by a nonresident, where the certificates representing the stock are kept at the place of domicile of the testator. State ex rel. Bankers' Trust Co. v. Walker, 70 M 484, 226 P 894 (1924).

For the purpose of imposing a succession tax, jurisdiction exists only when the exercise of some essential privilege in relation to the transfer of title (to stock in a foreign corporation in this instance) depends for its legality upon the law of the state levying the tax. State ex rel. Bankers' Trust Co. v. Walker, 70 M 484, 226 P 894 (1924).

Shares of stock of a corporation chartered under the laws of another state and belonging to a nonresident are not subject to an inheritance tax in this state. State ex rel. Bankers' Trust Co. v. Walker, 70 M 484, 226 P 894 (1924).

Constitutionality: Article XII, sec. 11, 1889 Mont. Const., which provided that taxes shall be levied and collected by general laws and for public purposes only and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, related to property taxes only and not to such as are imposed on inheritance. State ex rel. Rankin v. District Court, 70 M 322, 225 P 804 (1924), explained in In re Clark's Estate, 105 M 401, 74 P2d 401 (1937).

Chapter Attorney General's Opinions

OPINIONS UNDER FORMER LAW

Restoration and Repair of Daly Mansion: There is no indication in 72-16-445 (now repealed) and the following sections (part now repealed) that the Legislature intended to except property so transferred from the requirements of law regarding public construction contracts. Restoration and repair of the state-owned Daly Mansion are subject to 18-2-102 and 18-2-103. 42 A.G. Op. 66 (1988).

When Private Corporation Subject to Open Meeting Law: The Daly Mansion Preservation Trust, Incorporated, a private nonprofit corporation contracting with a state agency to restore and preserve state-owned property obtained under 72-16-445 through 72-16-450 (all now repealed), is a public body within the meaning of the open meeting law since it is performing a public function and is receiving funds generated by public property. 42 A.G. Op. 42 (1987).

Part 5
Joint Tenancies and Life Estates Determination of Tax — Termination

Part Case Notes

DECISIONS UNDER FORMER LAW

Law Governing Personal Property Decided by Situs of Property and Domicile of Owner — Tenancy by the Entirety Impermissible Mode of Personal Property Ownership in Montana: A Montana District Court determined that personal property jointly owned by Lurie and her husband as tenancy by the entirety in Missouri was owned by them either as joint tenancy property or as tenancy in common property after the couple moved to Montana. The property was subject to execution to satisfy a judgment against the husband on a validly issued writ. Lurie contended that as tenancy by the entirety property, it was not subject to execution to satisfy a judgment against the husband only, because Missouri law followed the personal property and should be applied in Montana. The Supreme Court concluded that the District Court was correct in determining that the law governing personal property is decided by the situs of the property and the domicile of the owner, so Montana law applied. Further, under Clark v. Clark, 143 M 183, 387 P2d 907 (1963), tenancy by the entirety is not a permissible mode of real property ownership in Montana, and the District Court properly extended the reasoning in Clark with equal force to personal property in Lurie's case. Lurie v. Sheriff, 2000 MT 103, 299 M 283, 999 P2d 342, 57 St. Rep. 414 (2000), distinguishing Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121 (1998).

Taxation of Joint Tenancies to Be Based on Full Value of Tenancies — Law to Be Determined at Time of Death — Finding of Ownership of Tenancies Clearly Erroneous: More than 3 years before his death in 1991, Emelio created 18 joint tenancies in his personal property with members of his extended family. As a joint tenant, Emelio retained a joint interest in the items of personal property until his death. Upon Emelio's death, all of the property was transferred to the other joint tenants. Emelio's estate paid taxes on the full value of the joint tenancies but challenged the Department of Revenue's calculation, claiming that the tax should be based on only 50% of each joint tenancy. The District Court agreed, finding that some of the joint tenants had contributed to the tenancies. Citing Burr v. Dept. of Revenue, 175 M 473, 575 P2d 45 (1978), the Supreme Court held that the law must be applied as of the date of Emelio's death and that it was therefore erroneous for the District Court to apply both the 1987 version of 72-16-303 (now repealed) and the rationale in Dept. of Revenue v. Dwyer, 236 M 405, 771 P2d 93 (1989), rather than the 1989 version of the statute. The later version of the statute requires the tax to be paid on the full value of the tenancy unless the surviving joint tenant can prove that the surviving tenant provided consideration or that the surviving tenant previously owned the property. The Supreme Court held that the District Court erroneously treated all Emelio's joint tenancy estates created more than 3 years before 1991 as a gift and that treatment is not contemplated by the statute nor were the tenancies intended as a gift because Emelio retained a joint interest for himself in all the property. The Supreme Court also held that the findings of the District Court that several of the other joint tenants contributed to the tenancies were not supported by the evidence and were therefore clearly erroneous and that the full value of the joint tenancy was therefore to be taxed. In re Estate of Parini, 279 M 85, 926 P2d 741, 53 St. Rep. 1062 (1996).

Department of Revenue — Rule Conflicting With Statutory Law Invalid: More than 3 years prior to his death, decedent created a joint tenancy with an individual not his spouse or issue, using property solely his. The Department's regulations relating to statutory law require a tax levy on the full value of the joint tenancy property when the survivor made no contribution. The Supreme Court held that the Department's interpretation of statutory law was incorrect and that only one-half of the property value was subject to taxation. The Department regulations conflicting with statutory law are of no effect. Dept. of Revenue v. Estate of Dwyer, 236 M 405, 771 P2d 93, 46 St. Rep. 463 (1989).

Joint Tenancy Created Three Years Prior to Death — No Contribution by Survivor: More than 3 years prior to his death, decedent created a joint tenancy with an individual not his spouse or issue, using only his property. Upon his death, the Department of Revenue argued that the total value of the property transferred to the survivor was taxable. The Supreme Court affirmed the lower court's ruling that only one-half of the value was taxable because, pursuant to 72-16-301(3) (now repealed), no transfer made more than 3 years prior to death "shall be treated as having been made in contemplation of death". The court also held that 72-16-303(2) (now repealed) does not apply to subject transfers to nonspouses or nonissue for full value taxation if the transfer was made 3 years prior to transferor's death. Dept. of Revenue v. Estate of Dwyer, 236 M 405, 771 P2d 93, 46 St. Rep. 463 (1989), distinguished in In re Estate of Parini, 279 M 85, 926 P2d 741, 53 St. Rep. 1062 (1996).

Estate by the Entireties: Estate by the entireties is not a permissible mode of ownership of property in Montana. Clark v. Clark, 143 M 183, 387 P2d 907 (1963), followed in Lurie v. Sheriff, 2000 MT 103, 299 M 283, 999 P2d 342, 57 St. Rep. 414 (2000), in which tenancy by the entirety as applied to personal property was held an impermissible mode of ownership in Montana in the same way that tenancy by the entirety as applied to real property was held impermissible in Clark.

United States Savings Bonds:

United States bonds issued in the names of the husband and wife were not subject to inheritance taxes where the bonds were purchased by the surviving husband from his own funds. In re Powell's Estate, 142 M 133, 381 P2d 957 (1963).

United States bonds issued in names of mother and son were not subject to inheritance taxes on death of mother where the surviving son, while in the service, sent money home out of his army pay to have the bonds purchased for him. In re Powell's Estate, 142 M 133, 381 P2d 957 (1963).

In estates where the death occurred before March 1, 1951, the effective date of 72-16-303 (now repealed), the tax on government series E and G bonds is generally imposed by 72-16-301 (now repealed). In re Marsh's Estate, 125 M 239, 234 P2d 459 (1951).

Government bonds can never be held in tenancy by the entirety, because either cotenant may sell the bonds upon surrender of the bonds and receive the full accrued value; while the very characteristic that distinguishes the tenancy by the entirety from other cotenancies is that neither of the cotenants alone can terminate the tenancy or sever the estate. In re Marsh's Estate, 125 M 239, 234 P2d 459 (1951).

United States savings bonds registered jointly in the name of the decedent and one of her three children and kept in a safe deposit box in the name of the decedent and one of her children to which such daughter had access did not constitute a gift to any of the children. The possession remained joint, and the bonds were taxable. In re Brown's Estate, 122 M 451, 206 P2d 816 (1949).

When person with her own funds purchased Series G United States savings bonds payable to her or in the alternative to another person named on the bonds, and she retained control of the bonds, they were not "held in the joint names of two or more persons" within the meaning of 72-16-303 (now repealed) and they amounted to a transfer to take effect at or after death taxable at their full market value under 72-16-301 (now repealed). St. Bd. of Equalization v. Cole, 122 M 9, 195 P2d 989 (1948), distinguished in In re Kuhr's Estate, 123 M 593, 220 P2d 83 (1950) and Petition of Hanson, 125 M 174, 232 P2d 342 (1951).

Character of Insurance Proceeds: If the insurance proceeds or the right thereto vest in the beneficiary, they then lose their life insurance characteristic and become ordinary assets, and this is true even though the proceeds may actually be paid to the beneficiary's estate. In re Holland's Estate, 136 M 324, 347 P2d 473 (1959).

Purpose of Section: Section 72-16-304 (now repealed) was adopted in order that insurance proceeds above $50,000 (see 1997 amendment) might be brought within the general provisions of 72-16-301 (now repealed). In re Holland's Estate, 136 M 324, 347 P2d 473 (1959).

Insurance Defined to Include Annuity:

Annuity policies are "insurance" within the meaning of 72-16-304 (now repealed). In re Hammerstrom's Estate, 133 M 469, 326 P2d 699 (1958); In re O'Grady's Estate, 133 M 594, 326 P2d 705 (1958).

Annuity contracts issued by life insurance companies constitute "insurance" and as such are immune from taxation under 72-16-304 (now repealed) unless in excess of $50,000 (see 1997 amendment), because of the provisions contained in sections 40-1001, 40-1301, 40-1302, and 66-2003, R.C.M. 1947 (now repealed), and there being nothing in the general statutes relating to life insurance companies repudiating the propriety of classifying annuities as insurance. In re Fligman's Estate, 113 M 505, 129 P2d 627 (1942), distinguished in In re Harper's Estate, 124 M 52, 218 P2d 927 (1950), In re Coleman's Estate, 132 M 339, 317 P2d 880 (1957), and In re Estate of Miles v. Miles, 2000 MT 41, 298 M 312, 994 P2d 1139, 57 St. Rep. 191 (2000).

Amount of Exclusion From Gross Estate: Decedent's gross estate aggregated $378,916.29, and $64,761.33 thereof represented proceeds from life insurance policies. Of this, $16,536.29 was payable to named beneficiaries. The balance of the life insurance proceeds, $48,225.04, was made payable to the executor of the estate. District Court was not in error in determining that $50,000 was exempt from inheritance tax (see 1997 amendment). In re Cline's Estate, 132 M 328, 317 P2d 874 (1957).

Annuity Proceeds: When total amount of annuity proceeds and insurance was $53,276.26, and the amount of proceeds from the annuity was $2,813.61, the $50,000 exemption (see 1997 amendment) did not extend to these annuity proceeds. In re Coleman's Estate, 132 M 339, 317 P2d 880 (1957).

Application of Statute:

Section 72-16-304 (now repealed) was a specific statute exempting all insurance proceeds up to $50,000 (see 1997 amendment) and taxing insurance proceeds over and above that amount. It makes no difference to whom the proceeds are payable, whether named beneficiaries, trustees, or personal representatives of the decedent. In re Cline's Estate, 132 M 328, 317 P2d 874 (1957); In re Coleman's Estate, 132 M 339, 317 P2d 880 (1957).

Naming ultimate beneficiaries of life insurance policies in trust agreement and not in insurance policies did not make proceeds subject to tax to the extent that they did not exceed $50,000 (see 1997 amendment). In re Coleman's Estate, 132 M 339, 317 P2d 880 (1957).

Joint Bank Account:

In the case of joint bank accounts where it can be shown that the money was originally furnished by the survivor and none by the decedent, the account is not taxable, for it comes within the exception in 72-16-303 (now repealed). Petition of Hanson, 125 M 174, 232 P2d 342 (1951).

When money, solely the property of one person, was deposited in a joint bank account payable either to her or the other person without consideration, and such deposit was made within 3 years of the death of the person, half of the account was a gift in contemplation of death and taxable under 72-16-301 (now repealed), and after the death of the person the half then received by right of survivorship is taxable under 72-16-303 (now repealed). St. Bd. of Equalization v. Cole, 122 M 9, 195 P2d 989 (1948), distinguished in In re Kuhr's Estate, 123 M 593, 220 P2d 83 (1950) and Petition of Hanson, 125 M 174, 232 P2d 342 (1951).

Joint Promissory Note: When the husband and wife hold a promissory note jointly it is taxable under 72-16-303 (now repealed). The property so taxed is the credits or choses in action, the various promissory notes, and that property never had belonged to the survivor prior to its acquisition by the husband and wife. Petition of Hanson, 125 M 174, 232 P2d 342 (1951).

Joint Purchase of Land: When a husband and wife purchase land jointly and the funds come from a joint bank account to which it can be shown that the husband originally contributed all the money, one-half of the realty is considered the wife's share upon her death, and it is subject to the tax imposed by 72-16-303 (now repealed). The fact that the consideration at some previous time came as a gift from one spouse to another is unimportant. In order for the exception in the statute to apply, it must be shown that the immediate joint tenancy originally belonged to the survivor prior to the creation of the immediate joint tenancy. Petition of Hanson, 125 M 174, 232 P2d 342 (1951).

Entire Estate Property of Surviving Spouse — No Tax Due: When property held in joint tenancy by husband and wife was purchased with the funds of the surviving husband, no inheritance tax was due on such property. In re Kuhr's Estate, 123 M 593, 220 P2d 83 (1950).

Matured Endowments Left With Insurer: Proceeds of life insurance policies which have matured as endowments and which are left with the insurance company at a fixed rate of interest, the principal sum payable at death, in accordance with one of the optional modes of settlement, are not exempt under the insurance exemption of 72-16-304 (now repealed). In re Harper's Estate, 124 M 52, 218 P2d 927 (1950), distinguished in In re Hammerstrom's Estate, 133 M 469, 326 P2d 699 (1958).

What Legal Rate Applicable: When trust was created in the year 1915 under which certain persons were to receive portions of the trust funds on the death of settlor of the trust who died in 1945, the transfer for inheritance tax purposes was to be taxed at the rate in existence in 1945 and not at the rate in existence in 1915. In re Kohrs' Estate, 122 M 145, 199 P2d 856, 5 ALR 2d 1046 (1948).

Constitutionality: Section 72-16-307 (now repealed) imposing an inheritance tax upon all estates of persons who died since April 1, 1921, remaining undistributed on the date of its approval, March 5, 1923, is a valid enactment and not open to attack on the grounds that it violates the equal protection of the law clause of the Constitution, is class legislation, and authorizes the taking of property without due process of law. State ex rel. Rankin v. District Court, 70 M 322, 225 P 804 (1924), explained in In re Clark's Estate, 105 M 401, 74 P2d 401 (1937).

Part Attorney General's Opinions

County Clerk — Joint Tenancy Terminations: County Clerk and Recorders are not required to issue "transfers of title" to survivors of a joint tenancy interest. Rather, upon filing of the application and certificates (form INH-3), the Clerk should index the transfer in the grantor and grantee index, noting the time and place of filing. The proper filing fee is $3. 37 A.G. Op. 134 (1978).

72-16-501. Interest of decedent terminated upon death.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Case Notes

DECISIONS UNDER CURRENT LAW

Death of Partner — Disposition of Property Partners Held Jointly: Robert and William, brothers, opened a joint checking account in 1947, paid all ranch expenses through the account, put all ranch income in the account, and equally split net profits. All cattle were branded with either of two brands, each of which was registered in the name of "William Palmer or Robert Palmer". The brothers were also joint tenants in a commodity brokerage account. The Supreme Court held that the cattle and both accounts were partnership property not held in joint tenancy and remained so upon Robert's death. Thus, they did not pass to William as the surviving joint tenant; rather, they remained in the partnership for the purpose of winding up the partnership and paying its liabilities, after which William must account to Robert's survivor, his widow, for Robert's share of the partnership. By its very nature, partnership property must be treated differently than property of individuals, including property held by individuals as joint tenants but who are not in partnership. This rule applies regardless of the formal legal manner in which the property is held. This is a rule of equity developed over hundreds of years and codified in the Uniform Partnership Act. In re Estate of Palmer, 218 M 285, 708 P2d 242, 42 St. Rep. 1585 (1985), followed in Fiedler v. Fiedler, 266 M 133, 879 P2d 675, 51 St. Rep. 691 (1994).

DECISIONS UNDER FORMER LAW

Adopted Child — Rate of Tax: When death of decedent occurred prior to the approval of the documents for adoption of child, and decedent had taken him into his home and directed his education and remembered him in his will, the Court was correct in fixing the inheritance tax at 8% of the property so left as to a stranger of the blood, instead of at 2% as an adopted child, no contention being made that decedent had for not less than 10 years stood in the mutually acknowledged relation of a parent, but it being contended child was legally adopted. In re Clark's Estate, 105 M 401, 74 P2d 401, 114 ALR 496 (1937).

72-16-502. Definition of decedent.

Compiler's Comments

2000 Amendment by Referendum: Chapter 9 near beginning of introduction substituted "part" for "section"; at end deleted remainder of section that read: "(c) was the owner of any other interest in property requiring the determination of inheritance tax because of death.

(2) Except as provided in subsection (6), a remainderman, surviving joint tenant, or other interested party shall, upon the death of a decedent, file with the department of revenue:

(a) a copy of the death certificate;
(b) a verified application, in a form prescribed by the department, containing information that the department considers necessary; and
(c) evidence of the instruments that created the life estate, joint tenancy, or other interest requiring determination of inheritance tax, if required by the department.
(3) Upon receipt of the application, the department shall:
(a) stamp the filing date upon the application;
(b) issue a certificate showing the inheritance tax due, if any;
(c) affix the certificate to a certified copy of the application and return the certificate and copy to the applicant or the applicant's attorney; and
(d) affix a copy of the certificate to the original application and keep it on file with the department.
(4) The applicant shall pay the inheritance tax determined to the county treasurer for transmittal to the state treasurer. The county treasurer shall issue a receipt for the payment of the tax.
(5) If disputes arise as to tax computation, they must be resolved as provided under the laws applicable to the determination of inheritance taxes in estates.
(6) A surviving joint tenant described in 72-16-313(1) or (2) of a decedent whose aggregate value of the interest in the joint property is less than the federal estate tax filing requirement is not required to file under subsection (2)"; and made minor changes in style. Amendment effective November 7, 2000.

Applicability: Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

1999 Amendment: Chapter 113 in (6) substituted "described in 72-16-313(1) or (2)" for "who is the surviving spouse". Amendment effective March 19, 1999.

Retroactive Applicability: Section 4, Ch. 113, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to estates of persons dying after December 31, 1998."

1995 Amendment: Chapter 391 in (2) inserted exception clause and after "shall" inserted "upon the death of a decedent"; inserted (6) concerning an exception to the filing requirement in subsection (2) for certain surviving joint tenants; and made minor changes in style. Amendment effective April 12, 1995.

Retroactive Applicability: Section 5, Ch. 391, L. 1995, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to deaths of holders of nonprobate interests occurring after July 1, 1979."

72-16-503. Filings required when holder of nonprobate interest in real property has died.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 37 at beginning of first sentence substituted "A person with an interest in real property that was owned by a decedent, as defined under 72-16-502, shall" for "If an interest in real property is involved under 72-16-502, the applicant shall" and deleted former last sentence that read: "A surviving joint tenant described in 72-16-313(1) or (2) is not subject to the recording requirements under 7-4-2613(3)"; deleted former (2) that read: "(2) A surviving joint tenant described in 72-16-313(1) or (2) with an interest in real property under 72-16-502 shall record with the clerk and recorder of each county in which the real property is located an acknowledged statement that the holder of the nonprobate interest has died and that the holder's interest in the property is terminated. The acknowledged statement must include a legal description of the real property"; and made minor changes in style. Amendment effective March 13, 2001.

Chapter 412 in (1) in two places substituted "7-4-2613(1)(c)" for "7-4-2613(3)". Chapter 37 rendered second substitution of "7-4-2613(1)(c)" for "7-4-2613(3)" in Ch. 412 void. Amendment effective October 1, 2001.

Retroactive Applicability: Section 4, Ch. 37, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to deaths occurring after December 31, 2000."

2000 Amendment by Referendum: Chapter 9 deleted former (3) that read: "(3) The recording of the documents under subsection (1) or (2) constitutes release of any lien for inheritance taxes." Amendment effective November 7, 2000.

Applicability: Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

1999 Amendment: Chapter 113 in second sentence in (1) and first sentence in (2) substituted "described in 72-16-313(1) or (2)" for "who is the surviving spouse"; and made minor changes in style. Amendment effective March 19, 1999.

Retroactive Applicability: Section 4, Ch. 113, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to estates of persons dying after December 31, 1998."

1995 Amendment: Chapter 391 in (1) inserted second sentence that read: "A surviving joint tenant who is the surviving spouse is not subject to the recording requirements under 7-4-2613(3)"; inserted (2) concerning the filing with the County Clerk and Recorder of the termination of a nonprobate interest holder's interest; in (3), after "subsection (1)", inserted "or (2)"; and made minor changes in style. Amendment effective April 12, 1995.

Retroactive Applicability: Section 5, Ch. 391, L. 1995, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to deaths of holders of nonprobate interests occurring after July 1, 1979."

1981 Amendment: Substituted "record" for "file" after "applicant shall" in (1); deleted former subsections (1)(a) through (1)(c) which related to the application in 72-16-502(2)(b), the inheritance tax certificate from revenue, and a payment receipt from the county treasurer; inserted "a document containing those matters required by 7-4-2613(3)" after "located" in (1); substituted "recording" for "filing" after "The" at the beginning of (2).

Part 6
Apportionment of Taxes

Part Case Notes

DECISIONS UNDER FORMER LAW

Constitutionality of State Inheritance Tax on a Nonexercised Special Power of Appointment: Value of English intangible trust property is included in gross estate subject to state inheritance tax when domiciliary dies without exercising special power of appointment over trust as domicile is a constitutional basis for inheritance taxation without regard to whether succession was effected under the laws of the state of domicile. The power to control the disposition of property after death is the taxable event, and this control is as effectively maintained by the nonexercise of a special power of appointment as by its exercise. In either case decedent determines the ultimate disposition of the property and the course of succession. In re Estate of Ward, 168 M 396, 543 P2d 382 (1975).

Supervisory Control: The Supreme Court was without jurisdiction in State ex rel. Blankenbaker v. District Court, 109 M 331, 96 P2d 936 (1939), to review the record of the proceedings on its Writ of Supervisory Control since the relatrix had a clear and adequate remedy by appeal from the judgment and order fixing the tax which she was required to pay, all duly prescribed by written law, but she failed to avail herself of such remedy and the judgment and order became final and res judicata. Hence the opinion, decision, and holding of this Court in the case of State ex rel. Blankenbaker v. District Court, 109 M 331, 96 P2d 936 (1939), are expressly disapproved and overruled. State ex rel. Reid v. District Court, 126 M 489, 255 P2d 693 (1953).

Filing of Motion for Rehearing Not to Extend Time for Taking Appeal: The filing and pendency of a motion for a rehearing and new trial of an order determining an inheritance tax does not extend the time within which an appeal therefrom may be taken (60 days after its entry) and if not taken within that time, the appeal will be dismissed. In re Blankenbaker's Estate, 108 M 383, 91 P2d 401 (1939), explained in State ex rel. Reid v. District Court, 126 M 489, 255 P2d 693 (1953).

Order Denying Rehearing or Reappraisement Not Appealable: An appeal does not lie from an order denying a motion for a rehearing or reappraisement or a new trial of the issues in a proceeding for the determination of an inheritance tax, the statutes not authorizing it. In re Blankenbaker's Estate, 108 M 383, 91 P2d 401 (1939), explained in State ex rel. Reid v. District Court, 126 M 489, 255 P2d 693 (1953).

72-16-601. Definitions.

Official Comments

[Sections 72-16-601 through 72-16-612 copy] the Uniform Estate Tax Apportionment Act.

Compiler's Comments

UPC Section: The corresponding provision in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-916(a).

72-16-602. Authority of court of administration to determine apportionment.

Official Comments

[Sections 72-16-601 through 72-16-612 copy] the Uniform Estate Tax Apportionment Act.

Compiler's Comments

UPC Section: The corresponding provision in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-916(c)(1).

72-16-603. Tax — how apportioned.

Official Comments

[Sections 72-16-601 through 72-16-612 copy] the Uniform Estate Tax Apportionment Act.

Compiler's Comments

1997 Amendment: Chapter 279 in exception clause in (1) and in two places in (2), after "will", inserted "or governing instrument"; and made minor changes in style.

1983 Amendment: In (1), inserted proviso at beginning of first sentence; and inserted (3) deferring to apportionment determined under federal estate tax law.

UPC Section: The corresponding provision in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-916(b).

Case Notes

Public Policy in Favor of Statutory Apportionment Precluded by Specific Provisions in Will — Estate Taxes to Be Paid by Residual Estate: In In re Estate of Kuralt, 2000 MT 359, 303 M 335, 15 P3d 931 (2000), the Supreme Court found that a letter by the decedent was a valid holographic codicil to the decedent's will conveying real property in Montana to the decedent's companion, but a question remained whether the estate or the companion was responsible for the estate taxes on the Montana property. Under the law of New York, where the will was admitted to probate, and similar law in Montana, there is a strong public policy in favor of statutory apportionment unless the will provides otherwise. In this case, the decedent's will specifically provided that estate taxes be paid by the residual estate without apportionment, which included those generated by the bequest of the Montana property by codicil. Because the language of the will was clear and unambiguous, the District Court correctly concluded that estate taxes on the Montana property must be paid by the residual estate. In re Estate of Kuralt, 2003 MT 92, 315 M 177, 68 P3d 662 (2003).

Failure to Apportion Taxes Among All Persons Interested in Estate According to Proportionate Interest — Reversible Error: Two sisters, who were heirs to their mother's estate, contended that because their brother received a $70,300 gift from their mother, his share of the estate should be charged with the extra tax that resulted from the gift. The District Court agreed and charged the $26,999 gift tax liability against the brother's share of the inheritance. The brother appealed, contending that charging the estate's tax liability solely to his share of the estate violated this section. The Supreme Court concurred and reversed. This section requires that taxes be apportioned to each interested person in proportion to the person's interest in the estate, unless the will provides otherwise. The will in this case did not provide otherwise, so the District Court had no legal basis to charge the entire tax liability to the brother's share. On remand, the tax was ordered to be apportioned among the three heirs. In re Estate of Greenheck, 2001 MT 114, 305 M 308, 27 P3d 42 (2001).

Clear Language of Will Sufficient Alternative to Statutory Apportionment Method: Morris's will clearly indicated that the specific bequests, costs of administration, and all state and federal taxes were to be paid first and that the remainder of the residual estate was to be divided equally between her two families. This language was held to constitute an unambiguous method of apportionment that was a controlling alternative to the method provided in this section. In re Estate of Morris, 254 M 368, 838 P2d 402, 49 St. Rep. 739 (1992).

Tax Based on Will Distribution: An inheritance tax is computed according to a probated will, not according to the settlement agreement subsequently entered into among the beneficiaries. An inheritance tax is a tax on the right to receive property, rather than a tax on the property itself. In re Estate of Winter, 226 M 24, 734 P2d 178, 44 St. Rep. 430 (1987).

Does Not Apply to Foreign Countries: Section 72-16-317 (now repealed) limits tax credits to inheritance taxes paid to other states and territories of the United States and is not to be extended to death duty taxes paid to foreign countries. In re Estate of Ward, 168 M 396, 543 P2d 382 (1975).

Federal Estate Taxes: When a will does not otherwise provide for the payment of federal estate taxes, the payment must be equitably apportioned among residuary interests so that a residuary interest not generating any estate taxes does not bear any burden for their payment. Robinson v. U.S., 518 F2d 1105 (9th Cir. 1975), reversing 369 F. Supp. 925 (D.C. Mont. 1974).

72-16-604. Equitable power of court to vary manner of apportionment.

Official Comments

[Sections 72-16-601 through 72-16-612 copy] the Uniform Estate Tax Apportionment Act.

Compiler's Comments

UPC Section: The corresponding provision in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-916(c)(2).

72-16-605. Distribution prior to apportionment — bond required.

Official Comments

[Sections 72-16-601 through 72-16-612 copy] the Uniform Estate Tax Apportionment Act.

Compiler's Comments

UPC Section: The corresponding provision in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-916(d)(2).

72-16-606. No apportionment as between temporary interest and remainder.

Official Comments

[Sections 72-16-601 through 72-16-612 copy] the Uniform Estate Tax Apportionment Act.

Compiler's Comments

UPC Section: The corresponding provision in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-916(f).

72-16-607. Allowance for exemptions, deductions, and credits.

Official Comments

[Sections 72-16-601 through 72-16-612 copy] the Uniform Estate Tax Apportionment Act.

Compiler's Comments

2003 Amendment: Chapter 114 in (5) near end substituted "26 U.S.C. 2053(d)" for "of 1954"; and made minor changes in style. Amendment effective October 1, 2003.

UPC Section: The corresponding provision in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-916(e).

Case Notes

Public Policy in Favor of Statutory Apportionment Precluded by Specific Provisions in Will — Estate Taxes to Be Paid by Residual Estate: In In re Estate of Kuralt, 2000 MT 359, 303 M 335, 15 P3d 931 (2000), the Supreme Court found that a letter by the decedent was a valid holographic codicil to the decedent's will conveying real property in Montana to the decedent's companion, but a question remained whether the estate or the companion was responsible for the estate taxes on the Montana property. Under the law of New York, where the will was admitted to probate, and similar law in Montana, there is a strong public policy in favor of statutory apportionment unless the will provides otherwise. In this case, the decedent's will specifically provided that estate taxes be paid by the residual estate without apportionment, which included those generated by the bequest of the Montana property by codicil. Because the language of the will was clear and unambiguous, the District Court correctly concluded that estate taxes on the Montana property must be paid by the residual estate. In re Estate of Kuralt, 2003 MT 92, 315 M 177, 68 P3d 662 (2003).

Federal Estate Taxes: When a widow renounced the will and elected to take her dower and intestate share pursuant to section 22-107, R.C.M. 1947 (since repealed), and her intestate share was one-third of the decedent's net estate in accordance with section 91-403(1), R.C.M. 1947 (since repealed), such elected statutory share, which qualified for the marital deduction and generated no federal estate tax liability, was nonetheless chargeable with a proportionate share of the estate's total estate tax liability. In re Estate of Mosby, 170 M 463, 554 P2d 1341 (1976).

72-16-608. Powers of personal representative in relation to satisfaction of tax liability.

Official Comments

[Sections 72-16-601 through 72-16-612 copy] the Uniform Estate Tax Apportionment Act.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding provision in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-916(d)(1).

Case Notes

DECISIONS UNDER FORMER LAW

Administrator Not Personally Liable for Tax on Insurance Paid Direct: When a decedent had entered into an annuity contract with an insurance company under which it was agreed that upon his death the payments should be made to his nieces, neither of whom was an heir at law or entitled to share in the estate remaining, and the payments were so made, the administrator could not be held personally liable for the tax on such amounts, since he never came into possession of them and could not deduct the amount of the tax from the distributive shares of the heirs at law. In re Powell's Estate, 110 M 213, 101 P2d 54, 128 ALR 116 (1940).

Each Legacy to Bear Own Proportionate Tax: Under 72-16-436 (now repealed) each specific share, interest, or legacy passing upon the death of a decedent must bear its proportionate part of the tax, and the share of one beneficiary cannot be used to pay the tax charged against that of another. In re Powell's Estate, 110 M 213, 101 P2d 54, 128 ALR 116 (1940).

Personal Liability Limited to Possibility to Enforce Payment: The provisions of 72-16-436 (now repealed) giving to executors and administrators power to sell property of estates to pay inheritance taxes, indicate strongly that the Legislature contemplated that such officers should be liable personally only in those cases where it was reasonably possible for them, as an incident of their duties in their official capacity, to enforce the payment of the tax from the beneficiaries upon whose right to succeed to the property the tax is based. In re Powell's Estate, 110 M 213, 101 P2d 54, 128 ALR 116 (1940).

Personal Liability of Executors and Administrators: Section 72-16-432 (now repealed) with reference to personal liability of administrators, executors, and trustees of estates for inheritance taxes until payment, is intended to mean personal liability only for the tax on property passing or which should pass through the hands of such officers or, at most, property impressed with a tax lien, which they might seize and sell in the same manner as they may do for the payment of estate debts under 72-16-436 (now repealed). In re Powell's Estate, 110 M 213, 101 P2d 54, 128 ALR 116 (1940).

72-16-609. Penalties and interest charged to fiduciary when caused by fiduciary's negligence.

Official Comments

[Sections 72-16-601 through 72-16-612 copy] the Uniform Estate Tax Apportionment Act.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

UPC Section: The corresponding provision in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-916(c)(3).

72-16-610. Action to recover apportioned tax — limitations on duty to initiate — uncollectibility.

Official Comments

[Sections 72-16-601 through 72-16-612 copy] the Uniform Estate Tax Apportionment Act.

Compiler's Comments

UPC Section: The corresponding provision in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-916(g).

Case Notes

DECISIONS UNDER FORMER LAW

Postponement of Payment Due to Litigation: Where litigation over the payment of an inheritance tax is conducted in good faith and plaintiff is even only partially successful, the interest payable on the amount due is only 6%, not 10%. (See In re Clark's Estate, 105 M 401, 74 P2d 401, 114 ALR 496 (1937).) State ex rel. Blankenbaker v. District Court, 109 M 331, 96 P2d 936 (1939), overruled on another point, State ex rel. Reid v. District Court, 126 M 489, 255 P2d 693 (1953).

Necessary Litigation: Provision to exact 10% interest if inheritance tax not paid within 18 months unless necessary litigation or other unavoidable delay intervene in which case it shall be 6% except that "litigation to defeat the payment of the tax is not necessary litigation", is not open to construction that 10% shall apply to all litigation, whether justified or successful or not, the purpose being to prevent unjustified delay by unnecessary litigation. In re Clark's Estate, 105 M 401, 74 P2d 401, 114 ALR 496 (1937).

72-16-611. Action to recover apportioned tax — determination of court prima facie correct.

Official Comments

[Sections 72-16-601 through 72-16-612 copy] the Uniform Estate Tax Apportionment Act.

Compiler's Comments

UPC Section: The corresponding provision in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-916(c)(4).

72-16-612. Action by foreign representative to recover apportioned tax.

Official Comments

[Sections 72-16-601 through 72-16-612 copy] the Uniform Estate Tax Apportionment Act.

Compiler's Comments

UPC Section: The corresponding provision in the Uniform Probate Code as adopted by the National Conference of Commissioners on Uniform State Laws is section 3-916(h).

Part 9
Estate Tax

Part Case Notes

No Annual Gift Exclusion Allowed as Deduction in Valuation of Real Property Gifted in Contemplation of Death: Langendorf gifted real property worth $128,000 to Dean and Teresa Hayden 2 years before his death. The personal representative subtracted $20,000 ($10,000 per donee) from the value of the property as an "annual gift exclusion" on a Department of Revenue form. The Department disallowed the exclusion and determined inheritance taxes on a value of $128,000. The District Court upheld the exclusion. The Supreme Court applied the language of the statute and, citing GBN, Inc. v. Dept. of Revenue, 249 M 261, 815 P2d 595 (1991), the general rule of taxation that an item may constitute a deduction only when the Legislature specifically establishes the deduction. The Supreme Court held that under the plain meaning of the statute, a deduction is not allowed for the first $10,000 of value per donee of the gifted property. Estate of Langendorf, 262 M 123, 863 P2d 434, 50 St. Rep. 1474 (1993).

Total Value of Obligations Deductible: The total value of obligations outstanding against joint tenancy property is deductible in arriving at a determination of the value of the estate subject to tax when creditors have the right to enforce the entire obligation against the obligors personally or individually. In re Baier, 173 M 396, 567 P2d 943 (1977).

Clear Market Value:

Clear market value as used in 72-16-308 (now repealed) means net value in the open market as determined by price willing but not obligated buyer would pay and willing but not obligated seller would accept, with both parties knowing all pertinent facts affecting value. In re Estate of Power, 156 M 100, 476 P2d 506 (1970).

Valuation of United States Treasury bonds redeemable at par in discharge of federal estate tax liability must be based on clear market value on date of decedent's death for purposes of 72-16-308 (now repealed) rather than on par value. In re Estate of Power, 156 M 100, 476 P2d 506 (1970).

Construction: The words "actually allowed and paid" as used in the statute do not relate to the ordinary expenses of administration. In re Warren's Estate, 128 M 395, 275 P2d 843 (1954).

Ordinary Expenses: While ordinarily the appraisers are the ones who fix the value of the property of an estate, where the estate consists of stock in a closely held corporation, the services of an accountant may become necessary to determine the fair market value of the stock, and the cost of such services is an ordinary expense in the administration of the estate. In re Warren's Estate, 128 M 395, 275 P2d 843 (1954).

Deductions Allowed: Section 72-16-308 (now repealed) is clear and direct and declares no deduction shall be allowed except those specified therein. In re McAnelly's Estate, 127 M 158, 258 P2d 741 (1953).

72-16-901. Purpose — liberal construction to effect.

Case Notes

DECISIONS UNDER FORMER LAW

Character of Property at Death: It is the character of the property at death that determines whether it is real or personal property and whether it is subject to a transfer tax. In re Briebach's Estate, 132 M 437, 318 P2d 223 (1957).

Contracts for Sale of Real Estate: Decedent had been a resident of Montana but had moved to California where he resided at the time of his death. During his lifetime he contracted to sell land in Montana. At the time of his death there remained due unpaid balances. Decedent left a will devising and bequeathing all of his property to his wife. Rights passing to widow under the contracts were properly excluded from the gross value of the estate subject to an inheritance tax under 72-16-801 (now repealed). In re Briebach's Estate, 132 M 437, 318 P2d 223 (1957).

Partnership Property:

When partnership is settled and the debts are paid, the real estate of the partnership retains its character as such and is not tax exempt as intangible property. In re Perry's Estate, 121 M 280, 192 P2d 532 (1948).

As to personal property of a partnership, only so much thereof as is necessary to discharge the duties imposed on the survivor passes to him, and the balance of the partnership property should be divided between the surviving partners and the heirs of the deceased partner, which property retains its character as tangible property and is not tax exempt. In re Perry's Estate, 121 M 280, 192 P2d 532 (1948).

72-16-903. Taxable situs of property.

Compiler's Comments

2000 Amendment by Referendum: Chapter 9 substituted current text concerning taxable situs for estate tax for former text that read: "For the purpose of this tax, the taxable situs of property shall be the same as the taxable situs for inheritance tax purposes." Amendment effective November 7, 2000.

Applicability: Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

72-16-904. Estate tax imposed.

Compiler's Comments

2000 Amendment by Referendum: Chapter 9 at beginning deleted "In addition to the inheritance taxes hereinabove imposed"; and made minor changes in style. Amendment effective November 7, 2000.

Applicability: Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

Case Notes

DECISIONS UNDER FORMER LAW

Withdrawal From Joint Bank Account: All of the funds in a husband and wife's joint tenancy bank account were withdrawn by the wife, who then created new joint accounts with herself and other persons. Shortly thereafter her husband died. The withdrawal by the wife was not a taxable transfer subject to inheritance tax because transfers to a spouse are not taxable. The steps taken in creating the new joint accounts were not transfers from the deceased husband to anyone and therefore were not subject to inheritance tax. In re Sinclair, 197 M 29, 640 P2d 918, 39 St. Rep. 331 (1982).

Erroneous Application: The Court erred by applying 72-16-313 (now repealed) as amended in 1973 and granting a refund of inheritance tax when it accrued prior to amendment with the death of the decedent amounting to a retrospective application in contravention of 1-2-109. Burr v. Dept. of Revenue, 175 M 473, 575 P2d 45 (1978).

72-16-905. Estate tax — how computed.

Compiler's Comments

2000 Amendment by Referendum: Chapter 9 at end of first sentence deleted "less the inheritance taxes, if any, due this state"; and made minor changes in style. Amendment effective November 7, 2000.

Applicability: Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

Case Notes

DECISIONS UNDER FORMER LAW

Widow's Life Estate: Decedent left a will giving wife residue and remainder of his property during the term of her natural life, provided she should remain his widow, with right to dispose of the same or any part thereof for her use, support, and maintenance, at her discretion. A following paragraph gave to his two daughters, in equal shares, the property referred to in the preceding paragraph to come into possession thereof at the death or remarriage of the wife. The widow never remarried and died within 6 months after death of testator. Net estate of taxable value of $99,022.61 passed under the paragraphs mentioned; of that amount Court properly found that $18,784.19 passed to the widow where amount was calculated upon the basis of her life expectancy of 5.72 years. In re Bishir's Estate, 132 M 558, 318 P2d 576 (1957).

72-16-906. Required filing of United States estate tax return.

Compiler's Comments

2005 Amendment: Chapter 513 near middle inserted "who died prior to January 1, 2005". Amendment effective April 28, 2005.

Retroactive Applicability: Section 7, Ch. 513, L. 2005, provided: "[Section 4] [72-16-906] applies retroactively, within the meaning of 1-2-109, to deaths occurring after December 31, 2004, for which the probate of the decedents' estates closes after [the effective date of this act]." Effective April 28, 2005.

2003 Amendment: Chapter 68 near beginning after "personal representative" inserted "or domiciliary foreign personal representative" and near middle substituted "estate is required to file a United States estate tax return" for "estate is subject to the payment of a United States estate tax" and deleted former second sentence that read: "He shall also file with the department a certificate or other evidence from the internal revenue service showing the amount of the United States estate tax as computed by the internal revenue service." Amendment effective March 14, 2003.

Retroactive Applicability: Section 9, Ch. 68, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to deaths occurring after December 31, 2000, for which the probate of the decedents' estates closes after [the effective date of this act]." Effective March 14, 2003.

1989 Amendment: In first sentence substituted "file a duplicate of the United States estate tax return with the department of revenue" for "file duplicates of the United States estate tax returns with the district court of the county in which such estate is being probated and with the department of revenue"; in second sentence, after "also file", deleted "with such court and"; and at end substituted "the internal revenue service" for "that agency".

Source — Explanation of Editorial Comments for 1989 Amendments: Chapter 582, L. 1989, generally revised the Uniform Probate Code and related law. The editorial comments that follow each section amended by Ch. 582 were prepared by Professor E. Edwin Eck of the University of Montana (now University of Montana-Missoula) School of Law.

1989 Editorial Comment: Under former Montana law, if an estate was subject to the payment of United States estate tax, the personal representative was required to file a duplicate of the United States estate tax return with the probate court and with the department of revenue. This change eliminates the requirement of a filing with the probate court.

72-16-907. Department to determine tax — rehearing and appeal — rulemaking.

Compiler's Comments

2000 Amendment by Referendum: Chapter 9 at end of (1)(b) substituted "may appeal the determination to district court" for "shall have the same right to apply for district court determination and of rehearing and appeal as is now provided for in the determination of inheritance taxes"; inserted (2) concerning rulemaking; and made minor changes in style. Amendment effective November 7, 2000.

Applicability: Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

Case Notes

DECISIONS UNDER FORMER LAW

Reasonable Diligence: The passage of 30 days between the issuance by the Department of Revenue of the first tax certificate and the amended tax certificate does not constitute a lack of reasonable diligence. In re Estate of Winter, 226 M 24, 734 P2d 178, 44 St. Rep. 430 (1987).

72-16-908. Persons liable for tax.

Case Notes

Duty of Administrator to Withhold Tax From Other Property: Section 72-16-436 (now repealed) indicates that the administrator's liability is only for the tax on property passing or which should pass through his hands or, at most, property impressed with a tax lien which he might seize and sell; but if he has in possession other property passing to the beneficiary who secures the particular property which passed under this section, he would be liable for the tax thereon because the tax of the transferee may be charged against the distributive share. In re Powell's Estate, 110 M 213, 101 P2d 54, 128 ALR 116 (1940).

72-16-909. When and where tax payable — interest.

Compiler's Comments

2001 Amendment: Chapter 574 at end of (1) substituted "department of revenue" for "county treasurer of the county in which the estate is being probated". Amendment effective July 1, 2001.

2000 Amendment by Referendum: Chapter 9 at end of (1) deleted "in the same manner provided for the payment of inheritance taxes in 72-16-441"; inserted (2) concerning interest on unpaid taxes; inserted (3) concerning litigation to defeat tax; inserted (4) concerning interest on deferred payment; and made minor changes in style. Amendment effective November 7, 2000.

Applicability: Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

72-16-912. Collection and deposit of tax.

Compiler's Comments

2001 Amendment: Chapter 574 near middle after "by the" deleted "several county treasurers or the"; and made minor changes in style. Amendment effective July 1, 2001.

The amendments to this section in sec. 36, Ch. 257, L. 2001, were rendered void by sec. 255(5), Ch. 574, L. 2001, a coordination section.

Part 10
Generation-Skipping Transfer Tax

72-16-1001. Definitions.

Compiler's Comments

2013 Amendment: Chapter 264 in definition of original transferor substituted "settlor" for "trustor". Amendment effective October 1, 2013.

Severability: Section 161, Ch. 264, L. 2013, was a severability clause.

72-16-1007. Rulemaking.

Compiler's Comments

2000 Amendment by Referendum: Chapter 9 deleted former first sentence that read: "The provisions of Title 72, chapter 16, parts 1 through 8, relating to the tax on inheritances and transfers, apply to 72-16-1001 through 72-16-1006 unless they are in conflict with this part." Amendment effective November 7, 2000.

Applicability: Section 38, Ch. 9, Sp. L. May 2000, provided: "This act applies to deaths occurring after December 31, 2000."

1991 Statement of Intent: The statement of intent attached to Ch. 273, L. 1991, provided: "A statement of intent is required for this bill because [section 7] [72-16-1007] requires the department of revenue to adopt rules for administering and enforcing the generation-skipping transfer tax. It is the intent of the legislature that the department adopt rules necessary for complying with the federal generation-skipping transfer tax and that the department model its rules on the federal regulations implementing the federal tax."

CHAPTER 17
ANATOMICAL GIFT ACT

Chapter Official Comments

The Uniform Anatomical Gift Act was promulgated in 1968. It has been adopted in all 50 states and the District of Columbia. In the prefatory note it was observed:

". . . if utilization of bodies and parts of bodies is to be effectuated, a number of competing interests in a dead body must be harmonized, and several troublesome legal questions must be answered. . . . Both the common law and the present statutory picture is [sic] one of confusion, diversity, and inadequacy. . . . The Uniform Anatomical Gift Act herewith presented by the National Conference of Commissioners on Uniform State Laws carefully weighs the numerous conflicting interests and legal problems. Wherever adopted it will encourage the making of anatomical gifts, thus facilitating therapy involving such procedures. . . . It will provide a useful and uniform legal environment throughout the country for this new frontier of modern medicine."

The contemporary significance of the Uniform Anatomical Gift Act has been recently assessed by the Hastings Center; in the Preface to its Report of the project on organ transplantation, "Ethical, Legal and Policy Issues Pertaining to Solid Organ Procurement" (October, 1985), it is stated:

"The issue of transplantation remained quiescent for many years. It was only with the successes occasioned by the introduction of powerful new immunosuppressive drugs such as Cyclosporine and improvements in surgical techniques for transplanting organs and tissues in the past few years that the issue of organ procurement was brought back into the center stage of public policy concern. Enhancements in the capacity to perform transplants increased the demand for solid organs. It has become apparent that the public policy instituted in 1969 [by promulgation of the Uniform Anatomical Gift Act in 1968] is not producing a sufficient supply of organs to meet the current or projected demand for them."

A 1985 Gallup Poll commissioned by the American Council on Transplantation reported that 93 percent of Americans surveyed knew about organ transplantation and, of these, 75 percent approved of the concept of organ donation. Although a large majority approves of organ donation, only 27 percent indicate that they would be very likely to donate their own organs, and only 17 percent have actually completed donor cards. Of those who were very likely to donate, nearly half have not told family members of their wish, even though family permission is usually requested before an organ is removed. (Report of the Task Force on Organ Transplantation pursuant to the 1984 National Organ Transplant Act—P.L. 98 507—"Organ Transplantation: Issues and Recommendations" (April 1986)).

The inadequacies in the present system of encouraging voluntary donation of organs were enumerated in the Hastings Center Report:

"The key problems that hinder organ donation include:

1. Failure of persons to sign written directives.
2. Failure of police and emergency personnel to locate written directives at accident sites.
3. Uncertainty on the part of the public about circumstances and timing of organ recovery.
4. Failure on the part of medical personnel to recover organs on the basis of written directives.
5. Failure to systemically approach family members concerning donation.
6. Inefficiency on the part of some organ procurement agencies in obtaining referrals of donors.
7. High wastage rates on the part of some organ procurement agencies in failing to place donated organs.
8. Failure to communicate the pronouncement of death to next of kin.
9. Failure to obtain adequate informed consent from family members."

State and federal legislation have addressed several of these problems. For example, a majority of states have enacted a variety of "required request" laws that require hospital administrators to discuss with next of kin the option of donating, or requesting the donation of, the organs of a decedent. Congress enacted the National Organ Transplant Act in 1984 prohibiting the purchase of organs in interstate commerce and providing grants to organ procurement agencies and a national organ-sharing system. The Act also provides for appointment of a Task Force on Organ Transplantation to conduct a comprehensive examination of organ donation and procurement, organ sharing within the United States, access by patients to donor organs and transplant procedures, diffusion and adoption of organ transplant technology, and future directions in research. The Task Force submitted a report in April 1986 entitled "Organ Transplantation: Issues and Recommendations." Among the findings:

"An overriding problem common to all organ transplantation programs as well as to the well-established programs in tissue banking (for corneal, skin and bone transplantation) is the serious gap between the need for the organs and tissues and the supply of donors. Despite substantial support for transplantation and a general willingness to donate organs and tissues after death, the demand far exceeds the supply. At any one time, there are an estimated 8,000 to 10,000 people waiting for a donor organ to become available."

Citing a recommendation of the Task Force, the bill for the reconciliation of the 1987 budget amended the Social Security Act to require that hospitals, as a condition to receiving Medicare or Medicaid after October 1, 1987, establish written protocols "for the identification of potential organ donors that [make families] . . . aware of the option of organ or tissue donation and their option to decline." (P.L. 99-509 § 9318).

Several amendments to the Uniform Act have been made since it was promulgated in 1968. In 1980, the NCCUSL voted to make optional the language that previously required the donor card to be signed "in the presence of two witnesses who must sign the document in his presence." Amendments have been made by several states authorizing individuals other than doctors to remove eyes and to address specific emerging problems. As a result, the objective of the 1968 Uniform Act has been eroded, i.e., "When generally adopted, even if the place of death, or the residence of the donor, or the place of use of the gift occurs in a state other than that of the execution of the gift, uncertainty as to the applicable law will be eliminated and all parties will be protected."

In 1984, the Executive Committee of NCCUSL approved the appointment of a study committee, and then in 1985 of a drafting committee, to propose amendments to the Uniform Anatomical Gift Act. The Committee has consulted with individuals and national organizations involved in organ procurement about possible changes in the generic provisions of the Uniform Act and to solicit comments and suggestions. A first draft of proposed amendments to the Uniform Act was considered at the annual meeting of NCCUSL in 1986.

The sequence of sections in the original Act has been changed, to combine the concept of "persons who may make an anatomical gift" (original Section 2) [72-17-201, 72-17-203 (now repealed), and 72-17-207], "manner of making anatomical gifts" (original Section 4) [72-17-204 and 72-17-205 (now repealed)], and "amendment or revocation of the gift" (original Section 6) [72-17-209 (now repealed)]. The authorization of gifts by next of kin or a guardian of the person contained in Section 2 [72-17-201, 72-17-203 (now repealed), and 72-17-207] of the original Act is Section 3 [72-17-214] of the amended Act. Several subsections of the original Act have been shifted to accommodate change in title and sequential arrangement of sections of the Act as amended. These changes are noted in the Comments. The scope of the Act continues to be limited to procurement. It does not cover processing except for a provision requiring coordination of procurement and utilization between hospitals and procurement organizations (Section 9) [72-17-108]. It does not cover distribution except for a provision prohibiting sale or purchase (Section 10) [72-17-302].

The proposed amendments simplify the manner of making an anatomical gift and require that the intentions of a donor be followed. For example, no witnesses are required on the document of gift (Section 2(b)) [72-17-201(2)] and consent of next of kin after death is not required if the donor has made an anatomical gift (Section 2(h)) [72-17-201(8)]. The identification of actual donors is facilitated by a duty to search for a document of gift (Section 5(c)) [72-17-213(2)] and of potential donors by the provisions for routine inquiry (Section 5(a)) [omitted from Montana enactment] and required request (Section 5(b)) [72-17-213(1)]. A gift of one organ, e.g., eyes, is not a limitation on the gift of other organs after death, in the absence of contrary indication by the decedent (Section 2(j)) [72-17-201(10)]. The right to refuse to make an anatomical gift and the manner of expressing the refusal are specified (Section 2(i)) [72-17-201(9)]. Revocation by a donor of an anatomical gift that has been made is effective without communication of the revocation to a specified donee (Section 2(f)) [72-17-201(6)]. Hospitals have been substituted for attending physicians as donees of anatomical gifts (Section 6(b)) [72-17-202(2)], and they are required to establish agreements or affiliations with other hospitals and procurement organizations in the region to coordinate the procurement and utilization of anatomical gifts (Section 9) [72-17-108]. If a request for an anatomical gift has been made for transplant or therapy by a person specified in the Act and if there is no contrary indication by the decedent or known objection by the next of kin to an anatomical gift, the [coroner] [medical examiner] or [local public health official] may authorize release and removal of a part subject to specific requirements (Section 4(a) and (b)) [72-17-215(1) and (2)]. The categories of persons that may remove anatomical parts are expanded to include eye enucleators and certain technicians (Section 8(c)) [72-17-301(3)]. The sale or purchase of parts is prohibited (Section 10) [72-17-302]. Persons who act, or attempt to act, in good faith in accordance with the terms of the Act are not liable in any civil action or criminal proceeding. The categories of persons covered by this exemption are specified (Section 11(c)) [72-17-207(3)].

The growing promise of transplantation was described in the Hastings Center Report:

"It is now possible to transplant vital organs such as hearts, livers and kidneys. Efforts are currently underway to perfect the transplantation of the heart and lung together, the pancreas and the small bowel. Post-mortem donors of these vital organs must have sustained brain death under circumstances in which their respiration and circulation can be supported artificially.

"Other human tissue such as corneas, bone and inner ear parts and skin can be utilized to restore important biological functions. These tissues may be removed some time after circulation and respiration have ceased. The cornea, for example, remains suitable for removal for transplantation for approximately six hours after the donor's heart has stopped beating."

Chapter Compiler's Comments

Severability: Section 17, Ch. 540, L. 1989, was a severability clause.

Chapter Administrative Rules

ARM 37.106.405 Minimum standards for a hospital — organ donation requests and protocols.

Part 1

General Provisions

72-17-101. Short title.

Compiler's Comments

2007 Amendment: Chapter 345 inserted "Revised". Amendment effective October 1, 2007.

Retroactive Applicability: Section 20, Ch. 345, L. 2007, provided: "[This act] applies to an anatomical gift or amendment to, revocation of, or refusal to make an anatomical gift made before October 1, 2007."

Source: The corresponding section of the Uniform Anatomical Gift Act (1987) as adopted by the National Conference of Commissioners on Uniform State Laws is section 15.

72-17-102. Definitions.

Official Comments

[The definition of person] is taken verbatim from the Uniform Statutory Construction Act, section 26(4). In any state that has adopted the Uniform Act or its equivalent, this subsection will be unnecessary.

[The definition of state] is taken from section 26(9) of the Uniform Statutory Construction Act.

This is Section 1 [72-17-102] of the original Act. Definitions (1) "Anatomical Gift" and (3) [(4) of Montana enactment] "Document of Gift" have been added to reduce the length and complexity of operative provisions of the Act.

In subsection (2) the committee decided it was unnecessary to expand the definition of "decedent" to include the definition of death contained in the Uniform Determination of Death Act. That Act provides:

"An individual who has sustained either irreversible cessation of circulatory and respiratory functions or irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards."

Almost all states have similar definitions either by statute or appellate court decisions.

The Report to Congress of the Task Force appointed under the 1984 National Organ Transplant Act (P.L. 98-507) recommends:

". . . that the Uniform Determination of Death Act be enacted by the legislatures of states that have not adopted this or a similar act. . . . that each state medical association develop and adopt model hospital policies and protocols for the determination of death based upon irreversible cessation of brain function that will be available to guide hospitals in developing and implementing institutional policies and protocols concerning brain death."

In subsections (5) [(6) of Montana enactment] and (12) [(14) of Montana enactment], the individuals authorized to remove a part have been expanded to include enucleators for eyes and technicians. Satisfactory completion of a prescribed course of training and experience is a prerequisite to certification of these nonphysician specialists. The type of certification and the person making it are bracketed. It may be done by a professional peer group organization, an organ procurement organization, agency or association, or by a hospital or state agency.

In subsection (10) [(12) of Montana enactment], "procurement organization" has been substituted for "bank or storage facility" and the function has been expanded to include procurement and distribution to reflect the diffusion of function, i.e., procurement, distribution or storage, and of objective, i.e., organs, tissues, eyes, bones, skin, fluids, etc. In the case of solid or visceral organs, they must be removed while bodily functions of the decedent are sustained with life support systems. If solid or visceral organs are not involved, life support systems are not required, although there are time limits following death within which removal must be completed, e.g., six hours in the case of eyes.

Compiler's Comments

2007 Amendment: Chapter 345 inserted definitions of adult, agent, disinterested witness, donor registry, driver's license, eye bank, guardian, identification card, know, minor, organ procurement organization, parent, prospective donor, reasonably available, recipient, record, refusal, sign, tissue, tissue bank, and transplant hospital; in definition of anatomical gift at end inserted "for the purposes of transplantation, therapy, research, or education"; in definition of decedent inserted "whose body or part is or may be the source of an anatomical gift"; in definition of document of gift in introductory clause after "means" inserted "any of the following methods used to make an anatomical gift", in (b) after "imprinted" substituted "on a driver's license, identification card, or donor registry" for "on a motor vehicle operator's license", and in (d) substituted "a witnessed oral statement" for "used to make an anatomical gift"; in definition of donor substituted "whose body or part is the subject of an anatomical gift" for "who makes a gift of all or part of the individual's body"; in definition of part inserted (b) providing that term does not include the whole body; in definition of person after "association" inserted "limited liability company, public corporation, instrumentality"; in definition of procurement organization substituted "an eye bank, organ procurement organization, or tissue bank" for "a person licensed, accredited, or approved under the laws of any state for procurement, distribution, or storage of human bodies or parts"; in definition of state after "Columbia" deleted "or the Commonwealth of" and inserted "the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States"; and made minor changes in style. Amendment effective October 1, 2007.

Retroactive Applicability: Section 20, Ch. 345, L. 2007, provided: "[This act] applies to an anatomical gift or amendment to, revocation of, or refusal to make an anatomical gift made before October 1, 2007."

1995 Amendments: Chapter 418 in definition of Department substituted "department of public health" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Chapter 546 in definition of Department substituted "department of public health and human services provided for in 2-15-2201" for "department of health and environmental sciences provided for in Title 2, chapter 15, part 21". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1989 Amendment: Inserted definitions of anatomical gift, document of gift, enucleator, and procurement organization; deleted definitions of bank or storage facility and eyebank association of America; substituted definition of hospital for former definition that read: "a hospital licensed, accredited, or approved under the laws of any state; includes a hospital operated by the United States government, a state, or a subdivision thereof, although not required to be licensed under state laws"; in definition of person inserted "joint venture" and "or commercial"; substituted definition of physician or surgeon for former definition that read: "a physician or surgeon licensed or authorized to practice under the laws of any state"; substituted definition of state for former definition that read: "any state, district, commonwealth, territory, insular possession, and any other area subject to the legislative authority of the United States of America"; substituted definition of technician for definition of technician trained in eye enucleation that read: "an individual who has satisfactorily completed a course in eye enucleation taught by an ophthalmologist"; and made minor changes in form and phraseology.

1983 Amendment: In (1), after "facility" deleted "licensed, accredited, or approved under the laws of any state" and inserted "operated by or under the supervision of a person who qualifies as a donee under subsection (1)(a) or (1)(b) of 72-17-202"; and inserted definitions of department, eyebank association of America, ophthalmologist, and technician trained in eye enucleation.

Uniform Act Section: The corresponding section of the Uniform Anatomical Gift Act (1987) as adopted by the National Conference of Commissioners on Uniform State Laws is section 1.

Changes From Uniform Act: Montana enactment added definitions of department and ophthalmologist; in definition of document of gift, after "motor vehicle operator's", omitted "or chauffeur's"; in definition of donor substituted "a gift" for "an anatomical gift"; in definition of enucleator substituted "certified pursuant to 72-17-311" for "certified by the [State Board of Medical Examiners]"; and in definition of hospital, after "approved", omitted "as a hospital".

72-17-103. Uniformity of interpretation.

Compiler's Comments

Source: The corresponding section of the Uniform Anatomical Gift Act (1987) as adopted by the National Conference of Commissioners on Uniform State Laws is section 13.

Changes From Uniform Act: Montana enactment substituted existing language for "This [act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [act] among states enacting it."

72-17-105. Legislative findings.

Compiler's Comments

Preamble: The preamble attached to Ch. 230, L. 2003, provided: "WHEREAS, more than 80,000 people are currently waiting for life-saving organ transplants on the national transplant waiting list, of which 1,200 persons live in our region, and 17 people die each day as a result of the shortage of donated organs."

Effective Date: This section is effective October 1, 2003.

72-17-106. Statewide organ and tissue donation registry.

Compiler's Comments

Preamble: The preamble attached to Ch. 230, L. 2003, provided: "WHEREAS, more than 80,000 people are currently waiting for life-saving organ transplants on the national transplant waiting list, of which 1,200 persons live in our region, and 17 people die each day as a result of the shortage of donated organs."

Effective Date: This section is effective October 1, 2003.

72-17-108. Coordination of procurement and use.

Official Comments

Among the recommendations of the Task Force pursuant to the 1984 National Organ Transplant Act, was the following:

"The Joint Commission on the Accreditation of Hospitals develop [sic] a standard that requires all acute care hospitals to both have an affiliation with an organ procurement agency and have formal policies and procedures for identifying potential organ and tissue donors and providing next of kin with appropriate opportunities for donation."

The failure of a hospital to establish the agreements or affiliations specified in this section will not affect gifts made to the hospital or gifts by patients in the hospital.

Compiler's Comments

2007 Amendment: Chapter 345 near beginning after "state" deleted "after consultation with other hospitals and procurement organizations", after "affiliations" inserted "with procurement organizations", and at end after "use" substituted "of anatomical gifts" for "of human bodies and parts"; and made minor changes in style. Amendment effective October 1, 2007.

Retroactive Applicability: Section 20, Ch. 345, L. 2007, provided: "[This act] applies to an anatomical gift or amendment to, revocation of, or refusal to make an anatomical gift made before October 1, 2007."

Source: The corresponding section of the Uniform Anatomical Gift Act (1987) as adopted by the National Conference of Commissioners on Uniform State Laws is section 9.

72-17-109. Relation to Electronic Signatures in Global and National Commerce Act.

Compiler's Comments

Effective Date: This section is effective October 1, 2007.

Retroactive Applicability: Section 20, Ch. 345, L. 2007, provided: "[This act] applies to an anatomical gift or amendment to, revocation of, or refusal to make an anatomical gift made before October 1, 2007."

Part 2

Execution and Operation of Anatomical Gift

72-17-201. Making, amending, revoking, and refusing to make anatomical gifts by individual.

Official Comments

The major structural changes from the original Act are found in Sections 2 and 3 [72-17-201 and 72-17-214]. The persons who may make an anatomical gift are divided into the individual donor (new Section 2) [72-17-201] and next of kin or guardians of the person (new Section 3) [72-17-214].

The manner of executing (old Section 4) [72-17-204 and 72-17-205 (now repealed)], and amending or revoking (old Section 6) [72-17-209 (now repealed)] anatomical gifts are incorporated in new Section 2 [72-17-201] as well as provisions of other sections that involve "making, amending, revoking, and refusing to make anatomical gifts by the individual." Provisions of old Section 2 [72-17-201, 72-17-203 (now repealed), and 72-17-207] that do not relate directly to this topic have been shifted to later sections. In the original Act there is the following Comment:

"To minimize confusion there is merit in having a uniform provision throughout the country. Also it is desirable to enlarge the class of possible donors as much as possible. Subsection (a) of Section 2 [former 72-17-201(1)], providing that any person of sound mind and 18 years or more of age may execute a gift, will afford both nationwide uniformity and a desirable enlargement of the class of donors. Persons 18 years of age or more are of sufficient maturity to make the required decisions and the Uniform Act takes advantage of this fact."

In subsection (a) [72-17-201(1)] the Act has been expanded by inserting the right to refuse to make an anatomical gift. The absence of a donor card or the lack of an entry authorizing a gift on a driver's license are ambiguous and are not "contrary indications" of a decedent preventing an anatomical gift by next of kin under Section 2(b) [former 72-17-201(2)] of the original Act. This amendment and a provision specifying the manner of making a refusal (subsection (i)) [72-17-201(9)] provide the option to individuals who are definitely opposed to the donation for any purpose or of any part of their body as an anatomical gift. If the donor wishes to limit the anatomical gift to a specific purpose, e.g., transplantation, or to a specified part, e.g., eyes, the limitation must be stated clearly, i.e., "transplantation only," "eyes only."

Subsection (b) [72-17-201(2)] incorporates the provisions of Section 4(b) [72-17-204(2) (now repealed)] of the original Act. Section 4(a) [72-17-204(1) (now repealed)] of the original Act has been relocated to subsection (e) [72-17-201(5)] to reflect the change from using wills to choosing other forms of documents of gift to make anatomical gifts.

The requirement of two witnesses signing a donor card or other document of gift has been deleted to simplify the making of anatomical gifts. Self authentication of a document of gift by a donor who cannot sign relieves the donee of the duty to search for the witnesses upon death of the donor.

In the original Act there were several forms included in the Comments with this admonition:

"As the Uniform Act becomes widely accepted it will prove helpful if the forms by which gifts are made are similar in each of the participating states. Such forms should be as simple and understandable as possible."

The forms in these Comments are suggested for the 1987 Act.

ANATOMICAL GIFT BY A LIVING DONOR

ANATOMICAL GIFT BY A LIVING DONOR

Pursuant to the Anatomical Gift Act, upon my death, I hereby give (check boxes applicable):

1. ☐ Any needed organs, tissues, or parts;
2. ☐ The following organs, tissues, or parts only..
....;
3. ☐ For the following purposes only...
....

(transplant-therapy-research-education)

....
Date of Birth Signature of Donor

....
Date Signed Address of Donor

INSTRUCTIONS

Check box 1 if the gift is unrestricted, i.e., of any organ, tissue, or part for any purpose specified in the Act; do not check box 2 or box 3. If the gift is restricted to specific organ(s), tissue(s), or part(s) only, e.g., heart, cornea, etc., check box 2 and write in the organ or tissue to be given. If the gift is restricted to one or more of the purposes listed, e.g., transplant, therapy, etc., check box 3 and write in the purpose for which the gift is made.

A gift category included in some forms "of my body for anatomical study if needed" has not been included. Although a gift of the entire body is authorized by the Act, the exercise of this option usually requires an agreement with a medical school before a gift is made.

A simple form of refusal under the Act could provide:

Pursuant to the Anatomical Gift Act, I hereby refuse to make any anatomical gift.

....

Date of Birth Signature of Declarant

....

Date of Signing Address of Declarant

Subsection (c) [72-17-201(3)] incorporates an amendment to the original Act in many states providing that an anatomical gift may be made by an attachment to the driver's license. The cross reference to subsection (b) [72-17-201(2)] incorporates the concept that a signature is required. A signature on the driver's license or on the card attached to the driver's license is sufficient. The hospital or other donee may rely on the anatomical gift even though the license has expired or has been terminated by official act.

The following form is suggested for attachment to the driver's license:

....

Print or Type Name of Donor

Pursuant to the Anatomical Gift Act, upon my death, I hereby give (check boxes applicable):

1. ☐ Any needed organs, tissues, or parts;
2. ☐ The following organs, tissues, or parts only..
....;
3. ☐ For the following purposes only...
....;

(transplant-therapy-research-education)

Refusal:

4. ☐ I refuse to make any anatomical gift.

....

Signature

INSTRUCTIONS

See Section 2(b) [72-17-201(2)] Comments. If the applicant for a driver's license refuses to make any anatomical gift, check box 4 only.

Subsection (d) [72-17-201(4)] is Section 4(d) [72-17-206 (now repealed)] of the original Act.

Subsection (e) [72-17-201(5)] is a restatement of Section 4(a) [72-17-204(1) (now repealed)] of the original Act.

Subsection (f) [72-17-201(6)] is a restatement of Section 6(a) and (b) [72-17-209(1) and (2) (now repealed)] of the original Act.

Subsection (g) [72-17-201(7)] is Section 6(a) [72-17-209(1) (now repealed)] of the original Act.

Subsection (h) [72-17-201(8)] states expressly the intention of the original Act that an anatomical gift not revoked by the donor cannot be revoked after the donor's death by any other person. This was explicit in the Comments to the original Act: "Subsection (e) [of Section 2] [72-17-203 (now repealed)] recognizes and gives legal effect to the right of the individual to dispose of his own body without subsequent veto by others." The Hastings Center Report cited the results of a telephone survey of organ procurement agencies in the United States in 1983 as follows:

". . . the survey revealed that few transplant centers were willing to procure organs solely on the basis of a donor card or driver's license consent by the deceased. In situations in which family members could not be located, less than twenty-five percent of the respondents said they would proceed with organ procurement despite the presence of a written directive."

This subsection removes any uncertainty.

Subsection (i) [72-17-201(9)] expands the original Act by providing a method of refusing to make an anatomical gift. A potential donor has several options. The donor may make an anatomical gift (Section 2(a)) [72-17-201(1)], may express or imply a contrary indication that an anatomical gift shall not be made (Section 2(j)(k)) [72-17-201(10) and (11)], or may refuse to make an anatomical gift (Section 2(i)) [72-17-201(9)]. Contrary indications may include membership in organizations that do not approve of organ donation, statements or actions by the potential donor that are inconsistent with organ donations, etc. To be effective as a limitation on a gift by next of kin under Section 3 [72-17-214] or on a release of a part by other persons under Section 4 [72-17-215], after death, the contrary indications must be known to the persons authorized to act under Sections 3 and 4 [72-17-214 and 72-17-215]. The option of refusal to make an anatomical gift provided for by subsection (i) [72-17-201(9)] is a method of documenting contrary indications that might not be communicated otherwise and therefore not effective as a limitation on next of kin and other persons authorized to give or release a part under Sections 3 and 4 [72-17-214 and 72-17-215] of the Act. If the potential donor is unable to speak because of paralysis or other disability, any form of communicating a refusal is sufficient, e.g., responding to a direct inquiry by a nod of the head, squeeze of the hand, blink of eyes, etc.

Subsection (j) [72-17-201(10)] addresses the problem of donor cards that have been circulated by various organizations and that appear to limit the anatomical gift to only one organ, e.g., eyes, kidneys, etc. This type of card should not be construed as an expression of the intention of the donor to limit the anatomical gift to that organ only, in the absence of a refusal to give other organs or of other contrary indications.

Subsection (k) [72-17-201(11)] provides that a revocation of an anatomical gift made previously by a donor is neither a refusal to make any anatomical gift nor a contrary indication by the donor that no part shall be given or released for any purpose authorized by the Act. It merely restores the donor to the status of an individual who has neither made nor refused to make an anatomical gift. In the absence of any other action or contrary indication by that individual before death, the next of kin or guardian of the person may make an anatomical gift pursuant to Section 3 [72-17-214] or the appropriate person may authorize release and removal of a part pursuant to Section 4 [72-17-215].

An amendment of an anatomical gift made previously by the donor, whether the amendment relates to a part or a purpose, is not a refusal nor a limitation on a gift or release of other parts for any purpose specified in the Act. If the amendment is intended to be a refusal it must be expressed clearly as provided in subsection (i) [72-17-201(9)].

Revocation or amendment of a previous anatomical gift is ambiguous. It does not indicate an intention of the donor to refuse to make an anatomical gift. This subsection removes that ambiguity.

Compiler's Comments

2007 Amendment: Chapter 345 in (1) at beginning substituted language allowing anatomical gift of a donor's body or part to be made during life of donor for transplantation, therapy, research, or education for "individual who is at least 18 years of age may"; in (1)(a) and (1)(b) substituted language allowing gift by donor if donor is adult or by minor if minor is emancipated or authorized to apply for driver's license at age 15 and allowing gift by agent of donor unless prohibited by power of attorney for health care or other record for former (1)(a) and (1)(b) that read: "(1)(a) make an anatomical gift for any of the purposes stated in 72-17-202; or

(b) limit an anatomical gift to one or more of those purposes"; inserted (1)(c) allowing gift by parent of donor if donor is unemancipated minor; inserted (1)(d) allowing gift by donor's guardian; in (2) substituted language allowing anatomical gift by statement or symbol on driver's license or identification card, by statement in will, by communication to disinterested witness during terminal illness or injury, or by signing donor card for former (2) that read: "(2) An anatomical gift may be made only by a document of gift signed by the donor. If the donor cannot sign, the document of gift must be signed by another individual and by two witnesses, all of whom have signed at the direction and in the presence of the donor and of each other, and must state that it has been signed"; inserted (3) allowing donor or other authorized person to make anatomical gift by donor card or other signed record and allowing donor who is physically unable to sign record to allow another individual to sign for donor in presence of two witnesses; in (4) deleted former first sentence that read: "If a document of gift is attached to or imprinted on a donor's motor vehicle operator's license, the document of gift must comply with subsection (2)" and after "license" inserted "or identification card issued to a donor"; in (6) in two places substituted reference to donor for reference to testator; in (7) at beginning inserted exception clause, after "donor" inserted "or other person authorized to make an anatomical gift under subsection (1)", and near end after "gift" deleted "not made by will"; substituted language in (7)(a) allowing amendment or revocation of gift only by record signed by donor or other person or another individual acting at direction of donor if donor unable to sign for former (a)(i) and (a)(ii) that read: "(i) a signed statement;

(ii) an oral statement made in the presence of two individuals"; in (7)(b) after "addressed" substituted "to at least two adults, one of whom is a disinterested witness" for "to a physician or surgeon"; inserted (7)(d) concerning later-executed document of gift amending or revoking previous gift; inserted (7)(e) concerning destroying or canceling gift document or portion of gift document with intent to revoke anatomical gift; substituted (8) requiring signed record to be witnessed by at least two adults, one of whom is disinterested witness, who have signed at donor's request and requiring signed record to state it has been signed and witnessed for former (8) that read: "(8) An anatomical gift that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of any person after the donor's death. The donor's family or health care provider may not refuse to honor the gift or thwart the procurement of the donation"; in (11)(a)(ii) substituted "driver's license or identification card" for "motor vehicle operator's license"; inserted (11)(a)(iii) allowing individual to refuse making anatomical gift by will even if will is probated or invalidated after death; in (11)(b) after "communication" inserted "addressed to at least two adults, at least one of whom is a disinterested witness"; inserted (12) outlining criteria to amend or revoke refusal; inserted (13) barring person other than donor from making, amending, or revoking anatomical gift in absence of express indication of donor except in certain cases and prohibiting donor's family or health care provider from refusing to honor gift or thwarting donation procurement; inserted (14) barring other persons from making anatomical gift of person's body or body part; in (15) before "contrary" inserted "an express", after "donor" inserted "or other person authorized under this section to make an anatomical gift", and after "part" inserted "for one or more of the purposes set forth in subsection (1)"; in (16) in first sentence after first "gift" inserted "of the donor's body or part" and at end inserted "and does not bar another person specified in 72-17-214 or this section from making an anatomical gift of the donor's body or part"; inserted (17) allowing parent of unemancipated minor who dies to revoke or amend minor's anatomical gift; inserted (18) allowing parent of minor to revoke minor's refusal of anatomical gift if minor dies; and made minor changes in style. Amendment effective October 1, 2007.

Retroactive Applicability: Section 20, Ch. 345, L. 2007, provided: "[This act] applies to an anatomical gift or amendment to, revocation of, or refusal to make an anatomical gift made before October 1, 2007."

2003 Amendment: Chapter 230 deleted former (1)(c) that read: "(c) refuse to make an anatomical gift"; in (5) inserted third sentence providing that gift made under section is sufficient legal authority for procurement without additional authority from donor or the donor's family or estate; inserted (6)(b) requiring donor to notify federally designated organ procurement organization of document destruction, cancellation, or mutilation in order to remove name from statutorily created donation registry; inserted second sentence in (8) prohibiting donor's family or health care provider from not honoring gift or from thwarting donation procurement; and made minor changes in style. Amendment effective October 1, 2003.

Preamble: The preamble attached to Ch. 230, L. 2003, provided: "WHEREAS, more than 80,000 people are currently waiting for life-saving organ transplants on the national transplant waiting list, of which 1,200 persons live in our region, and 17 people die each day as a result of the shortage of donated organs."

1989 Amendment: Rewrote section by deleting language that stated priorities of persons other than decedent who may make gift (see 1987 MCA for text) and by inserting language providing method for individual to make, amend, revoke, and refuse to make gift (see 1989 Session Law for text).

Applicability: Section 16, Ch. 540, L. 1989, provided: "[This act] applies to a document of gift, revocation, or refusal to make an anatomical gift signed by the donor or a person authorized to make or object to making an anatomical gift before, on, or after October 1, 1989."

Source: The corresponding section of the Uniform Anatomical Gift Act (1987) as adopted by the National Conference of Commissioners on Uniform State Laws is section 2.

Changes From Uniform Act: Montana enactment in (3), after "motor vehicle operator's", omitted "or chauffeur's"; in (5), in second sentence, substituted "after the testator's death" for "after death"; and in (9), after "motor vehicle operator's", omitted "or chauffeur's".

72-17-202. Persons who may become donees — purposes for which anatomical gifts may be made.

Official Comments

Subsection (a) [72-17-202(1)] is Section 3 [former 72-17-202(1)] of the original Act changed to combine subsections (1) and (3) [former 72-17-202(1)(a) and (1)(c)] and to reverse the sequence of purposes for which anatomical gifts may be made, i.e., transplantation followed by therapy rather than education, research, therapy, or transplantation. This emphasizes transplantation as a primary purpose.

Subsection (b) [72-17-202(2)] is a restatement of Section 4(c) [72-17-205 (now repealed)] of the original Act which provided that the attending physician would be the donee under specified circumstances. Hospitals are substituted for the attending physician. This will facilitate coordination of procurement and utilization of the gift pursuant to Section 9 [72-17-108].

Subsection (c) [72-17-202(3)] is substantially Section 2(c) [72-17-201(4)] of the original Act. The last sentence has been deleted because it does not apply to donees or purposes.

Compiler's Comments

2021 Amendment: Chapter 415 in (1)(a) at end after "education or research" inserted "a search and rescue unit established or recognized by a county as provided in 7-32-235 or persons certified by a state or local law enforcement agency to train search and rescue canines"; inserted (3)(e) regarding the transfer of a part for the purpose of training a search and rescue canine; inserted (4)(b) related to the training of search and rescue canines; in (9) after "education" inserted "or training search and rescue canines"; and made minor changes in style. Amendment effective October 1, 2021.

2007 Amendment: Chapter 345 in (1) after "stated" inserted "if named in the document of gift"; in (1)(a) after "organization" substituted language pertaining to accredited medical or dental school, college, or university or another appropriate person for former language that read: "for medical or dental education, research, advancement of medical or dental science, therapy, or transplantation"; in (1)(b) substituted language providing that individual designated as donee by person making gift be recipient of part for former text that read: "an accredited medical or dental school, college, or university for education, research, advancement of medical or dental science"; substituted (1)(c) allowing donee to be eye bank or tissue bank for former text that read: "a designated individual for therapy or transplantation needed by that individual"; in (2) substituted language providing that gift of anatomical part passes at direction of another person acting for donor if gift cannot be transplanted for former (2) that read: "(2) An anatomical gift may be made to a designated donee or without designating a donee. If a donee is not designated or if the donee is not available or rejects the anatomical gift, the anatomical gift may be accepted by a hospital"; inserted (3) outlining rules if anatomical gift of one or more specific body parts or all parts is made in document that does not name person; inserted (4) requiring gift to be used for transplantation or therapy or research or education if purposes for gift are not prioritized; inserted (5) allowing gift to be used only for transplantation or therapy if gift is made in document that does not name person and does not identify purpose of gift; inserted (6) allowing gift to be used only for transplantation or therapy if document specifies only general intent; inserted (7) outlining rules if gift cannot be transplanted, if gift does not name person or identify purpose of gift, or if document specifies only general intent; inserted (8) providing that anatomical gift of organ for transplantation or therapy passes to organ procurement organization as custodian of organ; inserted (9) providing that gift not passed under section or not used for transplantation, therapy, research, or education passes to person under obligation to dispose of body or part; in (10) inserted second sentence providing that if person knows anatomical gift was made on document of gift, person is considered to know of any amendment, revocation, or refusal to make gift on same document; inserted (11) providing section does not affect allocation of organs for transplantation or therapy; and made minor changes in style. Amendment effective October 1, 2007.

Retroactive Applicability: Section 20, Ch. 345, L. 2007, provided: "[This act] applies to an anatomical gift or amendment to, revocation of, or refusal to make an anatomical gift made before October 1, 2007."

1989 Amendment: Rewrote section revising list of persons who may be donees, clarifying purposes for which gifts may be made, and deleting language relating to liability (see 1987 MCA for former text and 1989 Session Law for new text).

Applicability: Section 16, Ch. 540, L. 1989, provided: "[This act] applies to a document of gift, revocation, or refusal to make an anatomical gift signed by the donor or a person authorized to make or object to making an anatomical gift before, on, or after October 1, 1989."

1983 Amendment: In (1)(c), after "facility" inserted "licensed, accredited, or approved under the laws of any state"; and inserted (2) relating to liability limitation.

Uniform Act Section: The corresponding section of the Uniform Anatomical Gift Act (1987) as adopted by the National Conference of Commissioners on Uniform State Laws is section 6.

Source: The corresponding section of the Uniform Anatomical Gift Act (1987) as adopted by the National Conference of Commissioners on Uniform State Laws is section 6.

Changes From Uniform Act: Montana enactment in (1)(a) substituted "hospital, surgeon, physician, or procurement organization for medical or dental education, research, advancement of medical or dental science, therapy, or transplantation" for "hospital, physician, surgeon, or procurement organization, for transplantation, therapy, medical or dental education, research, or advancement of medical or dental science"; and in (3) substituted "for therapy or transplantation" for "for transplantation or therapy".

72-17-207. Examination — autopsy — liability.

Official Comments

Subsection (a) [72-17-207(1)] is Section 2(d) [72-17-207] of the original Act.

The purpose of this subsection was explained in a Comment to the original Act:

"[It] is added at the suggestion of members of the medical profession who regard a post mortem examination, to the extent necessary to ascertain freedom from disease that might cause injury to the new host for transplanted parts, as essential to good medical practice."

Subsection (b) [72-17-207(2)] is a restatement of Section 7(d) [omitted in 1969 Montana enactment] of the original Act. The Comments to the original Act gave the reason for this subsection:

"[It] is necessary to preclude the frustration of the important medical examiners' duties in cases of death by suspected crime or violence. However, since such cases often can provide transplants of value to living persons, it may prove desirable in many if not most states to reexamine and amend, the medical examiner statutes to authorize and direct medical examiners to expedite their autopsy procedures in cases in which the public interest will not suffer."

In 1986 the Task Force on Organ Transplantation made a similar recommendation:

"To enact laws that would encourage coroners and medical examiners to give permission for organ and tissue procurement from cadavers under their jurisdiction."

Subsection (c) [72-17-207(3)] is a restatement of Section 7(c) [72-17-212 (now repealed)] of the original Act. It provided in part that "a person who acts in good faith . . . ." Concern was expressed that the term person was not sufficiently descriptive and may be construed to exclude hospitals and individuals. The present provision is more explicit. "Attempts to act in good faith" has also been added to the subsection.

Subsection (d) [72-17-207(4)] provides for limitation of liability for the benefit of the individual making a gift under the Act and that individual's estate. Some states have amended the uniform act by describing an anatomical gift as a service and not a sale or disclaiming any warranty of the part that is given. Similar provisions are found in statutes relating to blood banks.

Compiler's Comments

2007 Amendment: Chapter 345 in (1) inserted second sentence allowing examination of all donor or prospective donor's medical and dental records unless prohibited by law; in (2) inserted exception clause; in (3) at end inserted "or administrative proceeding"; inserted (4) allowing person in determining whether gift has been made, amended, or revoked to rely upon representations of certain individuals unless person knows representation is untrue; and made minor changes in style. Amendment effective October 1, 2007.

Retroactive Applicability: Section 20, Ch. 345, L. 2007, provided: "[This act] applies to an anatomical gift or amendment to, revocation of, or refusal to make an anatomical gift made before October 1, 2007."

1989 Amendment: At beginning of (1) substituted "An anatomical gift authorizes any reasonable examination necessary" for "A gift of all or part of a body authorizes any examination necessary"; inserted (2) providing chapter provisions are subject to state autopsy laws; and inserted (3) and (4) concerning liability relating to making of gift (see 1989 Session Law for text).

Source: The corresponding section of the Uniform Anatomical Gift Act (1987) as adopted by the National Conference of Commissioners on Uniform State Laws is section 11.

Changes From Uniform Act: Montana enactment in (3) omitted "[medical examiner], [local public health officer]", inserted "nurse", and, after "state", omitted "[or a foreign country]".

72-17-208. Document of gift — delivery — validity.

Official Comments

Subsection (a) [72-17-208(1)] is the last sentence of Section 4(b) [72-17-204(2) (now repealed)] of the original Act.

Subsection (b) [72-17-208(2)] is Section 5 [72-17-208] of the original Act. The Comments to that subsection include the following:

". . . in the great majority of the states, no provision is made for filing, recording, or delivery to the donee. The gift is by implication effective without such formality. . . . permissive filing provisions [are included] to expedite post mortem procedures."

Compiler's Comments

2007 Amendment: Chapter 345 in (2) in second sentence after "gift" inserted "or a refusal to make an anatomical gift" and in third sentence at end inserted "or the refusal to make an anatomical gift"; inserted (3) providing when gift document is valid; inserted (4) providing that laws of state govern interpretation of gift if document of gift valid; inserted (5) allowing person to presume validity of gift or amendment unless person knows gift was not validly executed or was revoked; and made minor changes in style. Amendment effective October 1, 2007.

Retroactive Applicability: Section 20, Ch. 345, L. 2007, provided: "[This act] applies to an anatomical gift or amendment to, revocation of, or refusal to make an anatomical gift made before October 1, 2007."

1989 Amendment: Inserted (1) providing that delivery is not required for a valid gift; and substituted (2) that reads: "(2) If an anatomical gift is made to a designated donee, the document of gift, or a copy, may be delivered to the donee to expedite the appropriate procedures after death. The document of gift, or a copy, may be deposited in any hospital, procurement organization, or registry office that accepts it for safekeeping or for facilitation of procedures after death. On request of an interested person, upon or after the donor's death, the person in possession shall allow the interested person to examine or copy the document of gift" for former language that read: "(1) If the gift is made by the donor to a specified donee, the will, card, or other document or an executed copy thereof may be delivered to the donee to expedite the appropriate procedures immediately after death. Delivery is not necessary to the validity of the gift.

(2) The will, card, or other document or an executed copy thereof may be deposited in any hospital, bank or storage facility, or registry office that accepts it for safekeeping or for facilitation of procedures after death.

(3) On request of any interested party upon or after the donor's death, the person in possession shall produce the document for examination."

Uniform Act Section: The corresponding section of the Uniform Anatomical Gift Act (1987) as adopted by the National Conference of Commissioners on Uniform State Laws is section 7.

72-17-213. Routine inquiry and required request — search and notification.

Official Comments

Each individual upon admission to a hospital is asked a series of routine questions, such as "Do you have insurance?" and "Are you allergic to any drugs?" Subsection (a) [omitted in Montana enactment] adds to the list a routine inquiry about organ donation. It requires that a question be asked to identify organ donors and mandates discussion about organ donation, after the consent of the attending physician, with those who answer in the negative. If there is an affirmative response, a request is made for the organ donor card, driver's license, or other document of gift to determine if there are limitations, e.g., of a particular part (eyes) or of a particular purpose (transplant only) and to place a copy in the medical record as evidence of a valid gift to be effective at death. Although the amendment is limited to the admission process of hospitals, doctors are encouraged to include a similar routine inquiry of patients in their office procedures and hospitals are encouraged to extend the routine inquiry to outpatient, emergency, minor surgery, and similar procedures that do not require admission to the hospital.

Among the major findings of the Hastings Center Report was the following:

"While many Americans believe that signing a donor card or other written directive assures that their wishes will be respected and acted upon, it does not. . . . Few, if any, organs are donated solely on the basis of donor cards or written directives. Written directives are only effective if hospital protocols and practices are designed to discover and act upon the contents of such directives."

Subsection (b) [72-17-213(1)] is a variation of the required request concept. All but a few states have passed a variety of the required request statutes since 1985. Some specify that next of kin be informed of the option to give, others that a request to give be made. Federal law requires written protocols by hospitals participating in Medicare or Medicaid that "assure that families of potential organ donors are made aware of the option of organ or tissue donation and their option to decline." Subsection (b) [72-17-213(1)] requires a discussion of the option and, if there is no response, a request to make an anatomical gift. No discussion or request is necessary if the medical record discloses a prior gift or a refusal to make a gift or if the gift would not be suitable according to accepted medical standards.

The requirement is imposed on the institution. The title of the chief executive officer should be substituted for [administrator]. "Representative" is not limited to employees of the hospital. It may be a doctor, organ procurement specialist, etc.

Subsection (c) [72-17-213(2)] is based upon the Uniform Duties to Disabled Persons Act promulgated by NCCUSL in 1972. The purpose of that Act is to provide, insofar as practicable, for a minimum level of duty towards persons in an unconscious state and toward those who are conscious but otherwise unable to communicate the existence of a condition requiring special treatment.

Subsection (d) [72-17-213(3)] reflects a conclusion of The Hastings Center Report: "Donor cards are often not found at accident sites, and even when they are, they are rarely located in hospital settings when needed."

This subsection requires that the hospital be notified as soon as a document of gift or refusal is located and that it be sent to the hospital with the individual or the body to which it relates, not taken to the hospital at some later time. Notification of the hospital of the existence and the contents of the document will enable the hospital to notify the organ procurement organization if there is a gift, that there is a potential donor, and the limitations, if any, of the gift.

Subsection (e) [72-17-213(4)] incorporates a recommendation of The Task Force Report pursuant to the National Organ Transplant Act of 1984 that "The Commission for Uniform State Laws develop model legislation that requires acute care hospitals to develop an affiliation with an organ procurement agency and to adopt routine inquiry policies and procedures." The present draft incorporates this recommendation in Sections 5 and 9 [72-17-213 and 72-17-108].

Subsection (f) [72-17-213(5)] encourages hospital accrediting agencies, law enforcement, and other state agencies that have existing disciplinary procedures to impose sanctions for failure to discharge the duties imposed by Section 5 [72-17-213].

Compiler's Comments

2007 Amendment: Chapter 345 in (1) in first sentence before "patient" inserted "hospitalized", after "patient" deleted "there is no medical record that the patient has made or refused to make an anatomical gift", and after "administrator shall" substituted language requiring notification of the procurement organization and, if appropriate, the coroner to ensure that trained designated requester is available to discuss donation opportunities for former language that read: "discuss the option to make or refuse to make an anatomical gift and request the making of an anatomical gift pursuant to 72-17-214(1)", inserted third sentence requiring person designated to be a representative of procurement organization or person with training provided or approved by procurement organization, and deleted former second, third, fourth, and fifth sentences that read: "The request must be made with reasonable discretion and sensitivity to the circumstances of the family. A request is not required if the gift is not suitable, based upon accepted medical standards, for a purpose specified in 72-17-202 or if there are medical or emotional conditions under which the request would contribute to severe emotional distress. An entry must be made in the medical record of the patient, stating the name and affiliation of the individual making the request and the name, response, and relationship to the patient of the person to whom the request was made. The department shall adopt rules to implement this subsection"; in (2) substituted language regarding requirements of procurement organization when hospital refers individual at or near death for former (2) that read: "(2) The following persons shall make a reasonable search for a document of gift or other information identifying the bearer as a donor or as an individual who has refused to make an anatomical gift:

(a) a law enforcement officer, fireman, paramedic, or other emergency rescuer finding an individual whom the searcher believes is dead or near death; and

(b) a hospital, upon the admission of an individual at or near the time of death, if there is not immediately available any other source of that information"; inserted (3) requiring hospital to make reasonable search for document of gift or information identifying bearer as donor or individual who has refused anatomical gift as soon as practical after arrival of individual believed dead or near death; inserted (7) requiring procurement organization to conduct reasonable search for parents of minor and allow opportunity to revoke or amend anatomical gift or revoke refusal upon death of minor who was donor or had signed refusal; inserted (8) requiring procurement organization to make reasonable search for person listed in 72-17-214 having priority to make gift for prospective donor upon referral by hospital and requiring organization to advise other person of all relevant information if organization receives information that anatomical gift to any other person was made, amended, or revoked; and made minor changes in style. Amendment effective October 1, 2007.

Retroactive Applicability: Section 20, Ch. 345, L. 2007, provided: "[This act] applies to an anatomical gift or amendment to, revocation of, or refusal to make an anatomical gift made before October 1, 2007."

1997 Amendment: Chapter 42 in (3) substituted "subsection (2)(a)" for "subsection (3)(a)". Amendment effective March 12, 1997.

Source: The corresponding section of the Uniform Anatomical Gift Act (1987) as adopted by the National Conference of Commissioners on Uniform State Laws is section 5.

Changes From Uniform Act: Montana enactment omitted subsection 5(a) of the Uniform Act requiring hospitals to ask each adult patient at admission if he is an organ or tissue donor; and in (1), after "72-17-202", inserted "or if there are medical or emotional conditions under which the request would contribute to severe emotional distress".

Administrative Rules

ARM 37.106.405 Minimum standards for a hospital — organ donation requests and protocols.

72-17-214. Making, revoking, and objecting to anatomical gifts by others.

Official Comments

Section 3 [72-17-214] combines Sections 2(b) and 4(e) [former 72-17-201(2) and 72-17-204(3) (now repealed)] of the original Act, clarifies the limited right of revocation by next of kin and provides for the effect of failure to make a gift by persons other than the donor. Subsection (a) [72-17-214(1)], as explained in Comments to the original Act:

". . . spells out the right of survivors to make the gift. Taking into account the very limited time available following death for the successful removal of such critical tissues as the kidney, the liver, and the heart, it seems desirable to eliminate all possible question by specifically stating the rights of and the priorities among the survivors."

The Act defines an anatomical gift as one "to take effect upon or after death." Survivors may execute the necessary documents of gift even prior to death. The following form is suggested:

Anatomical Gift by Next of Kin
or Guardian of the Person

Pursuant to the Uniform Anatomical Gift Act, I hereby make this anatomical gift from the body of (Name of Decedent)................................who died on (Date)............. at (Place).................. in (City and State)..

The marks in the appropriate squares and the words filled into the blanks below indicate my relationship to the decedent and my wishes respecting the gift.

I survive the decedent as ☐ spouse; ☐ adult son or daughter; ☐ parent; ☐ adult brother or sister; ☐ grandparent; ☐ guardian of the person. I hereby give (check boxes applicable):

☐ Any needed organs, tissues, or parts;

☐ The following organs, tissues, or parts only ....
....;

☐ For the following purposes only...
....

....
Date Signature of Survivor

....
Address of Survivor

INSTRUCTIONS

See Section 2(b) [72-17-201(2)] Comments.

As described in the Comments to the original Act, subsection (b) [72-17-214(2)]:

". . . provides for the effect of indicated objections by the decedent, and differences of view among the survivors. . . . In view of the fact that persons under 18 years of age are excluded from [Section 2](a) [former and current 72-17-201(1)], it is especially desirable to cover with care the status of survivors, so younger decedents may be included."

"Knows" is substituted for "actual notice" in subsection (b) [72-17-214(2)] and throughout the Act. Knowledge, i.e., what is known, is a more useful concept than actual notice, i.e., what should be known.

Subsection (c) [72-17-214(3)] is Section 4(e) [72-17-204(3) (now repealed)] of the original Act with the addition of "other form of communication."

Subsection (d) [72-17-214(4)] limits the right of revocation of a gift made by other survivors pursuant to subsection (a) [72-17-214(1)]. If there is no prior knowledge of the revocation by the individual removing the organ or tissue, the revocation is ineffective for any purpose and the anatomical gift may be procured and utilized as though no attempted revocation had occurred.

Subsection (e) [72-17-214(5)] is based on the concept that failure to act is ambiguous. This subsection removes that ambiguity. If a person of a prior class under subsection (a) [72-17-214(1)] is available but does not make a gift, subsection (e) [72-17-214(5)] authorizes a gift by a person of a lower class. If an anatomical gift is not made pursuant to Section 3 [72-17-214], the provisions of Section 4 [72-17-215] apply.

Compiler's Comments

2007 Amendment: Chapter 345 in (1) at beginning inserted "Subject to subsections (2) and (3)", after "persons" inserted "who is reasonably available", after "body" substituted "for a purpose authorized in 72-17-201(1)" for "for an authorized purpose", and at end inserted "as provided for in 72-17-201"; inserted (1)(a) allowing agent of decedent who could have made anatomical gift immediately before death to make gift; inserted (1)(f) allowing adult grandchildren of decedent to make anatomical gift; inserted (1)(i) allowing any other person having authority to dispose of decedent's body to make anatomical gift; inserted (2) allowing anatomical gift by member of class under certain conditions; in (3)(a) before "available" inserted "reasonably" and after "make" inserted "or to object to the making of"; in (3)(b) after "refusal" deleted "or contrary indications"; deleted former (3)(c) that read: "(c) the person proposing to make an anatomical gift knows of an objection to making an anatomical gift by a member of the person's class or a prior class"; inserted (5) allowing an anatomical gift by authorized person to be amended or revoked orally or in record by member of prior class and allowing gift to be amended or revoked by majority of available members if more than one member of prior class is available; in (6) at beginning substituted "A revocation made under subsection (5) is effective only if, before an incision has been made" for "An anatomical gift made by a person authorized under subsection (1) may be revoked by any member of the same or a prior class if, before procedures have begun", after "decedent" inserted "or before invasive procedures have begun to prepare the recipient", and before "physician" inserted "procurement organization, transplant hospital"; and made minor changes in style. Amendment effective October 1, 2007.

Retroactive Applicability: Section 20, Ch. 345, L. 2007, provided: "[This act] applies to an anatomical gift or amendment to, revocation of, or refusal to make an anatomical gift made before October 1, 2007."

Source: The corresponding section of the Uniform Anatomical Gift Act (1987) as adopted by the National Conference of Commissioners on Uniform State Laws is section 3.

72-17-215. Authorization by coroner or local public health official.

Official Comments

Under Section 2(b) [former 72-17-201(2)] of the original Act, the last category of persons authorized to make an anatomical gift "in the absence of actual notice of contrary indications by the decedent or actual notice of opposition by a member of the same or a prior class" was:

"(6) any other person authorized or under obligation to dispose of the body." [Omitted in 1969 Montana enactment.]

This was a residuary authorization, to apply in situations in which an individual did not "give all or any part of his body for any purpose" and the next of kin or guardian of the person did not make a gift. This residuary authorization in the original Act has been deleted in the proposed amendments and replaced by the more limited provisions of new Section 4 [72-17-215].

It is a residuary authorization for transplant or therapeutic purposes only.

The Task Force on Organ Transplantation reported that the number of potential donors annually is much smaller than the estimated one million deaths that occur each year in hospitals in the United States. The Hastings Center Report explained the uncertainty:

"There is no generally accepted figure for the number of persons who die each year in the United States under circumstances that would allow them to serve as cadaver organ donors. Studies conducted by the Centers for Disease Control of the U.S. Public Health Service suggest that at least 12,000 [based upon an age range of brain-dead donors from five to fifty-five years] and perhaps as many as 27,000 [based upon an age range of brain-dead donors from birth to age sixty-five] deaths which would permit cadaver organ recovery occur each year in hospitals in the United States. . . . Given the available estimates of the size of the donor pool, the current system for procuring organs yields somewhere between nine and twenty percent of the possible pool of donors for various types of organs and tissues."

In several states, there are statutes authorizing the medical examiner to remove eyes or corneal tissue under specified circumstances. These statutes are constitutional, Georgia Lions Eye Bank Inc. v. Lavant, 255 Ga. 60, 335 S.E.2d 127, 129 (1985)—"The protection of the public health is one of the duties devolving upon the State as a sovereign power;" cert. denied [475] U.S.

[1084], 106 S.Ct. 1464, 89 L.Ed. 721 (1986); Florida v. Powell, Fla., 497 So.2d 1188 (1986). There has been a significant increase in the number of corneal tissues available for transplant as a result of these statutes. For example, before passage of the statute in Georgia in 1978 approximately 25 corneal transplants were performed each year. In 1984, more than 1,000 persons regained their sight through transplants. In Florida, the increase was from 500 to more than 3,000.

Section 4 [72-17-215] applies this statutory concept to the removal of "any part from a body" for transplant or therapy only. Specific circumstances must exist and conditions for removal are prescribed. The title of the public official is bracketed to permit each state to designate the appropriate official. There is a variation among existing statutes in the requirement to inform or seek consent of next of kin before organs or tissues are removed. In several states, including Georgia and Florida, there is no requirement to inform or seek consent if the other conditions prescribed by statute are satisfied. In others, information and consent are required. Subsection (a)(2) [72-17-215(1)(b)] seeks to balance societal and family interests, that is, to increase the size of the donor pool and to give the family the opportunity to make or refuse to make an anatomical gift. The balance in this subsection is on the side of increasing the size of the donor pool. The duty to search the medical record or to inform next of kin is limited to "a reasonable effort taking into account the useful life of the part . . . ." This reflects a concern expressed in the Comments to the original Act: ". . . the very limited time available following death for the successful recovery of such critical tissues . . . ." The time will vary depending upon the part involved. In the case of corneal tissue, the time is within six hours after death. In the case of organs, the need, availability, and efficacy of life support systems must be considered. If removal must be immediate and there is no medical or other record and no person specified in Section 3(a) [72-17-214(1)] is present, the requirement of subsection (a)(2) [72-17-215(1)(b)] is satisfied.

Subsection (b) [72-17-215(2)] is a companion provision to subsection (a) [72-17-215(1)] to cover similar situations but in cases where the [coroner] [medical examiner] is not authorized to act. Under both subsections, the removal and release is limited to transplant or therapeutic purposes.

Compiler's Comments

Source: The corresponding section of the Uniform Anatomical Gift Act (1987) as adopted by the National Conference of Commissioners on Uniform State Laws is section 4.

Changes From Uniform Act: Montana enactment in (1) and (2), after "coroner", omitted "[medical examiner]".

72-17-216. Anatomical gifts — advance health care directive.

Compiler's Comments

Effective Date: This section is effective October 1, 2007.

Retroactive Applicability: Section 20, Ch. 345, L. 2007, provided: "[This act] applies to an anatomical gift or amendment to, revocation of, or refusal to make an anatomical gift made before October 1, 2007."

72-17-217. Cooperation between coroner, medical examiner, county attorney, and procurement organization.

Compiler's Comments

Effective Date: This section is effective October 1, 2007.

Retroactive Applicability: Section 20, Ch. 345, L. 2007, provided: "[This act] applies to an anatomical gift or amendment to, revocation of, or refusal to make an anatomical gift made before October 1, 2007."

72-17-218. Facilitation of anatomical gift from decedent whose body is under jurisdiction of coroner, medical examiner, or county attorney.

Compiler's Comments

Effective Date: This section is effective October 1, 2007.

Retroactive Applicability: Section 20, Ch. 345, L. 2007, provided: "[This act] applies to an anatomical gift or amendment to, revocation of, or refusal to make an anatomical gift made before October 1, 2007."

Part 3
Regulation — Qualifications

72-17-301. Rights and duties at death.

Official Comments to Revised Section

In subsection (a) [72-17-301(1)] the first sentence is a restatement of Section 2(e) [72-17-203 (now repealed)] of the original Act. The remainder of the subsection is Section 7(a) [former 72-17-301(1)] of the original Act.

The Comments to the original Act state:

"Subsection 2(e) [72-17-203 (now repealed)] recognizes and gives legal effect to the right of the individual to dispose of his own body without subsequent veto by others. . . . If the donee accepts the gift, absolute ownership vests in him. . . . The only restrictions are that the part must be removed without mutilation and the remainder of the body vests in the next of kin."

Subsection (b) [72-17-301(2)] is a restatement of Section 7(b) [former 72-17-301(2)] of the original Act.

The Comments to that original subsection include the following:

". . . because time is short following death for a transplant to be successful, the transplant team needs to remove the critical organ as soon as possible. Hence there is a possible conflict of interest between the attending physician and the transplant team, and accordingly subsection (b) [former 72-17-301(2)] excludes the attending physician from any part in the transplant procedures. . . . However, the language of the provision does not prevent the donor's attending physician from communicating with the transplant team or other relevant donees. This communication is essential to permit the transfer of important knowledge concerning the donor . . . ."

Official Comments to Original Section

[Sections 72-17-210 (renumbered 72-17-301) and 72-17-104 (now repealed) contain] several important provisions. The donee may of course, reject the gift if he deems it best to do so. If he accepts the gift, all possible provision is made for taking account of the interests of the survivors in dignified memorial ceremonies. Also if the donee accepts the gift, absolute ownership vests in him. He may, if he so desires, transfer his ownership to another person, whether the gift be of the whole body or merely a part. He may "cause the part to be removed" either by himself or by another person. The only restrictions are that the part must be removed without mutilation and the remainder of the body vests in the next of kin.

[Section 72-17-210(2) (renumbered 72-17-301(2))] leaves the determination of the time of death to the attending or certifying physician. No attempt is made to define the uncertain point in time when life terminates. This point is not subject to clear cut definition and medical authorities are currently working toward a consensus on the matter. Modern methods of cardiac pacing, artificial respiration, artificial blood circulation and cardiac stimulation can continue certain bodily systems and metabolism far beyond spontaneous limits. The real question is when have irreversible changes taken place that preclude return to normal brain activity and self sustaining bodily functions. No reasonable statutory definition is possible. The answer depends upon many variables, differing from case to case. Reliance must be placed upon the judgment of the physician in attendance. The Uniform Act so provides.

However, because time is short following death for a transplant to be successful, the transplant team needs to remove the critical organ as soon as possible. Hence there is a possible conflict of interest between the attending physician and the transplant team, and accordingly [72-17-210(2) (renumbered 72-17-301(2))] excludes the attending physician from any part in the transplant procedures. Such a provision isolates the conflict of interest and is eminently desirable. However, the language of the provision does not prevent the donor's attending physician from communicating with the transplant team or other relevant donees. This communication is essential to permit the transfer of important knowledge concerning the donor, for example, the nature of the disease processes affecting the donor or the results of studies carried out for tissue matching and other immunological data.

The entire section 7 [72-17-210 (renumbered 72-17-301) and 72-17-104 (now repealed)] merits genuinely liberal interpretation to effectuate the purpose and intent of the Uniform Act, that is, to encourage and facilitate the important and ever increasing need for human tissue and organs for medical research, education and therapy, including transplantation.

Compiler's Comments

2007 Amendment: Chapter 345 in (1) at beginning of first sentence inserted "Subject to 72-17-202 and 72-17-218", in third sentence after second "gift" inserted "and this chapter" and after "embalming" inserted "burial, or cremation", and in fourth sentence near beginning before "gift" inserted "anatomical" and after "embalming" inserted "burial, or cremation"; in (2) in first and second sentences after "surgeon" inserted "or coroner" and at end of second sentence substituted "72-17-201(5)" for "72-17-201(4)"; inserted (3) allowing person, unless prohibited by law other than chapter, to conduct at any time after donor's death reasonable examination to ensure medical suitability of body or part for intended purpose; inserted (4) allowing examination to include all medical and dental records of donor or prospective donor unless prohibited by law other than chapter; inserted (5) requiring procurement organization to conduct reasonable search for parents of minor and provide parents with opportunity to revoke or amend gift or revoke refusal upon death of minor who was donor or had signed refusal; inserted (6) requiring procurement organization to make reasonable search of person with priority to make anatomical gift upon referral by hospital and requiring organization if it receives information that anatomical gift made to any other person to promptly advise other person of all relevant information; and made minor changes in style. Amendment effective October 1, 2007.

Retroactive Applicability: Section 20, Ch. 345, L. 2007, provided: "[This act] applies to an anatomical gift or amendment to, revocation of, or refusal to make an anatomical gift made before October 1, 2007."

1989 Amendment: In (1) inserted first sentence providing donee rights are superior to those under 72-17-214(1), except with respect to autopsies, in second and third sentences, before "gift", inserted "anatomical", and near end of last sentence substituted "person" for "surviving spouse, next of kin, or other persons"; in (2), in four places, inserted "surgeon", in middle of second sentence substituted "determines the time of death" for "certifies the death", and at end inserted "unless the document of gift designates a particular physician or surgeon pursuant to 72-17-201(4)"; inserted (3) providing that if there has been a gift, technician may remove donated parts and enucleator may remove eyes or parts of eyes after determination of death; and made minor changes in phraseology.

Applicability: Section 16, Ch. 540, L. 1989, provided: "[This act] applies to a document of gift, revocation, or refusal to make an anatomical gift signed by the donor or a person authorized to make or object to making an anatomical gift before, on, or after October 1, 1989."

Source: The corresponding section of the Uniform Anatomical Gift Act (1987) as adopted by the National Conference of Commissioners on Uniform State Laws is section 8.

72-17-302. Sale or purchase of parts prohibited.

Official Comments

The report of the Task Force pursuant to the 1984 National Organ Transplant Act recommended that states pass laws prohibiting "the sale of organs from cadavers or living donors within their boundaries."

This section is not limited to donors. It applies to any person and to both purchases and sales for transplantation or therapy. It does not cover the sale by living donors if removal is intended to occur before death.

A major finding of the Hastings Center Report is:

"Altruism and a desire to benefit other members of the community are important moral reasons which motivate many to donate. Any perception on the part of the public that transplantation unfairly benefits those outside the community, those who are wealthy enough to afford transplantation, or that it is undertaken primarily with an eye toward profit rather than therapy will severely imperil the moral foundations, and thus the efficacy of the system."

Compiler's Comments

Source: The corresponding section of the Uniform Anatomical Gift Act (1987) as adopted by the National Conference of Commissioners on Uniform State Laws is section 10.

72-17-303. False acts concerning document of gift — penalty.

Compiler's Comments

Effective Date: This section is effective October 1, 2007.

Retroactive Applicability: Section 20, Ch. 345, L. 2007, provided: "[This act] applies to an anatomical gift or amendment to, revocation of, or refusal to make an anatomical gift made before October 1, 2007."

72-17-311. Eye enucleations — enucleators — qualifications.

Compiler's Comments

1989 Amendment: In (1)(b) and (3) substituted "an enucleator" for "a technician".

1987 Amendment: In (2), at beginning, inserted "An acceptable" and after "eye enucleation" deleted "acceptable under subsection (1)".

72-17-312. Approval of eye banks.

Compiler's Comments

1989 Amendment: At end substituted reference to 72-17-202 for reference to 72-17-202(1)(c).

CHAPTER 26
UNIFORM TRANSFERS TO MINORS ACT

Chapter Official Comments

This Act revises and restates the Uniform Gifts to Minors Act (UGMA), one of the Conference's most successful products, some version of which has been enacted in every American jurisdiction.

The original version of UGMA was adopted by the Conference in 1956 and closely followed a model "Act concerning Gifts of Securities to Minors" which was sponsored by the New York Stock Exchange and the Association of Stock Exchange Firms and which had been adopted in 14 states. The 1956 version of UGMA broadened the model act to cover gifts of money as well as securities but made few other changes.

In 1965 and 1966 the Conference revised UGMA to expand the types of financial institutions which could serve as depositories of custodial funds, to facilitate the designation of successor custodians, and to add life insurance policies and annuity contracts to the types of property (cash and securities) that could be made the subject of a gift under the Act.

Not all states adopted the 1966 revisions; some 11 jurisdictions retained their versions of the 1956 Act. More importantly, however, many states since 1966 have substantially revised their versions of UGMA to expand the kinds of property that may he [sic] made the subject of a gift under the Act, and a few states permit transfers to custodians from other sources, such as trusts and estates, as well as lifetime gifts. As a result, a great deal of non-uniformity has arisen among the states. Uniformity in this area is important, for the Conference has cited UGMA as an example of an act designed to avoid conflicts of law when the laws of more than one state may apply to a transaction or a series of transactions.

This Act follows the expansive approach taken by several states and allows any kind of property, real or personal, tangible or intangible, to be made the subject of a transfer to a custodian for the benefit of a miner [sic] [72-26-502(6)]. In addition, it permits such transfers not only by lifetime outright gifts [72-26-604], but also from trusts, estates and guardianships, whether or not specifically authorized in the governing instrument [72-26-605 and 72-26-606], and from other third parties indebted to a minor who does not have a conservator, such as parties against whom a minor has a tort claim or judgment, and depository institutions holding deposits or insurance companies issuing policies payable on death to a minor [72-26-607]. For this reason, and to distinguish the enactment of this statute from the 1956 and 1966 versions of UGMA, the title of the Act has been changed to refer to "Transfers" rather than to "Gifts," a much narrower term.

As so expanded, the Act might be considered a statutory form of trust or guardianship that continues until the minor reaches 21 [18 in Montana]. Note, however, that unlike a trust, a custodianship is not a separate legal entity or taxpayer. Under [72-26-609(2)], the custodial property is indefeasibly vested in the minor, not the custodian, and thus any income received is attributable to and reportable by the minor, whether or not actually distributed to the minor.

The expansion of the Act to permit transfers of any kind of property to a custodian creates a significant problem of potential personal liability for the minor or the custodian arising from the ownership of property such as real estate, automobiles, general partnership interests, and business proprietorships. This problem did not exist under UGMA under which custodial property was limited to bank deposits, securities and insurance. In response, [72-26-706] generally limits the claims of third parties to recourse against the custodial property, with the minor insulated against personal liability unless he is personally at fault. The custodian is similarly insulated unless he is personally at fault or fails to disclose his custodial capacity in entering into a contract.

Nevertheless, the Act should be used with caution with respect to property such as real estate or general partnership interests from which liabilities as well as benefits may arise. Many of the possible risks can and should be insured against, and the custodian has the power under [72-26-701(1)] to purchase such insurance, at least when other custodial assets are sufficient to do so. If the assets are not sufficient, there is doubt that a custodian will act, or there are significant uninsurable risks, a transferor should consider a trust with spendthrift provisions, such as a minority trust under Section 2503(c), IRC, rather than a custodianship, to make a gift of such property to a minor.

The Act retains (or reverts to) 21 [18 in Montana] as the age of majority or, more accurately, the age at which the custodianship terminates and the property is distributed. Since tax law permits duration of Section 2503(c) trusts to 21, even though the statutory age of majority is 18 in most states, this age should be retained since most donors and other transferors wish to preserve a custodianship as long as possible.

Finally, the Act restates and rearranges, rather than amends, the 1966 Act. The addition of other forms of property and other forms of dispositions made adherence to the format and language of the prior act very unwieldy. In addition, the 1966 and 1956 Acts closely followed the language of the earlier model act, which had already been adopted in several states, even though it did not conform to Conference style. It is hoped that this rewriting and revision of UGMA will improve its clarity while also expanding its coverage.

Chapter Compiler's Comments

Official Comments: Official comments appearing in this chapter are the notes and comments appearing in Vol. 8A, U.L.A., pocket part p. 107 (1986), as prepared by the National Conference of Commissioners on Uniform State Laws in explanation of the provisions of the Uniform Transfers to Minors Act (UTMA).

Montana Compiler Changes: The compiler has changed section references contained in the official comments to reflect Montana's codification of the UTMA information appearing in brackets has been added by the compiler to alert the reader to comments which may be inapplicable because of differences between the uniform version and the Montana version of the Act.

Part 5
General Provisions

72-26-501. Short title.

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 24.

72-26-502. Definitions.

Official Comments

To reflect the broader scope and the unlimited types of property to which the new Act will apply, a number of definitional changes have been made from the 1966 Act. In addition, several definitions specifically applicable to the limited types of property (cash, securities and insurance policies) subject to the 1966 Act have been eliminated as unnecessary. These include the definitions of "bank," "issuer," "life insurance policy or annuity contract," "security," and "transfer agent." No change in the meaning or construction of these terms as used in this Act is intended by such deletions.

The definitions of "domestic financial institution" and "insured financial institution" have been eliminated because few if any states limit deposits by custodians to local institutions, and the prudent person rule of [72-26-702(2)] may dictate the use of insured institutions as depositories, without having the Act so specify.

The principal changes or additions to the remaining definitions are discussed below.

[Subsection] (2). The definition of "benefit plan" is intentionally very broad and is meant to cover any contract, plan, system, account or trust such as a pension plan, retirement plan, death benefit plan, deferred compensation plan, employment agency arrangement or, stock bonus, option or profit sharing plan.

[Subsection] (4). The term "conservator" rather than "guardian of the estate" has been employed in the Act to conform to Uniform Probate Code terminology. The term includes a guardian of the minor's property, whether general, limited or temporary, and includes a committee, tutor, or curator of the minor's property.

[Subsection] (6). The definition of "custodial property" has been generalized and expanded to encompass every conceivable legal or equitable interest in property of any kind, including real estate and tangible or intangible personal property. The term is intended, for example, to include joint interests with right of survivorship, beneficial interests in land trusts, as well as all other intangible interests in property. Contingent or expectancy interests such as the designation as a beneficiary under insurance policies or benefit plans become "custodial property" only if the designation is irrevocable, or when it becomes so, but the Act specifically authorizes the "nomination" of a future custodian as beneficiary of such interests (see [72-26-601]). Proceeds of custodial property, both immediate and remote, are themselves custodial property, as is the case under UGMA.

Custodial property is defined without reference to the physical location of the property, even if it has one. No useful purpose would be served by restricting the application of the Act to, for example, real estate "located in this state," since a conveyance recorded in the state of the property's location, if done with proper formalities, should be effective even if that state has not enacted this Act. The rights, duties and powers of the custodian should be determined by reference to the law of the state under which the custodianship is created, assuming there is sufficient nexus under [72-26-503] between that state and the transferor, the minor or the custodian.

[Subsection] (11). [Not applicable in Montana.] This definition of "minor" retains the historical age of 21 as the age of majority, even though most states have lowered the age for most other purposes, as well as in their versions of the 1966 Act. Nevertheless, because the Internal Revenue Code continues to permit "minority trusts" under Section 2503(c), IRC, to continue in effect until age 21, and because it is believed that most donors creating minority trusts or custodianships prefer to retain the property under management for the benefit of the young person as long as possible, it is strongly suggested that the age of 21 be retained as the age of majority under the Act. For states that have reduced the age of majority in their versions of the 1966 Act, [72-26-505(3)] of this Act provides that a change back to 21 will not affect custodianships that have already terminated at an earlier age.

[Subsection] (13). The definition of the term "personal representative" is based upon that definition in Sec. 1-201(30) of the Uniform Probate Code [72-1-103(31)].

[Subsection] (15). The new definition of "transfer" is necessary to reflect the application of the Act not only to gifts, but also to distributions from trusts and estates, obligors of the minor, and transfers of the minor's own assets to a custodianship by the legal representative of a minor, all of which are now permitted by this Act.

[Subsection] (16). The new definition of "transferor" is required because the term includes not only the maker of a gift, i.e., a donor in the usual sense, but also fiduciaries and obligors who control or own property that is the subject of the transfer. Nothing in this Act requires that a transferor be an "adult." If permitted under other law of the enacting state relating to emancipation or competence to make a will, gift, or other transfer, a minor may make an effective transfer of property to a custodian for his benefit or for the benefit of another minor.

[Subsection] (17). Only entities authorized to exercise "general" trust powers qualify as "trust companies"; that is, the authority to exercise only limited fiduciary responsibilities, such as the authority to accept Individual Retirement Account deposits, is not sufficient.

Compiler's Comments

1989 Amendment: In definition of adult increased age of majority from 18 years to 21 years; and in definition of minor increased maximum age of minority from 18 years to 21 years.

Source — Explanation of Editorial Comments for 1989 Amendments: Chapter 582, L. 1989, generally revised the Uniform Probate Code and related law. The editorial comments that follow each section amended by Ch. 582 were prepared by Professor E. Edwin Eck of the University of Montana (now University of Montana-Missoula) School of Law.

1989 Editorial Comment: When the legislature adopted the Uniform Transfers to Minors Act in 1985, a minor was defined as "an individual who had not attained the age of 18 years". The term adult was correspondingly defined. Such a definition was contrary to the intention of the drafters of the Act. See 8 Uniform Laws Annotated 212 (pocket part) (1989). More importantly, such a definition was contrary to likely desires of donors who probably preferred that the transferred property be managed by the custodian for as long as possible.

Sections 72-26-604 and 72-26-605 authorize transfers to custodians "for the benefit of a minor". The Montana definition of a minor apparently prevented the creation of a custodianship for a person 18 years of age or older and under 21 years of age. Nevertheless, a custodianship could have been created for a person under 18 years of age and such a custodianship would not terminate until attainment of 21 years of age. See 72-26-803(1).

This change defines a minor as an individual who has not attained the age of 21 years. Thus, a custodianship can be created for any person who has not attained 21 years of age. This change places Montana in conformance with the national Uniform Transfers to Minors Act. See corresponding national Uniform Transfers to Minors Act section 1.

This change does not deprive any adult of his or her rights. The Act sets age 21 as the age at which the custodianship terminates and the property is distributed. For convenience of reference, the Act refers to 21 as the age of majority. However, if a donor does not make an irrevocable gift described in 72-26-604 or an irrevocable transfer described in 72-26-605, the custodianship will terminate upon the person's attaining the age of 18 years. See 72-26-803.

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 1.

72-26-503. Scope and jurisdiction.

Official Comments

This section has no counterpart in the 1966 Act. It attempts to resolve uncertainties and conflicts-of-laws questions that have frequently arisen because of the present nonuniformity of UGMA in the various states and which may continue to arise during the transition from UGMA to this Act.

The creation of a custodianship must invoke the law of a particular state because of the form of the transfer required under [72-26-603(1)]. This section provides that a choice of the UTMA of the enacting state is appropriate and effective if any of the nexus factors specified in subsection [(1)] exists at the time of the transfer. This Act continues to govern, and subsection [(2)] makes the custodian accountable and subject to personal jurisdiction in the courts of the enacting state for the duration of the custodianship, despite subsequent relocation of the parties or the property.

Subsection [(3)] recognizes that residents of the enacting state may elect to have the law of another state apply to a transfer. That choice is valid if a nexus with the chosen state exists at the time of the transfer. If personal jurisdiction can be obtained in the enacting state under other law apart from this Act, the custodianship may be enforced in its courts, which are directed to apply the law of the state elected by the transferor.

If the choice of law under subsection [(1)] or [(3)] is ineffective because of the absence of the required nexus, the transfer may still be effective under the Act of another state with which a nexus does exist. See [72-26-504].

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 2.

72-26-504. Applicability.

Official Comments

This section is new and has two purposes. First, it operates as a "savings clause" to validate transfers made after its effective date which mistakenly refer to the enacting state's UGMA rather than to this Act. Second, it validates transfers attempted under the UGMA of another state which would not permit transfers from that source or of property of that kind or under the UTMA of another state with no nexus to the transaction, provided in each case that the enacting state has a sufficient nexus to the transaction under [72-26-503].

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 21.

72-26-505. Effect on existing custodianships.

Official Comments

Subsection [(1)] is new and is based on Section 45-109a of the Connecticut Act which validates gifts of real estate and partnership interests made prior to their inclusion as "custodial property" under that Act. However, this provision goes further and purports also to validate prior transfers of the kind now covered by the Act, i.e., transfers from estates, trusts, guardianships, and obligors.

All states have previously enacted some version of UGMA, and it will be more orderly to subject gifts or other transfers under the prior Act to the procedures of this Act, rather than to keep both Acts in force, presumably for 18 or 21 years until all custodianships created under prior law have terminated. Subsection [(2)] is intended to apply this Act to prior gifts and existing custodianships insofar as it is constitutionally permissible to do so. However, prior custodianships will continue to terminate at the age prescribed under the prior Act.

Optional subsection [(3)] is also new and is based upon Section 45-109b of the Connecticut Act. It is intended for adoption in those states that amended their Acts to reduce the age of majority to 18, but which adopt the recommended return to 21 as the ago [sic] at which custodianships terminate. Its purpose is to avoid resurrecting custodianships for persons not yet 21 which terminated during the period that the age of 18 governor [sic] termination.

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 22.

72-26-506. Uniformity of application and construction.

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 23.

Part 6
Manner of Creating Custodial Property and Effecting Transfer

72-26-601. Nomination of custodian.

Official Comments

This section is new and permits a future custodian for a minor to be nominated to receive a distribution under a will or trust, or as a beneficiary of a power of appointment, or of contractual rights such as a life or endowment insurance policy, annuity contract, P.O.D. Account, benefit plan, or similar future payment right. Nomination of a future custodian does not constitute a "transfer" under this Act and does not create custodial property. If it did, the nomination and beneficiary designation would have to be permanent, since a "transfer" is irrevocable and indefeasibly vests ownership of the interest in the minor under [72-26-609(2)].

Instead, this section permits a revocable beneficiary designation that takes effect only when the donor dies, or when a lifetime transfer to the custodian for the minor beneficiary occurs, such as a distribution under an inter vivos trust. However, an unrevoked nomination under this section is binding on a personal representative or trustee [72-26-605(2)] and on insurance companies and other obligors who contract to pay in the future [72-26-607(2)].

The person making the nomination may name contingent or successive future custodians to serve, in the order named, in the event that the person first nominated dies, or is unable, declines, or is ineligible to serve. Such a substitute future custodian is a custodian "nominated . . . under [this section]" to whom the transfer must be made under [72-26-605(2) and 72-26-607(2)].

Any person nominated as future custodian may decline to serve before the transfer occurs and may resign at any time after the transfer. See [72-26-801].

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 3.

72-26-602. Single custodianship.

Official Comments

The first sentence follows Section 2(b) of the 1966 Act [former 72-26-201]. The second sentence states what was implicit in the 1966 Act, that additional transfers at different times and from different sources may be made to an existing custodian for the minor and do not create multiple custodianships. This provision also permits an existing custodian to be named as successor custodian by another custodian for the same minor who resigns under [72-26-801] for the purpose of consolidating the assets in a single custodianship.

Note, however, that these results are limited to transfers made "under this Act." Gifts previously made under the enacting state's UGMA or under the UGMA or UTMA of another state must be treated as separate custodianships, even though the same custodian and minor are involved, because of possible differences in the age of distribution and custodian's powers under those other Acts.

Even when all transfers to a single custodian are made "under this Act" and a single custodianship results, custodial property transferred under [72-26-606 and 72-26-607] must be accounted for separately from property transferred under [72-26-604 and 72-26-605] because the custodianship will terminate sooner with respect to the former property if the enacting state has a statutory age of majority lower than 21. See [72-26-803] and the Comment thereto.

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 10.

72-26-603. Manner of creating custodial property and effecting transfer — designation of initial custodian — control.

Official Comments

The 1966 Act contained optional bracketed language permitting an adopting state to limit the class of eligible initial custodians to an adult member of the minor's family or a guardian of the minor. This optional limitation has been deleted because it would preclude the use of an individual and uncompensated custodian if no qualified or willing family member is available.

Otherwise, with respect to transfers of securities, cash, and insurance or annuity contracts, this section tracks the cognate provisions of subsection 2(a) of the 1966 Act [former 72-26-201], with one exception. Under subsection [(1)(a)(ii)], a transfer of securities in registered form may be accomplished without registering the transfer in the name of the custodian so that transfers may be accomplished more expeditiously, and so that securities may be held by custodians in street name. In other words, subsection [(1)(a)(i)] is not the exclusive manner for making effective transfers of securities in registered form. [The amendment of subsection (1)(b) by Ch. 86, L. 1987, also provides for the transfer of securities held in the name of a broker, financial institution, or its nominee, i.e., unregistered securities, as custodial property.]

In addition, subsection [(1)] creates new procedures for handling the additional types of property now subject to the Act; specifically:

[Subsection (1)(c)] covers the irrevocable transfer of ownership of like and endowment insurance policies and annuity contracts.

[Subsection (1)(d)] covers the irrevocable exercise of a power of appointment and the irrevocable present assignment of future payment rights, such as royalties, interest and principal payments under a promissory note, or beneficial interests under life or endowment or annuity insurance contracts or benefit plans. The payor, issuer, or obligor may require additional formalities such as completion of a specific assignment form and an endorsement, but the transfer is effective upon delivery of the notification. See [72-26-601] and the Comment thereto for the procedure for revocably "nominating" a future custodian as a beneficiary of a power of appointment or such payment rights.

[Subsection (1)(e)] is the exclusive method for the transfer of real estate and includes a disposition effected by will. Under the law of those states in which a devise of real estate vests in the devisee without the need for a deed from the personal representative of the decedent, a document such as the will must still be "recorded" under this provision to make the transfer effective. For inter vivos transfers, of course, a conveyance in recordable form would be employed for dispositions of real estate to a custodian.

[Subsection (1)(f)] covers the transfer of personal property such as automobiles, aircraft, and other property subject to registration of ownership with a state or federal agency. Either registration of the transfer in the name of the custodian or delivery of the endorsed certificate in registerable form makes the transfer effective.

[Subsection (1)(g)] is a residual classification, covering all property not otherwise covered in the preceding paragraphs. Examples would include nonregistered securities, partnership interests, and tangible personal property not subject to title certificates.

The form of transfer document recommended and set forth in subsection [(2)] contains an acceptance that must be executed by the custodian to make the disposition effective. While such a form of written acceptance is not specifically required in the case of registered securities under subsection [(1)(a)], money under [(1)(b)], insurance contracts or interests under [(1)(c) or (1)(d)], real estate under [(1)(e)], or titled personal property under [(1)(f)], it is certainly the better and recommended practice to obtain the acknowledgment, consent, and acceptance of the designated custodian on the instrument of transfer, or otherwise.

A transferor may create a custodianship by naming himself as custodian, except for transfers of securities under subsection [(1)(a)(ii)], insurance and annuity contracts under [(1)(c)(ii)], and titled personalty under [(1)(f)(ii)], which are made without registering them in the name of the custodian, and transfers of the residual class of property covered by [(1)(g)]. In all of these cases a transfer of possession and control to a third party is necessary to establish donative intent and consummation of the transfer, and designation of the transferor as custodian renders the transfer invalid under [72-26-609(1)(b)].

Note, also, that the Internal Revenue Service takes the position that custodial property is includable in the gross estate of the donor if he appoints himself custodian and dies while serving in that capacity before the minor attains the age of 21. Rev.Rul. 57-366, C.B. 1957-2, 618; Rev. Rul. 59-357, C.B. 1959-2, 212; Rev.Rul. 70-348, C.B. 1970-2, 193; Estate of Prudowsky v. Comm'r, 55 T.C. 890 (1971), affd. per curiam, 465 F.2d 62 (7th Cir. 1972).

This Act has been drafted in an attempt to avoid income attribution to the parent or inclusion of custodial insurance policies on a custodian's life in the estate of the custodian through the changes made in the standards for expenditure of custodial property and the custodian's incidents of ownership in custodial property. See [72-26-701 and 72-26-703] and the Comments thereto. However, the much greater problem of inclusion of custodial property in the estate of the donor who serves as custodian remains. Therefore, despite the fact that this section of the Act permits it in the case of registered securities, money, life insurance, real estate, and personal property subject to titling laws, it is generally still inadvisable for a donor to appoint himself custodian or for a parent of the minor to serve as custodian. See, generally Sections 2036 and 2038 I.R.C. and Rulings and cases cited above; with respect to gifts of closely held stock when a donor retains voting rights by serving as custodian, see Section 2036(b), I.R.C., overruling U.S. v. Byrum, 408 U.S. 125 (1972), rehearing denied 409 U.S. 898.

Subsection [(3)] tracks in substance Section 2(c) of the 1966 Act [former 72-26-201]. However, it replaces the requirement that the transferor "promptly do all things within his power" to complete the transfer, with the requirement that such action must be taken "as soon as practicable." This change is intended only to reflect the fact that possession and control of property transferred from an estate can rarely by accomplished with the immediacy that the term "promptly" may have implied. In the case of inter vivos transfers, no relaxation of the former requirement is intended, since "prompt" transfer of dominion is usually practicable.

Compiler's Comments

1987 Amendment: Near beginning of (1)(b), after "delivered", inserted reference to transfer of a security held in the name of a broker, financial institution, or its nominee.

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 9.

72-26-604. Transfer by gift or exercise of power of appointment.

Official Comments

To emphasize the different kinds of transfers that create presently effective custodianships under this Act, they are separately described in [72-26-604 through 72-26-607]. This section in part corresponds to Section 2(a) of the 1966 Act and covers the traditional lifetime gift that was the only kind of transfer authorized by the 1966 Act. It also covers an irrevocable exercise of a power of appointment in favor of a custodian, as distinguished from the exercise of a power in a revocable instrument that results only in the nomination of a future custodian under [72-26-601].

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 4.

72-26-605. Transfer authorized by will or trust.

Official Comments

This section is new and has no counterpart in the 1966 Act. It is based on nonuniform provisions adopted by Connecticut, Illinois, Wisconsin and other states to validate distributions from trusts and estates to a custodian for a minor beneficiary, when the use of a custodian is expressly authorized by the governing instrument. It also covers the designation of the custodian whenever the settlor or testator fails to make a nomination, or the future custodian nominated under [72-26-601] (and any alternate named) fails to qualify.

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 5.

72-26-606. Other transfer by fiduciary.

Official Comments

This section is new and has no counterpart in the 1966 Act. It covers a new concept, already authorized by the law of some states through nonuniform amendments to the 1966 Act, to permit custodianships to be used as guardianship or conservator substitutes, even though not specifically authorized by the person whose property is the subject of the transfer. It also permits the legal representative of the minor, such as a conservator or guardian, to transfer the minor's own property to a new or existing custodianship for the purposes of convenience or economies of administration.

A custodianship may be created under this section even though not specifically authorized by the transferor, the testator, or the settlor of the trust if three tests are satisfied. First, the fiduciary making the transfer must determine in good faith and in his fiduciary capacity that a custodianship will be in the best interests of the minor. Second, a custodianship may not be prohibited by, or inconsistent with, the terms of any governing instrument. Inconsistent terms would include, for example, a spendthrift clause in a governing trust, provisions terminating a governing trust for the minor's benefit at a time other than the time of the minor's age of majority, and provisions for mandatory distributions of income or principal at specific times or periodic intervals. Provisions for other outright distributions or bequests would not be inconsistent with the creation of a custodianship under this section. Third, the amount of property transferred, (as measured by its value) must be of such relatively small amount that the lack of court supervision and the typically stricter investment standards that would apply to the conservator otherwise required will not be important. However, if the property is of significant size, transfer to a custodian may still be made if the court approves and if the other two tests are met.

The custodianship created under this section without express authority in the governing instrument will terminate upon the minor's attainment of the statutory age of majority of the enacting state apart from this Act, i.e., at the same age a conservatorship of the minor would end. See [72-26-803(2)] and the Comment thereto.

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 6.

72-26-607. Transfer by obligor.

Official Comments

This section is new and, like [72-26-606], permits a custodianship to be established as a substitute for a conservator to receive payments due a minor from sources other than estates, trusts, and existing guardianships covered by [72-26-605 and 72-26-606]. For example, a tort judgment debtor of a minor, a bank holding a joint or P.O.D. account of which a minor is the surviving payee, or an insurance company holding life insurance policy or benefit plan proceeds payable to a minor may create a custodianship under this section.

Use of this section is mandatory when a future custodian has been nominated under [72-26-601] as a named beneficiary of an insurance policy, benefit plan, deposit account, or the like, because the original owner of the property specified a custodianship (and a future custodian) to receive the property. If that custodian (or any alternate named) is not available, if none was nominated, or none could have been nominated (as in the case of a tort judgment payable to the minor), this section is permissive and does not preclude the obligor from requiring the appointment of a conservator to receive payment. It allows the obligor to transfer to a custodian unless the property exceeds the stated value, in which case a conservator must be appointed to receive it.

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 7.

72-26-608. Receipt for custodial property.

Official Comments

This section discharges transferors from further responsibility for custodial property delivered to and receipted for by the custodian. See also [72-26-705] which protects transferors and other third parties dealing with custodians. Because a discharge or release for a donative transfer is not necessary, this section had no counterpart in the 1966 Act.

This section does not authorize an existing custodian, or a custodian to whom an obligor makes a transfer under [72-26-607], to settle or release a claim of the minor against a third party. Only a conservator, guardian ad litem or other person authorized under other law to act for the minor may release such a claim.

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 8.

72-26-609. Validity and effect of transfer.

Official Comments

Subsection [(1)] generally tracks Section 2(c) of the 1966 Act [former 72-26-201], except that the transferor's designation of himself as custodian of property for which he is not eligible to serve under [72-26-603(1)] makes the transfer ineffective. See Comment to [72-26-603].

The balance of this section generally tracks Section 3 of the 1966 Act [former 72-26-202] with a number of necessary, and perhaps significant, changes required by the new kinds of property subject to custodianships. The 1966 Act provides that a transfer made in accordance with its terms "conveys to the minor indefeasibly vested legal title to the [custodial property]." Because equitable interests in property may be the subject of a transfer under this Act, the reference to "legal title" has been deleted, but no change concerning the effect or finality of the transfer is intended.

However, subsection [(2)] qualifies the rights of the minor in the property, by making them subject to "the rights, powers, duties and authority" of the custodian under this Act, a concept that may have been implicit and intended in the 1966 Act, but not expressed. the concept is important because of the kinds of property, particularly real estate, now subject to custodianship. If the minor is married, it would be possible for homestead, dower, or community property rights to attach to real estate (or other property) acquired after marriage by the minor through a transfer to a custodianship for his benefit. The quoted language qualifying the minor's interest in the property is intended to override these rights insofar as they may conflict with the custodian's ability and authority to manage, sell, or transfer such property while it is custodial property. Upon termination of the custodianship and transfer of the custodial property to the former minor, the custodial property would then become subject to such spousal rights for the first time.

For a list of the immunities enjoyed by third persons under subsection [(3)], see [72-26-705] and the Comment thereto.

Because a custodianship under this Act can extend beyond the age of majority in many states, or beyond emancipation of a minor through marriage or otherwise, the Drafting Committee considered the addition of a spendthrift clause to this section. The idea was rejected because neither the 1966 Act nor its predecessors had such a provision, because spendthrift protection would extend only until 21 in any event and judgments against the minor would then be enforceable, and because the spendthrift qualification on the interest of the minor in the property may be inconsistent with the theory of the Act to convey the property indefeasibly to the minor.

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 11.

Part 7

Administration by Custodian — Liability

72-26-701. Powers of custodian.

Official Comments

Subsection [(1)] replaces the specific list of custodian's powers in Section 4(f) of the 1966 Act [former 72-26-302] which related only to securities, money, and insurance, then the only permitted kinds of custodial property. It was determined not to expand the list to try to deal with all forms of property now covered by the Act and to specify all powers that might be appropriate for each kind of property, or to refer to an existing body of state law, such as the Trustee's Powers Act, since such powers would not be uniform. Instead, this provision grants the custodian the very broad and general powers of an unmarried adult owner of the property, subject to the prudent person rule and to the duties of segregation and record keeping specified in [72-26-702]. This approach permits the Act to be self-contained and more readily understandable by volunteer, nonprofessional fiduciaries, who most often serve as custodians. It is intended that the authority granted includes the powers most often suggested for custodians, such as the power to borrow, whether at interest or interest free, the power to invest in common trust funds, and the power to enter contracts that extend beyond the termination of the custodianship.

Subsection [(1)] further specifies that the custodian's powers or incidents of ownership in custodial property such as insurance policies may be exercised only in his capacity as custodian. This provision is intended to prevent the exercise of those powers for the direct or indirect benefit of the custodian, so as to avoid as nearly as possible the result that a custodian who dies while holding an insurance policy on his own life for the benefit of a minor will have the policy taxed in his estate. See, Section 2042, I.R.C.; but compare Terriberry v. U.S., 517 F.2d 286 (5th Cir. 1975), and Rose v. U.S., 511 F.2d 259 (5th Cir. 1975).

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 13.

72-26-702. Care of custodial property.

Official Comments

Subsection [(1)] expands Section 4(a) of the 1966 Act [former 72-26-302] to include the duties to take control and appropriately register or record custodial property in the name of the custodian.

Subsection [(2)] restates and makes somewhat stricter the prudent man fiduciary standard for the custodian, since it is now cast in terms of a prudent person "dealing with property of another" rather than one "who is seeking a reasonable income and the preservation of his capital," as under the 1966 Act. The rule also adds a slightly higher standard for professional fiduciaries. The rule parallels section 7-302 of the Uniform Probate Code in order to refer to the existing and growing body of law interpreting that standard. The 1966 Act permitted a custodian to retain any security or bank account received, without the obligation to diversify investment. This subsection extends that rule to any property received.

In order to eliminate any uncertainty that existed under the 1966 Act, subsection [(3)] grants specific authority to invest custodial property in life insurance on the minor's life, provided the minor's estate is the sole beneficiary, or on the life of another person in whom the minor has an insurable interest, provided the minor, the minor's estate, or the custodian in his custodial capacity is made the beneficiary of such policies.

Subsection [(4)] generally tracks Section 4(g) of the 1966 Act but adds the provision requiring that custodial property consisting of an undivided interest be held as a tenant in common. This provision permits the custodian to invest custodial property in common trust funds, mutual funds, or in a proportional interest in a "jumbo" certificate of deposit. Investment in property held in joint tenancy with right of survivorship is not permitted, but the Act does not preclude a transfer of such an interest to a custodian, and the custodian is authorized under subsection [(2)] to retain a joint tenancy interest so received.

Subsection [(5)] follows Section 4(h) of the 1966 Act [former 72-26-302], but adds the requirement that income tax information be maintained and made available for preparation of the minor's tax returns. Because the custodianship is not a separate legal entity or taxpayer, the minor's tax identification number should be used to identify all custodial property accounts.

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 12.

72-26-703. Use of custodial property.

Official Comments

Subsections [(1) and (2)] track subsections (b) and (c) of Section 4 of the 1966 Act [former 72-26-302], but with two significant changes. The standard for expenditure of custodial property has been amended to read "for the use and benefit of the minor," rather than "for the support, maintenance, education and benefit of the minor" as specified under the 1966 Act. This change is intended to avoid the implication that the custodial property can be used only for the required support of the minor.

The IRS has taken the position that the income from custodial property, to the extent it is used for the support of the minor-donee, is includable in the gross income of any person who is legally obligated to support the minor-donee, whether or not that person or parent is serving as the custodian. Rev.Rul. 56-484, C.B. 1956-2, 23; Rev.Rul. 59-357, C.B. 1959-2, 212. However, Reg. 1.662(a)-4 provides that the term "legal obligation" includes a legal obligation to support another person if, and only if, the obligation is not affected by the adequacy of the dependent's own resources. Thus, if under local law a parent may use the resources of a child for the child's support in lieu of supporting the child himself of herself, no obligation of support exists, whether or not income is actually used for support, at least if the child's resources are adequate. See, Bittker, Federal Taxation of Income Estates and Gifts ¶ 80.44 (1981).

For this reason, new subsection [(3)] has been added to specify that distributions or expenditures may be made for the minor without regard to the duty or ability of any other person to support the minor and that distributions or expenditures are not in substitution for, and shall not affect, the obligation of any person to support the minor. Other possible methods of avoiding the attribution of custodial property income to the person obligated to support the minor would be to prohibit the use of custodial property or its income for that purpose, or to provide that any such use gives rise to a cause of action by the minor against his parent to the extent that custodial property or income is so used. The first alternative was rejected as too restrictive, and the second as too cumbersome.

The "use and benefit" standard in subsections [(1) and (2)] is intended to include payment of the minor's legally enforceable obligations such as tax or child support obligations or tort claims. Custodial property could be reached by levy of a judgment creditor in any event, so there is no reason not to permit custodian or court-ordered expenditures for enforceable claims.

An "interested person" entitled to seek court ordered distributions under subsection [(2)] would include not only the parent or conservator or guardian of the minor and a transferor or a transferor's legal representative, but also a public agency or official with custody of the minor and a third party to whom the minor owes legally enforceable debts.

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 14.

72-26-704. Custodian's expenses, compensation, and bond.

Official Comments

This section parallels and restates Section 5 of the 1966 Act [former 72-26-301, 72-26-304, and 72-26-305]. It deletes the statement that a custodian may act without compensation for services, since that concept is implied in the retained provision that a custodian has an "election" to be compensated. However, to prevent abuse, the latter provision for permissive compensation is denied to a custodian who is also the donor of the custodial property.

The custodian's election to charge compensation must be exercised (although the compensation need not be actually paid) at least annually or it lapses and may not be exercised later. This provision is intended to avoid imputed income to the custodian who waives compensation, and also to avoid the accumulation of a large unanticipated claim for compensation exercisable at termination of the custodianship.

This section deletes as surplusage the bracketed optional standards contained in the 1966 Act for determining "reasonable compensation" which included, "in the order stated," a direction by the donor, statutes governing compensation of custodians or guardians, or court order. While compensation of custodians becomes a more likely occurrence and a more important issue under this Act because property requiring increased management may now be subject to custodianship, compensation can still be determined by agreement, by reference to a statute or by court order, without the need to so state in this Act.

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 15.

72-26-705. Exemption of third person from liability.

Official Comments

This section carries forward, but shortens and simplifies, Section 6 of the 1966 Act [former 72-26-303], with no substantive change intended. The 1966 revision permitted a 14-year old minor to appoint a successor custodian and specifically provided that third parties were entitled to rely on the appointment. Because this section refers to any custodian, and "custodian" is defined to include successor custodians [72-26-502(7)], a successor custodian appointed by the minor is included among those upon whom third parties may rely.

Similarly, because this section protects any third "persons," it is not necessary to specify here or in [72-26-609(3)] that it extends to any "issuer, transfer agent, bank, life insurance company, broker, or other person or financial institution," as did the 1966 Act. See the definition of "person" in [72-26-502(12)].

This section excludes from its protection persons with "knowledge" of the irregularity of a transaction, a concept not expressed but probably implied in Section 6 of the 1966 Act. See, e.g., State ex rel. Paden v. Currel, 597 S.W.2d 167 (Mo.App.1980) disapproving the pledge of custodial property to secure a personal loan to the custodian.

Similarly, this section does not alter the requirements for bona fide purchaser or holder in due course status under other law for persons who acquire from a custodian custodial property subject to recordation or registration.

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 16.

72-26-706. Liability to third persons.

Official Comments

This section has no counterpart in the 1966 Act and is based upon Section 5-429 of the Uniform Probate Code [72-5-436], relating to limitations on the liability of conservators. Because some forms of custodial property now permitted under this Act can give rise to liabilities as well as benefits (e.g., general partnership interests, interests in real estate or business proprietorships, automobiles, etc.) the Committee believes it is necessary to protect the minor and other assets he might have or acquire from such liabilities, since the minor is unable to disclaim a transfer to a custodian for his benefit. Similar protection for the custodian is necessary so as not to discourage nonprofessional or uncompensated persons from accepting the office. Therefore this section generally limits the claims of third parties to recourse against the custodial property, as third parties dealing with a trust are generally limited to recourse against the trust corpus.

The custodian incurs personal liability only as provided in subsection [(2)] for actual fault or for failure to disclose his custodial capacity "in the contract" when contracting with third parties. In oral contracts, oral disclosure of the custodial capacity is sufficient. The minor, on the other hand, incurs personal liability under subsection [(3)] only for actual fault.

When custodial property is subjected to claims of third parties under this section, the minor or his legal representative, if not a party to the action by which the claim is successfully established, may seek to recover the loss from the custodian in a separate action. See [72-26-802] and the Comment thereto.

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 17.

Part 8

Renunciation, Resignation, Death, or Removal of Custodian — Accounting — Termination — Successor

72-26-801. Renunciation, resignation, death, or removal of custodian — designation of successor custodian.

Official Comments

This section tracks but condenses Section 7 of the 1966 Act [former 72-26-401 through 72-26-404] to provide that the custodian, or if the custodian does not do so, the minor if he is 14, may appoint the successor custodian, or failing that, that the conservator of the minor or a court appointee shall serve. It also covers disclaimer of the office by designated or successor custodians or by nominated future custodians who decline to serve.

This Act broadens the category of persons who may be designated by the initial custodian as successor custodian from an adult member of the minor's family, his conservator, or a trust company to any adult or trust company. However, the minor's designation remains limited to an adult member of his family (expanded to include a spouse and a stepparent, see [72-26-502(10)], his conservator, or a trust company.

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 18.

72-26-802. Accounting by and determination of liability of custodian.

Official Comments

This section carries forward Section 8 of the 1966 Act [former 72-26-306], but expands the class of parties who may require an accounting by the custodian to include any person who made a transfer to him (or any such person's legal representative), the minor's guardian of the person, and the successor custodian.

Subsection [(2)] authorizes but does not obligate a successor custodian to seek an accounting by the predecessor custodian. Since the minor and other persons mentioned in subsection [(1)] may also seek an accounting from the predecessor at any time, it is anticipated that the exercise of this right by the successor should be rare.

Subsection [(1)] also gives the same parties (other than a successor custodian) the right to seek recovery from the custodian for loss or diminution of custodial property resulting from successful claims by third persons under [72-26-706], unless that issue has already been adjudicated in an action under that section to which the minor was a party.

This section does not contain a separate statute of limitations precluding petitions for accounting after termination of the custodianship. Because custodianships can be created without the knowledge of the minor, a person might learn of a custodian's failure to turn over custodial property long after reaching majority, and should not be precluded from asserting his rights in the case of such fraud. In addition, the 1966 Act has no such preclusion and seems to have worked well. Other law, such as general statutes of limitation and the doctrine of laches, should serve adequately to protect former custodians from harassment.

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 19.

72-26-803. Termination of custodianship.

Official Comments

This section tracks Section 4(d) of the 1966 Act [former 72-26-302], but provides that custodianships created by fiduciaries without express authority from the donor of the property under [72-26-606] and by obligors of the minor under [72-26-607] terminate upon the minor's attaining the age of majority under the general laws of the state, since these custodianships are substitutes for conservatorships that would otherwise terminate at that time. Because property in a single custodianship may be distributable at different times, separate accounting for custodial property by source may be required. See Comment to [72-26-602].

Compiler's Comments

Source: The corresponding provision of the Uniform Transfers to Minors Act, as adopted by the National Conference of Commissioners on Uniform State Laws, is section 20.

CHAPTER 30
MANAGEMENT OF INSTITUTIONAL FUNDS

Part 1
General Provisions

72-30-101. Short title.

Compiler's Comments

2007 Amendment: Chapter 421 after ""Uniform" inserted "Prudent". Amendment effective October 1, 2007.

72-30-102. Definitions.

Official Comments

The Uniform Act applies generally to colleges, universities, hospitals, religious organizations and other institutions of an eleemosynary nature. It applies to a governmental organization to the extent that the organization holds funds for the listed purposes, e.g., a public school which has an endowment fund.

A non-governmental institution which is not "charitable" in the classic sense is not within the Act, even though it may hold funds for such purpose. If the fund is separate and distinct from the noncharitable organization, the fund itself may be an institution to which the Act applies.

An institutional fund is any fund held by an institution which it may invest for a long or short term. Excluded from the Act is any fund held by a trustee which is not an institution as defined in this Act, e.g., a bank or trust company, for the benefit of an institution even though the institution is the sole beneficiary.

A fund held by an institution for the benefit of any noninstitutional beneficiary is also excluded. The exclusion would apply to any fund with an individual beneficiary such as an annuity trust or a unitrust. When the interest of a noninstitutional beneficiary is terminated, the fund may then become an institutional fund.

The "use, benefit, or purposes" of an institution broadly encompasses all of the activities permitted by its charter or other source of authority. A fund to provide scholarships for students or medical care for indigent patients is held by the school or hospital for the institution's purposes. Such a fund is not deemed to be held for the benefit of a particular student or patient as distinct from the use, benefit, or purposes of the institution, nor does the student or patient have an interest in the fund as a "beneficiary which is not an institution."

The particular recipient of the aid of a charitable organization is not a "beneficiary" in the sense of a beneficiary of a private trust; only the Attorney General or similar public authority may enforce a charitable trust. 4 Scott, Law of Trusts § 348 pp. 2768-9 (3d ed. 1967); Bogert, The Law of Trusts and Trustees § 411-15 pp. 317-348 (2d ed. 1962).

An endowment fund is an institutional fund, or any part thereof, which is held in perpetuity or for a term and which is not wholly expendable by the institution. Implicit in the definition is the continued maintenance of all or a specified portion of the original gift. "Endowment fund" is specially defined because it is subject to the appropriation rules of [72-30-201, now repealed].

A restriction on use that makes a fund an endowment fund arises only from the applicable gift instrument. If a governing board has the power to spend all of a fund but, in its discretion, decides to invest the fund and spend only the yield or appreciation therefrom, the fund does not become an endowment fund under this definition, but it may be described as a "quasi-endowment fund" or a "fund functioning as endowment."

A fund which is not an institutional fund originally and therefore not an endowment fund may become an endowment fund at a later time. For example, a fund given to an institution to pay the grantor's widow a life income, with the remainder to the institution, would become an institutional fund on the widow's death, and, if the fund were not then wholly expendable, it would become an endowment fund at that time.

If a gift instrument provided that the institution could use the income from the fund for ten years and thereafter spend the entire principal, the fund would be an endowment fund for the ten-year period and would cease to be an endowment fund at the time it became wholly expendable.

The definition [of "governing board"] is meant to designate the policy making or management group which has the responsibility for the affairs of the institution or the fund.

"Historic dollar value" is simply the value of the fund expressed in dollars at the time of the original contribution to the fund plus the dollar value of any subsequent gifts to the fund. Accounting entries recording realization of gains or losses to the fund have no effect upon historic dollar value. No increase or decrease in historic dollar value of the fund results from the sale of an asset held by the fund and the reinvestment of the proceeds in another asset.

If the gift instrument directs accumulation, the historic dollar value will increase with each accumulation. For example, if a donor gives an institution $300,000 and directs that the fund is to be accumulated until its value reaches $500,000, the historic dollar value will be the aggregate value of $500,000 at the time the fund becomes available for use by the institution.

If under the terms of the gift instrument a portion of an endowment fund, after passage of time or upon the happening of some event, becomes currently wholly expendable, such portion should be treated as a separate fund and the historic dollar value of the remaining endowment fund should be reduced proportionately.

A gift instrument establishes the terms of the gift. It may be a writing of any form, or it may result from the institution's solicitation activities, or the by-laws, or other rules of an existing fund.

Compiler's Comments

2009 Amendment: Chapter 328 in definition of endowment fund after "gift instrument" inserted "or instrument of donor intent"; inserted definition of instrument of donor intent; and made minor changes in style. Amendment effective April 18, 2009.

2007 Amendment: Chapter 421 inserted definitions of charitable purpose, person, program-related asset, and record; deleted definition of governing board that read: ""Governing board" means the body responsible for the management of an institution or of an institutional fund"; deleted definition of historic dollar value that read: ""Historic dollar value" means the aggregate fair value in dollars of:

(a) an endowment fund at the time it became an endowment fund;

(b) each subsequent donation to the fund at the time it is made; and

(c) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund"; in definition of endowment fund inserted (b) providing an exemption for assets that an institution designates for its own use; in definition of gift instrument substituted "record or records" for "will, deed, grant, conveyance, agreement, memorandum, writing, or other governing document", substituted "solicitation" for "solicitations for which an institutional fund resulted", and inserted "granted to"; in definition of institution in (a) substituted "a person, other than an individual" for "an incorporated or unincorporated organization", after "for" deleted "educational, religious", and after "charitable" deleted "or other eleemosynary", in (b) substituted "government or governmental subdivision, agency, or instrumentality" for "governmental organization" and at end substituted "a charitable purpose" for "any of these purposes", and inserted (c) concerning a trust that had both charitable and noncharitable interests after all noncharitable interests have terminated; in definition of institutional fund in (a) substituted "exclusively for charitable purposes" for "for its exclusive use, benefit, or purposes", inserted (b)(i) concerning program-related assets, and in (b)(iii) substituted "an interest" for "possible rights"; and made minor changes in style. Amendment effective October 1, 2007.

72-30-103. Uniformity of application and construction.

Compiler's Comments

2007 Amendment: Chapter 421 made minor changes in style. Amendment effective October 1, 2007.

Part 2
Management of Funds

72-30-207. Release or modification of restrictions on management, investment, or purpose.

Official Comments

One of the difficult problems of fund management involves gifts restricted to uses which cannot be feasibly administered or to investments which are no longer available or productive. There should be an expeditious way to make necessary adjustments when the restrictions no longer serve the original purpose. Cy pres has not been a satisfactory answer and is reluctantly applied in some states. See Restatement of Trusts (2d), §§ 381, 399; 4 Scott, Law of Trusts § 399 p. 3084, § 399.4 pp. 3119 et seq. (3d ed. 1967).

This section permits a release of limitations that imperil efficient administration of a fund or prevent sound investment management if the governing board can secure the approval of the donor or the appropriate court.

Although the donor has no property interest in a fund after the gift, nonetheless if it is the donor's limitation that controls the governing board and he or she agrees that the restriction need not apply, the board should be free of the burden. See Restatement of Trusts (2d) § 367. Scott suggests that in minor matters, the consent of the settlor may be effective to remove restrictions upon the trustees in the administration of a charitable trust. 4 Scott § 367.3 p. 2846 (3d ed. 1967).

If the donor is unable to consent or cannot be identified, the appropriate court may upon application of a governing board release a limitation which is shown to be obsolete, inappropriate or impracticable.

This section authorizes only a release of a limitation. Thus, if a fund were established to provide scholarships for students named Brown from Brown County, Iowa, a donor might acquiesce in a reduction of the limitation to enable the institution to offer scholarships to students from Brown County who are not named Brown, or to students from other counties in Iowa or to students from other states, or he could acquiesce in the release of the restriction to scholarships so that the fund could be used for the general educational purposes of the school.

Subsection [(4)] makes it clear that the Act does not purport to limit the established doctrine of cy pres. A liberalization of, addition to, or substitute for cy pres is not without respectable support. Professor Kenneth Karst in "The Efficiency of the Charitable Dollar: An Unfilled State Responsibility," 73 Harv. L. Rev. 433 (1960) suggested that the doctrine of cy pres be expanded to permit the courts to redirect charitable grants if the purpose had become "obsolete, or useless, or prejudicial to the public welfare, or are insignificant in comparison with the magnitude of the endowment..." quoting from the Nathan Report (of the British Committee on the Law and Practice Relating to Charitable Trusts, Cmd. 8710, 1952) quoting the Scotland Education Act 1946, 9-10 Geo. 6, ch. 72 § 119(b). The Uniform Act provision is far less broad; it applies only to the release of restrictions on the gift under limited circumstances.

New England courts apply a rather strict doctrine of separation of powers to deny legislative encroachment on judicial cy pres. The Act is compatible with the New England cases because the final decision is in the courts. See City of Hartford v. Larrabee Fund Association, 161 Conn. 312, 288 A.2d 71 (1971); Opinion of Justices, 101 N.H. 531, 133 A.2d 792 (1957).

No federal tax problems for the donor are anticipated by permitting release of a restriction. The donor has no right to enforce the restriction, no interest in the fund and no power to change the eleemosynary beneficiary of the fund. He may only acquiesce in a lessening of a restriction already in effect.

Compiler's Comments

2021 Amendment: Chapter 267 in (4) at end of introductory clause inserted "the institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument or instrument of donor intent and"; in (4)(b) substituted "12 years" for "20 years"; deleted former (4)(c) that read: "(c) the institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument or instrument of donor intent"; and made minor changes in style. Amendment effective October 1, 2021.

2009 Amendment: Chapter 328 throughout section after "gift instrument" inserted "or instrument of donor intent". Amendment effective April 18, 2009.

2007 Amendment: Chapter 421 in (1) substituted "If the donor consents in a record" for "With the written consent of the donor", substituted "an institution" for "governing board", after "may release" inserted "or modify", substituted "management" for "use", and inserted "or purpose"; deleted former (2) that read: "(2) If written consent of the donor cannot be obtained by reason of his death, disability, unavailability, or impossibility of identification, the governing board may apply in the name of the institution to the appropriate court for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. The attorney general shall be notified of the application and shall be given an opportunity to be heard. If the court finds that the restriction is obsolete, inappropriate, or impracticable, it may by order release the restriction in whole or in part. A release under this subsection may not change an endowment fund to a fund that is not an endowment fund"; in (3) near beginning after "release" inserted "or modification", after "other than" deleted "educational, religious", after "charitable" deleted "or other eleemosynary", and at end after "institution" deleted "affected"; deleted former (4) that read: "(4) This section does not limit the application of the doctrine of cy-pres"; inserted (2) specifying that the court may, under specific circumstances, modify a restriction contained in a gift instrument; inserted (3) specifying that a court may modify the purpose of an institutional fund or restriction on the use of a fund if a particular purpose contained in a gift instrument becomes unlawful, impracticable, impossible, or wasteful; inserted (4) providing that if an institution determines that a restriction is unlawful, impracticable, impossible, or wasteful, the institution may release or modify the restriction under certain circumstances; and made minor changes in style. Amendment effective October 1, 2007.

72-30-208. Standard of conduct in managing and investing institutional fund.

Compiler's Comments

2009 Amendment: Chapter 328 in (1) and (5) after "gift instrument" inserted "or instrument of donor intent"; in (5)(d) at end inserted "or unless the gift instrument or instrument of donor intent provides otherwise". Amendment effective April 18, 2009.

Effective Date: This section is effective October 1, 2007.

72-30-209. Appropriation for expenditure or accumulation of endowment fund — rules of construction.

Compiler's Comments

2009 Amendment: Chapter 328 throughout section after "gift instrument" inserted "or instrument of donor intent"; in (1) in introductory clause near end after "shall" inserted "in addition to considering the gift instrument or instrument of donor intent"; and made minor changes in style. Amendment effective April 18, 2009.

Effective Date: This section is effective October 1, 2007.

72-30-210. Delegation of management and investment functions.

Compiler's Comments

2009 Amendment: Chapter 328 in (1) near beginning after "gift instrument" inserted "in an instrument of donor intent"; and made minor changes in style. Amendment effective April 18, 2009.

Effective Date: This section is effective October 1, 2007.

72-30-211. Reviewing compliance.

Compiler's Comments

Effective Date: This section is effective October 1, 2007.

72-30-212. Application to existing institutional funds.

Compiler's Comments

Effective Date: This section is effective October 1, 2007.

72-30-213. Relation to Electronic Signatures in Global and National Commerce Act.

Compiler's Comments

2019 Amendment: Chapter 3 substituted "section 101(c) of that act, 15 U.S.C. 7001(c)" for "section 101 of that act, 15 U.S.C. 7001(a)" and substituted "section 103(b) of that act, 15 U.S.C. 7003(b)" for "section 103 of that act, 15 U.S.C. 7003(b)". Amendment effective October 1, 2019.

Effective Date: This section is effective October 1, 2007.

CHAPTER 31
MISCELLANEOUS PROVISIONS RELATING TO FIDUCIARIES

Chapter Case Notes

Lawsuit by Shareholder Causing Damages Considered Breach of Fiduciary Duty of Care: Sletteland brought a suit against two other corporate shareholders for charging excessive attorney fees and seeking their removal as corporate directors. The District Court held that the fees were excessive, but found no grounds for removal. The other shareholders filed a counterclaim against Sletteland, alleging that he breached his fiduciary duty in bringing the lawsuit because the timing of the suit caused refinancing of a project to fail, resulting in damage to the corporation and to other shareholders. The District Court agreed, and both parties appealed their respective issues. The Supreme Court reversed on the issue of excessive fees, but affirmed on the issue of breach of fiduciary duty. The fiduciary duty between shareholders of a close corporation is one of utmost good faith and loyalty. Sletteland admittedly knew of the refinancing and, as an attorney and investment banker, also knew the effect that a lawsuit alleging misconduct by board members would have on a refinancing effort. In fact, it appeared that the suit was brought to specifically derail the refinancing. Sletteland was the person who determined the timing of the suit, which was filed immediately before the individuals involved in the refinancing were to meet for discussions, and when asked to withdraw the suit so refinancing could conclude, he refused to do so. Sletteland did not use the care that an ordinarily prudent person would use in a similar situation, resulting in the breach of fiduciary duty. The Supreme Court also affirmed the award of damages. Although future damages could not be calculated exactly in this case, the District Court did not abuse its discretion in basing its calculations on expert testimony of a well-known regional economist. Sletteland v. Roberts, 2000 MT 382, 304 M 21, 16 P3d 1062, 57 St. Rep. 1639 (2000).

Bank's Fiduciary Duty to Borrower: The relationship between a bank and a person to whom it lends money is generally that of creditor and debtor and, as such, does not impose fiduciary duties on the bank except on proof of special circumstances, such as a situation in which the bank acts as an adviser. Security agreements between the bank and the company and its owners were part of the creditor/debtor relationship. The bank merely exercised its rights under the security agreements and the law when it foreclosed on the collateral. Even assuming that the bank owed a fiduciary duty to the company and its owners, there could be no breach of such duty when the bank acted for legitimate business reasons in accordance with the security agreements. Richland Nat'l Bank & Trust v. Swenson, 249 M 410, 816 P2d 1045, 48 St. Rep. 730 (1991).

No Negligence Regarding Repayment Term of Loan: Borrowers argued that bank was negligent in structuring a loan, but they cited no authority to support the proposition that a negligence action may be based on a repayment term of a lawful contract bargained between two parties. Absent the existence of a fiduciary duty, which bank did not have with respect to the loan, the law does not support such a claim. Richland Nat'l Bank & Trust v. Swenson, 249 M 410, 816 P2d 1045, 48 St. Rep. 730 (1991).

Fiduciary Duty Between Shareholders in Close Corporation When No Other Type of Relationship Exists: The fiduciary duty between stockholders of a close corporation is one of utmost good faith and loyalty. However, the controlling group should not be stymied by a minority stockholder's grievances if the controlling group can demonstrate a legitimate business purpose and the minority stockholder cannot demonstrate a less harmful alternative. If called on to settle a dispute between the stockholders, the court must weigh the legitimate business purpose, if any, against the practicability of a less harmful alternative. Daniels v. Thomas, Dean & Hoskins, Inc., 246 M 125, 804 P2d 359, 47 St. Rep. 2293 (1990), citing Donahue v. Rodd Electrotype Co. of New England, Inc., 328 NE 2d 505 (Mass. 1975), and Wilkes v. Springside Nursing Home, Inc., 353 NE 2d 657 (Mass. 1976), and distinguishing Skierka v. Skierka Bros., Inc., 192 M 505, 629 P2d 214 (1981), Deist v. Wachholz, 208 M 207, 678 P2d 188 (1984), and Dunfee v. Baskin-Robbins, 221 M 447, 720 P2d 1148 (1986).

In Warren v. Campbell Farming Corp., 2011 MT 324, 363 Mont. 190, 271 P.3d 36, the Montana Supreme Court, in answering a certified question from the Tenth Circuit Court of Appeals, revisited the Daniels test and concluded that the Daniels test does not apply to claims involving director conflict of interest transactions. However, the Daniels test does apply to minority shareholders' claims of breach of fiduciary duties against majority shareholders.

No Constructive Trust When Wife Awarded Home Purchased With Loan From Husband's Mother: In a divorce case, the wife was awarded the family home that had been purchased with money loaned to the husband by his mother. The lower court's decision that no constructive trust existed in the mother's favor was affirmed on appeal. The Supreme Court ruled that there had been no fraud on the wife's part and that the mother continued to lend money to her son after he had failed to secure the loans with the real estate, as she had requested. Gitto v. Gitto, 239 M 47, 778 P2d 906, 46 St. Rep. 1502 (1989).

Breach of Joint Venture Fiduciary Trust — Award of Investment Plus Interest Affirmed: Kelly and Rust agreed to purchase land, subdivide it, and sell it at a profit. Rust advanced Kelly $4,000 as one-half the purchase price. Kelly paid the $4,000 balance and recorded the deed, but did not include Rust on the recorded deed. Rust moved from the area and later attempted, through his agent, to purchase Kelly's interest in the land. The agent was told the land was already sold, so Rust brought an action to recover his investment plus interest. The trial court properly held that: (1) the parties had entered into a joint venture; (2) Kelly was required in equity to hold the property in a constructive trust; (3) Kelly breached the joint venture fiduciary duty and attempted to deprive Rust of his interest in the property; and (4) Rust was entitled to return of his $4,000 investment plus interest. Rust v. Kelly, 228 M 220, 741 P2d 786, 44 St. Rep. 1471 (1987).

Fiduciary Relationship Between Insurer and Insured — Breach Constituting Constructive Fraud: Fiduciary duties are simply a statement of the kind of good faith duty owed by an insurer to an insured. An insurance company has to consider the interests of both itself and the insured, but failure to act in the highest good faith toward the insured may constitute constructive fraud. Tynes v. Bankers Life Co., 224 M 350, 730 P2d 1115, 43 St. Rep. 2243 (1986).

Burdens of Proof in Case Involving Claimed Breach of Fiduciary Duty by Union Officers: In a dispute between a union and its former business managers, the District Court gave a general instruction that the party who asserts the affirmative of an issue has the burden of proving that issue by a preponderance of the evidence. The court further instructed the jury that if a fiduciary profits personally from the use of union funds, the burden shifts to the fiduciary to show he acted reasonably. Finally, the court instructed that a person with the duty to keep proper accounts has the burden of proving that he is entitled to the credits he claims. These instructions were consistent, clear, and accurate. Local Union No. 400 v. Bosh, 220 M 304, 715 P2d 36, 43 St. Rep. 388 (1986).

Fiduciary Duty of Union Officers: It was proper to instruct the jury on the duty of fiduciary responsibility owed by union officers by comparing it to a trust relationship; stating that, as fiduciaries, the officers were required to act prudently; and allowing the jury to consider the duties, powers, and obligations in the union constitution and bylaws. Local Union No. 400 v. Bosh, 220 M 304, 715 P2d 36, 43 St. Rep. 388 (1986). See also Luke v. Gager, 2000 MT 377, 303 M 474, 16 P3d 377, 57 St. Rep. 1599 (2000).

Fiduciary Relationship Basis for Constructive Fraud Cause of Action: Dealings or transactions between parties who have a fiduciary relationship provide a sufficient contract to support an action for constructive fraud. Local Union No. 400 v. Bosh, 220 M 304, 715 P2d 36, 43 St. Rep. 388 (1986). See also Luke v. Gager, 2000 MT 377, 303 M 474, 16 P3d 377, 57 St. Rep. 1599 (2000).

Trustee's Right to Appeal Court Order When Trustee Not a Party: Trustee-bank could appeal from court order directing trustee to pay all income due beneficiary to beneficiary's judgment creditors, even though the trustee was not a party to the action between the beneficiary and creditors. The trustee had a fiduciary duty to preserve and protect the trust assets. Lundgren v. Hoglund, 219 M 295, 711 P2d 809, 42 St. Rep. 2031 (1985).

Banks — Real Estate Sale — No Fiduciary Relationship: The bank prepared a mortgage and deed of trust as a service to and at request of the buyer and the sellers. Upon default of the buyer, the sellers filed an action for declaratory ruling as to rights between the bank and the sellers. The sellers argued there was a fiduciary relationship between themselves and the bank. The court found there were no special circumstances present that would create a fiduciary relationship when the bank did not find the buyer or advise on the terms of the sale, the sellers maintained accounts in other banks, and the sellers had dealt with the loan department on only a few occasions prior to the transaction in question. The sellers' dealings with the bank were not of the exclusive repeated nature necessary to justify finding a fiduciary relationship. Pulse v. N. Am. Land Title Co. of Mont., 218 M 275, 707 P2d 1105, 42 St. Rep. 1578 (1985), followed in Simmons v. Jenkins, 230 M 429, 750 P2d 1067, 45 St. Rep. 328 (1988). See also Mann Farms, Inc. v. Traders St. Bank of Poplar, 245 M 234, 801 P2d 73, 47 St. Rep. 2094 (1990) (replacing previous opinion, subsequently withdrawn, at 47 St. Rep. 1557 (1990)), Lachenmaier v. First Bank Sys., Inc., 246 M 26, 803 P2d 614, 47 St. Rep. 2244 (1990), Simmons Oil Corp. v. Holly Corp., 258 M 79, 852 P2d 523, 50 St. Rep. 433 (1993), Kondelik v. First Fidelity Bank of Glendive, 259 M 446, 857 P2d 687, 50 St. Rep. 874 (1993), and Gliko v. Permann, 2006 MT 30, 331 M 112, 130 P3d 155 (2006).

Attorney's Obligation to Deal in Good Faith: Because of the inequality that exists between attorney and client in bargaining over a fee, attorney has an obligation to deal fairly and in good faith when negotiating, charging, and collecting a fee. In a fee dispute over handling of dissolution, client pleaded sufficient facts to raise question whether there was a breach of the obligation owed to deal fairly and in good faith. District Court erred in granting summary judgment for attorney. Supreme Court reversed and remanded for trial, giving client leave to amend counterclaim to specifically describe a breach of the implied covenant. Morse v. Espeland, 215 M 148, 696 P2d 428, 42 St. Rep. 251 (1985).

Insurer's Concealment of Material Facts — Bad Faith: In an action against his insurance company for failure to settle a third-party claim within policy limits, plaintiff offered and the trial court gave an instruction stating that an insurer is liable for bad faith if it intentionally conceals material facts within its knowledge and not known by the insured. Defendant contended it was error to give the instruction. On appeal, the Supreme Court stated that the duty of a fiduciary to his beneficiary is no less than that of a trustee. The fiduciary, as a trustee, is bound to act in the highest good faith toward his beneficiary and may not obtain any advantage over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind. It was therefore not error to inform the jury that an insurance company which "intentionally" conceals material facts within its knowledge and not known to the insured may be found to be acting in bad faith. The concealed facts must be material to the subject of the trust or duty of the fiduciary as the instruction stated. The judgment was affirmed. Gibson v. W. Fire Ins. Co., 210 M 267, 682 P2d 725, 41 St. Rep. 1048 (1984).

Bank's Fiduciary Duty to Customers It Gives Financial Advice — Real Estate Sales: Wife, whose husband had recently died, signed a contract for a deed to her ranch with Dittman, who signed as "trustee". There were two other purchasers, who did not sign: a person to whom, according to the evidence, wife would not have knowingly sold and the marketing officer of the bank used by the wife and husband for some 24 years. Wife was unfamiliar with real estate and financial affairs and relied upon the advice of various bank officers with regard to the sale of the ranch. This put the bank in a prima facie fiduciary relationship as to the wife. The relationship and its attendant duties extended to the advising officers in their dealings with the wife in regard to sale of the ranch. The marketing officer thus had a duty to fully inform the wife and protect her interests. This duty he breached, and the breach amounted to constructive fraud, where evidence showed that: (1) the contract price and terms were disadvantageous to the wife; (2) the true purchasers were not disclosed to her either by the contract or the marketing officer; (3) the purchasers intended to and began to subdivide and sell the ranch, though the marketing officer knew wife apparently did not wish this, having refused an earlier offer to purchase with right to subdivide; (4) the marketing officer had extensive financial interests involving loans to him from his bank, and an audit of the bank recommended that in view of this his lending authority should be eliminated or curtailed; and (5) the lower court was unimpressed with the way in which wife's attorney in the negotiations represented her interests. The lower court properly ordered the contract for deed rescinded. Deist v. Wachholz, 208 M 207, 678 P2d 188, 41 St. Rep. 286 (1984). See also Kondelik v. First Fidelity Bank of Glendive, 259 M 446, 857 P2d 687, 50 St. Rep. 874 (1993).

Professional Misconduct — Lawyer Disbarred: The Supreme Court found substantial credible evidence supporting the findings of the Commission on Practice that the respondent violated 72-5-423, 72-20-201 (now repealed), 72-20-203 (now repealed), 72-20-204 (now repealed), 72-20-207 (now repealed), and various disciplinary rules and that he engaged in deceitful conduct for which he could be guilty of a misdemeanor in accordance with 37-61-406. The respondent was ordered disbarred and required to make restitution of $22,127.74. In re Reno, 187 M 262, 609 P2d 704, 37 St. Rep. 688 (1980).

Specific Finding on Existence of Confidential Relationship: There was no need for a specific finding on the issue of the existence of a confidential or fiduciary relationship because there was insufficient proof of wrongdoing on the part of defendant, even if he were considered to be a voluntary trustee. Boatman v. Berg, 176 M 208, 577 P2d 382 (1978).

Forfeiture of Option: Neighboring ranchers signed a writing, agreeing to become equal partners in purchase of adjoining grazing leases and ranch lands. Each contributed $1,000 to bind a 1-year purchase option covering lands and leases. They forfeited the option and option payment but continued their joint activities. Nine months after forfeiture one partner purchased all for himself, taking title jointly with his wife, and they in turn deeded a portion to their son. The wife and son, as donees, were controlled by the donor's actions. Bradbury v. Nagelhus, 132 M 417, 319 P2d 503 (1957).

Joint Option to Purchase: Neighboring ranchers signed a writing, agreeing to become equal partners in purchase of adjoining grazing leases and ranch lands. Each contributed $1,000 to bind a 1-year purchase option covering lands and leases. The option and option payment were forfeited but they continued their joint activities. Nine months after forfeiture one partner purchased all for himself. A constructive trust was raised which purchaser could not revoke. He was required to convey an undivided one-half interest in the lands and leases to other partner subject to down-to-date accounting and reimbursement in net amount of purchase price found to be due from plaintiff to purchaser after accounting was completed from date of original agreement. Bradbury v. Nagelhus, 132 M 417, 319 P2d 503 (1957).

Industrial Accident Board: The Industrial Accident Board (now the Division of Workers' Compensation of the Department of Labor and Industry) is under a legal and moral duty to deal fairly with workmen as beneficiaries and to disclose all matters affecting their interests, either beneficially or otherwise. Yurkovich v. Indus. Accident Bd., 132 M 77, 314 P2d 866 (1957).

Gift in Violation of Trust: One who takes personal property from a trustee by way of a gift made in violation of the latter's trust becomes an involuntary trustee thereof (72-20-301, now repealed), stands in the shoes of the trustee, and cannot assert the bar of the Statute of Limitations unless he repudiates the trust, and knowledge of such repudiation is gained by the cestui que trust. Davidson v. Stagg, 94 M 272, 22 P2d 152 (1933).

Pledge Mingled With Funds of Estate: The money pledged by tenant to protect estate against abatement of property rented for violations of law constituted a trust fund. Since it had been mingled with the funds of the estate without any attempt at segregation, the entire funds of the estate were impressed with the trust in favor of the tenant, and since the residuary legatees and devisees had received the trust fund on distribution, they were liable to him for the money pledged as involuntary trustees. Ryan v. Stagg, 89 M 390, 298 P 353 (1931).

Director of Corporation: The rule declared by 72-20-205 (now repealed) that a trustee may not undertake a trust adverse in its nature to the interest of his beneficiary without the consent of the latter does not preclude a director of a corporation from becoming interested in another concern engaged in a business similar to, but not interfering with, that of his corporation. So long as he acts in good faith to the corporation and its shareholders and violates no legal or moral duty which he owes to it and them, he is free to engage in an independent competitive business. Greer v. Stannard, 85 M 78, 277 P 622, 64 ALR 772 (1929).

Officer of Bank Dealing With It: While an officer or director of a bank stands in a fiduciary relation to it and will not be permitted to profit because of his position as such, he may engage in ordinary business transactions with it or through it, provided his dealings are fair and he takes no undue advantage of his fiduciary relationship. Duffy v. Hastings, 78 M 22, 252 P 316 (1926).

Business Trust: Under 72-20-208 (now repealed), where two of three trustees of a common-law trust were officers of an oil company to which the trustees granted an extension of a drilling lease on lands owned by the trust under circumstances showing lack of good faith, and whose interests were adverse to those of the trust, it will be presumed that the agreement was entered into without consideration and through undue influence. Williard v. Campbell Oil Co., 77 M 30, 248 P 219 (1926).

Manager of Syndicate: By 72-20-201 and 72-20-207 (now repealed), it is made the duty of a trustee to act in the utmost good faith to those for whom he acts, and failure of the manager of a syndicate to inform those to whom sales of units were made through the use of the mails, that by contracts made by him approximately 50% of the proceeds of sales was paid as commissions and expenses to sales agents, was a breach of trust and a fraud upon them. Campbell v. U.S., 12 F2d 873 (1926).

Director Dealing With Corporation: There is no presumption that a director dealing with his corporation does so in bad faith unless he gains an advantage thereby, and if the company is indebted to him on a bona fide claim he may enforce it by the same method open to any other of its creditors. Mayger v. St. Louis Min. & Mill. Co., 68 M 492, 219 P 1102 (1923).

Constructive Trust:

The basis of a constructive trust is fraud, and such a trust arises when the legal title to property is obtained by a person in violation of some duty owed to the one who is equally entitled thereto, the property being held in hostility to his beneficial rights of ownership. Word v. Moore, 66 M 550, 214 P 79 (1923).

A constructive trust is created by operation of law, upon breach of a fiduciary relation by the person sought to be held, its basis being fraud, actual or constructive. MacGinniss Realty Co. v. Hinderager, 63 M 172, 206 P 436 (1922).

A constructive trust is created by operation of law, upon breach of a fiduciary relation by the person sought to be held. Eisenberg v. Goldsmith, 42 M 563, 113 P 1127 (1911).

Sale by Broker to Himself Voidable: A real estate broker entrusted with the privilege of selling the land of his principal cannot sell to himself, and where he does so, the sale made by him is voidable at the option of the owner. Crowley v. Rorvig, 61 M 245, 203 P 496 (1921), followed in Boyne, U.S.A., Inc. v. Mallas, 236 M 305, 769 P2d 1235, 46 St. Rep. 380 (1989).

Guardian: It is fraud for a guardian to use the ward's funds entrusted to him for any purpose not connected with the trust. In re Allard Guardianship, 49 M 219, 141 P 661 (1914).

Accounting — Selling Price of Land: Good faith requires an agent employed to sell land to account to his principal for the entire selling price, less the agreed commission. Middlefork Cattle Co. v. Todd, 49 M 259, 141 P 641 (1914).

Real Estate Broker: If a broker is employed to sell land at a certain price on commission, and he finds a purchaser at that price, but induces his principal to sell at a lower figure, upon the representation that he cannot get any more, and the broker pockets the difference, it is a clear case of fraud upon his principal, and an action lies to compel him to disgorge the amount of profit so wrongfully realized. Middlefork Cattle Co. v. Todd, 49 M 259, 141 P 641 (1914).

Guardian as Trustee:

A guardian is a trustee and is held to the strict accountability attaching to a trustee. Smith v. Smith, 210 F 947 (D.C. Mont. 1914), affirmed in 224 F 1 (1915).

Where a guardian who had used his ward's money in payment of his debts concealed this fact from the Court in applying for authority to borrow his ward's money at a low rate of interest, the order so procured by fraud and imposition was voidable and afforded no protection to the guardian, and he was liable for legal interest both before and after the order granting such authority, there having been no such disclosure as is required by 72-20-204 (now repealed). Smith v. Smith, 210 F 947 (D.C. Mont. 1914), affirmed in 224 F 1 (1915).

Purchase of Property by Fiduciary — Director of Mining Corporation: The directors of a mining corporation are not allowed to profit by virtue of their position, and a breach of official duty on their part is fraud in law. A director who purchases the property of the corporation at a judicial sale must not be permitted to obtain a dishonest advantage over the corporation or its stockholders. Coombs v. Barker, 31 M 526, 79 P 1 (1905).

Part 1
General

Part Case Notes

Mortgage Servicer's Behavior May Result in Fiduciary Duty Toward Debtor: Although the relationship between a bank and a mortgage customer generally does not give rise to fiduciary responsibilities, if a mortgage servicer goes beyond the ordinary role of a lender of money and actively advises a mortgage customer beyond the customary debtor-creditor relationship, the servicer may owe the customer a fiduciary duty. Morrow v. Bank of America, N.A., 2014 MT 117, 375 Mont. 38, 324 P.3d 1167, distinguished in House v. U.S. Bank Nat'l Ass'n, 2021 MT 45, 403 Mont. 287, 481 P.3d 820.

72-31-101. Oath in behalf of corporation acting as fiduciary.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

72-31-102. Investment by fiduciaries in home owners' loan corporation bonds authorized.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 3
Uniform Power of Attorney Act

Part Official Comments

Prefatory Note

The catalyst for the Uniform Power of Attorney Act (the "Act") was a national review of state power of attorney legislation. The review revealed growing divergence among states' statutory treatment of powers of attorney. The original Uniform Durable Power of Attorney Act ("Original Act"), last amended in 1987, was at one time followed by all but a few jurisdictions. Despite initial uniformity, the review found that a majority of states had enacted non-uniform provisions to deal with specific matters upon which the Original Act is silent. The topics about which there was increasing divergence included: 1) the authority of multiple agents; 2) the authority of a later-appointed fiduciary or guardian; 3) the impact of dissolution or annulment of the principal's marriage to the agent; 4) activation of contingent powers; 5) the authority to make gifts; and 6) standards for agent conduct and liability. Other topics about which states had legislated, although not necessarily in a divergent manner, included: successor agents, execution requirements, portability, sanctions for dishonor of a power of attorney, and restrictions on authority that has the potential to dissipate a principal's property or alter a principal's estate plan.

A national survey was then conducted by the Joint Editorial Board for Uniform Trust and Estate Acts (JEB) to ascertain whether there was actual divergence of opinion about default rules for powers of attorney or only the lack of a detailed uniform model. The survey was distributed to probate and elder law sections of all state bar associations, to the fellows of the American College of Trust and Estate Counsel, the leadership of the ABA Section of Real Property, Probate and Trust Law and the National Academy of Elder Law Attorneys, as well as to special interest list serves of the ABA Commission on Law and Aging. Forty-four jurisdictions were represented in the 371 surveys returned.

The survey responses demonstrated a consensus of opinion in excess of seventy percent that a power of attorney statute should:

(1) provide for confirmation that contingent powers are activated;
(2) revoke a spouse-agent's authority upon the dissolution or annulment of the marriage to the principal;
(3) include a portability provision;
(4) require gift making authority to be expressly stated in the grant of authority;
(5) provide a default standard for fiduciary duties;
(6) permit the principal to alter the default fiduciary standard;
(7) require notice by an agent when the agent is no longer willing or able to act;
(8) include safeguards against abuse by the agent;
(9) include remedies and sanctions for abuse by the agent;
(10) protect the reliance of other persons on a power of attorney; and
(11) include remedies and sanctions for refusal of other persons to honor a power of attorney.

Informed by the review and the survey results, the Conference's drafting process also incorporated input from the American College of Trust and Estate Counsel, the ABA Section of Real Property, Probate and Trust Law, the ABA Commission on Law and Aging, the Joint Editorial Board for Uniform Trust and Estate Acts, the National Conference of Lawyers and Corporate Fiduciaries, the American Bankers Association, AARP, other professional groups, as well as numerous individual lawyers and corporate counsel. As a result of this process, the Act codifies both state legislative trends and collective best practices, and strikes a balance between the need for flexibility and acceptance of an agent's authority and the need to prevent and redress financial abuse.

While the Act contains safeguards for the protection of an incapacitated principal, the Act is primarily a set of default rules that preserve a principal's freedom to choose both the extent of an agent's authority and the principles to govern the agent's conduct. Among the Act's features that enhance drafting flexibility are the statutory definitions of powers in Article 2 [72-31-336 through 72-31-352], which can be incorporated by reference in an individually drafted power of attorney or selected for inclusion on the optional statutory form provided in Article 3 [72-31-353 and 72-31-354]. The statutory definitions of enumerated powers are an updated version of those in the Uniform Statutory Form Power of Attorney Act (1988), which the Act supersedes. The national review found that eighteen jurisdictions had adopted some type of statutory form power of attorney. The decision to include a statutory form power of attorney in the Act was based on this trend and the proliferation of power of attorney forms currently available to the public.

Sections 119 and 120 [72-31-324 and 72-31-325] of the Act address the problem of persons refusing to accept an agent's authority. Section 119 [72-31-324] provides protection from liability for persons that in good faith accept an acknowledged power of attorney. Section 120 [72-31-325] sanctions refusal to accept an acknowledged power of attorney unless the refusal meets limited statutory exceptions. An alternate Section 120 [72-31-325] is provided for states that may wish to limit sanctions to refusal of an acknowledged statutory form power of attorney.

In exchange for mandated acceptance of an agent's authority, the Act does not require persons that deal with an agent to investigate the agent or the agent's actions. Instead, safeguards against abuse are provided through heightened requirements for granting authority that could dissipate the principal's property or alter the principal's estate plan (Section 201(a)) [72-31-336(1)], provisions that set out the agent's duties and liabilities (Sections 114 and 117) [72-31-319 and 72-31-322] and by specification of the categories of persons that have standing to request judicial review of the agent's conduct (Section 116) [72-31-321]. The following provides a brief overview of the entire Act.

Overview of the Uniform Power of Attorney Act

The Act consists of 4 articles. The basic substance of the Act is located in Articles 1 and 2 [72-31-301 through 72-31-328 and 72-31-336 through 72-31-352]. Article 3 [72-31-353 and 72-31-354] contains the optional statutory form and Article 4 [72-31-365 through 72-31-367] consists of miscellaneous provisions dealing with general application of the Act and repeal of certain prior acts.

Article 1 — General Provisions and Definitions — Section 102 [72-31-302] lists definitions which are useful in interpretation of the Act. Of particular note is the definition of "incapacity" which replaces the term "disability" used in the Original Act. The definition of "incapacity" is consistent with the standard for appointment of a conservator under Section 401 of the Uniform Guardianship and Protective Proceedings Act as amended in 1997. Another significant change in terminology from the Original Act is the use of "agent" in place of the term "attorney in fact." The term "agent" was also used in the Uniform Statutory Form Power of Attorney Act and is intended to clarify confusion in the lay public about the meaning of "attorney in fact." Section 103 [72-31-303] provides that the Act is to apply broadly to all powers of attorney, but excepts from the Act powers of attorney for health care and certain specialized powers such as those coupled with an interest or dealing with proxy voting.

Another innovation is the default rule in Section 104 [72-31-304] that a power of attorney is durable unless it contains express language indicating otherwise. This change from the Original Act reflects the view that most principals prefer their powers of attorney to be durable as a hedge against the need for guardianship. While the Original Act was silent on execution requirements for a power of attorney, Section 105 [72-31-305] requires the principal's signature and provides that an acknowledged signature is presumed genuine. Section 106 [72-31-306] recognizes military powers of attorney and powers of attorney properly executed in other states or countries, or which were properly executed in the state of enactment prior to the Act's effective date. Section 107 [72-31-307] states a choice of law rule for determining the law that governs the meaning and effect of a power of attorney.

Section 108 [72-31-308] addresses the relationship of the agent to a later court-appointed fiduciary. The Original Act conferred upon a conservator or other later-appointed fiduciary the same power to revoke or amend the power of attorney as the principal would have had prior to incapacity. In contrast, the Act reserves this power to the court and states that the agent's authority continues until limited, suspended, or terminated by the court. This approach reflects greater deference for the previously expressed preferences of the principal and is consistent with the state legislative trend that has departed from the Original Act.

The default rule for when a power of attorney becomes effective is stated in Section 109 [72-31-309]. Unless the principal specifies that it is to become effective upon a future date, event, or contingency, the authority of an agent under a power of attorney becomes effective when the power is executed. Section 109 [72-31-309] permits the principal to designate who may determine when contingent powers are triggered. If the trigger for contingent powers is the principal's incapacity, Section 109 [72-31-309] provides that the person designated to make that determination has the authority to act as the principal's personal representative under the Health Insurance Portability and Accountability Act (HIPAA) for purposes of accessing the principal's health-care information and communicating with the principal's health-care provider. This provision does not, however, confer on the designated person the authority to make health-care decisions for the principal. If the trigger for contingent powers is incapacity but the principal has not designated anyone to make the determination, or the person authorized is unable or unwilling to make the determination, the determination may be made by a physician or licensed psychologist, who must find that the principal's ability to manage property or business affairs is impaired, or by an attorney at law, judge, or appropriate governmental official, who must find that the principal is missing, detained, or unable to return to the United States.

The bases for termination of a power of attorney are covered in Section 110 [72-31-310]. In response to concerns expressed in the JEB survey, the Act provides as the default rule that authority granted to a principal's spouse is revoked upon the commencement of proceedings for legal separation, marital dissolution or annulment.

Sections 111 through 118 [72-31-316 through 72-31-323] address matters related to the agent, including default rules for coagents and successor agents (Section 111) [72-31-316], reimbursement and compensation (Section 112) [72-31-317], an agent's acceptance of appointment (Section 113) [72-31-318], and the agent's duties (Section 114) [72-31-319]. Section 115 [72-31-320] provides that a principal may lower the standard of liability for agent conduct subject to a minimum level of accountability for actions taken dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal. Section 116 [72-31-321] sets out a comprehensive list of persons that may petition the court to review the agent's conduct and Section 117 [72-31-322] addresses agent liability. An agent may resign by following the notice procedures described in Section 118 [72-31-323].

Sections 119 and 120 [72-31-324 and 72-31-325] are included in the Act to address the frequently reported problem of persons refusing to accept a power of attorney. Section 119 [72-31-324] protects persons that in good faith accept an acknowledged power of attorney without actual knowledge that the power of attorney is revoked, terminated, or invalid or that the agent is exceeding or improperly exercising the agent's powers. Subject to statutory exceptions, alternative Sections 120 [72-31-325] impose liability for refusal to accept a power of attorney. Alternative A sanctions refusal of an acknowledged power of attorney and Alternative B sanctions only refusal of an acknowledged statutory form power of attorney.

Sections 121 through 123 [72-31-326 through 72-31-328] address the relationship of the Act to other law. Section 121 [72-31-326] clarifies that the Act is supplemented by the principles of common law and equity to the extent those principles are not displaced by a specific provision of the Act, and Section 122 [72-31-327] further clarifies that the Act is not intended to supersede any law applicable to financial institutions or other entities. With respect to remedies, Section 123 [72-31-328] provides that the remedies under the Act are not exclusive and do not abrogate any other cause of action or remedy that may be available under the law of the enacting jurisdiction.

Article 2 — Authority — The Act offers the drafting attorney enhanced flexibility whether drafting an individually tailored power of attorney or using the statutory form. Like the Uniform Statutory Form Power of Attorney Act, Sections 204 through 217 [72-31-339 through 72-31-352] of the Act set forth detailed descriptions of authority relating to subjects such as "real property," "retirement plans," and "taxes," which a principal, pursuant to Section 202 [72-31-337], may incorporate in full into the power of attorney either by a reference to the short descriptive term for the subject used in the Act or to the section number. Section 202 [72-31-337], further states that a principal may modify in a power of attorney any authority incorporated by reference. The definitions in Article 2 also provide meaning for authority with respect to subjects enumerated on the optional statutory form in Article 3. Section 203 [72-31-338], applies to all incorporated authority and grants of general authority, providing further detail on how the authority is to be construed.

Article 2 [72-31-336 through 72-31-352] also addresses concerns about authority that might be used to dissipate the principal's property or alter the principal's estate plan. Section 201(a) [72-31-336(1)] lists specific categories of authority that cannot be implied from a grant of general authority, but which may be granted only through express language in the power of attorney. Section 201(b) [72-31-336(2)] contains a default rule prohibiting an agent that is not an ancestor, spouse, or descendant of the principal from creating in the agent or in a person to whom the agent owes a legal obligation of support an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

Article 3 — Statutory Forms — The optional form in Article 3 [72-31-353 and 72-31-354] is designed for use by lawyers as well as lay persons. It contains, in plain language, instructions to the principal and agent. Step-by-step prompts are given for designation of the agent and successor agents, and grant of general and specific authority. In the section of the form addressing general authority, the principal must initial the subjects over which the principal wishes to delegate general authority to the agent. In the section of the form addressing specific authority, the

Section 201(a) [72-31-336(1)] categories of specific authority are listed, preceded by a warning to the principal about the potential consequences of granting such authority to an agent. The principal is instructed to initial only the specific categories of actions that the principal intends to authorize. Article 3 [72-31-353 and 72-31-354] also contains a sample agent certification form.

Article 4 — Miscellaneous Provisions — The miscellaneous provisions in Article 4 [72-31-365 through 72-31-367] clarify the relationship of the Act to other law and pre-existing powers of attorney. Enacting jurisdictions should repeal their existing power of attorney statutes, including, if applicable, the Uniform Durable Power of Attorney Act, The Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code.

ARTICLE 1 [72-31-301 through 72-31-328]
GENERAL PROVISIONS

The Uniform Power of Attorney Act replaces the Uniform Durable Power of Attorney Act, the Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code. The primary purpose of the Uniform Durable Power of Attorney Act was to provide individuals with an inexpensive, non-judicial method of surrogate property management in the event of later incapacity. Two key concepts were introduced by the Uniform Durable Power of Attorney Act: 1) creation of a durable agency-one that survives, or is triggered by, the principal's incapacity, and 2) validation of post-mortem exercise of powers by an agent who acts in good faith and without actual knowledge of the principal's death. The success of the Uniform Durable Power of Attorney Act is evidenced by the widespread use of durable powers in every jurisdiction, not only for incapacity planning, but also for convenience while the principal retains capacity. However, the limitations of the Uniform Durable Power of Attorney Act are evidenced by the number of states that have supplemented and revised their statutes to address myriad issues upon which the Uniform Durable Power of Attorney Act is silent. These issues include parameters for the creation and use of powers of attorney as well as guidelines for the principal, the agent, and the person who is asked to accept the agent's authority. The general provisions and definitions of Article 1 in the Uniform Power of Attorney Act address those issues.

In addition to providing greater detail than the Uniform Durable Power of Attorney Act, this Act changes two presumptions in the earlier act: 1) that a power of attorney is not durable unless it contains language to make it durable; and 2) that a later court-appointed fiduciary for the principal has the power to revoke or amend a previously executed power of attorney. Section 104 [72-31-304] of this Article reverses the non-durability presumption by stating that a power of attorney is durable unless it expressly provides that it is terminated by the incapacity of the principal. Section 108 [72-31-308] gives deference to the principal's choice of agent by providing that if a court appoints a fiduciary to manage some or all of the principal's property, the agent's authority continues unless limited, suspended, or terminated by the court.

Although the Act is primarily a default statute, Article 1 also contains rules that govern all powers of attorney subject to the Act. Examples of these rules include imposition of certain minimum fiduciary duties on an agent who has accepted appointment (Section 114(a)) [72-31-319(1)], recognition of persons who have standing to request judicial construction of the power of attorney or review of the agent's conduct (Section 116) [72-31-321], and protections for persons who accept an acknowledged power of attorney without actual knowledge that the power of attorney or the agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the power (Section 119) [72-31-324]. In contrast with the rules of general application in Article 1, the default provisions are clearly indicated by signals such as "unless the power of attorney otherwise provides,"or "except as otherwise provided in the power of attorney." These signals alert the draftsperson to options for enlarging or limiting the Act's default terms. For example, default provisions in Article 1 state that, unless the power of attorney otherwise provides, the power of attorney is effective immediately (Section 109) [72-31-309], coagents may exercise their authority independently (Section 111) [72-31-316], and an agent is entitled to reimbursement of expenses reasonably incurred and to reasonable compensation (Section 112) [72-31-317].

ARTICLE 2 [72-31-336 through 72-31-352]
AUTHORITY

Article 2 is based in part on the predecessor Uniform Statutory Form Power of Attorney Act, approved in 1988. It provides the default statutory construction for authority granted in a power of attorney. Sections 204 through 217 [72-31-339 through 72-31-352] describe authority with respect to various subject matters. These descriptions may be incorporated by reference in the optional statutory form (Section 301) [72-31-353] or in an individually drafted power of attorney.

Incorporation is accomplished either by referring to the descriptive term for the subject or by providing a citation to the section in which the authority is described (Section 202) [72-31-337]. A principal may also modify any authority incorporated by reference (Section 202(c)) [72-31-337(3)]. Section 203 [72-31-338] supplements Sections 204 through 217 [72-31-339 through 72-31-352] by providing general terms of construction that apply to all grants of authority under those sections unless otherwise indicated in the power of attorney.

Most of the language in Sections 204 through 216 of Article 2 [72-31-339 through 72-31-351] comes directly from the Uniform Statutory Form Power of Attorney Act. The language has been revised where necessary to reflect modern custom and practice. Where significant changes have been made, they are noted in a comment to the relevant section. In general, there are two important differences between the statutory treatment of authority in this Act and in the Uniform Statutory Form Power of Attorney Act. First, this Act includes a section that provides a default rule for the parameters of gift making authority (Section 217) [72-31-352]. Second, this Act identifies specific acts that may be authorized only by an express grant in the power of attorney (Section 201(a))[72-31-336(1)]. Express authorization for the acts listed in Section 201(a) [72-31-336(1)] is required because of the risk those acts pose to the principal's property and estate plan. The purpose of Section 201(a) [72-31-336(1)] is to make clear that authority for these acts may not be inferred from a grant of general authority.

ARTICLE 3 [72-31-353 and 72-31-354]
STATUTORY FORMS

Article 3 [72-31-353 and 72-31-354] provides a concise, optional statutory form for creating a power of attorney under this Act (Section 301) [72-31-353]. With the proliferation of power of attorney forms in the public domain, the advantage of a statutorily-sanctioned form is the promotion of uniformity in power of attorney practice. In states such as Illinois and New York, where state-sanctioned statutory forms have existed for many years, the statutory form is widely used by both lawyers and lay persons. The familiarity and common understanding achieved with the use of one statutory form also facilitates acceptance of powers of attorney. In the twenty years preceding this Act, the number of states with statutory forms has increased from only a few to eighteen.

In addition to the statutory form power of attorney, Article 3 provides an optional form for agent certification of facts pertaining to a power of attorney (Section 302) [72-31-354]. Pursuant to Section 119 [72-31-324], a person may request an agent to certify any factual matter concerning the principal, agent, or power of attorney. The form in Section 302 [72-31-354] is intended to facilitate agent compliance with these requests. The form lists factual matters about which persons commonly request certification (e.g., the principal is alive and has not revoked the power of attorney or the agent's authority), and provides a designated space for certification of additional factual statements. Both the statutory form power of attorney and the agent certification form may be tailored to accommodate individual circumstances and objectives.

Part Compiler's Comments

Source: Uniform Power of Attorney Act, approved July 2006, National Conference of Commissioners on Uniform State Laws.

72-31-301. Short title.

Official Comments

This Act, which replaces the Uniform Durable Power of Attorney Act, does not contain the word "durable" in the title. Pursuant to Section 104 [72-31-304], a power of attorney created under the Act is durable unless the power of attorney provides that it is terminated by the incapacity of the principal.

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 101, Uniform Power of Attorney Act.

72-31-302. Definitions.

Official Comments

Although most of the definitions in Section 102 [72-31-302] are self-explanatory, a few of the terms warrant further comment.

"Agent" replaces the term "attorney in fact" used in the Uniform Durable Power of Attorney Act to avoid confusion in the lay public about the meaning of the term and the difference between an attorney in fact and an attorney at law. Agent was also used in the Uniform Statutory Form Power of Attorney Act which this Act supersedes.

"Incapacity" replaces the term "disability" used in the Uniform Durable Power of Attorney Act in recognition that disability does not necessarily render an individual incapable of property and business management. The definition of incapacity stresses the operative consequences of the individual's impairment-inability to manage property and business affairs-rather than the impairment itself. The definition of incapacity in the Act is also consistent with the standard for appointment of a conservator under Section 401 of the Uniform Guardianship and Protective Proceedings Act as amended in 1997.

The definition of "power of attorney" clarifies that the term applies to any grant of authority in a writing or other record from a principal to an agent which appears from the grant to be a power of attorney, without regard to whether the words "power of attorney" are actually used in the grant.

"Presently exercisable general power of appointment" is defined to clarify that where the phrase appears in the Act it does not include a power exercisable by the principal in a fiduciary capacity or exercisable only by will. Cf. Restatement (Third) of Property (Wills and Don. Trans.) § 19.8 cmt. d (Tentative Draft No. 5, approved 2006) (noting that unless the donor of a presently exercisable power of attorney has manifested a contrary intent, it is assumed that the donor intends that the donee's agent be permitted to exercise the power for the benefit of the donee). Including in a power of attorney the authority to exercise a presently exercisable general power of appointment held by the principal is consistent with the objective of giving an agent comprehensive management authority over the principal's property and financial affairs. The term appears in Section 211 [72-31-346] (Estates, Trusts, and Other Beneficial Interests) in the context of authority to exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal (see Section 211(b)(3)) [72-31-346(2)(c)], and in Section 217 [72-31-352] (Gifts) in the context of authority to exercise for the benefit of someone else a presently exercisable general power of appointment held by the principal (see Section 217(b)(1)) [72-31-352(2)(a)]. The term is also incorporated by reference when using the statutory form in Section 301 [72-31-353] to grant authority with respect to "Estates, Trusts, and Other Beneficial Interests" or authority with respect to "Gifts." If a principal wishes to delegate authority to exercise a power that the principal holds in a fiduciary capacity, Section 201(a)(7) [72-31-336 (1)(g)] requires that the power of attorney contain an express grant of such authority. Furthermore, delegation of a power held in a fiduciary capacity is possible only if the principal has authority to delegate the power, and the agent's authority is necessarily limited by whatever terms govern the principal's ability to exercise the power.

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 102, Uniform Power of Attorney Act.

72-31-303. Applicability.

Official Comments

The Uniform Power of Attorney Act is intended to be comprehensive with respect to delegation of surrogate decision making authority over an individual's property and property interests, whether for the purpose of incapacity planning or mere convenience. Given that an agent will likely exercise authority at times when the principal cannot monitor the agent's conduct, the Act specifies minimum agent duties and protections for the principal's benefit. These provisions, however, may not be appropriate for all delegations of authority that might otherwise be included within the definition of a power of attorney. Section 103 [72-31-303] lists delegations of authority that are excluded from the Act because the subject matter of the delegation, the objective of the delegation, the agent's role with respect to the delegation, or a combination of the foregoing, would make application of the Act's provisions inappropriate.

Paragraph (1) [72-31-303(1)] excludes a power to the extent that it is coupled with an interest in the subject of the power. This exclusion addresses situations where, due to the agent's interest in the subject matter of the power, the agent is not intended to act as the principal's fiduciary. See Restatement (Third) of Agency § 3.12 (2006) and M.T. Brunner, Annotation, What Constitutes Power Coupled with Interest within Rule as to Termination of Agency, 28 A.L.R.2d 1243 (1953). Common examples of powers coupled with an interest include powers granted to a creditor to perfect or protect title in, or to sell, pledged collateral. While the example of "a power given to or for the benefit of a creditor in connection with a credit transaction" is highlighted in paragraph (1) [72-31-303(1)], it is not meant to exclude application of paragraph (1) [72-31-303(1)] to other contexts in which a power may be coupled with an interest, such as a power held by an insurer to settle or confess judgment on behalf of an insured. See, e.g., Hayes v. Gessner, 52 N.E.2d 968 (Mass. 1944).

Paragraph (2) [72-31-303(2)] excludes from the Act delegations of authority to make health-care decisions for the principal. Such delegations are covered under other law of the jurisdiction. The Act recognizes, however, that matters of financial management and health-care decision making are often interdependent. The Act consequently provides in Section 114(b)(5) [72-31-319(2)(e)] a default rule that an agent under the Act must cooperate with the principal's health-care decision maker.

Likewise, paragraph (3) [72-31-303(3)] excludes from the Act a proxy or other delegation to exercise voting rights or management rights with respect to an entity. The rules with respect to those rights are typically controlled by entity-specific statutes within a jurisdiction. See, e.g., Model Bus. Corp. Act § 7.22 (2002); Unif. Ltd. Partnership Act § 118 (2001); and Unif. Ltd. Liability Co. Act § 404(e) (1996). Notwithstanding the exclusion of such delegations from the operation of this Act, Section 209 [72-31-344] contemplates that a power granted to an agent with respect to operation of an entity or business includes the authority to "exercise in person or by proxy... a right, power, privilege, or option the principal has or claims to have as the holder of stocks and bonds...." (see paragraph (5) of Section 209) [72-31-344(5)]. Thus, while a person that holds only a proxy pursuant to an entity voting statute will not be subject to the provisions of this Act, an agent that is granted Section 209 [72-31-344] authority is subject to the Act because the principal has given the agent authority that is greater than that of a mere voting proxy. In fact, typical entity statutes contemplate that a principal's agent or "attorney in fact" may appoint a proxy on behalf of the principal. See, e.g., Model Bus. Corp. Act § 7.22 (2002); Unif. Ltd. Partnership Act § 118 (2001); and Unif. Ltd. Liability Co. Act § 404(e) (1996).

Paragraph (4) [72-31-303(4)] excludes from the Act any power created on a governmental form for a governmental purpose. Like the excluded powers in paragraphs (2) and (3) [72-31-303(2) and (3)], the authority for a power created on a governmental form emanates from other law and is generally for a limited purpose. Notwithstanding this exclusion, the Act specifically provides in paragraph (7) of Section 203 [72-31-338(7)] that a grant of authority to an agent includes, with respect to that subject matter, authority to "prepare, execute, and file a record, report, or other document to safeguard or promote the principal's interest under a statute or governmental regulation." Section 203, paragraph (8) [72-31-338(8)], further clarifies that the agent has the authority to "communicate with any representative or employee of a government or governmental subdivision, agency, or instrumentality, on behalf of the principal." The intent of these provisions is to minimize the need for a special power on a governmental form with respect to any subject matter over which an agent is granted authority under the Act.

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 103, Uniform Power of Attorney Act.

72-31-304. Power of attorney is durable.

Official Comments

Section 104 [72-31-304] establishes that a power of attorney created under the Act is durable unless it expressly states otherwise. This default rule is the reverse of the approach under the Uniform Durable Power of Attorney Act and based on the assumption that most principals prefer durability as a hedge against the need for guardianship. See also Section 107 [72-31-307] Comment (noting that the default rules of the jurisdiction's law under which a power of attorney is created, including the default rule for durability, govern the meaning and effect of a power of attorney).

Compiler's Comments

2011 Amendment: Chapter 109 substituted current text for "A power of attorney legally sufficient under this part is durable to the extent that durable powers are permitted by other law of this state and the power of attorney contains language, such as "This power of attorney will continue to be effective if I become disabled, incapacitated, or incompetent." showing the intent of the principal that the power granted may be exercised notwithstanding later disability, incapacity, or incompetency." Amendment effective October 1, 2011.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

Source: Section 104, Uniform Power of Attorney Act.

72-31-305. Execution of power of attorney.

Official Comments

While notarization of the principal's signature is not required to create a valid power of attorney, this section strongly encourages the practice by according acknowledged signatures a statutory presumption of genuineness. Furthermore, because Section 119 [72-31-324] (Acceptance of and Reliance Upon Acknowledged Power of Attorney) and Section 120 [72-31-325] (Liability for Refusal to Accept Acknowledged Power of Attorney, and Alternative B-Liability for Refusal to Accept Acknowledged Statutory Form Power of Attorney) do not apply to unacknowledged powers, persons who are presented with an unacknowledged power of attorney may be reluctant to accept it. As a practical matter, an acknowledged signature is required if the power of attorney will be recorded by the agent in conjunction with the execution of real estate documents on behalf of the principal. See R.P.D., Annotation, Recording Laws as Applied to Power of Attorney under which Deed or Mortgage is Executed, 114 A.L.R. 660 (1938).

This section, at a minimum, requires that the power of attorney be signed by the principal or by another individual who the principal has directed to sign the principal's name. If another individual is directed to sign the principal's name, the signing must occur in the principal's "conscious presence." The 1990 amendments to the Uniform Probate Code codified the "conscious presence" test for the execution of wills (Section 2-502(a)(2)), which generally requires that the signing is sufficient if it takes place within the range of the senses-usually sight or hearing-of the individual who directed that another sign the individual's name. See Unif. Probate Code § 2-502 cmt. (2003). For a discussion of acknowledgment of a signature by an individual whose name is signed by another, see R.L.M., Annotation, Formal Acknowledgment of Instrument by One Whose Name is Signed thereto by Another as an Adoption of the Signature, 57 A.L.R. 525 (1928).

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 105, Uniform Power of Attorney Act.

72-31-306. Validity of power of attorney.

Official Comments

One of the purposes of the Uniform Power of Attorney Act is promotion of the portability and use of powers of attorney. Section 106 [72-31-306] makes clear that the Act does not affect the validity of pre-existing powers of attorney executed under prior law in the enacting jurisdiction, powers of attorney validly created under the law of another jurisdiction, and military powers of attorney. While the effect of this section is to recognize the validity of powers of attorney created under other law, it does not abrogate the traditional grounds for contesting the validity of execution such as forgery, fraud, or undue influence.

This section also provides that unless another law in the jurisdiction requires presentation of the original power of attorney, a photocopy or electronically transmitted copy has the same effect as the original. An example of another law that might require presentation of the original power of attorney is the jurisdiction's recording act. See, e.g., Restatement (Third) of Property (Wills & Don. Trans.) § 6.3 cmt. e (2003) (noting that in order to record a deed, "some states require that the document of transfer be signed, sealed, attested, and acknowledged").

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 106, Uniform Power of Attorney Act.

72-31-307. Meaning and effect of power of attorney.

Official Comments

This section recognizes that a foreign power of attorney, or one executed before the effective date of the Uniform Power of Attorney Act, may have been created under different default rules than those in this Act. Section 107 [72-31-307] provides that the meaning and effect of a power of attorney is to be determined by the law under which it was created. For example, the law in another jurisdiction may provide for different default rules with respect to durability of a power of attorney (see Section 104) [72-31-304], the authority of coagents (see Section 111) [72-31-316] or the scope of specific authority such as the authority to make gifts (see Section 217) [72-31-352]. Section 107 [72-31-307] clarifies that the principal's intended grant of authority will be neither enlarged nor narrowed by virtue of the agent using the power in a different jurisdiction. For a discussion of the issues that can arise with inter-jurisdictional use of powers of attorney, see Linda S. Whitton, Crossing State Lines with Durable Powers, Prob. & Prop., Sept./Oct. 2003, at 28.

This section also establishes an objective means for determining what jurisdiction's law the principal intended to govern the meaning and effect of a power of attorney. The phrase, "the law of the jurisdiction indicated in the power of attorney," is intentionally broad, and includes any statement or reference in a power of attorney that indicates the principal's choice of law. Examples of an indication of jurisdiction include a reference to the name of the jurisdiction in the title or body of the power of attorney, citation to the jurisdiction's power of attorney statute, or an explicit statement that the power of attorney is created or executed under the laws of a particular jurisdiction. In the absence of an indication of jurisdiction in the power of attorney, Section 107 [72-31-307] provides that the law of the jurisdiction in which the power of attorney was executed controls. The distinction between "the law of the jurisdiction indicated in the power of attorney" and "the law of the jurisdiction in which the power of attorney was executed" is an important one. The common practice of property ownership in more than one jurisdiction increases the likelihood that a principal may execute in one jurisdiction a power of attorney that was created and intended to be interpreted under the laws of another jurisdiction. A clear indication of the jurisdiction's law that is intended to govern the meaning and effect of a power of attorney is therefore advisable in all powers of attorney. See, e.g., Section 301 [72-31-353] (providing for the name of the jurisdiction to appear in the title of the statutory form power of attorney).

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 107, Uniform Power of Attorney Act.

72-31-308. Nomination of conservator or guardian — relation of agent to court-appointed fiduciary.

Official Comments

Section 108(b) [72-31-308(2)] is a departure from the Uniform Durable Power of Attorney Act which gave a court-appointed fiduciary the same power to revoke or amend a power of attorney as the principal would have if not incapacitated. See Unif. Durable Power of Atty. Act § 3(a) (1987). In contrast, this Act gives deference to the principal's choice of agent by providing that the agent's authority continues, notwithstanding the later court appointment of a fiduciary, unless the court acts to limit or terminate the agent's authority. This approach assumes that the later-appointed fiduciary's authority should supplement, not truncate, the agent's authority. If, however, a fiduciary appointment is required because of the agent's inadequate performance or breach of fiduciary duties, the court, having considered this evidence during the appointment proceedings, may limit or terminate the agent's authority contemporaneously with appointment of the fiduciary. Section 108(b) [72-31-308(2)] is consistent with the state legislative trend that has departed from the Uniform Durable Power of Attorney Act. See, e.g., 755 Ill. Comp. Stat. Ann. 45/2-10 (West 1992); Ind. Code Ann. § 30-5-3-4 (West 1994); Kan. Stat. Ann. § 58-662 (2005); Mo. Ann. Stat. § 404.727 (West 2001); N.J. Stat. Ann. § 46:2B-8.4 (West 2003); N.M. Stat. Ann. § 45-5-503A (LexisNexis 2004); Utah Code Ann. § 75-5-501 (Supp. 2006); Vt. Stat. Ann. tit. 14, § 3509(a) (2002); Va. Code Ann. § 11-9.1B (2006). Section 108(b) [72-31-308(2)] is also consistent with the Uniform Health-Care Decisions Act § 6(a) (1993), which provides that a guardian may not revoke the ward's advance health-care directive unless the court appointing the guardian expressly so authorizes. Furthermore, it is consistent with the Uniform Guardianship and Protective Proceedings Act (1997), which provides that a guardian or conservator may not revoke the ward's or protected person's power of attorney for health-care or financial management without first obtaining express authority of the court. See Unif. Guardianship & Protective Proc. Act § 316(c) (guardianship), § 411(d) (protective proceedings).

Deference for the principal's autonomous choice is evident both in the presumption that an agent's authority continues unless limited or terminated by the court, and in the directive that the court shall appoint a fiduciary in accordance with the principal's most recent nomination (see subsection (a)) [72-31-308(1)]. Typically, a principal will nominate as conservator or guardian the same individual named as agent under the power of attorney. Favoring the principal's choice of agent and nominee, an approach consistent with most statutory hierarchies for guardian selection (see Unif. Guardianship & Protective Proc. Act § 310(a)(2) (1997)), also discourages guardianship petitions filed for the sole purpose of thwarting the agent's authority to gain control over a vulnerable principal. See Unif. Guardianship & Protective Proc. Act § 310 cmt. (1997). See also Linda S. Ershow-Levenberg, When Guardianship Actions Violate the Constitutionally-Protected Right of Privacy, NAELA News, Apr. 2005, at 1 (arguing that appointment of a guardian when there is a valid power of attorney in place violates the alleged incapacitated person's constitutionally protected rights of privacy and association).

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 108, Uniform Power of Attorney Act.

72-31-309. When power of attorney effective.

Official Comments

This section establishes a default rule that a power of attorney is effective when executed. If the principal chooses to create what is commonly known as a "springing" or contingent power of attorney-one that becomes effective at a future date or upon a future event or contingency-the principal may authorize the agent or someone else to provide written verification that the event or contingency has occurred (subsection (b)) [72-31-309(2)]. Because the person authorized to verify the principal's incapacitation will likely need access to the principal's health information, subsection (d) [72-31-309(4)] qualifies that person to act as the principal's "personal representative" for purposes of the Health Insurance Portability and Accountability Act (HIPAA). See 45 C.F.R. § 164.502(g)(1)-(2) (2006) (providing that for purposes of disclosing an individual's protected health information, "a covered entity must... treat a personal representative as the individual"). Section 109 [72-31-309] does not, however, empower the agent to make health-care decisions for the principal. See Section 103 [72-31-303] and comment (discussing exclusion from this Act of powers to make health-care decisions).

The default rule reflects a "best practices" philosophy that any agent who can be trusted to act for the principal under a springing power of attorney should be trustworthy enough to hold an immediate power. Survey evidence suggests, however, that a significant number of principals still prefer springing powers, most likely to maintain privacy in the hope that they will never need a surrogate decision maker. See Linda S. Whitton, National Durable Power of Attorney Survey Results and Analysis, National Conference of Commissioners on Uniform State Laws, 6-7 (2002), http://www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm (reporting that 23% of lawyer respondents found their clients preferred springing powers, 61% reported a preference for immediate powers, and 16% saw no trend; however, 89% stated that a power of attorney statute should authorize springing powers).

If the principal's incapacity is the trigger for a springing power of attorney and the principal has not authorized anyone to make that determination, or the authorized person is unable or unwilling to make the determination, this section provides a default mechanism to trigger the power. Incapacity based on the principal's impairment may be verified by a physician or licensed psychologist (subsection (c)(1)) [72-31-309(3)(a)], and incapacity based on the principal's unavailability (i.e., the principal is missing, detained, or unable to return to the United States) may be verified by an attorney at law, judge, or an appropriate governmental official (subsection (c)(2)) [72-31-309(3)(b)]. Examples of appropriate governmental officials who may be in a position to determine that the principal is incapacitated within the meaning of Section 102(5)(B) [72-31-302(5)(b)] include an officer acting under authority of the United States Department of State or uniformed services of the United States or a sworn federal or state law enforcement officer. The default mechanism for triggering a power of attorney is available only when no incapacity determination has been made. It is not available to challenge the determination made by the principal's authorized designee.

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 109, Uniform Power of Attorney Act.

72-31-310. Termination of power of attorney or agent's authority.

Official Comments

This section addresses termination of a power of attorney or an agent's authority under a power of attorney. It first lists termination events (see subsections (a) and (b)) [72-31-310(1) and (2)], and then lists circumstances that, in contrast, either do not invalidate the power of attorney (see subsections (c) and (f)) [72-31-310(3) and (6)] or the actions taken pursuant to the power of attorney (see subsections (d) and (e)) [72-31-310(4) and (5)].

Subsection (c) [72-31-310(3)] provides that a power of attorney under the Act does not become "stale." Unless a power of attorney provides for termination upon a certain date or after the passage of a period of time, lapse of time since execution is irrelevant to validity, a concept carried over from the Uniform Durable Power of Attorney Act. See Unif. Durable Power of Atty. Act § 1 (as amended in 1987). Similarly, subsection (f) [72-31-310(6)] clarifies that a subsequently executed power of attorney will not revoke a prior power of attorney by virtue of inconsistency alone. To effect a revocation, a subsequently executed power of attorney must expressly revoke a previously executed power of attorney or state that all other powers of attorney are revoked. The requirement of express revocation prevents inadvertent revocation when the principal intends for one agent to have limited authority that overlaps with broader authority held by another agent. For example, the principal who has given one agent a very broad power of attorney, including general authority with respect to real property, may later wish to give another agent limited authority to execute closing documents with respect to out-of-town real estate.

Subsections (d) and (e) [72-31-310(4) and (5)] emphasize that even a termination event is not effective as to the agent or person who, without actual knowledge of the termination event, acts in good faith under the power of attorney. For example, the principal's death terminates a power of attorney (see subsection (a)(1)) [72-31-310(1)(a)], but an agent who acts in good faith under a power of attorney without actual knowledge of the principal's death will bind the principal's successors in interest with that action (see subsection (d)) [72-31-310(4)]. The same result is true if the agent knows of the principal's death, but the person who accepts the agent's apparent authority has no actual knowledge of the principal's death. See Restatement (Third) of Agency § 3.11 (2006) (stating that "termination of actual authority does not by itself end any apparent authority held by an agent"). See also Section 119 (c) [72-31-324(3)] (stating that "[a] person that in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney is... terminated... may rely upon the power of attorney as if the power of attorney were... still in effect...."). These concepts are also carried forward from the Uniform Durable Power of Attorney Act. See Unif. Durable Power Atty. Act § 4 (1987).

Of special note in the list of termination events is subsection (b)(3) [72-31-310(2)(c)] which provides that a spouse-agent's authority is revoked when an action is filed for the dissolution or annulment of the agent's marriage to the principal, or their legal separation. Although the filing of an action for dissolution or annulment might render a principal particularly vulnerable to self-interested actions by a spouse-agent, subsection (b)(3) [72-31-310(2)(c)] is not mandatory and may be overridden in the power of attorney. There may be special circumstances precipitating the dissolution, such as catastrophic illness and the need for public benefits, that would prompt the principal to specify that the agent's authority continues notwithstanding dissolution, annulment or legal separation.

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 110, Uniform Power of Attorney Act.

72-31-316. Coagents or successor agents.

Official Comments

This section provides several default rules that merit careful consideration by the principal. Subsection (a) [72-31-316(1)] states that if a principal names coagents, each coagent may exercise its authority independently unless otherwise directed in the power of attorney. The Act adopts this default position to discourage the practice of executing separate, co-extensive powers of attorney in favor of different agents, and to facilitate transactions with persons who are reluctant to accept a power of attorney from only one of two or more named agents. This default rule should not, however, be interpreted as encouraging the practice of naming coagents. For a principal who can still monitor the activities of an agent, naming coagents multiplies monitoring responsibilities and significantly increases the risk that inconsistent actions will be taken with the principal's property. For the incapacitated principal, the risk is even greater that coagents will use the power of attorney to vie for control of the principal and the principal's property. Although the principal can override the default rule by requiring coagents to act by majority or unanimous consensus, such a requirement impedes use of the power of attorney, especially among agents who do not share close physical or philosophical proximity. A more prudent practice is generally to name one original agent and one or more successor agents. If desirable, a principal may give the original agent authority to delegate the agent's authority during periods when the agent is temporarily unavailable to serve (see Section 201(a)(5)) [72-31-336(1)(e)].

Subsection (b) [72-31-316(2)] states that unless a power of attorney otherwise provides, a successor agent has the same authority as that granted to the original agent. While this default provision ensures that the scope of authority granted to the original agent can be carried forward by successors, a principal may want to consider whether a successor agent is an appropriate person to exercise all of the authority given to the original agent. For example, authority to make gifts, to create, amend, or revoke an inter vivos trust, or to create or change survivorship and beneficiary designations (see Section 201(a)) [72-31-336(1)] may be appropriate for a spouse-agent, but not for an adult child who is named as the successor agent.

Subsection (c) [72-31-316(3)] provides a default rule that an agent is not liable for the actions of another agent unless the agent participates in or conceals the breach of fiduciary duty committed by that other agent. Consequently, absent specification to the contrary in the power of attorney, an agent has no duty to monitor another agent's conduct. However, subsection (d) [72-31-316(4)] does require that an agent that has actual knowledge of a breach or imminent breach of fiduciary duty must notify the principal, and if the principal is incapacitated, take reasonably appropriate action to safeguard the principal's best interest. Subsection (d) [72-31-316(4)] provides that if an agent fails to notify the principal or to take action to safeguard the principal's best interest, that agent is only liable for the reasonably foreseeable damages that could have been avoided had the agent provided the required notification.

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 111, Uniform Power of Attorney Act.

72-31-317. Reimbursement and compensation of agent.

Official Comments

This section provides a default rule that an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to reasonable compensation. While it is unlikely that a principal would choose to alter the default rule as to expenses, a principal's circumstances may warrant including limitations in the power of attorney as to the categories of expenses the agent may incur; likewise, the principal may choose to specify the terms of compensation rather than leave that determination to a reasonableness standard. Although many family-member agents serve without compensation, payment of compensation to the agent may be advantageous to the principal in circumstances where the principal needs to spend down income or resources to meet qualifications for public benefits.

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 112, Uniform Power of Attorney Act.

72-31-318. Agent's acceptance.

Official Comments

This section establishes a default rule for agent acceptance of appointment under a power of attorney. Unless a different method is provided in the power of attorney, an agent's acceptance occurs upon exercise of authority, performance of duties, or any other assertion or conduct indicating acceptance. Acceptance is the critical reference point for commencement of the agency relationship and the imposition of fiduciary duties (see Section 114(a)) [72-31-319(1)]. Because a person may be unaware that the principal has designated the person as an agent in a power of attorney, clear demarcation of when an agency relationship commences is necessary to protect both the principal and the agent. See Karen E. Boxx, The Durable Power of Attorney's Place in the Family of Fiduciary Relationships, 36 Ga. L. Rev. 1, 41 (2001) (noting that "fiduciary duties should be imposed only to the extent the attorney-in-fact knows of the role, is able to accept responsibility, and affirmatively accepts"). The Act also provides a default method for agent resignation (see Section 118) [72-31-323], which terminates the agency relationship (see Section 110(b)(2)) [72-31-310(2)(b)].

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 113, Uniform Power of Attorney Act.

72-31-319. Agent's duties.

Official Comments

Although well settled that an agent under a power of attorney is a fiduciary, there is little clarity in state power of attorney statutes about what that means. See generally Karen E. Boxx, The Durable Power of Attorney's Place in the Family of Fiduciary Relationships, 36 Ga. L. Rev. 1 (2001); Carolyn L. Dessin, Acting as Agent under a Financial Durable Power of Attorney: An Unscripted Role, 75 Neb. L. Rev. 574 (1996). Among states that address agent duties, the standard of care varies widely and ranges from a due care standard (see, e.g., 755 Ill. Comp. Stat. Ann. 45/2-7 (West 1992); Ind. Code Ann. § 30-5-6-2 (West 1994)) to a trustee-type standard (see, e.g., Fla. Stat. Ann. § 709.08(8) (West 2000 & Supp. 2006); Mo. Ann. Stat. § 404.714 (West

2001)). Section 114 [72-31-319] clarifies agent duties by articulating minimum mandatory duties (subsection (a)) [72-31-319(1)] as well as default duties that can be modified or omitted by the principal (subsection (b)) [72-31-319(2)].

The mandatory duties-acting in accordance with the principal's reasonable expectations, if known, and otherwise in the principal's best interest; acting in good faith; and acting only within the scope of authority granted-may not be altered in the power of attorney. Establishing the principal's reasonable expectations as the primary guideline for agent conduct is consistent with a policy preference for "substituted judgment" over "best interest" as the surrogate decision-making standard that better protects an incapacitated person's self-determination interests. See Wingspan-The Second National Guardianship Conference, Recommendations, 31 Stetson L. Rev. 595, 603 (2002). See also Unif. Guardianship & Protective Proc. Act § 314(a) (1997).

The Act does not require, nor does common practice dictate, that the principal state expectations or objectives in the power of attorney. In fact, one of the advantages of a power of attorney over a trust or guardianship is the flexibility and informality with which an agent may exercise authority and respond to changing circumstances. However, when a principal's subjective expectations are potentially inconsistent with an objective best interest standard, good practice suggests memorializing those expectations in a written and admissible form as a precaution against later challenges to the agent's conduct (see Section 116) [72-31-321].

If a principal's expectations potentially conflict with a default duty under the Act, then stating the expectations in the power of attorney, or altering the default rule to accommodate the expectations, or both, is advisable. For example, a principal may want to invest in a business owned by a family member who is also the agent in order to improve the economic position of the agent and the agent's family. Without the principal's clear expression of this objective, investment by the agent of the principal's property in the agent's business may be viewed as breaching the default duty to act loyally for the principal's benefit (subsection (b)(1)) [72-31-319(2)(a)] or the default duty to avoid conflicts of interest that impair the agent's ability to act impartially for the principal's best interest (subsection (b)(2)) [72-31-319(2)(b)].

Two default duties in this section protect the principal's previously-expressed choices. These are the duty to cooperate with the person authorized to make health-care decisions for the principal (subsection (b)(5)) [72-31-319(2)(e)] and the duty to preserve the principal's estate plan (subsection (b)(6)) [72-31-319(2)(f)]. However, an agent has a duty to preserve the principal's estate plan only to the extent the plan is actually known to the agent and only if preservation of the estate plan is consistent with the principal's best interest. Factors relevant to determining whether preservation of the estate plan is in the principal's best interest include the value of the principal's property, the principal's need for maintenance, minimization of taxes, and eligibility for public benefits. The Act protects an agent from liability for failure to preserve the estate plan if the agent has acted in good faith (subsection (c)) [72-31-319(3)].

Subsection (d) [72-31-319(4)] provides that an agent acting with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has a conflict of interest. This position is a departure from the traditional common law duty of loyalty which required an agent to act solely for the benefit of the principal. See Restatement (Second) of Agency § 387 (1958); see also Unif. Trust Code § 802(a) (2003) (requiring a trustee to administer a trust "solely in the interests" of the beneficiary). Subsection (d) [72-31-319(4)] is modeled after state statutes which provide that loyalty to the principal can be compatible with an incidental benefit to the agent. See Cal. Prob. Code § 4232(b) (West Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/2-7 (West 1992); Ind. Code Ann. § 30-5-9-2 (West 1994 & Supp. 2005). The Restatement (Third) of Agency § 8.01 (2006) also contemplates that loyal service to the principal may be concurrently beneficial to the agent (see Reporter's note a). See also John H. Langbein, Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?, 114 Yale L.J. 929, 943 (2005) (arguing that the sole interest test for loyalty should be replaced by the best interest test). The public policy which favors best interest over sole interest as the benchmark for agent loyalty comports with the practical reality that most agents under powers of attorney are family members who have inherent conflicts of interest with the principal arising from joint property ownership or inheritance expectations.

Subsection (e) [72-31-319(5)] provides additional protection for a principal who has selected an agent with special skills or expertise by requiring that such skills or expertise be considered when evaluating the agent's conduct. If a principal chooses to appoint a family member or close friend to serve as an agent, but does not intend that agent to serve under a higher standard because of special skills or expertise, the principal should consider including an exoneration provision within the power of attorney (see comment to Section 115 [72-31-320].

Subsections (f) and (g) [72-31-319(6) and (7)] state protections for an agent that are similar in scope to those applicable to a trustee. Subsection (f) [72-31-319(6)] holds an agent harmless for decline in the value of the principal's property absent a breach of fiduciary duty (cf. Unif. Trust Code § 1003(b) (2003)). Subsection (g) [72-31-319(7)] holds an agent harmless for the conduct of a person to whom the agent has delegated authority, or who has been engaged by the agent on the principal's behalf, provided the agent has exercised care, competence, and diligence in selecting and monitoring the person (cf. Unif. Trust Code § 807(c) (2003).

Subsection (h) [72-31-319(8)] codifies the agent's common law duty to account to a principal (see Restatement (Third) of Agency § 8.12 (2006); Restatement (First) of Agency § 382 (1933)). Rather than create an affirmative duty of periodic accounting, subsection (h) [72-31-319(8)] states that the agent is not required to disclose receipts, disbursements or transactions unless ordered by a court or requested by the principal, a fiduciary acting for the principal, or a governmental agency with authority to protect the welfare of the principal. If the principal is deceased, the principal's personal representative or successor in interest may request an agent to account. While there is no affirmative duty to account unless ordered by the court or requested by one of the foregoing persons, subsection (b)(4) [72-31-319(2)(d)] does create a default duty to keep records.

The narrow categories of persons that may request an agent to account are consistent with the premise that a principal with capacity should control to whom the details of financial transactions are disclosed. If a principal becomes incapacitated or dies, then the principal's fiduciary or personal representative may succeed to that monitoring function. The inclusion of a governmental agency (such as Adult Protective Services) in the list of persons that may request an agent to account is patterned after state legislative trends and is a response to growing national concern about financial abuse of vulnerable persons. See 755 Ill. Comp. Stat. Ann. 45/2-7.5 (West Supp. 2006 & 2006 Ill. Legis. Serv. 1754); 20 Pa. Cons. Stat. Ann. § 5604(d) (West 2005); Vt. Stat. Ann. tit.14, § 3510(b) (2002 & 2006-3 Vt. Adv. Legis. Serv. 228). See generally Donna J. Rabiner, David Brown & Janet O'Keeffe, Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them, 16 J. Elder Abuse & Neglect 65 (2004). As an additional protective counter-measure to the narrow categories of persons who may request an agent to account, the Act contains a broad standing provision for seeking judicial review of an agent's conduct. See Section 116 [72-31-321] and Comment.

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 114, Uniform Power of Attorney Act.

72-31-320. Exoneration of agent.

Official Comments

This section permits a principal to exonerate an agent from liability for breach of fiduciary duty, but prohibits exoneration for a breach committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal. The mandatory minimum standard of conduct required of an agent is equivalent to the good faith standard applicable to trustees. A trustee's failure to adhere to that standard cannot be excused by language in the trust instrument. See Unif. Trust Code § 1008 cmt. (2003) (noting that "a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries"). See also Section 102(4) [72-31-302(4)] (defining good faith for purposes of the Act as "honesty in fact"). Section 115 [72-31-320] provides, as an additional measure of protection for the principal, that an exoneration provision is not binding if it was inserted as the result of abuse of a confidential or fiduciary relationship with the principal. While as a matter of good practice an exoneration provision should be the exception rather than the rule, its inclusion in a power of attorney may be useful in meeting particular objectives of the principal. For example, if the principal is concerned that contentious family members will attack the agent's conduct in order to gain control of the principal's assets, an exoneration provision may deter such action or minimize the likelihood of success on the merits.

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 115, Uniform Power of Attorney Act.

72-31-321. Judicial relief.

Official Comments

The primary purpose of this section is to protect vulnerable or incapacitated principals against financial abuse. Subsection (a) [72-31-321(1)] sets forth broad categories of persons who have standing to petition the court for construction of the power of attorney or review of the agent's conduct, including in the list a "person that demonstrates sufficient interest in the principal's welfare" (subsection (a)(8)) [72-31-321(1)(h)]. Allowing any person with sufficient interest to petition the court is the approach taken by the majority of states that have standing provisions. See Cal. Prob. Code § 4540 (West Supp. 2006); Colo. Rev. Stat. Ann. § 15-14-609 (West 2005); 755 Ill. Comp. Stat. Ann. 45/2-10 (West 1992); Ind. Code Ann. § 30-5-3-5 (West 1994); Kan. Stat. Ann.§ 58-662 (2005); Mo. Ann. Stat. § 404.727 (West 2001); N.H. Rev. Stat. Ann. § 506:7 (LexisNexis 1997 & Supp. 2005); Wash. Rev. Code Ann. § 11.94.100 (Supp. 2006); Wis. Stat. Ann. § 243.07(6r) (West 2001). But cf. 20 Pa. Cons. Stat. Ann. § 5604 (West 2005) (limiting standing to an agency acting pursuant to the Older Adults Protective Services Act); Vt. Stat. Ann. tit.14, § 3510(b) (2002 & 2006-3 Vt. Adv. Legis. Serv. 228) (limiting standing to the commissioner of disabilities, aging, and independent living).

In addition to providing a means for detecting and redressing financial abuse by agents, this section protects the self-determination rights of principals. Subsection (b) [72-31-321(2)] states that the court must dismiss a petition upon the principal's motion unless the court finds that the principal lacks the capacity to revoke the agent's authority or the power of attorney. Contrasted with the breadth of Section 116 [72-31-321] is Section 114(h) [72-31-319(8)] which narrowly limits the persons who can request an agent to account for transactions conducted on the principal's behalf. The rationale for narrowly restricting who may request an agent to account is the preservation of the principal's financial privacy. See Section 114 [72-31-319] Comment. Section 116 [72-31-321] operates as a check-and-balance on the narrow scope of Section 114(h) [72-31-319(8)] and provides what, in many circumstances, may be the only means to detect and stop agent abuse of an incapacitated principal.

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 116, Uniform Power of Attorney Act.

72-31-322. Agent's liability.

Official Comments

This section provides that an agent's liability for violating the Act includes not only the amount necessary to restore the principal's property to what it would have been had the violation not occurred, but also any amounts for attorney's fees and costs advanced from the principal's property on the agent's behalf. This section does not, however, limit the agent's liability exposure to these amounts. Pursuant to Section 123 [72-31-328], remedies under the Act are not exclusive. If a jurisdiction has enacted separate statutes to deal with financial abuse, an agent may face additional civil or criminal liability. For a discussion of state statutory responses to financial abuse, see Carolyn L. Dessin, Financial Abuse of the Elderly: Is the Solution a Problem?, 34 McGeorge L. Rev. 267 (2003).

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 117, Uniform Power of Attorney Act.

72-31-323. Agent's resignation — notice.

Official Comments

Section 118 [72-31-323] provides a default procedure for an agent's resignation. An agent who no longer wishes to serve should formally resign in order to establish a clear demarcation of the end of the agent's authority and to minimize gaps in fiduciary responsibility before a successor accepts the office. If the principal still has capacity when the agent wishes to resign, this section requires only that the agent give notice to the principal. If, however, the principal is incapacitated, the agent must, in addition to giving notice to the principal, give notice as set forth in paragraphs (1) or (2) [72-31-323(1) or (2)].

Paragraph (1) [72-31-323(1)] provides that notice must be given to a fiduciary, if one has been appointed, and to a coagent or successor agent, if any. If the principal does not have an appointed fiduciary and no coagent or successor agent is named in the power of attorney, then the agent may choose among the notice options in paragraph (2) [72-31-323(2)]. Paragraph (2) [72-31-323(2)] permits the resigning agent to give notice to the principal's caregiver, a person reasonably believed to have sufficient interest in the principal's welfare, or a governmental agency having authority to protect the welfare of the principal. The choice among these options is intentionally left to the agent's discretion and is governed by the same standards as apply to other agent conduct. See Section 114(a) [72-31-319(1)] (requiring the agent to act in accordance with the principal's reasonable expectations, if known, and otherwise in the principal's best interest).

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 118, Uniform Power of Attorney Act.

72-31-324. Acceptance of and reliance upon acknowledged power of attorney.

Official Comments

This section protects persons who in good faith accept an acknowledged power of attorney. Section 119 [72-31-324] does not apply to unacknowledged powers of attorney. See Section 105 [72-31-305] (providing that the signature on a power of attorney is presumed genuine if acknowledged). Subsection (a) [72-31-324(1)] states that for purposes of this section and Section 120 [72-31-325] "acknowledged" means "purportedly" verified before an individual authorized to take acknowledgments. The purpose of this definition is to protect a person that in good faith accepts an acknowledged power of attorney without knowledge that it contains a forged signature or a latent defect in the acknowledgment. See, e.g., Cal. Prob. Code § 4303(a)(2) (West Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/2-8 (Supp. 2006); Ind. Code Ann. § 30-5-8-2 (West 1994); N.C. Gen. Stat. § 32A-40 (2005). The Act places the risk that a power of attorney is invalid upon the principal rather than the person that accepts the power of attorney. This approach promotes acceptance of powers of attorney, which is essential to their effectiveness as an alternative to guardianship. The national survey conducted by the Joint Editorial Board for Uniform Trust and Estate Acts (see Prefatory Note) found that a majority of respondents had difficulty obtaining acceptance of powers of attorney. Sixty-three percent reported occasional difficulty and seventeen percent reported frequent difficulty. Linda S. Whitton, National Durable Power of Attorney Survey Results and Analysis, National Conference of Commissioners on Uniform State Laws 12-13 (2002), available at http://www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm.

Section 119 [72-31-324] permits a person to rely in good faith on the validity of the power of attorney, the validity of the agent's authority, and the propriety of the agent's exercise of authority, unless the person has actual knowledge to the contrary (subsection (c)) [72-31-324(3)]. Although a person is not required to investigate whether a power of attorney is valid or the agent's exercise of authority proper, subsection (d) [72-31-324(4)] permits a person to request an agent's certification of any factual matter (see Section 302 [72-31-354] for a sample certification form) and an opinion of counsel as to any matter of law. If the power of attorney contains, in whole or part, language other than English, an English translation may also be requested. Further protection is provided in subsection (f) [72-31-324(6)] for persons that conduct activities through employees. Subsection (f) [72-31-324(6)] states that for purposes of Sections 119 and 120 [72-31-324 and 72-31-325], a person is without actual knowledge of a fact if the employee conducting the transaction is without actual knowledge of the fact.

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 119, Uniform Power of Attorney Act.

72-31-325. Liability for refusal to accept acknowledged power of attorney.

Official Comments

As a complement to Section 119 [72-31-324], Section 120 [72-31-325] enumerates the bases for legitimate refusals of a power of attorney as well as sanctions for refusals that violate the Act. Like Section 119, [72-31-324] Section 120 [72-31-325] does not apply to unacknowledged powers of attorney.

Subsection (b) [72-31-325(2)] of Section 120 [72-31-325] provides the bases upon which an acknowledged power of attorney may be refused without liability. The last paragraph of subsection (b) [72-31-325(2)] permits refusal of an otherwise valid acknowledged power of attorney that does not meet any of the other bases for refusal if the person in good faith believes that the principal is subject to abuse by the agent or someone acting in concert with the agent (paragraph (6)) [72-31-325(2)(f)]. A refusal under this paragraph is protected if the person makes, or knows another person has made, a report to the governmental agency authorized to protect the welfare of the principal. Pennsylvania has a similar provision. See 20 Pa. Cons. Stat. Ann. § 5608(a) (West 2005).

Unless a basis exists in subsection (b) [72-31-325(2)] for refusing an acknowledged power of attorney, subsection (a) [72-31-325(1)] requires that, within seven business days after the power of attorney is presented, a person must either accept the power of attorney or request a certification, a translation, or an opinion of counsel pursuant to Section 119 [72-31-324]. If a request under Section 119 [72-31-324], is made, the person must decide to accept or reject the power of attorney no later than five business days after receipt of the requested document (subsection (a)(2)) [72-31-325(1)(b)]. Provided no basis exists for refusing the power of attorney, subsection (a)(3) [72-31-325(1)(c)] prohibits a person from requesting an additional or different form of power of attorney for authority granted in the power of attorney presented.

Subsection (c) of Section 120 [72-31-325(3)] provides that a person that refuses an acknowledged power of attorney in violation of Section 120 [72-31-325] is subject to a court order mandating acceptance and to reasonable attorney's fees and costs incurred in the action to confirm the validity of the power of attorney or to mandate acceptance. Statutory liability for unreasonable refusal of a power of attorney is based on a growing state legislative trend. See, e.g., Alaska Stat. § 13.26.353(c) (2004); Cal. Prob. Code § 4306(a) (West Supp. 2006); Fla. Stat. Ann. § 709.08(11) (West 2000 & Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/ 2-8 (West 1992); Ind. Code Ann. § 30-5-9-9 (West Supp. 2005); Minn. Stat. Ann. § 523.20 (West 2006); N.Y. Gen. Oblig. Law § 5-1504 (McKinney 2001); N.C. Gen. Stat. § 32A-41 (2005); 20 Pa. Cons. Stat. Ann. § 5608 (West 2005); S.C. Code Ann. § 62-5-501(F)(1) (Supp. 2005).

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 120, Uniform Power of Attorney Act.

72-31-326. Principles of law and equity.

Official Comments

The Act is supplemented by common law, including the common law of agency, where provisions of the Act do not displace relevant common law principles. The common law of agency is articulated in the Restatement of Agency and includes contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. The common law also includes the traditional and broad equitable jurisdiction of the court, which this Act in no way restricts.

The statutory text of the Uniform Power of Attorney Act is also supplemented by these comments, which, like the comments to any Uniform Act, may be relied on as a guide for interpretation. See Acierno v. Worthy Bros. Pipeline Corp., 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform Commercial Code); Yale University v. Blumenthal, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act); 2B Norman Singer, Southerland Statutory Construction § 52.5 (6th ed. 2000).

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 121, Uniform Power of Attorney Act.

72-31-327. Laws applicable to financial institutions and entities.

Official Comments

This section addresses concerns of representatives from the banking and insurance industries that there may be regulations which govern those entities that conflict with provisions of this Act. Although no specific conflicts were identified during the drafting process, Section 122 [72-31-327] provides that in the event a law applicable to a financial institution or other entity is inconsistent with this Act, the other law will supersede this Act to the extent of the inconsistency. This concern about inconsistency with the requirements of other law is already substantially addressed in Section 120 [72-31-325], which provides, in pertinent part, that a person is not required to accept a power of attorney if, "the person is not otherwise required to engage in a transaction with the principal in the same circumstances," or "engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law."

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 122, Uniform Power of Attorney Act.

72-31-328. Remedies under other law.

Official Comments

The remedies under the Act are not intended to be exclusive with respect to causes of action that may accrue in relation to a power of attorney. The Act applies to many persons, individual and entity (see Section 102(6) [72-31-302(6)] (defining "person" for purposes of the Act)), that may serve as agents or that may be asked to accept a power of attorney. Likewise, the Act applies to many subject areas (see Article 2 [72-31-336 through 72-31-352]) over which principals may delegate authority to agents. Remedies under other laws which govern such persons and subject matters should be considered by aggrieved parties in addition to remedies available under this Act. See, e.g., Section 117 [72-31-322] Comment.

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 123, Uniform Power of Attorney Act.

72-31-336. Authority that requires specific grant — grant of general authority.

Official Comments

This section distinguishes between grants of specific authority that require express language in a power of attorney and grants of general authority. Section 201(a) [72-31-336(1)] enumerates the acts that require an express grant of specific authority and which may not be inferred from a grant of general authority. This approach follows a growing trend among states to require express specific authority for such actions as making a gift, creating or revoking a trust, and using other non-probate estate planning devices such as survivorship interests and beneficiary designations. See, e.g., Cal. Prob. Code § 4264 (West Supp. 2006); Kan. Stat. Ann. § 58-654(f) (2005); Mo. Ann. Stat. § 404.710 (West 2001); Wash. Rev. Code Ann. § 11.94.050 (West Supp. 2006). The rationale for requiring a grant of specific authority to perform the acts enumerated in subsection (a) [72-31-336(1)] is the risk those acts pose to the principal's property and estate plan. Although risky, such authority may nevertheless be necessary to effectuate the principal's property management and estate planning objectives. Ideally, these are matters about which the principal will seek advise before granting authority to an agent.

The Act does not contain statutory construction language for any of the acts enumerated in subsection (a) [72-31-336(1)] other than the making of gifts (see Section 217) [72-31-352]. Because a gift of the principal's property reduces the principal's estate, the Act, like a number of state statutes, sets default per-donee limits on gift amounts. See, e.g., N.Y. Gen. Oblig. Law § 5-1502M (McKinney 2001); 20 Pa. Cons. Stat. Ann. § 5603(a)(2)(ii) (West 2005). However, as with any authority incorporated by reference in a power of attorney, the principal may enlarge or restrict the default parameters set by the Act.

With respect to other acts listed in Section 201(a) [72-31-336(1)], the Act contemplates that the principal will specify any special instructions in the power of attorney to further define or limit the authority granted. For example, if a principal grants authority to create or change rights of survivorship (subsection (a)(3)) [72-31-336(1)(c)] or beneficiary designations (subsection (a)(4)) [72-31-336(1)(d)] the principal may choose to restrict that authority to specifically identified property interests, accounts, or contracts. Principals should carefully consider not only whether to authorize any of the acts listed in Section 201(a) [72-31-336(1)], but also whether to limit the scope of such actions.

Subsection (b) [72-31-336(2)] contains an additional safeguard for the principal. It establishes as a default rule that an agent who is not an ancestor, spouse, or descendant of the principal may not exercise authority to create in the agent or in an individual the agent is legally obligated to support, an interest in the principal's property. For example, a non-relative agent with gift making authority could not make a gift to the agent or a dependant of the agent without the principal's express authority in the power of attorney. In contrast, a spouse-agent with express gift-making authority could implement the principal's expectation that annual family gifts be continued without additional authority in the power of attorney.

Notwithstanding a grant of authority to perform any of the enumerated acts in subsection (a) [72-31-336(1)], an agent is bound by the mandatory fiduciary duties set forth in Section 114(a) [72-31-319(1)], as well as the default duties that the principal has not modified. For a list of these default rules, see Section 301 [72-31-353] Comment. If the principal's expectations for the performance of authorized acts potentially conflict with those duties, then clarification of the principal's expectations, modification of the default duties, or both, may be advisable. See Section 114 [72-31-319] Comment.

Authority for acts and subject matters other than those listed in Section 201(a) [72-31-336(1)] may be granted either through incorporation by reference (see Section 202) [72-31-337] or, if the principal wishes to grant comprehensive general authority, by a grant of authority to do all the acts that a principal could do. A broad grant of general authority is interpreted under the Act as including all of the subject matters and authority described in Sections 204 through 216 [72-31-339 through 72-31-351] (see subsection (c)) [72-31-336(3)].

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 201, Uniform Power of Attorney Act.

Case Notes

Requisite Capacity to Execute Estate Documents Challenged — Finding of Capacity Upheld: The decedent was diagnosed with cancer and given a month to live. A month later, he was admitted to the hospital, where he signed a durable power of attorney and a pour-over will, in which he appointed his longtime companion as his personal representative. The decedent's brother filed suit and argued that the decedent had lacked the requisite mental capacity to execute documents regarding the distribution of his estate. In support of his claim, the brother testified that the decedent had been confused and disoriented in the hospital. At trial, however, medical records indicated the decedent was alert at the hospital and witnesses testified that the decedent was not confused. On appeal, Supreme Court affirmed, concluding that the decedent had possessed the requisite mental capacity to execute the estate documents. In re Estate of Cook, 2020 MT 240, 401 Mont. 374, 472 P.3d 1179.

72-31-337. Incorporation of authority.

Official Comments

This section provides two methods for incorporating into a power of attorney the Act's statutory construction for authority over various subject matters. A reference in a power of attorney to the descriptive term for a subject in Sections 204 through 217 [72-31-339 through 72-31-352], or to the section number, incorporates the entire statutory section as if it were set out in full in the power of attorney. Subsection (c) [72-31-337(3)] provides that a principal may modify any authority incorporated by reference. The optional statutory form power of attorney provided in Section 301 [72-31-353] uses the descriptive terms in Sections 204 through 217 [72-31-339 through 72-31-352] to incorporate statutory construction for authority granted on the form and provides a "Special Instructions" section where the principal may modify any authority incorporated by reference.

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 202, Uniform Power of Attorney Act.

72-31-338. Construction of authority generally.

Official Comments

This section is based on Section 3 of the Uniform Statutory Form Power of Attorney Act. It describes incidental types of authority that accompany all authority granted to an agent under each of Sections 204 through 217 [72-31-339 through 72-31-352], unless this incidental authority is modified in the power of attorney. The actions authorized in Section 203 [72-31-338] are of the type often necessary for the exercise or implementation of authority over the subjects described in Sections 204 through 217 [72-31-339 through 72-31-352]. See Unif. Statutory Form Power of Atty. Act prefatory note (1988). Paragraph (10) [72-31-338(10)], which states that an agent is authorized to "do any lawful act with respect to the subject and all property related to the subject," emphasizes that a grant of general authority is intended to be comprehensive unless otherwise limited by the Act or the power of attorney. Paragraphs (8) and (9) [72-31-338(8) and (9)] were added to the section to clarify that this comprehensive authority includes authorization to communicate with government employees on behalf of the principal, to access communications intended for the principal, and to communicate on behalf of the principal using all modern means of communication.

Compiler's Comments

2011 Amendment: Chapter 109 substituted introductory language for "By executing a statutory power of attorney with respect to a subject listed in 72-31-201(1), the principal, except as limited or extended by the principal in the power of attorney, empowers the agent for that subject to"; in (2) near middle substituted "cancel, terminate, reform, restate" for "reform"; in (3) substituted current text for "execute, acknowledge, seal, and deliver a deed, revocation, mortgage, lease, notice, check, release, or other instrument the agent considers desirable to accomplish a purpose of a transaction"; in (4) at beginning substituted "initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept" for "prosecute, defend, submit to arbitration, settle, and propose or accept"; in (5) after "assistance of a court" inserted "or other governmental agency"; in (6) after "accountant" inserted "discretionary investment manager" and at end substituted "advisor" for "assistant"; deleted former (7) that read: "(7) keep appropriate records of each transaction, including an accounting of receipts and disbursements"; in (7) after "or other document" deleted "the agent considers desirable" and after "under a statute or" deleted "governmental"; deleted former (9) that read: "(9) reimburse the agent for expenditures properly made by the agent in exercising the powers granted by the power of attorney; and"; inserted (8) and (9) concerning communications; in (10) at beginning deleted "in general" and at end inserted "and all property related to the subject"; and made minor changes in style. Amendment effective October 1, 2011.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

Source: Section 203, Uniform Power of Attorney Act.

72-31-339. Real property.

Compiler's Comments

2011 Amendment: Chapter 109 substituted introductory language for "In a statutory power of attorney, the language granting power with respect to real property transactions empowers the agent to"; in (1) substituted current text for "accept as a gift or as security for a loan, reject, demand, buy, lease, receive, or otherwise acquire an interest in real property or a right incident to real property"; in (2) substituted current text for "sell, exchange, or convey, with or without covenants; quitclaim; release; surrender; mortgage; encumber; partition; consent to partitioning; subdivide; apply for zoning, rezoning, or other governmental permits; plat or consent to platting; develop; grant options concerning; lease; sublet; or otherwise dispose of an interest in real property or a right incident to real property"; inserted (3) concerning pledge or mortgage of an interest in real property; in (4) inserted "conditional sale contract"; in (5)(c) after "paying" inserted "assessing"; in (7) substituted "an entity" for "a legal entity" and substituted "stocks and bonds or other property" for "shares of stock or obligations"; in (7)(b) after "selling an option" inserted "right of"; in (7)(c) substituted "exercising any voting rights" for "voting them"; and made minor changes in style. Amendment effective October 1, 2011.

1993 Amendment: Chapter 494 substituted current text concerning construction of a statutory power of attorney with respect to real property transactions for former text that read: "(1) In a statutory short form power of attorney, the language conferring general authority with respect to real property transactions means that the principal authorizes the attorney-in-fact:

(a) to accept as a gift or as security for a loan or to reject, demand, buy, lease, receive, or otherwise acquire either ownership or possession of any estate or interest in real property;

(b) to sell, exchange, convey either with or without covenants, quitclaim, release, surrender, mortgage, encumber, partition or consent to the partitioning, plat or consent to platting, grant options concerning, lease or sublet, or otherwise dispose of any estate or interest in real property;

(c) to release in whole or in part, assign the whole or a part of, satisfy in whole or in part, and enforce by action, proceeding, or otherwise any mortgage, encumbrance, lien, or other claim to real property that exists or is claimed to exist in favor of the principal;

(d) to do any act of management or of conservation with respect to any estate or interest in real property owned or claimed to be owned by the principal, including, by way of illustration but not of restriction, power to insure against any casualty, liability, or loss; to obtain or regain possession or protect the estate or interest by action, proceeding, or otherwise; to pay, compromise, or contest taxes or assessments; to apply for and receive refunds in connection with taxes or assessments; and to purchase supplies, hire assistance or labor, and make repairs or alterations in the structures or lands;

(e) to use in any way, develop, modify, alter, replace, remove, erect, or install structures or other improvements upon any real property in which the principal has or claims to have any estate or interest;

(f) to demand, receive, or obtain by action, proceeding, or otherwise any money or other thing of value to which the principal is, may become, or may claim to be entitled as the proceeds of an interest in real property or of one or more of the transactions enumerated in this section; to conserve, invest, disburse, or utilize anything received for purposes enumerated in this section; and to reimburse the attorney-in-fact for any expenditures properly made by the attorney-in-fact in the execution of the powers conferred on the attorney-in-fact by the statutory short form power of attorney;

(g) to participate in any reorganization with respect to real property and receive and hold any shares of stock or instrument of similar character received in accordance with a plan of reorganization and to act with respect to the shares, including, by way of illustration but not of restriction, power to sell or to otherwise dispose of the shares; to exercise or sell any option, conversion, or similar right with respect to the shares, and to vote on the shares in person or by the granting of a proxy;

(h) to agree and contract, in any manner, with any person, and on any terms that the attorney-in-fact may select, for the accomplishment of any of the purposes enumerated in this section and to perform, rescind, reform, release, or modify an agreement, contract, or any other similar agreement or contract made by or on behalf of the principal;

(i) to execute, acknowledge, seal, and deliver any deed, revocation, mortgage, lease, notice, check, or other instrument that the attorney-in-fact considers useful for the accomplishment of any of the purposes enumerated in this section;

(j) to prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any real estate transaction or to intervene in any action or proceeding relating to the claim;

(k) to hire, discharge, and compensate any attorney, accountant, expert witness, or other assistant when the attorney-in-fact considers that action to be desirable for the proper execution of any of the powers described in this section and for the keeping of needed records; and

(l) in general and in addition to all the specific acts in this section, to do any other act with respect to any estate or interest in real property.

(2) All powers described in this section are exercisable equally with respect to any estate or interest in real property owned by the principal at the giving of the power of attorney or acquired after that time, whether located in Montana or elsewhere."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

Source: Section 204, Uniform Power of Attorney Act.

72-31-340. Tangible personal property.

Compiler's Comments

2011 Amendment: Chapter 109 substituted introductory language for "In a statutory power of attorney, the language granting power with respect to tangible personal property transactions empowers the agent to"; in (1) substituted "an extension of credit" for "a loan"; in (2) after "with or without covenants" inserted "representations, or warranties, quitclaim", after "surrender" deleted "mortgage, encumber, pledge, hypothecate", and after "a security interest in" deleted "pawn"; inserted (3) concerning the grant of a security interest in tangible personal property; in (4) after "by litigation or otherwise a" deleted "mortgage" and after "security interest" deleted "encumbrance"; in (5)(c) after "paying" inserted "assessing"; in (5)(f) after "using" deleted "altering" and at end inserted "or improvements to the property"; inserted (6) concerning interests in tangible personal property; and made minor changes in style. Amendment effective October 1, 2011.

1993 Amendment: Chapter 494 in introductory clause, after "language", substituted "granting power" for "conferring general authority" and after "transactions" substituted "empowers the agent to" for "means that the principal authorizes the attorney-in-fact"; in (2), after "hypothecate", inserted "create a security interest in"; in (3), after "release", "assign", and "satisfy", deleted reference to in whole or in part, after "by" substituted "litigation" for "action, proceeding", after "mortgage" inserted "security interest", and after "claim" substituted "on behalf" for "that exists or is claimed to exist in favor"; in (4), near middle after "property", substituted "on behalf of" for "owned or claimed to be owned by" and at end, after "including", deleted "by way of illustration but not of restriction, power"; in (4)(b), before "property", deleted "tangible personal" and after "interest" substituted "by litigation" for "in any tangible personal property by action, proceeding"; in (4)(f), after "alterations", deleted "of any tangible personal property or interest in any tangible personal property"; deleted former (1)(e) through (1)(j) that read: "(e) to demand, receive, or obtain by action, proceeding, or otherwise any money or other thing of value to which the principal is, may become, or may claim to be entitled as the proceeds of any tangible personal property or of any interest in any tangible personal property or of one or more of the transactions enumerated in this section; to conserve, invest, disburse, or utilize anything received for purposes enumerated in this section; and to reimburse the attorney-in-fact for any expenditures properly made by the attorney-in-fact in the execution of the powers conferred on the attorney-in-fact by the statutory short form power of attorney;

(f) to agree and contract, in any manner, with any person, and on any terms that the attorney-in-fact may select, for the accomplishment of any of the purposes enumerated in this section and to perform, rescind, reform, release, or modify any agreement or contract or any other similar agreement or contract made by or on behalf of the principal;

(g) to execute, acknowledge, seal, and deliver any conveyance, mortgage, lease, notice, check, or other instrument that the attorney-in-fact considers useful for the accomplishment of any of the purposes enumerated in this section;

(h) to prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any tangible personal property transaction or to intervene in any action or proceeding relating to a claim;

(i) to hire, discharge, and compensate any attorney, accountant, expert witness, or other assistant when the attorney-in-fact considers that action to be desirable for the proper execution by the attorney-in-fact of any of the powers described in this section and for the keeping of needed records; and

(j) in general and in addition to all the specific acts listed in this section, to do any other acts with respect to any tangible personal property or interest in any tangible personal property"; deleted former (2) that read: "(2) All powers described in this section are exercisable equally with respect to any tangible personal property or interest in any tangible personal property owned by the principal at the giving of the power of attorney or acquired after that time, whether located in Montana or elsewhere"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

Source: Section 205, Uniform Power of Attorney Act.

72-31-341. Stocks and bonds.

Official Comments

The substance of this section remains unchanged from Section 6 the Uniform Statutory Form Power of Attorney Act; however, the wording is revised to reflect that "stocks and bonds" is now a defined term in the Act. See Section 102(14) [72-31-302(14)].

Compiler's Comments

2011 Amendment: Chapter 109 substituted introductory language for "In a statutory power of attorney, the language granting power with respect to stock and bond transactions empowers the agent to"; in (1) after "bonds" deleted "mutual funds, and all other types of securities and financial instruments except commodity futures contracts; call and put options on stocks and stock indexes"; inserted (2) concerning account for stocks and bonds; inserted (3) concerning pledge of stocks and bonds as security for payment of a debt; in (4) and (5) substituted "stocks and bonds" for "securities"; and made minor changes in style. Amendment effective October 1, 2011.

1993 Amendment: Chapter 494 substituted current text concerning construction of statutory power of attorney with respect to stock and bond transactions for former text that read: "(1) In a statutory short form power of attorney, the language conferring general authority with respect to bond, share, and commodity transactions means that the principal authorizes the attorney-in-fact:

(a) to accept as a gift or as security for a loan or to reject, demand, buy, receive, or otherwise acquire either ownership or possession of any bond, share, instrument of similar character, commodity interest, or any instrument with respect to the bond, share, or interest, together with the interest, dividends, proceeds, or other distributions connected with any of those instruments;

(b) to sell or sell short and to exchange, transfer either with or without a guaranty, release, surrender, hypothecate, pledge, grant options concerning, loan, trade in, or otherwise to dispose of any bond, share, instrument of similar character, commodity interest, or any instrument with respect to the bond, share, or interest;

(c) to release in whole or in part, assign the whole or a part of, satisfy in whole or in part, and enforce by action, proceeding, or otherwise any pledge, encumbrance, lien, or other claim as to any bond, share, instrument of similar character, commodity interest, or any interest with respect to the bond, share, or interest when the pledge, encumbrance, lien, or other claim is owned or claimed to be owned by the principal;

(d) to do any act of management or of conservation with respect to any bond, share, instrument of similar character, commodity interest, or any instrument with respect to the interest owned or claimed to be owned by the principal or in which the principal has or claims to have an interest, including, by way of illustration but not of restriction, power to insure against any casualty, liability, or loss; to obtain or regain possession or protect the principal's interest by action, proceeding, or otherwise; to pay, compromise, or contest taxes or assessments; to apply for and receive refunds in connection with taxes or assessments; to consent to and participate in any reorganization, recapitalization, liquidation, merger, consolidation, sale, lease, or other change in or revival of a corporation or other association, in the financial structure of any corporation or other association, or in the priorities, voting rights, or other special rights with respect to the corporation or association; to become a depositor with any protective, reorganization, or similar committee of the bond, share, other instrument of similar character, commodity interest, or any instrument with respect to the bond, share, or interest belonging to the principal; to make any payments reasonably incident to the foregoing; to exercise or sell any option, conversion, or similar right; to vote in person or by the granting of a proxy with or without the power of substitution, either discretionary, general, or otherwise, for the accomplishment of any of the purposes enumerated in this section;

(e) to carry in the name of a nominee selected by the attorney-in-fact any evidence of the ownership of any bond, share, other instrument of similar character, commodity interest, or instrument with respect to the bond, share, or interest, belonging to the principal;

(f) to employ, in any way believed to be desirable by the attorney-in-fact, any bond, share, other instrument of similar character, commodity interest, or any instrument with respect to the bond, share, or interest in which the principal has or claims to have any interest for the protection or continued operation of any speculative or margin transaction personally begun or personally guaranteed, in whole or in part, by the principal;

(g) to demand, receive, or obtain by action, proceeding, or otherwise any money or other thing of value to which the principal is, may become, or may claim to be entitled as the proceeds of any interest in a bond, share, other instrument of similar character, commodity interest, or any instrument with respect to the bond, share, interest, or of one or more of the transactions enumerated in this section; to conserve, invest, disburse, or utilize anything received for purposes enumerated in this section; and to reimburse the attorney-in-fact for any expenditures properly made by the attorney-in-fact in the execution of the powers conferred on the attorney-in-fact by the statutory short form power of attorney;

(h) to agree and contract, in any manner, with any broker or other person, and on any terms that the attorney-in-fact selects, for the accomplishment of any of the purposes enumerated in this section and to perform, rescind, reform, release, or modify the agreement or contract or any other similar agreement made by or on behalf of the principal;

(i) to execute, acknowledge, seal, and deliver any consent, agreement, authorization, assignment, revocation, notice, waiver of notice, check, or other instrument that the attorney-in-fact considers useful for the accomplishment of any of the purposes enumerated in this section;

(j) to execute, acknowledge, and file any report or certificate required by law or governmental regulation;

(k) to prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any bond, share, or commodity transaction or to intervene in any related action or proceeding;

(l) to hire, discharge, and compensate any attorney, accountant, expert witness, or other assistant when the attorney-in-fact considers that action to be desirable for the proper execution of any of the powers described in this section and for the keeping of needed records; and

(m) in general and in addition to all the specific acts listed in this section, to do any other acts with respect to any interest in any bond, share, other instrument of similar character, commodity interest, or instrument with respect to a commodity.

(2) All powers described in this section are exercisable equally with respect to any interest in any bond, share, instrument of similar character, commodity interest, or instrument with respect to a commodity owned by the principal at the giving of the power of attorney or acquired after that time, whether located in Montana or elsewhere."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

Source: Section 206, Uniform Power of Attorney Act.

72-31-342. Commodities and options.

Compiler's Comments

2011 Amendment: Chapter 109 substituted introductory language for "In a statutory power of attorney, the language granting power with respect to commodity and option transactions empowers the agent to"; in (2) at end deleted "with a broker"; and made minor changes in style. Amendment effective October 1, 2011.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

Source: Section 207, Uniform Power of Attorney Act.

72-31-343. Banks and other financial institutions.

Compiler's Comments

2011 Amendment: Chapter 109 substituted introductory language for "In a statutory power of attorney, the language granting power with respect to banking and other financial institution transactions empowers the agent to"; in (3) substituted "contract for services available from a financial institution, including renting" for "hire"; deleted former (4) that read: "(4) contract to procure other services available from a financial institution as the agent considers desirable"; in (4) inserted "electronic funds transfer"; in (5) substituted "statements of account" for "bank statements"; in (7) near beginning after "money" deleted "at an interest rate agreeable to the agent" and at end inserted "or a debt guaranteed by the principal"; in (8) inserted "transfer money"; in (9) inserted "or document of title whether tangible or electronic"; in (10) inserted "and use" and inserted references to debit cards and electronic transaction authorizations; and made minor changes in style. Amendment effective October 1, 2011.

1993 Amendment: Chapter 494 in introductory clause, after "statutory", deleted "short form", after "language" substituted "granting power" for "conferring general authority", after "banking" inserted "and other financial institution", and after "transactions" substituted "empowers the agent to" for "means that the principal authorizes the attorney-in-fact"; in (1), before "account", deleted "deposit"; in (2), at beginning, substituted "establish, modify, and terminate" for "to open in the name of the principal alone or in a way that clearly evidences the principal and attorney-in-fact relationship a deposit", after "account" substituted "or other banking arrangement" for "of any type", substituted "financial institution" for "institution that serves as a depository for funds", and at end substituted "agent" for "attorney-in-fact"; in (4) substituted "from a financial institution as the agent" for "by the banking institution as the attorney-in-fact"; in (5), at beginning, deleted "to make, sign, and deliver checks or drafts for any purpose and to", after "otherwise" substituted "money" for "any funds", after "custody of" substituted "a financial institution" for "any banking institution", and at end deleted "wherever located, either before or after the execution of the power of attorney"; deleted former (1)(d) that read: "(d) to prepare any necessary financial statements of the assets and liabilities or income and expenses of the principal for submission to any banking institution"; in (6), before "statements", inserted "bank", after "notices" substituted "and similar" for "or other", and substituted "financial institution" for "banking institution"; in (7), after "vault", substituted "and withdraw or add to the contents" for "that the principal could enter if personally present"; in (8), after "rate", substituted "agreeable to the agent" for "the attorney-in-fact selects", after "security" substituted "personal property" for "any assets", and after "principal" substituted "necessary in order to borrow" for "the attorney-in-fact considers desirable or necessary for borrowing"; in (9), after "notes", deleted "bills of exchange" and after "accept" deleted "any bill of exchange"; in (10), before "sight draft", substituted "act upon a" for "to deal in and to deal with any" and after "nonnegotiable instrument" deleted "in which the principal has or claims to have an interest"; in (11), after "letters of credit", inserted "credit cards, and traveler's checks", substituted "financial institution" for "banking institution selected by the attorney-in-fact", and at end, after "credit", deleted "that the attorney-in-fact considers desirable or necessary"; in (12), at end after "paper", substituted "or a financial transaction with a financial institution" for "or any banking transaction in which the principal has an interest or by which the principal is or might be affected in any way"; deleted former (1)(l) through (1)(p) that read: "(l) to demand, receive, obtain by action, proceeding, or otherwise any money or other thing of value to which the principal is, may become, or may claim to be entitled as the proceeds of any banking transaction and to reimburse the attorney-in-fact for any expenditures properly made in the execution of the powers conferred upon the attorney-in-fact by the statutory short form power of attorney;

(m) to execute, acknowledge, and deliver any instrument of any kind, in the name of the principal or otherwise, that the attorney-in-fact considers useful for the accomplishment of any of the purposes enumerated in this section;

(n) to prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any banking transaction or to intervene in any related action or proceeding;

(o) to hire, discharge, and compensate any attorney, accountant, expert witness, or other assistant when the attorney-in-fact considers that action to be desirable for the proper execution of any of the powers described in this section and for the keeping of needed records;

(p) in general and in addition to all the specific acts listed in this section, to do any other acts in connection with any banking transaction that does or may in any way affect the financial or other interests of the principal"; deleted former (2) that read: "(2) All powers described in this section are exercisable equally with respect to any banking transaction engaged in by the principal at the giving of the power of attorney or engaged in after that time, whether conducted in Montana or elsewhere."; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

Source: Section 208, Uniform Power of Attorney Act.

72-31-344. Operation of entity or business.

Official Comments

The substance of this section remains unchanged from Section 9 of the Uniform Statutory Form Power of Attorney Act; however, the wording is updated to encompass all modern business and entity forms, including limited liability companies, limited liability partnerships, and entities that may be organized other than for a business purpose.

Compiler's Comments

2011 Amendment: Chapter 109 substituted current text for former text that read: "In a statutory power of attorney, the language granting power with respect to business operating transactions empowers the agent:

(1) to operate, buy, sell, enlarge, reduce, and terminate a business interest;

(2) to the extent that an agent is permitted by law to act for a principal and subject to the terms of the partnership agreement, to:

(a) perform a duty or discharge a liability and exercise a right, power, privilege, or option that the principal has, may have, or claims to have under a partnership agreement, whether or not the principal is a partner;

(b) enforce the terms of a partnership agreement by litigation or otherwise; and

(c) defend, submit to arbitration, settle, or compromise litigation to which the principal is a party because of membership in the partnership;

(3) to exercise in person or by proxy or enforce, by litigation or otherwise, a right, power, privilege, or option the principal has or claims to have as the holder of a bond, share, or other instrument of similar character and to defend, submit to arbitration, settle, or compromise litigation to which the principal is a party because of a bond, share, or similar instrument;

(4) with respect to a business owned solely by the principal, to:

(a) continue, modify, renegotiate, extend, and terminate a contract made with an individual or a legal entity, firm, association, or corporation by or on behalf of the principal with respect to the business before execution of the power of attorney;

(b) determine:

(i) the location of its operation;

(ii) the nature and extent of its business;

(iii) the methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in its operation;

(iv) the amount and types of insurance carried;

(v) the mode of engaging, compensating, and dealing with its accountants, attorneys, and other agents and employees;

(c) change the name or form of organization under which the business is operated and enter into a partnership agreement with other persons or organize a corporation to take over all or part of the operation of the business; and

(d) demand and receive money due or claimed by the principal or on the principal's behalf in the operation of the business and control and disburse the money in the operation of the business;

(5) to put additional capital into a business in which the principal has an interest;

(6) to join in a plan of reorganization, consolidation, or merger of the business;

(7) to sell or liquidate a business or part of it at the time and upon the terms the agent considers desirable;

(8) to establish the value of a business under a buyout agreement to which the principal is a party;

(9) to prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to a business that are required by a governmental agency or instrumentality or that the agent considers desirable and to make related payments; and

(10) to pay, compromise, or contest taxes or assessments and to do any other act that the agent considers desirable to protect the principal from illegal or unnecessary taxation, fines, penalties, or assessments with respect to a business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney." Amendment effective October 1, 2011.

1993 Amendment: Chapter 494 in introductory clause, after "statutory", deleted "short form", after "language" substituted "granting power" for "conferring general authority", and after "transactions" substituted "empowers the agent to" for "means that the principal authorizes the attorney-in-fact"; inserted (1) concerning operation, continuation, or termination of business interest; inserted (2) concerning agent's authority under law and agreement; in (2)(a), at end before "partner", deleted "general or limited"; in (2)(b), after "agreement", substituted "by litigation or otherwise" for "for the protection of the principal, by action, proceeding, or otherwise, as the attorney-in-fact considers desirable or necessary"; in (2)(c), after "compromise", substituted "litigation" for "any action or other legal proceeding"; in (3), after "enforce, by", substituted "litigation" for "action, proceeding" and near end, after "compromise", substituted "litigation" for "any action or other legal proceeding"; in (4), after "business", deleted "enterprise"; in (4)(a), after "terminate", substituted "a contract made with an individual or a legal entity" for "any contractual arrangements made with any person, entity" and after "business" substituted "before execution" for "enterprise prior to the granting"; in (4)(b)(i), before "the location", deleted "the policy of the business enterprise as to" and after "location of" deleted "the site or sites to be used for"; in (4)(b)(v), after "mode of", substituted "engaging" for "securing", after "attorneys" deleted "servants", and after "employees" deleted "required for its operation; and to agree and to contract in any manner, with any person, and on any terms that the attorney-in-fact considers desirable or necessary for effectuating any or all of the decisions of the attorney-in-fact as to policy and to perform, rescind, reform, release, or modify the agreement or contract or any other similar agreement or contract made by or on behalf of the principal"; in (4)(c), after "business", deleted "enterprise", after "take over" inserted "all or part of", and after "business" deleted "or any part of the business, as the attorney-in-fact considers desirable or necessary"; in (4)(d), after "principal", inserted "or on the principal's behalf", after "disburse the" substituted "money" for "funds", and after "operation of the" substituted "business" for "enterprise in any way that the attorney-in-fact considers desirable or necessary, and to engage in any banking transactions that the attorney-in-fact considers desirable or necessary for effectuating the execution of any of the powers of the attorney-in-fact described in this subsection (1)(c)"; inserted (5) concerning additional capital; inserted (6) concerning reorganization, consolidation, or merger; inserted (7) concerning sale or liquidation; inserted (8) concerning valuation in a buyout; in (9), after "business", deleted "operating transaction of the principal", after "agency" deleted "department", before "considers desirable" substituted "agent" for "attorney-in-fact", and after "considers desirable" deleted "or necessary for any purpose"; in (10), before "considers desirable", substituted "agent" for "attorney-in-fact", after "considers desirable" deleted "or necessary", and at end, after "attorney", deleted "as taxes, fines, penalties, or assessments"; deleted former (1)(f) through (1)(j) that read: "(f) to demand, receive, or obtain by action, proceeding, or otherwise any money or other thing of value to which the principal is, may become, or may claim to be entitled as the proceeds of any business operation of the principal; to conserve, invest, disburse, or use anything so received for purposes enumerated in this section; and to reimburse the attorney-in-fact for any expenditures properly made by the attorney-in-fact in the execution of the powers conferred upon the attorney-in-fact by the statutory short form power of attorney;

(g) to execute, acknowledge, seal, and deliver any deed, assignment, mortgage, lease, notice, consent, agreement, authorization, check, or other instrument that the attorney-in-fact considers useful for the accomplishment of any of the purposes enumerated in this section;

(h) to prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any business operating transaction or to intervene in any related action or proceeding;

(i) to hire, discharge, and compensate any attorney, accountant, expert witness, or other assistant when the attorney-in-fact considers that action to be desirable for the proper execution by the attorney-in-fact of any of the powers described in this section and for the keeping of needed records; and

(j) in general and in addition to all the specific acts listed in this section, to do any other act that the attorney-in-fact considers desirable or necessary for the furtherance or protection of the interests of the principal in any business"; deleted former (2) that read: "(2) All powers described in this section are exercisable equally with respect to any business in which the principal is interested at the time of giving of the power of attorney or in which the principal becomes interested after that time, whether operated in Montana or elsewhere"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

Source: Section 209, Uniform Power of Attorney Act.

72-31-345. Insurance and annuities.

Official Comments

This section contains a significant change from Section 10 of the Uniform Statutory Form Power of Attorney Act. The default language in the Uniform Statutory Form Power of Attorney Act permitted an agent to designate the beneficiary of an insurance contract. See Unif. Statutory Form Power of Atty. Act § 10(4) (1988). However, under Section 210 [72-31-345] of this Act, an agent does not have authority to "create or change a beneficiary designation" unless that authority is specifically granted to the agent pursuant to Section 201(a) [72-31-336(1)]. The authority granted under Paragraph (2) of Section 210 [72-31-345(2)] is more limited, allowing an agent to only "procure new, different, and additional contracts of insurance and annuities for the principal and the principal's spouse, children, and other dependents." A principal who grants authority to an agent under Section 210 [72-31-345] should therefore carefully consider whether a specific grant of authority to create or change beneficiary designations is also desirable.

Compiler's Comments

2011 Amendment: Chapter 109 substituted introductory language for "In a statutory power of attorney, the language granting power with respect to insurance and annuity transactions empowers the agent to"; in (1) and in (3) after "pay the premium or" substituted "make a contribution" for "assessment" and after "modify" inserted "exchange"; deleted former (4) that read: "(4) designate the beneficiary of the contract; however, an agent may be named a beneficiary of the contract or of an extension, renewal, or substitute for the contract only to the extent that the agent was named as a beneficiary under a contract procured by the principal before executing the power of attorney"; in (5) after "cash surrender value" inserted reference to insurance or annuity contract; inserted (7) concerning the exercise of investment power; in (8) at end inserted reference to insurance or annuity contracts; in (9) after "insurance" deleted "contract"; deleted former (10) that read: "(10) change the beneficiary of a contract of insurance or annuity; however, the agent may not be designated a beneficiary except to the extent permitted by subsection (4)"; in (10) after "procure" substituted "a benefit or assistance under a statute or regulation" for "government aid"; and made minor changes in style. Amendment effective October 1, 2011.

1993 Amendment: Chapter 494 in introductory clause, after "statutory", deleted "short form", after "language" substituted "granting power" for "conferring general authority", after "insurance" inserted "and annuity", and after "transactions" substituted "empowers the agent to" for "means that the principal authorizes the attorney-in-fact"; in (1), after "contract", deleted "of life, accident, health, or disability insurance or any contract for the provision of health care services or any combination of these contracts", after "principal" deleted "prior to the granting of the power of attorney", and after "that insures" inserted "or provides an annuity to"; in (2), after "contracts of", deleted "life, accident, health, or disability", after "insurance" inserted "and annuities", after "principal" substituted "and the principal's spouse, children, and other dependents and" for "or contracts for provision of health care services for the principal", after "insurance" inserted "or annuity", and at end, after "payment", deleted "under each contract"; in (3), after "contract", inserted "of insurance or annuity" and after "procured by" substituted "the agent" for "the attorney-in-fact"; in (4), after "however", substituted "an agent" for "that the attorney-in-fact", after "beneficiary" substituted "of the contract or of an extension, renewal, or substitute for the contract only to the extent that the agent" for "except if permitted under 72-31-208, the attorney-in-fact may be named the beneficiary of death benefit proceeds under an insurance contract or if the attorney-in-fact", after "principal" substituted "before executing" for "prior to the granting", and at end, after "power of attorney", deleted "the attorney-in-fact may continue to be named as the beneficiary under the contract or under any extension or renewal of or substitute for the contract"; in (5), at beginning, deleted "with respect to any contract of life, accident, health, disability, or liability insurance as to which the principal has or claims to have any one or more of the powers described in this section, to", after "receive" deleted "any available", and after "insurance" substituted "or annuity" for "whether for the payment of a premium or for the procuring of cash"; in (7), after "election", deleted "as to beneficiary or mode of payment"; in (9), after "contract", inserted "or annuity, with respect to which the principal has or claims to have a power described in this section"; in (10), after "insurance", inserted "or annuity", after "however" substituted "the agent" for "the attorney-in-fact", and after "may not be" substituted "designated a beneficiary except to the extent permitted by subsection (4)" for "a new beneficiary, except if permitted under 72-31-208, the attorney-in-fact may be the beneficiary of death benefit proceeds under an insurance contract or if the attorney-in-fact was named as a beneficiary under the contract that was procured by the principal prior to the granting of the power of attorney, the attorney-in-fact may continue to be named as the beneficiary under the contract or under any extension or renewal of or substitute for the contract"; deleted former (1)(d) that read: "(d) to demand, receive, or obtain by action, proceeding, or otherwise any money, dividend, or other thing of value to which the principal is, may become, or may claim to be entitled as the proceeds of any contract of insurance or of one or more of the transactions enumerated in this section; to conserve, invest, disburse, or utilize anything received for purposes enumerated in this section; and to reimburse the attorney-in-fact for any expenditures properly made by the attorney-in-fact in the execution of the powers conferred on the attorney-in-fact by the statutory short form power of attorney"; in (12), before "sell", inserted "collect" and after "insurance" inserted "or annuity"; in (13), after "insurance", inserted "or annuity" and after "proceeds" deleted "of the refunds"; deleted former (1)(h) through (1)(m) that read: "(h) to agree and contract, in any manner, with any person, and on any terms that the attorney-in-fact selects, for the accomplishment of any of the purposes enumerated in this section and to perform, rescind, reform, release, or modify the agreement or contract;

(i) to execute, acknowledge, seal, and deliver any consent, demand, request, application, agreement, indemnity, authorization, assignment, pledge, notice, check, receipt, waiver, or other instrument that the attorney-in-fact considers useful for the accomplishment of any of the purposes enumerated in this section;

(j) to continue, procure, pay the premium or assessment on, modify, rescind, release, terminate, or otherwise deal with any contract of insurance, other than those enumerated in subsection (1)(a) or (1)(b), whether fire, marine, burglary, compensation, liability, hurricane, casualty, or other type, or any combination of insurance or to do any act or acts with respect to the contract or with respect to its proceeds or enforcement that the attorney-in-fact considers desirable or necessary for the promotion or protection of the interests of the principal;

(k) to prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any insurance transaction or to intervene in any related action or proceeding;

(l) to hire, discharge, and compensate any attorney, accountant, expert witness, or other assistant when the attorney-in-fact considers the action to be desirable for the proper execution by the attorney-in-fact of any of the powers described in this section and for the keeping of needed records; and

(m) in general and in addition to all the specific acts listed in this section, to do any other acts in connection with procuring, supervising, managing, modifying, enforcing, and terminating contracts of insurance or for the provisions of health care services in which the principal is the insured or is otherwise in any way interested"; deleted former (2) that read: "(2) All powers described in this section are exercisable with respect to any contract of insurance or for the provision of health care service in which the principal is in any way interested, whether made in Montana or elsewhere"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

Source: Section 210, Uniform Power of Attorney Act.

72-31-346. Estates, trusts, and other beneficial interests.

Official Comments

This section, which corresponds to Section 11 of the Uniform Statutory Form Power of Attorney Act, has been revised to clarify that an agent's authority includes authority to exercise, for the benefit of the principal, a presently exercisable general power of appointment held by the principal (subsection (b)(3)) [72-31-346(2)(c)]. "Presently exercisable general power of appointment" is defined for purposes of the Act in Section 102(8) [72-31-302(8)].

Compiler's Comments

2011 Amendment: Chapter 109 inserted (1) providing definition of estate, trust, or other beneficial interest; in (2) substituted introductory language for "In a statutory power of attorney, the language granting power with respect to estate, trust, and other beneficiary transactions, empowers the agent to act for the principal in all matters that affect a trust, probate estate, guardianship, conservatorship, escrow, custodianship, or other fund from which the principal is, may become, or claims to be entitled as a beneficiary to a share or payment, including to"; in (1)(a) after "accept" deleted "reject, disclaim", after "assign" deleted "release", and after "exchange" deleted "or consent to a reduction in or modification of"; inserted (2)(c) concerning presently exercisable general power of appointment; in (2)(d) and (2)(e) after "participate in" substituted "submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to ligation" for "and oppose litigation"; in (2)(g) inserted references to securities intermediaries and annuities; and made minor changes in style. Amendment effective October 1, 2011.

1993 Amendment: Chapter 494 in introductory clause, after "statutory", deleted "short form", after "language" substituted "granting power" for "conferring general authority", before "beneficiary transactions" inserted "estate, trust, and other", and after "transactions" substituted "empowers the agent to" for "means that the principal authorizes the attorney-in-fact to represent and"; in (2), after "obtain, by", substituted "litigation" for "action, proceeding"; in (3), after "oppose", substituted "litigation to ascertain" for "any proceeding, judicial, or otherwise, for the ascertainment of", after "deed" inserted "will", and after "or other" inserted "instrument or"; in (4), after "oppose", substituted "litigation to remove, substitute" for "any proceeding, judicial or otherwise, for the removal, substitution"; in (5), after "received for", substituted "an authorized purpose" for "purposes listed in this section; and to reimburse the attorney-in-fact for any expenditures properly made by the attorney-in-fact in the execution of the powers conferred on the attorney-in-fact by the statutory short form power of attorney"; deleted former (1)(a)(iii) through (1)(a)(vii) that read: "(iii) to prepare, sign, file, and deliver all reports, compilations of information, returns, or papers with respect to any interest had or claimed by or on behalf of the principal in the fund; to pay, compromise, contest, or apply for and receive refunds in connection with any tax or assessment, with respect to any interest had or claimed by or on behalf of the principal in the fund or with respect to any property in which an interest is had or claimed;

(iv) to agree and contract in any manner, with any person, and on any terms the attorney-in-fact selects, for the accomplishment of the purposes listed in this section and to perform, rescind, reform, release, or modify the agreement or contract or any other similar agreement or contract made by or on behalf of the principal;

(v) to execute, acknowledge, verify, seal, file, and deliver any deed, assignment, mortgage, lease, consent, designation, pleading, notice, demand, election, conveyance, release, assignment, check, pledge, waiver, admission of service, notice of appearance, or other instrument that the attorney-in-fact considers useful for the accomplishment of any of the purposes enumerated in this section;

(vi) to submit to arbitration, settle, and propose or accept a compromise with respect to any controversy or claim that affects the administration of the fund, in any one of which the principal has or claims to have an interest and to do any and all acts that the attorney-in-fact considers to be desirable or necessary in effectuating the compromise;

(vii) to hire, discharge, and compensate any attorney, accountant, expert witness, or other assistant when the attorney-in-fact considers that action to be desirable for the proper execution by the attorney-in-fact of any of the powers described in this section and for the keeping of needed records"; in (6), after "transfer", deleted "any part or all of any", after "real" substituted "property" for "estate", after "accounts" inserted "with financial institutions", after "insurance, and other" substituted "property" for "assets of any kind and nature", and at end substituted "settlor" for "grantor"; deleted former (1)(b) that read: "(b) in general and in addition to all the specific acts listed in this section, to do any other acts with respect to the administration of a trust, probate estate, guardianship, conservatorship, escrow, custodianship, or other fund in which the principal has or claims to have an interest as a beneficiary"; deleted former (2) and (3) that read: "(2) For the purposes of subsection (1), "fund" means any trust, probate estate, guardianship, conservatorship, escrow, custodianship, or any other fund in which the principal has or claims to have an interest.

(3) All powers described in this section are exercisable equally with respect to the administration or disposition of any trust, probate estate, guardianship, conservatorship, escrow, custodianship, or other fund in which the principal is interested at the giving of the power of attorney or becomes interested after that time as a beneficiary, whether located in Montana or elsewhere"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

Source: Section 211, Uniform Power of Attorney Act.

72-31-347. Claims and litigation.

Compiler's Comments

2011 Amendment: Chapter 109 substituted introductory language for "In a statutory power of attorney, the language with respect to claims and litigation empowers the agent to"; in (1) substituted "maintain before a court or administrative agency a claim, claim for relief, cause of action, counterclaim, offset, recoupment, or defense, including an action" for "prosecute before a court or administrative agency a claim, counterclaim, or offset, and defend against an individual, a legal entity, or government, including suits"; in (2) after "intervene" inserted "or otherwise participate" and after "litigation" deleted "and act as amicus curiae"; in (3) at beginning substituted "seek" for "in connection with litigation, procure" and after "garnishment" deleted "libel"; in (4) substituted "make or accept a tender" for "in connection with litigation, perform any lawful act, including acceptance of tender" and after "consent to examination" deleted "before trial"; in (5) after "submit to" substituted "alternative dispute resolution" for "arbitration" and at end deleted "with respect to a claim or litigation"; in (7) after "insolvency" deleted "proceedings" and after "reorganization" deleted "proceeding or a"; in (8) inserted "award, or order" and after "connection with" inserted "a claim or"; in (9) after "receive" deleted "and conserve"; and made minor changes in style. Amendment effective October 1, 2011.

1993 Amendment: Chapter 494 in introductory clause, after "statutory", deleted "short form", after "language" deleted "conferring general authority", and after "litigation" substituted "empowers the agent to" for "means that the principal authorizes the attorney-in-fact"; in (1), after "administrative", substituted "agency" for "board, department, commissioner, or other tribunal any cause of action", after "offset" substituted "and defend" for "or defense, that the principal has or claims to have", and after "individual" substituted "legal entity or government, including suits to recover property" for "partnership, association, corporation, government, or other person or instrumentality, including, by way of illustration and not of restriction, power to sue for the recovery of land"; in (2), after "action", deleted "of interpleader or other action" and after "intervene" substituted "in litigation" for "or interplead in any action or proceeding"; in (3), after "connection with", substituted "litigation" for "any action or proceeding or controversy at law or otherwise, to apply for and, if possible" and after "relief and" substituted "use an" for "to resort to and to utilize in all ways permitted by law any"; in (4), after "connection with", substituted "litigation" for "any action or proceeding, at law or otherwise", after "perform any" substituted "lawful act" for "act that the principal might perform, including, by way of illustration and not of restriction", and at end, after "litigation", deleted "or controversy as seems desirable to the attorney-in-fact"; in (5), after "claim", deleted "existing in favor of or against the principal" and after "litigation" deleted "to which the principal is, may become, or may be designated a party"; in (6), after "service of", deleted "a summons, citation, or other", after "pleadings" substituted "seek appellate review" for "to appeal to appellate tribunals", after "bonds" deleted "at the times and to the extent the attorney-in-fact considers desirable or necessary", after "instrument" deleted "that the attorney-in-fact considers desirable or necessary", and after "defense" substituted "of a claim or litigation" for "of any claim by or against the principal or of any litigation to which the principal is, may become, or may be designated a party"; in (7), at beginning before "act", deleted "to appear for, represent, and" and after "principal in" substituted "property" for "any real property, bond, share, commodity interest, tangible personal property"; deleted former (1)(h) that read: "(h) to hire, discharge, and compensate any attorney, accountant, expert witness, or other assistant when the attorney-in-fact considers that action to be desirable for the proper execution of any of the powers described in this section"; in (8), after "pay", deleted "from funds in the control of the attorney-in-fact or for the account of the principal", after "connection with" substituted "litigation" for "any transaction enumerated in this section", and at end, after "proceeds of", substituted "a claim or litigation" for "one or more of the transactions enumerated in this section, and to receive, endorse, and deposit checks"; deleted former (1)(j) that read: "(j) in general and in addition to all the specific acts listed in this section, to do any other acts in connection with any claim by or against the principal or with litigation to which the principal is, may become, or may be designated a party"; deleted former (2) that read: "(2) All powers described in this section are exercisable equally with respect to any claim or litigation existing at the giving of the power of attorney or arising after that time, whether arising in Montana or elsewhere"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

Source: Section 212, Uniform Power of Attorney Act.

72-31-348. Personal and family maintenance.

Official Comments

This section, based on Section 13 of the Uniform Statutory Form Power of Attorney Act, contains three important changes. The first is clarification in subsection (a)(1) [72-31-348(1)(a)] of who qualifies to benefit from payments for personal and family maintenance. Paragraph (1) [72-31-348(1)(a)] states that the individuals who may benefit include not only the principal's children and other individuals legally entitled to be supported by the principal, but also "individuals whom the principal has customarily supported or indicated the intent to support," "whether living when the power of attorney is executed or later born." This definition is broad enough to include common recipients of family support such as parents and later-born grandchildren if such support is intended by the principal.

The second important addition to Section 213 [72-31-348] is the inclusion of paragraph (6) in subsection (a) [72-31-348(1)(f)] which qualifies the agent to act as the principal's "personal representative" for purposes of the Health Insurance Portability and Accountability Act (HIPAA) so that the agent can communicate with health care providers in order to pay medical bills. See 45 C.F.R. § 164.502(g)(1)-(2) (2006) (providing that for purposes of disclosing an individual's protected health information, "a covered entity must... treat a personal representative as the individual"). Section 213 [72-31-348] does not, however, empower the agent to make health-care decisions for the principal. See Section 103 [72-31-303] and comment (discussing exclusion from this Act of powers to make health-care decisions).

The third important addition to this section is subsection (b) [72-31-348(2)] which provides that authority under Section 213 [72-31-348] is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to making gifts. Although payments made for the benefit of persons under Section 213 [72-31-348] may in fact be subject to gift tax treatment, subsection (b) [72-31-348(2)] clarifies that the authority for personal and family maintenance payments by an agent emanates from this section rather than Section 217 [72-31-352]. This is an important distinction because the Act requires a grant of specific authority under Section 201(a) [72-31-336(1)] to authorize gift making, and the default provisions of Section 217 limit the amounts of those gifts. The authority to make payments under Section 213 [72-31-348] is not constrained by either of these provisions.

Compiler's Comments

2011 Amendment: Chapter 109 in (1) substituted introductory language for "In a statutory power of attorney, the language granting power with respect to personal and family maintenance empowers the agent to"; in (1)(a) after "principal and the" substituted "following individuals, whether living when the power of attorney is executed or later born" for "principal's spouse, children, and other individuals customarily or legally entitled to be supported by the principal"; inserted (1)(a)(i) through (1)(a)(iii) concerning individuals supported by the principal; inserted (1)(b) concerning child support and other family maintenance; in (1)(d) inserted reference to postsecondary and vocational education; in (1)(e) substituted "health care" for "medical, dental, and surgical care, hospitalization"; inserted (1)(f) concerning authority to act as the principal's personal representative pursuant to HIPAA; in (1)(h) near beginning after "maintain" substituted "credit and debit" for "or open charge" and after "open new accounts" deleted "the agent considers desirable to accomplish a lawful purpose"; in (1)(i) after "principal in a" substituted "religious institution" for "church"; inserted (2) regarding an agent's authority with respect to maintenance; and made minor changes in style. Amendment effective October 1, 2011.

1993 Amendment: Chapter 494 in introductory clause, after "statutory", deleted "short form", after "language" substituted "granting power" for "conferring general authority", after "respect to" inserted "personal and" and after "maintenance" substituted "empowers the agent to" for "means that the principal authorizes the attorney-in-fact"; in (1), after "standard of living", substituted "of the principal and the principal's spouse, children, and other individuals customarily or legally entitled to be supported by the principal" for "of the spouse, children, and other dependents, including, by way of illustration and not of restriction, power to" and at end, after "occupied by", substituted "those individuals" for "the principal's family or dependents"; in (2), at beginning, substituted "provide for the individuals described in subsection (1) normal domestic help" for "to provide normal domestic help for the operation of the household" and after "travel expenses" substituted "and funds for shelter, clothing, food, appropriate education, and other current living costs" for "to provide usual educational facilities; and to provide funds for all the current living costs of the spouse, children, and other dependents, including, among other things, shelter, clothing, food, and incidentals"; in (3), after "pay for", inserted "the individuals described in subsection (1)" and after "care" deleted "for the spouse, children, and other dependents of the principal"; in (4), after "made by the principal", substituted "for the individuals described in subsection (1) for" for "either prior to or after the execution of the power of attorney, for the principal's spouse, children, and other dependents with respect to" and after "including" substituted "registering, licensing, insuring, and replacing them" for "by way of illustration but not of restriction, power to license, insure, and replace any automobiles owned by the principal and customarily used by the spouse, children, or other dependents"; substituted (5) concerning maintaining or opening charge accounts for former text that read: "(d) to continue whatever charge accounts have been operated by the principal prior to the execution of the power of attorney or after execution of the power of attorney for the convenience of the principal's spouse, children, or other dependents; to open new accounts the attorney-in-fact considers to be desirable for the accomplishment of any of the purposes enumerated in this section; and to pay the items charged on those accounts by any person authorized or permitted by the principal to make charges prior to the execution of the power of attorney"; deleted former (1)(f) through (1)(j) that read: "(f) to demand, receive, or obtain by action, proceeding, or otherwise any money or other thing of value to which the principal is, may become, or may claim to be entitled to as salary, wages, commission, or other remuneration for services performed, as a dividend or distribution upon any stock, or as interest or principal upon any indebtedness or any periodic distribution of profits from any partnership or business in which the principal has or claims an interest and to endorse, collect, or otherwise realize upon any instrument for the payment received;

(g) to use any asset of the principal for the performance of the powers enumerated in this section, including, by way of illustration and not of restriction, power to draw money by check or otherwise from any bank deposit of the principal; to sell any interest in real property, bonds, shares, commodity interests, tangible personal property, or other assets of the principal; and to borrow money and pledge as security for a loan, any asset, including insurance, that belongs to the principal;

(h) to execute, acknowledge, verify, seal, file, and deliver any application, consent, petition, notice, release, waiver, agreement, or other instrument that the attorney-in-fact considers useful for the accomplishment of any of the purposes enumerated in this section;

(i) to hire, discharge, and compensate any attorney, accountant, or other assistant when the attorney-in-fact considers that action to be desirable for the proper execution by any of the powers described in this section and for the keeping of needed records; and

(j) in general and in addition to all the specific acts listed in this section, to do any other acts for the welfare of the spouse, children, or other dependents or for the preservation and maintenance of the other personal relationships of the principal to parents, relatives, friends, and organizations as are appropriate"; deleted former (2) that read: "(2) All powers described in this section are exercisable equally whether the acts required for their execution relate to real or personal property owned by the principal at the giving of the power of attorney or acquired after that time, whether those acts are performable in Montana or elsewhere"; and made minor changes in style.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

Source: Section 213, Uniform Power of Attorney Act.

72-31-349. Benefits from governmental programs or civil or military service.

Compiler's Comments

2011 Amendment: Chapter 109 inserted (1) defining benefits from governmental programs or civil or military service; in (2) substituted introductory language for "In a statutory power of attorney, the language granting power with respect to benefits from social security, medicare, medicaid or other governmental programs or civil or military service empowers the agent to"; inserted (2)(c) concerning authority of an agent with respect to a benefit or program; in (2)(d) near beginning after "file, and" substituted "maintain" for "prosecute" and near middle after "to which the principal" substituted "may be entitled to receive under a statute or regulation" for "claims to be entitled under a statute or governmental regulation"; in (2)(e) substituted current language for "prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to any benefits the principal may be entitled to receive"; in (2)(f) substituted "subsection (2)(d)" for "this section"; and made minor changes in style. Amendment effective October 1, 2011.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

Source: Section 214, Uniform Power of Attorney Act.

72-31-350. Retirement plans.

Official Comments

This section, based on Section 15 of the Uniform Statutory Form Power of Attorney Act, has been substantially updated to reflect changes in the laws governing retirement plans. A significant departure from the Uniform Statutory Form Power of Attorney Act is the deletion of default authority in the agent to waive the right of the principal to be a beneficiary of a joint or survivor annuity (see Unif. Statutory Form Power of Atty. Act § 15 (1988)). Under this Act, the authority to waive the principal's right to be a beneficiary of a joint and survivor annuity must be given by a specific grant pursuant to Section 201(a) [72-31-336(1)].

Compiler's Comments

2011 Amendment: Chapter 109 substituted current text for former text that read: "In a statutory power of attorney, the language granting power with respect to retirement plan transactions empowers the agent to:

(1) select payment options under any retirement plan in which the principal participates, including plans for self-employed individuals;

(2) designate beneficiaries under those plans and change existing designations;

(3) make voluntary contributions to those plans;

(4) exercise the investment powers available under any self-directed retirement plan;

(5) make "rollovers" of plan benefits into other retirement plans;

(6) if authorized by the plan, borrow from, sell assets to, and purchase assets from the plan; and

(7) waive the right of the principal to be a beneficiary of a joint or survivor annuity if the principal is a spouse who is not employed." Amendment effective October 1, 2011.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

Source: Section 215, Uniform Power of Attorney Act.

72-31-351. Taxes.

Compiler's Comments

2011 Amendment: Chapter 109 substituted introductory language for "In a statutory power of attorney, the language granting power with respect to tax matters empowers the agent to"; in (1) after "payroll" inserted "property"; and made minor changes in style. Amendment effective October 1, 2011.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

Source: Section 216, Uniform Power of Attorney Act.

72-31-352. Gifts.

Official Comments

This section provides default limitations on an agent's authority to make a gift of the principal's property. Authority to make a gift must be made by a specific grant in a power of attorney (see Section 201(a)(2)) [72-31-336(1)(b)]; see also Section 301 [72-31-353]. The mere granting to an agent of authority to make gifts does not, however, grant an agent unlimited authority. The agent's authority is subject to this section unless enlarged or further limited by an express modification in the power of attorney. Without modification, the authority of an agent under this section is limited to gifts in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion, or twice that amount if the principal and the principal's spouse consent to make a split gift.

Subsection (a) of this section [72-31-352(1)] clarifies the fact that a gift includes not only outright gifts, but also gifts for the benefit of a person. Subsection (a) [72-31-352(1)] provides examples of gifts made for the benefit of a person, but these examples are not intended to be exclusive.

Subsection (c) [72-31-352(3)] emphasizes that exercise of authority to make a gift, as with exercise of all authority under a power of attorney, must be consistent with the principal's objectives. If these objectives are not known, then gifts must be consistent with the principal's best interest based on all relevant factors. Subsection (c) [72-31-352(3)] provides examples of factors relevant to the principal's best interest, but these examples are illustrative rather than exclusive.

To the extent that a principal's objectives with respect to the making of gifts may potentially conflict with an agent's default duties under the Act, the principal should carefully consider stating those objectives in the power of attorney, or altering the default rules to accommodate the objectives, or both. See Section 114 [72-31-319] Comment.

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 217, Uniform Power of Attorney Act.

72-31-353. Statutory form power of attorney.

Official Comments

This section provides an optional form for creating a power of attorney. Any power of attorney that substantially complies with the form in Section 301 [72-31-353] constitutes a statutory form power of attorney with the meaning and effect prescribed by the Act.

The form begins with an "Important Information" section that contains instructions for the principal and concludes with an "Important Information for Agent" section that contains general information for the agent about agent duties, events that terminate an agent's authority, and agent liability. The form is constructed to guide the principal through designation of an agent, optional designation of one or more successor agents, and selection of subject areas and acts with respect to which the principal wishes to grant the agent authority. The form also contains an option for nomination of a conservator or guardian in the event later court-appointment of a fiduciary becomes necessary (see Section 108 [72-31-308] and Comment).

The grant of authority provisions in the form are divided into two sections: "Grant of General Authority," which corresponds to the subject areas defined in Sections 204 through 216 [72-31-339 through 72-31-351] of the Act, and "Grant of Specific Authority," which corresponds to the actions for which Section 201(a) [72-31-336(1)] requires an express grant of authority in a power of attorney. Article 2 of the Act [72-31-336 through 72-31-352] provides statutory construction with respect to all of the subject matters in the Grant of General Authority section and for the authority to make a gift listed in the Grant of Specific Authority section. The principal may modify any authority granted in the form by using the "Special Instructions" section of the form. For example, the scope of authority to make a gift is defined by the default provisions of Section 217 [72-31-352] unless the principal expands or narrows that authority in the Special Instructions.

Cautionary language in the Grant of Specific Authority section alerts the principal to the increased risks associated with a grant of authority that could significantly reduce the principal's property or alter the principal's estate plan. The form is constructed to require that the principal initial each action over which the principal grants specific authority. The separate authorization of acts covered by Section 201(a) [72-31-336(1)] is intended to emphasize to the principal the significance of granting such specific authority and to minimize the risk that those actions might be authorized inadvertently.

Many principals may wish to grant an agent comprehensive authority over their day-to-day affairs. If this is the case, the principal may grant authority over all of the subject areas in the Grant of General Authority section by initialing "All Preceding Subjects." Otherwise, the principal may authorize fewer than all of the subjects listed in the Grant of General Authority section by initialing only those particular subjects.

The statutory form is drafted to follow the Act's default provisions, but it does not preclude alteration of the default rules or the exercise of other options available under the Act. For example, if not altered by the Special Instructions, the default rules embodied in a statutory form power of attorney include:

(1) the power of attorney is durable (Section 104) [72-31-304];

(2) the power of attorney is effective when executed (Section 109) [72-31-309];

(3) a spouse-agent's authority terminates upon the filing of an action for dissolution, annulment, or legal separation (Section 110(b)(3)) [72-31-310(2)(c)];

(4) lapse of time does not affect an agent's authority (Section 110(c)) [72-31-310(3)];

(5) a successor agent has the same authority as the original agent (Section 111(b)) [72-31-316(2)];

(6) a successor agent may not act until all predecessors have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve (Section 111(b)) [72-31-316(2)];

(7) an agent is entitled to reimbursement of expenses reasonably incurred (Section 112) [72-31-317];

(8) an agent is entitled to reasonable compensation (Section 112) [72-31-317];

(9) the agent accepts appointment by exercising authority or performing duties, or by any assertion or conduct indicating acceptance (Section 113) [72-31-318];

(10) an agent has a duty to act loyally for the principal's benefit; to act so as not to create a conflict of interest that impairs the ability to act impartially in the principal's best interest; to act with care, competence, and diligence; to keep a record of receipts, disbursements, and transactions; to cooperate with the principal's health-care agent; to attempt to preserve the principal's estate plan to the extent the plan is known to the agent and if preservation is consistent with the principal's best interest; and to account if ordered by a court or requested by the principal, a fiduciary acting for the principal, a governmental agency with authority to protect the principal, or the personal representative or successor in interest of the principal's estate (Section 114) [72-31-319];

(11) an agent must give notice of resignation as specified in Section 118 [72-31-323]; and

(12) an agent that is not the principal's ancestor, spouse, or descendant may not exercise authority to create in the agent, or an individual to whom the agent owes support, an interest in the principal's property (Section 201(b)) [72-31-336(2)].

Although the statutory form does not include express prompts for deviating from the foregoing default rules, any statutorily-sanctioned deviation from the statutory form may be indicated in, or on an addendum to, the Special Instructions.

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 301, Uniform Power of Attorney Act.

72-31-354. Agent's certification.

Official Comments

This section provides an optional form that may be used by an agent to certify facts concerning a power of attorney. Although the form contains statements of fact about which persons commonly request certification, other factual statements may be added to the form for the purpose of providing an agent certification pursuant to Section 119 [72-31-324].

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 302, Uniform Power of Attorney Act.

72-31-365. Uniformity of application and construction.

Compiler's Comments

2011 Amendment: Chapter 109 substituted current language for "This part must be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this part among states enacting it." Amendment effective October 1, 2011.

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

Source: Section 401, Uniform Power of Attorney Act.

72-31-366. Relation to Electronic Signatures in Global and National Commerce Act.

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 402, Uniform Power of Attorney Act.

72-31-367. Effect on existing powers of attorney.

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Source: Section 403, Uniform Power of Attorney Act.

Part 4

Revised Uniform Fiduciary Access to Digital Assets Act

Part Compiler's Comments

Effective Date: This section is effective October 1, 2017.

Retroactive Applicability: Section 20, Ch. 286, L. 2017, provided: "(1) [Sections 1 through 17] [72-31-401 through 72-31-417] apply retroactively, within the meaning of 1-2-109, to:

(a) a fiduciary acting under a will or power of attorney executed before, on, or after [the effective date of this act] [October 1, 2017];

(b) a personal representative acting for a decedent who died before, on, or after [the effective date of this act] [October 1, 2017];

(c) a conservatorship proceeding commenced before, on, or after [the effective date of this act] [October 1, 2017]; and

(d) a trustee acting under a trust created before, on, or after [the effective date of this act] [October 1, 2017].

(2) [Sections 1 through 17] [72-31-401 through 72-31-417] apply to a custodian if the user resides in this state or resided in this state at the time of the user's death.

(3) [Sections 1 through 17] [72-31-401 through 72-31-417] do not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business."

Severability: Section 19, Ch. 286, L. 2017, was a severability clause.

CHAPTER 34
PRINCIPAL AND INCOME

Chapter Compiler's Comments

Source — Explanation of Official Comments: The text of the Montana Trust Code (Title 72, ch. 33 through 36, MCA) was proposed by a joint committee of the State Bar of Montana and the Montana Bankers Association and was enacted by Ch. 685, L. 1989. Professor E. Edwin Eck of the University of Montana (now University of Montana-Missoula) School of Law was the lawyer chairman of the Joint Committee on Trust Law Revision. The Committee began work in 1986 and completed its proposal in November 1987.

The Montana Trust Code is based in substantial part on the California Trust Law, California Probate Code sections 15000 through 18201, which was adopted by California in 1986 and became operative in California on July 1, 1987. The official comments that follow each section cite the corresponding California section, if any. If the Montana section constitutes a change in substance from the corresponding California provision, the official comment includes a discussion of the change. If the Montana section is based upon a statute of a state other than California, that state's statute is cited in the official comment.

The official comments that follow were prepared by the Joint Committee on Trust Law Revision.

Chapter Case Notes

Self-Dealing During Agency Relationship — Proof of Undue Influence and Constructive Fraud — Shift of Burden of Proof — Agent Prohibited From Acting as Trustee Would Have Been Prohibited: Alice, a good friend of Maggie, lived near her and undertook to manage Maggie's financial affairs when Maggie's health began failing. As Maggie became more afflicted with dementia, Alice moved in with Maggie to care for her and began writing all of Maggie's checks for her. Alice also began selling Maggie's securities, depositing the proceeds into her own account, and writing checks to herself for purposes that sometimes involved Maggie. During this time, Maggie's physician found her mental capacity to be steadily diminishing and urged Alice to take Maggie to a nursing home. After Alice had depleted Maggie's financial resources from approximately $200,000 to approximately $20,000, Maggie's sister, Ida, discovered that Maggie had been moved to a nursing home and discovered that her money had been spent by Alice. Maggie died shortly thereafter, and the personal representative brought an action against Alice for an accounting of Maggie's funds. The Supreme Court held that all of the criteria for proof of undue influence established in Christensen v. Britton, 240 M 393, 784 P2d 908 (1989), had been satisfied and that the District Court therefore erred in not shifting the burden of proof to Alice to prove that the financial transactions involving Alice were fair and voluntary. Likewise, the Supreme Court also held, because of the agency or fiduciary relationship between Alice and Maggie, that the District Court erred in placing the burden on the estate to prove constructive fraud. The Supreme Court held that under statutory provisions of agency law, Alice was not authorized to do any act that a trustee would be prohibited by this chapter from doing and found that such a prohibition still existed under 28-10-407(3), even though 72-20-208 had been repealed. The Supreme Court therefore remanded the case to the District Court for a new trial. Luke v. Gager, 2000 MT 377, 303 M 474, 16 P3d 377, 57 St. Rep. 1599 (2000).

Part 4
Montana Uniform Principal and Income Act

Part Official Comments

PREFATORY NOTE

This revision of the 1931 Uniform Principal and Income Act and the 1962 Revised Uniform Principal and Income Act has two purposes.

One purpose is to revise the 1931 and the 1962 Acts. Revision is needed to support the now widespread use of the revocable living trust as a will substitute, to change the rules in those Acts that experience has shown need to be changed, and to establish new rules to cover situations not provided for in the old Acts, including rules that apply to financial instruments invented since 1962.

The other purpose is to provide a means for implementing the transition to an investment regime based on principles embodied in the Uniform Prudent Investor Act [Title 72, chapter 34, part 6], especially the principle of investing for total return rather than a certain level of "income" as traditionally perceived in terms of interest, dividends, and rents.

Revision of the 1931 and 1962 Acts

The prior Acts and this revision of those Acts deal with four questions affecting the rights of beneficiaries:

(1) How is income earned during the probate of an estate to be distributed to trusts and to persons who receive outright bequests of specific property, pecuniary gifts, and the residue?

(2) When an income interest in a trust begins (i.e., when a person who creates the trust dies or when she transfers property to a trust during life), what property is principal that will eventually go to the remainder beneficiaries and what is income?

(3) When an income interest ends, who gets the income that has been received but not distributed, or that is due but not yet collected, or that has accrued but is not yet due?

(4) After an income interest begins and before it ends, how should its receipts and disbursements be allocated to or between principal and income?

Changes in the traditional sections are of three types: new rules that deal with situations not covered by the prior Acts, clarification of provisions in the 1962 Act, and changes to rules in the prior Acts.

New rules. Issues addressed by some of the more significant new rules include:

(1) The application of the probate administration rules to revocable living trusts after the settlor's death and to other terminating trusts. Articles 2 and 3 [72-34-428 through 72-34-432].

(2) The payment of interest or some other amount on the delayed payment of an outright pecuniary gift that is made pursuant to a trust agreement instead of a will when the agreement or state law does not provide for such a payment. Section 201(3) [72-34-428(2)].

(3) The allocation of net income from partnership interests acquired by the trustee other than from a decedent (the old Acts deal only with partnership interests acquired from a decedent). Section 401 [72-34-433].

(4) An "unincorporated entity" concept has been introduced to deal with businesses operated by a trustee, including farming and livestock operations, and investment activities in rental real estate, natural resources, timber, and derivatives. Section 403 [72-34-435].

(5) The allocation of receipts from discount obligations such as zero-coupon bonds. Section 406(b) [72-34-438(2)].

(6) The allocation of net income from harvesting and selling timber between principal and income. Section 412 [72-34-444].

(7) The allocation between principal and income of receipts from derivatives, options, and asset-backed securities. Sections 414 and 415 [72-34-446 and 72-34-447].

(8) Disbursements made because of environmental laws. Section 502(a)(7) [72-34-449(1)(g)].

(9) Income tax obligations resulting from the ownership of S corporation stock and interests in partnerships. Section 505 [72-34-452].

(10) The power to make adjustments between principal and income to correct inequities caused by tax elections or peculiarities in the way the fiduciary income tax rules apply. Section 506 [72-34-453].

Clarifications and changes in existing rules. A number of matters provided for in the prior Acts have been changed or clarified in this revision, including the following:

(1) An income beneficiary's estate will be entitled to receive only net income actually received by a trust before the beneficiary's death and not items of accrued income. Section 303 [72-34-432].

(2) Income from a partnership is based on actual distributions from the partnership, in the same manner as corporate distributions. Section 401 [72-34-433].

(3) Distributions from corporations and partnerships that exceed 20% of the entity's gross assets will be principal whether or not intended by the entity to be a partial liquidation. Section 401(d)(2) [72-34-433(4)(a)(ii)].

(4) Deferred compensation is dealt with in greater detail in a separate section. Section 409 [72-34-441].

(5) The 1962 Act rule for "property subject to depletion," (patents, copyrights, royalties, and the like), which provides that a trustee may allocate up to 5% of the asset's inventory value to income and the balance to principal, has been replaced by a rule that allocates 90% of the amounts received to principal and the balance to income. Section 410 [72-34-442].

(6) The percentage used to allocate amounts received from oil and gas has been changed - 90% of those receipts are allocated to principal and the balance to income. Section 411 [72-34-443].

(7) The unproductive property rule has been eliminated for trusts other than marital deduction trusts. Section 413 [72-34-445].

(8) Charging depreciation against income is no longer mandatory, and is left to the discretion of the trustee. Section 503 [72-34-450].

Coordination with the Uniform Prudent Investor Act [Title 72, chapter 34, part 6]

The law of trust investment has been modernized. See Uniform Prudent Investor Act [Title 72, chapter 34, part 6] (1994); Restatement (Third) of Trusts: Prudent Investor Rule (1992) (hereinafter Restatement of Trusts 3d: Prudent Investor Rule). Now it is time to update the principal and income allocation rules so the two bodies of doctrine can work well together. This revision deals conservatively with the tension between modern investment theory and traditional income allocation. The starting point is to use the traditional system. If prudent investing of all the assets in a trust viewed as a portfolio and traditional allocation effectuate the intent of the settlor, then nothing need be done. The Act, however, helps the trustee who has made a prudent, modern portfolio-based investment decision that has the initial effect of skewing return from all the assets under management, viewed as a portfolio, as between income and principal beneficiaries. The Act gives that trustee a power to reallocate the portfolio return suitably. To leave a trustee constrained by the traditional system would inhibit the trustee's ability to fully implement modern portfolio theory.

As to modern investing see, e.g., the Preface to, terms of, and Comments to the Uniform Prudent Investor Act [Title 72, chapter 34, part 6] (1994); the discussion and reporter's note by Edward C. Halbach, Jr. in Restatement of Trusts 3d: Prudent Investor Rule; John H. Langbein, The Uniform Prudent Investor Act and the Future of Trust Investing, 81 Iowa L. Rev. 641 (1996); Bevis Longstreth, Modern Investment Management and the Prudent Man Rule (1986); John H. Langbein & Richard A. Posner, The Revolution in Trust Investment Law, 62 A.B.A.J. 887 (1976); and Jeffrey N. Gordon, The Puzzling Persistence of the Constrained Prudent Man Rule, 62 N.Y.U. L. Rev. 52 (1987). See also R.A. Brearly, An Introduction to Risk and Return from Common Stocks (2d ed. 1983); Jonathan R. Macey, An Introduction to Modern Financial Theory (2d ed. 1998). As to the need for principal and income reform see, e.g., Joel C. Dobris, Real Return, Modern Portfolio Theory and College, University and Foundation Decisions on Annual Spending From Endowments: A Visit to the World of Spending Rules, 28 Real Prop., Prob., & Tr. J. 49 (1993); Joel C. Dobris, The Probate World at the End of the Century: Is a New Principal and Income Act in Your Future?, 28 Real Prop., Prob., & Tr. J. 393 (1993); and Kenneth L. Hirsch, Inflation and the Law of Trusts, 18 Real Prop., Prob., & Tr. J. 601 (1983). See also, Jerold I. Horn, The Prudent Investor Rule - Impact on Drafting and Administration of Trusts, 20 ACTEC Notes 26 (Summer 1994).

Part Compiler's Comments

Effective Date: This part is effective October 1, 2003.

Source: This part is adopted from the California version of the Uniform Principal and Income Act, Cal. Probate Code sections 16320 through 16375. Therefore, the official comments may not correspond directly to the Montana statute.

72-34-422. Definitions.

Official Comments

"Income beneficiary." The definitions of income beneficiary (Section 102(5)) [72-34-422(4)] and income interest (Section 102(6)) [72-34-422(5)] cover both mandatory and discretionary beneficiaries and interests. There are no definitions for "discretionary income beneficiary" or "discretionary income interest" because those terms are not used in the Act.

Inventory value. There is no definition for inventory value in this Act because the provisions in which that term was used in the 1962 Act have either been eliminated (in the case of the underproductive property provision) or changed in a way that eliminates the need for the term (in the case of bonds and other money obligations, property subject to depletion, and the method for determining entitlement to income distributed from a probate estate).

"Net income." The reference to "transfers under this Act to or from income" means transfers made under Sections 104(a), 412(b), 502(b), 503(b), 504(a), and 506 [72-34-424(1), 72-34-444(2), 72-34-449(2), 72-34-450(2), 72-34-451(1), and 72-34-453].

"Terms of a trust." This term was chosen in preference to "terms of the trust instrument" (the phrase used in the 1962 Act) to make it clear that the Act applies to oral trusts as well as those whose terms are expressed in written documents. The definition is based on the Restatement

(Second) of Trusts § 4 (1959) and the Restatement (Third) of Trusts § 4 (Tent. Draft No. 1, 1996). Constructional preferences or rules would also apply, if necessary, to determine the terms of the trust.

72-34-423. Allocation between principal and income — impartial exercise of discretion.

Official Comments

Prior Act. The rule in Section 2(a) [72-34-403(1), now repealed] of the 1962 Act is restated in Section 103(a) [72-34-423(1)], without changing its substance, to emphasize that the Act contains only default rules and that provisions in the terms of the trust are paramount. However, Section 2(a) [72-34-403(1), now repealed] of the 1962 Act applies only to the allocation of receipts and disbursements to or between principal and income. In this Act, the first sentence of Section 103(a) [72-34-423(1)] states that it also applies to matters within the scope of Articles 2 and 3 [72-34-428 through 72-34-432]. Section 103(a)(2) [72-34-423(1)(b)] incorporates the rule in Section 2(b) [72-34-403(2), now repealed] of the 1962 Act that a discretionary allocation made by the trustee that is contrary to a rule in the Act should not give rise to an inference of imprudence or partiality by the trustee.

The Act deletes the language that appears at the end of 1962 Act Section 2(a)(3) [72-34-403(1)(c), now repealed]- "and in view of the manner in which men of ordinary prudence, discretion and judgment would act in the management of their affairs" - because persons of ordinary prudence, discretion and judgment, acting in the management of their own affairs do not normally think in terms of the interests of successive beneficiaries. If there is an analogy to an individual's decision-making process, it is probably the individual's decision to spend or to save, but this is not a useful guideline for trust administration. No case has been found in which a court has relied on the "prudent man" rule of the 1962 Act.

Fiduciary discretion. The general rule is that if a discretionary power is conferred upon a trustee, the exercise of that power is not subject to control by a court except to prevent an abuse of discretion. Restatement (Second) of Trusts § 187. The situations in which a court will control the exercise of a trustee's discretion are discussed in the comments to § 187. See also id. § 233 Comment p.

Questions for which there is no provision. Section 103(a)(4) [72-34-423(1)(d)] allocates receipts and disbursements to principal when there is no provision for a different allocation in the terms of the trust, the will, or the Act. This may occur because money is received from a financial instrument not available at the present time (inflation-indexed bonds might have fallen into this category had they been announced after this Act was approved by the Commissioners on Uniform State Laws) or because a transaction is of a type or occurs in a manner not anticipated by the Drafting Committee for this Act or the drafter of the trust instrument.

Allocating to principal a disbursement for which there is no provision in the Act or the terms of the trust preserves the income beneficiary's level of income in the year it is allocated to principal, but thereafter will reduce the amount of income produced by the principal. Allocating to principal a receipt for which there is no provision will increase the income received by the income beneficiary in subsequent years, and will eventually, upon termination of the trust, also favor the remainder beneficiary. Allocating these items to principal implements the rule that requires a trustee to administer the trust impartially, based on what is fair and reasonable to both income and remainder beneficiaries. However, if the trustee decides that an adjustment between principal and income is needed to enable the trustee to comply with Section 103(b) [72-34-423(2)], after considering the return from the portfolio as a whole, the trustee may make an appropriate adjustment under Section 104(a) [72-34-424(1)].

Duty of impartiality. Whenever there are two or more beneficiaries, a trustee is under a duty to deal impartially with them. Restatement of Trusts 3d: Prudent Investor Rule § 183 (1992). This rule applies whether the beneficiaries' interests in the trust are concurrent or successive. If the terms of the trust give the trustee discretion to favor one beneficiary over another, a court will not control the exercise of such discretion except to prevent the trustee from abusing it. Id. § 183, Comment a. "The precise meaning of the trustee's duty of impartiality and the balancing of competing interests and objectives inevitably are matters of judgment and interpretation. Thus, the duty and balancing are affected by the purposes, terms, distribution requirements, and other circumstances of the trust, not only at the outset but as they may change from time to time." Id. § 232, Comment c.

The terms of a trust may provide that the trustee, or an accountant engaged by the trustee, or a committee of persons who may be family members or business associates, shall have the power to determine what is income and what is principal. If the terms of a trust provide that this Act specifically or principal and income legislation in general does not apply to the trust but fail to provide a rule to deal with a matter provided for in this Act, the trustee has an implied grant of discretion to decide the question. Section 103(b) [72-34-423(2)] provides that the rule of impartiality applies in the exercise of such a discretionary power to the extent that the terms of the trust do not provide that one or more of the beneficiaries are to be favored. The fact that a person is named an income beneficiary or a remainder beneficiary is not by itself an indication of partiality for that beneficiary.

72-34-424. Adjustments between principal and income.

Official Comments

Purpose and Scope of Provision. The purpose of Section 104 [72-34-424] is to enable a trustee to select investments using the standards of a prudent investor without having to realize a particular portion of the portfolio's total return in the form of traditional trust accounting income such as interest, dividends, and rents. Section 104(a) [72-34-424(1)] authorizes a trustee to make adjustments between principal and income if three conditions are met: (1) the trustee must be managing the trust assets under the prudent investor rule; (2) the terms of the trust must express the income beneficiary's distribution rights in terms of the right to receive "income" in the sense of traditional trust accounting income; and (3) the trustee must determine, after applying the rules in Section 103(a) [72-34-423(1)], that he is unable to comply with Section 103(b) [72-34-423(2)]. In deciding whether and to what extent to exercise the power to adjust, the trustee is required to consider the factors described in Section 104(b) [72-34-424(7)], but the trustee may not make an adjustment in circumstances described in Section 104(c) [72-34-424(2)].

Section 104 [72-34-424] does not empower a trustee to increase or decrease the degree of beneficial enjoyment to which a beneficiary is entitled under the terms of the trust; rather, it authorizes the trustee to make adjustments between principal and income that may be necessary if the income component of a portfolio's total return is too small or too large because of investment decisions made by the trustee under the prudent investor rule. The paramount consideration in applying Section 104(a) [72-34-424(1)] is the requirement in Section 103(b) [72-34-423(2)] that "a fiduciary must administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries." The power to adjust is subject to control by the court to prevent an abuse of discretion. Restatement (Second) of Trusts § 187 (1959). See also id. §§ 183, 232, 233, Comment p (1959).

Section 104 [72-34-424] will be important for trusts that are irrevocable when a State adopts the prudent investor rule by statute or judicial approval of the rule in Restatement of Trusts 3d: Prudent Investor Rule. Wills and trust instruments executed after the rule is adopted can be drafted to describe a beneficiary's distribution rights in terms that do not depend upon the amount of trust accounting income, but to the extent that drafters of trust documents continue to describe an income beneficiary's distribution rights by referring to trust accounting income, Section 104 [72-34-424] will be an important tool in trust administration.

Three conditions to the exercise of the power to adjust. The first of the three conditions that must be met before a trustee can exercise the power to adjust - that the trustee invest and manage trust assets as a prudent investor - is expressed in this Act by language derived from the Uniform Prudent Investor Act [Title 72, chapter 34, part 6], but the condition will be met whether the prudent investor rule applies because the Uniform Act [Title 72, chapter 34, part 6] or other prudent investor legislation has been enacted, the prudent investor rule has been approved by the courts, or the terms of the trust require it. Even if a State's legislature or courts have not formally adopted the rule, the Restatement establishes the prudent investor rule as an authoritative interpretation of the common law prudent man rule, referring to the prudent investor rule as a "modest reformulation of the Harvard College dictum and the basic rule of prior Restatements." Restatement of Trusts 3d: Prudent Investor Rule, Introduction, at 5. As a result, there is a basis for concluding that the first condition is satisfied in virtually all States except those in which a trustee is permitted to invest only in assets set forth in a statutory "legal list."

The second condition will be met when the terms of the trust require all of the "income" to be distributed at regular intervals; or when the terms of the trust require a trustee to distribute all of the income, but permit the trustee to decide how much to distribute to each member of a class of beneficiaries; or when the terms of a trust provide that the beneficiary shall receive the greater of the trust accounting income and a fixed dollar amount (an annuity), or of trust accounting income and a fractional share of the value of the trust assets (a unitrust amount). If the trust authorizes the trustee in its discretion to distribute the trust's income to the beneficiary or to accumulate some or all of the income, the condition will be met because the terms of the trust do not permit the trustee to distribute more than the trust accounting income.

To meet the third condition, the trustee must first meet the requirements of Section 103(a) [72-34-423(1)], i.e., she must apply the terms of the trust, decide whether to exercise the discretionary powers given to the trustee under the terms of the trust, and must apply the provisions of the Act if the terms of the trust do not contain a different provision or give the trustee discretion. Second, the trustee must determine the extent to which the terms of the trust clearly manifest an intention by the settlor that the trustee may or must favor one or more of the beneficiaries. To the extent that the terms of the trust do not require partiality, the trustee must conclude that she is unable to comply with the duty to administer the trust impartially. To the extent that the terms of the trust do require or permit the trustee to favor the income beneficiary or the remainder beneficiary, the trustee must conclude that she is unable to achieve the degree of partiality required or permitted. If the trustee comes to either conclusion - that she is unable to administer the trust impartially or that she is unable to achieve the degree of partiality required or permitted - she may exercise the power to adjust under Section 104(a) [72-34-424(1)].

Impartiality and productivity of income. The duty of impartiality between income and remainder beneficiaries is linked to the trustee's duty to make the portfolio productive of trust accounting income whenever the distribution requirements are expressed in terms of distributing the trust's "income." The 1962 Act implies that the duty to produce income applies on an asset by asset basis because the right of an income beneficiary to receive "delayed income" from the sale proceeds of underproductive property under Section 12 [72-34-412, now repealed] of that Act arises if "any part of principal . . . has not produced an average net income of a least 1% per year of its inventory value for more than a year . . . ." Under the prudent investor rule, "[t]o whatever extent a requirement of income productivity exists, . . . the requirement applies not investment by investment but to the portfolio as a whole." Restatement of Trusts 3d: Prudent Investor Rule § 227, Comment i, at 34. The power to adjust under Section 104(a) [72-34-424(1)] is also to be exercised by considering net income from the portfolio as a whole and not investment by investment. Section 413(b) [72-34-445(2)] of this Act eliminates the underproductive property rule in all cases other than trusts for which a marital deduction is allowed; the rule applies to a marital deduction trust if the trust's assets "consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets . . ." — in other words, the section applies by reference to the portfolio as a whole.

While the purpose of the power to adjust in Section 104(a) [72-34-424(1)] is to eliminate the need for a trustee who operates under the prudent investor rule to be concerned about the income component of the portfolio's total return, the trustee must still determine the extent to which a distribution must be made to an income beneficiary and the adequacy of the portfolio's liquidity as a whole to make that distribution.

For a discussion of investment considerations involving specific investments and techniques under the prudent investor rule, see Restatement of Trusts 3d: Prudent Investor Rule § 227, Comments k-p.

Factors to consider in exercising the power to adjust. Section 104(b) [72-34-424(7)] requires a trustee to consider factors relevant to the trust and its beneficiaries in deciding whether and to what extent the power to adjust should be exercised. Section 2(c) of the Uniform Prudent Investor Act [72-34-603(3)] sets forth circumstances that a trustee is to consider in investing and managing trust assets. The circumstances in Section 2(c) of the Uniform Prudent Investor Act [72-34-603(3)] are the source of the factors in paragraphs (3) through (6) and (8) of Section 104(b) [72-34-424(7)(c) through (7)(f) and (7)(h)], (modified where necessary to adapt them to the purposes of this Act) so that, to the extent possible, comparable factors will apply to investment decisions and decisions involving the power to adjust. If a trustee who is operating under the prudent investor rule decides that the portfolio should be composed of financial assets whose total return will result primarily from capital appreciation rather than dividends, interest, and rents, the trustee can decide at the same time the extent to which an adjustment from principal to income may be necessary under Section 104 [72-34-424]. On the other hand, if a trustee decides that the risk and return objectives for the trust are best achieved by a portfolio whose total return includes interest and dividend income that is sufficient to provide the income beneficiary with the beneficial interest to which the beneficiary is entitled under the terms of the trust, the trustee can decide that it is unnecessary to exercise the power to adjust.

Assets received from the settlor. Section 3 of the Uniform Prudent Investor Act [72-34-605(1)] provides that "[a] trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." The special circumstances may include the wish to retain a family business, the benefit derived from deferring liquidation of the asset in order to defer payment of income taxes, or the anticipated capital appreciation from retaining an asset such as undeveloped real estate for a long period. To the extent the trustee retains assets received from the settlor because of special circumstances that overcome the duty to diversify, the trustee may take these circumstances into account in determining whether and to what extent the power to adjust should be exercised to change the results produced by other provisions of this Act that apply to the retained assets. See Section 104(b)(5) [72-34-424(7)(e)]; Uniform Prudent Investor Act § 3, [72-34-605(1)] Comment, 7B U.L.A. 18, at 25-26 (Supp. 1997); Restatement of Trusts 3d: Prudent Investor Rule § 229 and Comments a-e.

Limitations on the power to adjust. The purpose of subsections (c)(1) through (4) [72-34-424(2)(a) through (2)(d)] is to preserve tax benefits that may have been an important purpose for creating the trust. Subsections (c)(5), (6), and (8) [72-34-424(2)(e) and (2)(f)] deny the power to adjust in the circumstances described in those subsections in order to prevent adverse tax consequences, and subsection (c)(7) [72-34-424(2)(g)] denies the power to adjust to any beneficiary, whether or not possession of the power may have adverse tax consequences.

Under subsection (c)(1) [72-34-424(2)(a)], a trustee cannot make an adjustment that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction is allowed; but this subsection does not prevent the trustee from making an adjustment that increases the amount of income paid from a marital deduction trust to the spouse. Subsection (c)(1) [72-34-424(2)(a)] applies to a trust that qualifies for the marital deduction because the spouse has a general power of appointment over the trust, but it applies to a qualified terminable interest property (QTIP) trust only if and to the extent that the fiduciary makes the election required to obtain the tax deduction. Subsection (c)(1) [72-34-424(2)(a)] does not apply to a so-called "estate" trust. This type of trust qualifies for the marital deduction because the terms of the trust require the principal and undistributed income to be paid to the surviving spouse's estate when the spouse dies; it is not necessary for the terms of an estate trust to require the income to be distributed annually. Reg. § 20.2056(c)-2(b)(1)(iii).

Subsection (c)(3) [72-34-424(2)(c)] applies to annuity trusts and unitrusts with no charitable beneficiaries as well as to trusts with charitable income or remainder beneficiaries; its purpose is to make it clear that a beneficiary's right to receive a fixed annuity or a fixed fraction of the value of a trust's assets is not subject to adjustment under Section 104(a) [72-34-424(1)]. Subsection (c)(3) [72-34-424(2)(c)] does not apply to any additional amount to which the beneficiary may be entitled that is expressed in terms of a right to receive income from the trust. For example, if a beneficiary is to receive a fixed annuity or the trust's income, whichever is greater, subsection (c)(3) [72-34-424(2)(c)] does not prevent a trustee from making an adjustment under Section 104(a) [72-34-424(1)] in determining the amount of the trust's income.

If subsection (c)(5), (6), (7), or (8), [72-34-424(2)(e), (2)(f), or (2)(g)] prevents a trustee from exercising the power to adjust, subsection (d) [72-34-424(3)] permits a cotrustee who is not subject to the provision to exercise the power unless the terms of the trust do not permit the cotrustee to do so.

Release of the power to adjust. Section 104(e) [72-34-424(4)] permits a trustee to release all or part of the power to adjust in circumstances in which the possession or exercise of the power might deprive the trust of a tax benefit or impose a tax burden. For example, if possessing the power would diminish the actuarial value of the income interest in a trust for which the income beneficiary's estate may be eligible to claim a credit for property previously taxed if the beneficiary dies within ten years after the death of the person creating the trust, the trustee is permitted under subsection (e) [72-34-424(4)] to release just the power to adjust from income to principal.

Trust terms that limit a power to adjust. Section 104(f) [72-34-424(6)] applies to trust provisions that limit a trustee's power to adjust. Since the power is intended to enable trustees to employ the prudent investor rule without being constrained by traditional principal and income rules, an instrument executed before the adoption of this Act whose terms describe the amount that may or must be distributed to a beneficiary by referring to the trust's income or that prohibit the invasion of principal or that prohibit equitable adjustments in general should not be construed as forbidding the use of the power to adjust under Section 104(a) [72-34-424(1)] if the need for adjustment arises because the trustee is operating under the prudent investor rule. Instruments containing such provisions that are executed after the adoption of this Act should specifically refer to the power to adjust if the settlor intends to forbid its use. See generally, Joel

C. Dobris, Limits on the Doctrine of Equitable Adjustment in Sophisticated Postmortem Tax Planning, 66 Iowa L. Rev. 273 (1981).

Examples. The following examples illustrate the application of Section 104 [72-34-424]:

Example (1) - T is the successor trustee of a trust that provides income to A for life, remainder to B. T has received from the prior trustee a portfolio of financial assets invested 20% in stocks and 80% in bonds. Following the prudent investor rule, T determines that a strategy of investing the portfolio 50% in stocks and 50% in bonds has risk and return objectives that are reasonably suited to the trust, but T also determines that adopting this approach will cause the trust to receive a smaller amount of dividend and interest income. After considering the factors in Section 104(b) [72-34-424(7)], T may transfer cash from principal to income to the extent T considers it necessary to increase the amount distributed to the income beneficiary.

Example (2) - T is the trustee of a trust that requires the income to be paid to the settlor's son C for life, remainder to C's daughter D. In a period of very high inflation, T purchases bonds that pay double-digit interest and determines that a portion of the interest, which is allocated to income under Section 406 [72-34-438] of this Act, is a return of capital. In consideration of the loss of value of principal due to inflation and other factors that T considers relevant, T may transfer part of the interest to principal.

Example (3) - T is the trustee of a trust that requires the income to be paid to the settlor's sister E for life, remainder to charity F. E is a retired schoolteacher who is single and has no children. E's income from her social security, pension, and savings exceeds the amount required to provide for her accustomed standard of living. The terms of the trust permit T to invade principal to provide for E's health and to support her in her accustomed manner of living, but do not otherwise indicate that T should favor E or F. Applying the prudent investor rule, T determines that the trust assets should be invested entirely in growth stocks that produce very little dividend income. Even though it is not necessary to invade principal to maintain E's accustomed standard of living, she is entitled to receive from the trust the degree of beneficial enjoyment normally accorded a person who is the sole income beneficiary of a trust, and T may transfer cash from principal to income to provide her with that degree of enjoyment.

Example (4) - T is the trustee of a trust that is governed by the law of State X. The trust became irrevocable before State X adopted the prudent investor rule. The terms of the trust require all of the income to be paid to G for life, remainder to H, and also give T the power to invade principal for the benefit of G for "dire emergencies only." The terms of the trust limit the aggregate amount that T can distribute to G from principal during G's life to 6% of the trust's value at its inception. The trust's portfolio is invested initially 50% in stocks and 50% in bonds, but after State X adopts the prudent investor rule T determines that, to achieve suitable risk and return objectives for the trust, the assets should be invested 90% in stocks and 10% in bonds. This change increases the total return from the portfolio and decreases the dividend and interest income. Thereafter, even though G does not experience a dire emergency, T may exercise the power to adjust under Section 104(a) [72-34-424(1)] to the extent that T determines that the adjustment is from only the capital appreciation resulting from the change in the portfolio's asset allocation. If T is unable to determine the extent to which capital appreciation resulted from the change in asset allocation or is unable to maintain adequate records to determine the extent to which principal distributions to G for dire emergencies do not exceed the 6% limitation, T may not exercise the power to adjust. See Joel C. Dobris, Limits on the Doctrine of Equitable Adjustment in Sophisticated Postmortem Tax Planning, 66 Iowa L. Rev. 273 (1981).

Example (5) - T is the trustee of a trust for the settlor's child. The trust owns a diversified portfolio of marketable financial assets with a value of $600,000, and is also the sole beneficiary of the settlor's IRA, which holds a diversified portfolio of marketable financial assets with a value of $900,000. The trust receives a distribution from the IRA that is the minimum amount required to be distributed under the Internal Revenue Code, and T allocates 10% of the distribution to income under Section 409(c) [72-34-441(3)] of this Act. The total return on the IRA's assets exceeds the amount distributed to the trust, and the value of the IRA at the end of the year is more than its value at the beginning of the year. Relevant factors that T may consider in determining whether to exercise the power to adjust and the extent to which an adjustment should be made to comply with Section 103(b) [72-34-423(2)] include the total return from all of the trust's assets, those owned directly as well as its interest in the IRA, the extent to which the trust will be subject to income tax on the portion of the IRA distribution that is allocated to principal, and the extent to which the income beneficiary will be subject to income tax on the amount that T distributes to the income beneficiary.

Example (6) - T is the trustee of a trust whose portfolio includes a large parcel of undeveloped real estate. T pays real property taxes on the undeveloped parcel from income each year pursuant to Section 501(3) [72-34-448(3)]. After considering the return from the trust's portfolio as a whole and other relevant factors described in Section 104(b) [72-34-424(7)], T may exercise the power to adjust under Section 104(a) [72-34-424(1)] to transfer cash from principal to income in order to distribute to the income beneficiary an amount that T considers necessary to comply with Section 103(b) [72-34-423(2)].

Example (7) - T is the trustee of a trust whose portfolio includes an interest in a mutual fund that is sponsored by T. As the manager of the mutual fund, T charges the fund a management fee that reduces the amount available to distribute to the trust by $2,000. If the fee had been paid directly by the trust, one-half of the fee would have been paid from income under Section 501(1) [72-34-448(1)] and the other one-half would have been paid from principal under Section 502(a)(1) [72-34-449(1)(a)]. After considering the total return from the portfolio as a whole and other relevant factors described in Section 104(b) [72-34-424(7)]), T may exercise its power to adjust under Section 104(a) [72-34-424(1)] by transferring $1,000, or half of the trust's proportionate share of the fee, from principal to income.

Compiler's Comments

2013 Amendment: Chapter 264 in (1)(a) substituted "72-38-901" for "72-34-603"; in (3) at beginning deleted "Notwithstanding 72-33-611"; and in (7)(b) and (7)(e) substituted "settlor" for "trustor". Amendment effective October 1, 2013.

Severability: Section 161, Ch. 264, L. 2013, was a severability clause.

72-34-428. Rules applicable after decedent's death or termination of income interest.

Official Comments

Terminating income interests and successive income interests. A trust that provides for a single income beneficiary and an outright distribution of the remainder ends when the income interest ends. A more complex trust may have a number of income interests, either concurrent or successive, and the trust will not necessarily end when one of the income interests ends. For that reason, the Act speaks in terms of income interests ending and beginning rather than trusts ending and beginning. When an income interest in a trust ends, the trustee's powers continue during the winding up period required to complete its administration. A terminating income interest is one that has ended but whose administration is not complete.

If two or more people are given the right to receive specified percentages or fractions of the income from a trust concurrently and one of the concurrent interests ends, e.g., when a beneficiary dies, the beneficiary's income interest ends but the trust does not. Similarly, when a trust with only one income beneficiary ends upon the beneficiary's death, the trust instrument may provide that part or all of the trust assets shall continue in trust for another income beneficiary. While it is common to think and speak of this (and even to characterize it in a trust instrument) as a "new" trust, it is a continuation of the original trust for a remainder beneficiary who has an income interest in the trust assets instead of the right to receive them outright. For purposes of this Act, this is a successive income interest in the same trust. The fact that a trust may or may not end when an income interest ends is not significant for purposes of this Act.

If the assets that are subject to a terminating income interest pass to another trust because the income beneficiary exercises a general power of appointment over the trust assets, the recipient trust would be a new trust; and if they pass to another trust because the beneficiary exercises a nongeneral power of appointment over the trust assets, the recipient trust might be a new trust in some States (see 5A Austin W. Scott & William F. Fratcher, The Law of Trusts § 640, at 483 (4th ed. 1989)); but for purposes of this Act a new trust created in these circumstances is also a successive income interest.

Gift of a pecuniary amount. Section 201(3) and (4) [72-34-428(2) and (4)] provide different rules for an outright gift of a pecuniary amount and a gift in trust of a pecuniary amount; this is the same approach used in Section 5(b)(2) [72-34-406(2)(b), now repealed] of the 1962 Act.

Interest on pecuniary amounts. Section 201(3) [72-34-428(2)] provides that the beneficiary of an outright pecuniary amount is to receive the interest or other amount provided by applicable law if there is no provision in the will or the terms of the trust. Many States have no applicable law that provides for interest or some other amount to be paid on an outright pecuniary gift under an inter vivos trust; this section provides that in such a case the interest or other amount to be paid shall be the same as the interest or other amount required to be paid on testamentary pecuniary gifts. This provision is intended to accord gifts under inter vivos instruments the same treatment as testamentary gifts. The various state authorities that provide for the amount that a beneficiary of an outright pecuniary amount is entitled to receive are collected in Richard B. Covey, Marital Deduction and Credit Shelter Dispositions and the Use of Formula Provisions, App. B (4th ed. 1997).

Administration expenses and interest on death taxes. Under Section 201(2)(B) [72-34-428(3)(b)] a fiduciary may pay administration expenses and interest on death taxes from either income or principal. An advantage of permitting the fiduciary to choose the source of the payment is that, if the fiduciary's decision is consistent with the decision to deduct these expenses for income tax purposes or estate tax purposes, it eliminates the need to adjust between principal and income that may arise when, for example, an expense that is paid from principal is deducted for income tax purposes or an expense that is paid from income is deducted for estate tax purposes.

The United States Supreme Court has considered the question of whether an estate tax marital deduction or charitable deduction should be reduced when administration expenses are paid from income produced by property passing in trust for a surviving spouse or for charity and deducted for income tax purposes. The Court rejected the IRS position that administration expenses properly paid from income under the terms of the trust or state law must reduce the amount of a marital or charitable transfer, and held that the value of the transferred property is not reduced for estate tax purposes unless the administration expenses are material in light of the income the trust corpus could have been expected to generate. Commissioner v. Estate of Otis C. Hubert, 117 S.Ct. 1124 (1997). The provision in Section 201(2)(B) [72-34-428(3)(b)] permits a fiduciary to pay and deduct administration expenses from income only to the extent that it will not cause the reduction or loss of an estate tax marital or charitable contributions deduction, which means that the limit on the amount payable from income will be established eventually by Treasury Regulations.

Interest on estate taxes. The IRS agrees that interest on estate and inheritance taxes may be deducted for income tax purposes without having to reduce the estate tax deduction for amounts passing to a charity or surviving spouse, whether the interest is paid from principal or income. Rev. Rul. 93-48, 93-2 C.B. 270. For estates of persons who died before 1998, a fiduciary may not want to deduct for income tax purposes interest on estate tax that is deferred under Section 6166 or 6163 because deducting that interest for estate tax purposes may produce more beneficial results, especially if the estate has little or no income or the income tax bracket is significantly lower than the estate tax bracket. For estates of persons who die after 1997, no estate tax or income tax deduction will be allowed for interest paid on estate tax that is deferred under Section 6166. However, interest on estate tax deferred under Section 6163 will continue to be deductible for both purposes, and interest on estate tax deficiencies will continue to be deductible for estate tax purposes if an election under Section 6166 is not in effect.

Under the 1962 Act, Section 13(c)(5) [72-34-416(3)(e), now repealed] charges interest on estate and inheritance taxes to principal. The 1931 Act has no provision. Section 501(3) [72-34-448(3)] of this Act provides that, except to the extent provided in Section 201(2)(B) or (C) [72-34-428(3)(b) or (3)(c), all interest must be paid from income.

Case Notes

Interpretation of Will Devising Ranch — Distribution of Income: After two siblings disputed who should receive their parents' ranch, the District Court interpreted the decedent's will to devise the entirety of the ranch to one sibling. The other sibling, who was also the personal representative of the estate, appealed, arguing that under the will he was entitled to a portion of the ranch and that the other sibling should not have been allowed to object to the proposed distribution of income from the ranch. The Supreme Court affirmed, concluding that the District Court correctly interpreted the clear intent of the decedent and that once the District Court determined that one sibling was entitled to the entire ranch, it followed that the same sibling was entitled to receive all of the income from the ranch. Ecton v. Ecton, 2013 MT 114, 370 Mont. 52, 300 P.3d 706.

72-34-429. Beneficiary's portion of net income — maintenance of records — distribution date.

Official Comments

Relationship to prior Acts. Section 202 [72-34-429] retains the concept in Section 5(b)(2) [72-34-406(2)(b), now repealed] of the 1962 Act that the residuary legatees of estates are to receive net income earned during the period of administration on the basis of their proportionate interests in the undistributed assets when distributions are made. It changes the basis for determining their proportionate interests by using asset values as of a date reasonably near the time of distribution instead of inventory values; it extends the application of these rules to distributions from terminating trusts; and it extends these rules to gain or loss realized from the disposition of assets during administration, an omission in the 1962 Act that has been noted by several commentators. See, e.g., Richard B. Covey, Marital Deduction and Credit Shelter Dispositions and the Use of Formula Provisions 91 (4th ed. 1998); Thomas H. Cantrill, Fractional or Percentage Residuary Bequests: Allocation of Postmortem Income, Gain and Unrealized Appreciation, 10 Prob. Notes 322, 327 (1985).

72-34-430. Beneficiary's entitlement to net income — assets subject to trust — assets subject to successive income interest — termination of income interest.

Official Comments

Period during which there is no beneficiary. The purpose of the second part of subsection (d) [72-34-430(4)] is to provide that, at the end of a period during which there is no beneficiary to whom a trustee may distribute income, the trustee must apply the same apportionment rules that apply when a mandatory income interest ends. This provision would apply, for example, if a settlor creates a trust for grandchildren before any grandchildren are born. When the first grandchild is born, the period preceding the date of birth is treated as having ended, followed by a successive income interest, and the apportionment rules in Sections 302 and 303 [72-34-431 and 72-34-432] apply accordingly if the terms of the trust do not contain different provisions.

72-34-431. Allocation of income receipt or disbursement.

Official Comments

Prior Acts. Professor Bogert stated that "Section 4 [72-34-405, now repealed] of the [1962] Act makes a change with respect to the apportionment of the income of trust property not due until after the trust began but which accrued in part before the commencement of the trust. It treats such income as to be credited entirely to the income account in the case of a living trust, but to be apportioned between capital and income in the case of a testamentary trust. The [1931] Act apportions such income in the case of both types of trusts, except in the case of corporate dividends." George G. Bogert, The Revised Uniform Principal and Income Act, 38 Notre Dame Law. 50, 52 (1962). The 1962 Act also provides that an asset passing to an inter vivos trust by a bequest in the settlor's will is governed by the rule that applies to a testamentary trust, so that different rules apply to assets passing to an inter vivos trust depending upon whether they were transferred to the trust during the settlor's life or by his will.

Having several different rules that apply to similar transactions is confusing. In order to simplify administration, Section 302 [72-34-431] applies the same rule to inter vivos trusts (revocable and irrevocable), testamentary trusts, and assets that become subject to an inter vivos trust by a testamentary bequest.

Periodic payments. Under Section 302 [72-34-431], a periodic payment is principal if it is due but unpaid before a decedent dies or before an asset becomes subject to a trust, but the next payment is allocated entirely to income and is not apportioned. Thus, periodic receipts such as rents, dividends, interest, and annuities, and disbursements such as the interest portion of a mortgage payment, are not apportioned. This is the original common law rule. Edwin A. Howes, Jr., The American Law Relating to Income and Principal 70 (1905). In trusts in which a surviving spouse is dependent upon a regular flow of cash from the decedent's securities portfolio, this rule will help to maintain payments to the spouse at the same level as before the settlor's death. Under the 1962 Act, the pre-death portion of the first periodic payment due after death is apportioned to principal in the case of a testamentary trust or securities bequeathed by will to an inter vivos trust.

Nonperiodic payments. Under the second sentence of Section 302(b) [72-34-431(2)], interest on an obligation that does not provide a due date for the interest payment, such as interest on an income tax refund, would be apportioned to principal to the extent it accrues before a person dies or an income interest begins unless the obligation is specifically given to a devisee or remainder beneficiary, in which case all of the accrued interest passes under Section 201(1) [72-34-428(1)] to the person who receives the obligation. The same rule applies to interest on an obligation that has a due date but does not provide for periodic payments. If there is no stated interest on the obligation, such as a zero coupon bond, and the proceeds from the obligation are received more than one year after it is purchased or acquired by the trustee, the entire amount received is principal under Section 406 [72-34-438].

72-34-432. Undistributed income — definition — payment to beneficiary.

Official Comments

Prior Acts. Both the 1931 Act (Section 4) and the 1962 Act (Section 4(d)) [72-34-405(4), now repealed] provide that a deceased income beneficiary's estate is entitled to the undistributed income. The Drafting Committee concluded that this is probably not what most settlors would want, and that, with respect to undistributed income, most settlors would favor the income beneficiary first, the remainder beneficiaries second, and the income beneficiary's heirs last, if at all. However, it decided not to eliminate this provision to avoid causing disputes about whether the trustee should have distributed collected cash before the income beneficiary died.

Accrued periodic payments. Under the prior Acts, an income beneficiary or his estate is entitled to receive a portion of any payments, other than dividends, that are due or that have accrued when the income interest terminates. The last sentence of subsection (a) [72-34-432(1)] changes that rule by providing that such items are not included in undistributed income. The items affected include periodic payments of interest, rent, and dividends, as well as items of income that accrue over a longer period of time; the rule also applies to expenses that are due or accrued.

Example - accrued periodic payments. The rules in Section 302 [72-34-431] and Section 303 [72-34-432] work in the following manner: Assume that a periodic payment of rent that is due on July 20 has not been paid when an income interest ends on July 30; the successive income interest begins on July 31, and the rent payment that was due on July 20 is paid on August 3. Under Section 302(a) [72-34-431(1)], the July 20 payment is added to the principal of the successive income interest when received. Under Section 302(b) [72-34-431(2)], the entire periodic payment of rent that is due on August 20 is income when received by the successive income interest. Under Section 303 [72-34-432], neither the income beneficiary of the terminated income interest nor the beneficiary's estate is entitled to any part of either the July 20 or the August 20 payments because neither one was received before the income interest ended on July 30. The same principles apply to expenses of the trust.

Beneficiary with an unqualified power to revoke. The requirement in subsection (b) [72-34-432(2)] to pay undistributed income to a mandatory income beneficiary or her estate does not apply to the extent the beneficiary has an unqualified power to revoke more than five percent of the trust immediately before the income interest ends. Without this exception, subsection (b) [72-34-432(2)] would apply to a revocable living trust whose settlor is the mandatory income beneficiary during her lifetime, even if her will provides that all of the assets in the probate estate are to be distributed to the trust.

If a trust permits the beneficiary to withdraw all or a part of the trust principal after attaining a specified age and the beneficiary attains that age but fails to withdraw all of the principal that she is permitted to withdraw, a trustee is not required to pay her or her estate the undistributed income attributable to the portion of the principal that she left in the trust. The assumption underlying this rule is that the beneficiary has either provided for the disposition of the trust assets (including the undistributed income) by exercising a power of appointment that she has been given or has not withdrawn the assets because she is willing to have the principal and undistributed income be distributed under the terms of the trust. If the beneficiary has the power to withdraw 25% of the trust principal, the trustee must pay to her or her estate the undistributed income from the 75% that she cannot withdraw.

72-34-433. Allocation of receipts to income or principal — entity defined.

Official Comments

Entities to which Section 401 [72-34-433] applies. The reference to partnerships in Section 401(a) [72-34-433(1)] is intended to include all forms of partnerships, including limited partnerships, limited liability partnerships, and variants that have slightly different names and characteristics from State to State. The section does not apply, however, to receipts from an interest in property that a trust owns as a tenant in common with one or more co-owners, nor would it apply to an interest in a joint venture if, under applicable law, the trust's interest is regarded as that of a tenant in common.

Capital gain dividends. Under the Internal Revenue Code and the Income Tax Regulations, a "capital gain dividend" from a mutual fund or real estate investment trust is the excess of the fund's or trust's net long-term capital gain over its net short-term capital loss. As a result, a capital gain dividend does not include any net short-term capital gain, and cash received by a trust because of a net short-term capital gain is income under this Act.

Reinvested dividends. If a trustee elects (or continues an election made by its predecessor) to reinvest dividends in shares of stock of a distributing corporation or fund, whether evidenced by new certificates or entries on the books of the distributing entity, the new shares would be principal. Making or continuing such an election would be equivalent to deciding under Section 104 [72-34-424] to transfer income to principal in order to comply with Section 103(b) [72-34-423(2)]. However, if the trustee makes or continues the election for a reason other than to comply with Section 103(b) [72-34-423(2)], e.g., to make an investment without incurring brokerage commissions, the trustee should transfer cash from principal to income in an amount equal to the reinvested dividends.

Distribution of property. The 1962 Act describes a number of types of property that would be principal if distributed by a corporation. This becomes unwieldy in a section that applies to both corporations and all other entities. By stating that principal includes the distribution of any property other than money, Section 401 [72-34-433] embraces all of the items enumerated in Section 6 [72-34-407, now repealed] of the 1962 Act as well as any other form of nonmonetary distribution not specifically mentioned in that Act.

Partial liquidations. Under subsection (d)(1) [72-34-433(4)(a)(i)], any distribution designated by the entity as a partial liquidating distribution is principal regardless of the percentage of total assets that it represents. If a distribution exceeds 20% of the entity's gross assets, the entire distribution is a partial liquidation under subsection (d)(2) [72-34-433(4)(a)(ii)] whether or not the entity describes it as a partial liquidation. In determining whether a distribution is greater than 20% of the gross assets, the portion of the distribution that does not exceed the amount of income tax that the trustee or a beneficiary must pay on the entity's taxable income is ignored.

Other large distributions. A cash distribution may be quite large (for example, more than 10% but not more than 20% of the entity's gross assets) and have characteristics that suggest it should be treated as principal rather than income. For example, an entity may have received cash from a source other than the conduct of its normal business operations because it sold an investment asset; or because it sold a business asset other than one held for sale to customers in the normal course of its business and did not replace it; or it borrowed a large sum of money and secured the repayment of the loan with a substantial asset; or a principal source of its cash was from assets such as mineral interests, 90% of which would have been allocated to principal if the trust had owned the assets directly. In such a case the trustee, after considering the total return from the portfolio as a whole and the income component of that return, may decide to exercise the power under Section 104(a) [72-34-424(1)] to make an adjustment between income and principal, subject to the limitations in Section 104(c) [72-34-424(2)].

72-34-434. Allocation of amounts received from specified trusts or estates.

Official Comments

Terms of the distributing trust or estate. Under Section 103(a) [72-34-423(1)], a trustee is to allocate receipts in accordance with the terms of the recipient trust or, if there is no provision, in accordance with this Act. However, in determining whether a distribution from another trust or an estate is income or principal, the trustee should also determine what the terms of the distributing trust or estate say about the distribution - for example, whether they direct that the distribution, even though made from the income of the distributing trust or estate, is to be added to principal of the recipient trust. Such a provision should override the terms of this Act, but if the terms of the recipient trust contain a provision requiring such a distribution to be allocated to income, the trustee may have to obtain a judicial resolution of the conflict between the terms of the two documents.

Investment trusts. An investment entity to which the second sentence of this section applies includes a mutual fund, a common trust fund, a business trust or other entity organized as a trust for the purpose of receiving capital contributed by investors, investing that capital, and managing investment assets, including asset-backed security arrangements to which Section 415 [72-34-447] applies. See John H. Langbein, The Secret Life of the Trust: The Trust as an Instrument of Commerce, 107 Yale L.J. 165 (1997).

72-34-435. Separate accounting records for business or other activity.

Official Comments

Purpose and scope. The provisions in Section 403 [72-34-435] are intended to give greater flexibility to a trustee who operates a business or other activity in proprietorship form rather than in a wholly-owned corporation (or, where permitted by state law, a single-member limited liability company), and to facilitate the trustee's ability to decide the extent to which the net receipts from the activity should be allocated to income, just as the board of directors of a corporation owned entirely by the trust would decide the amount of the annual dividend to be paid to the trust. It permits a trustee to account for farming or livestock operations, rental properties, oil and gas properties, timber operations, and activities in derivatives and options as though they were held by a separate entity. It is not intended, however, to permit a trustee to account separately for a traditional securities portfolio to avoid the provisions of this Act that apply to such securities.

Section 403 [72-34-435] permits the trustee to account separately for each business or activity for which the trustee determines separate accounting is appropriate. A trustee with a computerized accounting system may account for these activities in a "subtrust"; an individual trustee may continue to use the business and record-keeping methods employed by the decedent or transferor who may have conducted the business under an assumed name. The intent of this section is to give the trustee broad authority to select business record-keeping methods that best suit the activity in which the trustee is engaged.

If a fiduciary liquidates a sole proprietorship or other activity to which Section 403 [72-34-435] applies, the proceeds would be added to principal, even though derived from the liquidation of accounts receivable, because the proceeds would no longer be needed in the conduct of the business. If the liquidation occurs during probate or during an income interest's winding up period, none of the proceeds would be income for purposes of Section 201 [72-34-428].

Separate accounts. A trustee may or may not maintain separate bank accounts for business activities that are accounted for under Section 403 [72-34-435]. A professional trustee may decide not to maintain separate bank accounts, but an individual trustee, especially one who has continued a decedent's business practices, may continue the same banking arrangements that were used during the decedent's lifetime. In either case, the trustee is authorized to decide to what extent cash is to be retained as part of the business assets and to what extent it is to be transferred to the trust's general accounts, either as income or principal.

72-34-436. Amounts allocated to principal.

Official Comments

Eminent domain awards. Even though the award in an eminent domain proceeding may include an amount for the loss of future rent on a lease, if that amount is not separately stated the entire award is principal. The rule is the same in the 1931 and 1962 Acts.

72-34-437. Amounts received from rental property allocation.

Official Comments

Application of Section 403 [72-34-435]. This section applies to the extent that the trustee does not account separately under Section 403 [72-34-435] for the management of rental properties owned by the trust.

Receipts that are capital in nature. A portion of the payment under a lease may be a reimbursement of principal expenditures for improvements to the leased property that is characterized as rent for purposes of invoking contractual or statutory remedies for nonpayment. If the trustee is accounting for rental income under Section 405 [72-34-437], a transfer from income to reimburse principal may be appropriate under Section 504 [72-34-451] to the extent that some of the "rent" is really a reimbursement for improvements. This set of facts could also be a relevant factor for a trustee to consider under Section 104(b) [72-34-424(7)] in deciding whether and to what extent to make an adjustment between principal and income under Section 104(a) [72-34-424(1)] after considering the return from the portfolio as a whole.

72-34-438. Interest on obligation to pay money — allocation.

Official Comments

Variable or floating interest rates. The reference in subsection (a) [72-34-438(1)] to variable or floating interest rate obligations is intended to clarify that, even though an obligation's interest rate may change from time to time based upon changes in an index or other market indicator, an obligation to pay money containing a variable or floating rate provision is subject to this section and is not to be treated as a derivative financial instrument under Section 414 [72-34-446].

Discount obligations. Subsection (b) [72-34-438(2)] applies to all obligations acquired at a discount, including short-term obligations such as U.S. Treasury Bills, long-term obligations such as U.S. Savings Bonds, zero-coupon bonds, and discount bonds that pay interest during part, but not all, of the period before maturity. Under subsection (b) [72-34-438(2)], the entire increase in value of these obligations is principal when the trustee receives the proceeds from the disposition unless the obligation, when acquired, has a maturity of less than one year. In order to have one rule that applies to all discount obligations, the Act eliminates the provision in the 1962 Act for the payment from principal of an amount equal to the increase in the value of U.S. Series

E bonds. The provision for bonds that mature within one year after acquisition by the trustee is derived from the Illinois act. 760 ILCS 15/8 (1996).

Subsection (b) [72-34-438(2)] also applies to inflation-indexed bonds - any increase in principal due to inflation after issuance is principal upon redemption if the bond matures more than one year after the trustee acquires it; if it matures within one year, all of the increase, including any attributable to an inflation adjustment, is income.

Effect of Section 104 [72-34-424]. In deciding whether and to what extent to exercise the power to adjust between principal and income granted by Section 104(a) [72-34-424(1)], a relevant factor for the trustee to consider is the effect on the portfolio as a whole of having a portion of the assets invested in bonds that do not pay interest currently.

72-34-440. Insubstantial allocation — allocation of entire amount to principal — exceptions.

Official Comments

This section is intended to relieve a trustee from making relatively small allocations while preserving the trustee's right to do so if an allocation is large in terms of absolute dollars.

For example, assume that a trust's assets, which include a working interest in an oil well, have a value of $1,000,000; the net income from the assets other than the working interest is $40,000; and the net receipts from the working interest are $400. The trustee may allocate all of the net receipts from the working interest to principal instead of allocating 10%, or $40, to income under Section 411 [72-34-443]. If the net receipts from the working interest are $35,000, so that the amount allocated to income under Section 411 [72-34-443] would be $3,500, the trustee may decide that this amount is sufficiently significant to the income beneficiary that the allocation provided for by Section 411 [72-34-443] should be made, even though the trustee is still permitted under Section 408 [72-34-440] to allocate all of the net receipts to principal because the $3,500 would increase the net income of $40,000, as determined before making an allocation under Section 411 [72-34-443], by less than 10%. Section 408 [72-34-440] will also relieve a trustee from having to allocate net receipts from the sale of trees in a small woodlot between principal and income.

While the allocation to principal of small amounts under this section should not be a cause for concern for tax purposes, allocations are not permitted under this section in circumstances described in Section 104(c) [72-34-424(2)] to eliminate claims that the power in this section has adverse tax consequences.

72-34-441. Payments characterized as interest or dividend — allocation to income — allocation of other payments — excess allocation to income in order to obtain estate tax marital deduction.

Official Comments

Scope. Section 409 [72-34-441] applies to amounts received under contractual arrangements that provide for payments to a third party beneficiary as a result of services rendered or property transferred to the payer. While the right to receive such payments is a liquidating asset of the kind described in Section 410 [72-34-442] (i.e., "an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration"), these payment rights are covered separately in Section 409 [72-34-441] because of their special characteristics.

Section 409 [72-34-441] applies to receipts from all forms of annuities and deferred compensation arrangements, whether the payment will be received by the trust in a lump sum or in installments over a period of years. It applies to bonuses that may be received over two or three years and payments that may last for much longer periods, including payments from an individual retirement account (IRA), deferred compensation plan (whether qualified or not qualified for special federal income tax treatment), and insurance renewal commissions. It applies to a retirement plan to which the settlor has made contributions, just as it applies to an annuity policy that the settlor may have purchased individually, and it applies to variable annuities, deferred annuities, annuities issued by commercial insurance companies, and "private annuities" arising from the sale of property to another individual or entity in exchange for payments that are to be made for the life of one or more individuals. The section applies whether the payments begin when the payment right becomes subject to the trust or are deferred until a future date, and it applies whether payments are made in cash or in kind, such as employer stock (in-kind payments usually will be made in a single distribution that will be allocated to principal under the second sentence of subsection (c)) [72-34-441(3)].

The 1962 Act. Under Section 12 [72-34-412, now repealed] of the 1962 Act, receipts from "rights to receive payments on a contract for deferred compensation" are allocated to income each year in an amount "not in excess of 5% per year" of the property's inventory value. While "not in excess of 5%" suggests that the annual allocation may range from zero to 5% of the inventory value, in practice the rule is usually treated as prescribing a 5% allocation. The inventory value is usually the present value of all the future payments, and since the inventory value is determined as of the date on which the payment right becomes subject to the trust, the inventory value, and thus the amount of the annual income allocation, depends significantly on the applicable interest rate on the decedent's date of death. That rate may be much higher or lower than the average long-term interest rate. The amount determined under the 5% formula tends to become fixed and remain unchanged even though the amount received by the trust increases or decreases.

Allocations Under Section 409(b) [72-34-441(2)]. Section 409(b) [72-34-441(2)] applies to plans whose terms characterize payments made under the plan as dividends, interest, or payments in lieu of dividends or interest. For example, some deferred compensation plans that hold debt obligations or stock of the plan's sponsor in an account for future delivery to the person rendering the services provide for the annual payment to that person of dividends received on the stock or interest received on the debt obligations. Other plans provide that the account of the person rendering the services shall be credited with "phantom" shares of stock and require an annual payment that is equivalent to the dividends that would be received on that number of shares if they were actually issued; or a plan may entitle the person rendering the services to receive a fixed dollar amount in the future and provide for the annual payment of interest on the deferred amount during the period prior to its payment. Under Section 409(b) [72-34-441(2)], payments of dividends, interest or payments in lieu of dividends or interest under plans of this type are allocated to income; all other payments received under these plans are allocated to principal.

Section 409(b) [72-34-441(2)] does not apply to an IRA or an arrangement with payment provisions similar to an IRA. IRAs and similar arrangements are subject to the provisions in Section 409(c) [72-34-441(3)].

Allocations Under Section 409(c) [72-34-441(3)]. The focus of Section 409 [72-34-441], for purposes of allocating payments received by a trust to or between principal and income, is on the payment right rather than on assets that may be held in a fund from which the payments are made. Thus, if an IRA holds a portfolio of marketable stocks and bonds, the amount received by the IRA as dividends and interest is not taken into account in determining the principal and income allocation except to the extent that the Internal Revenue Service may require them to be taken into account when the payment is received by a trust that qualifies for the estate tax marital deduction (a situation that is provided for in Section 409(d)) [72-34-441(4)]. An IRA is subject to federal income tax rules that require payments to begin by a particular date and be made over a specific number of years or a period measured by the lives of one or more persons. The payment right of a trust that is named as a beneficiary of an IRA is not a right to receive particular items that are paid to the IRA, but is instead the right to receive an amount determined by dividing the value of the IRA by the remaining number of years in the payment period. This payment right is similar to the right to receive a unitrust amount, which is normally expressed as an amount equal to a percentage of the value of the unitrust assets without regard to dividends or interest that may be received by the unitrust.

An amount received from an IRA or a plan with a payment provision similar to that of an IRA is allocated under Section 409(c) [72-34-441(3)], which differentiates between payments that are required to be made and all other payments. To the extent that a payment is required to be made (either under federal income tax rules or, in the case of a plan that is not subject to those rules, under the terms of the plan), 10% of the amount received is allocated to income and the balance is allocated to principal. All other payments are allocated to principal because they represent a change in the form of a principal asset; Section 409 [72-34-441] follows the rule in Section 404(2) [72-34-436(2)], which provides that money or property received from a change in the form of a principal asset be allocated to principal.

Section 409(c) [72-34-441(3)] produces an allocation to income that is similar to the allocation under the 1962 Act formula if the annual payments are the same throughout the payment period, and it is simpler to administer. The amount allocated to income under Section 409 [72-34-441] is not dependent upon the interest rate that is used for valuation purposes when the decedent dies, and if the payments received by the trust increase or decrease from year to year because the fund from which the payment is made increases or decreases in value, the amount allocated to income will also increase or decrease.

Marital deduction requirements. When an IRA is payable to a QTIP marital deduction trust, the IRS treats the IRA as separate terminable interest property and requires that a QTIP election be made for it. In order to qualify for QTIP treatment, an IRS ruling states that all of the IRA's income must be distributed annually to the QTIP marital deduction trust and then must be allocated to trust income for distribution to the spouse. Rev. Rul. 89-89, 1989-2 C.B. 231. If an allocation to income under this Act of 10% of the required distribution from the IRA does not meet the requirement that all of the IRA's income be distributed from the trust to the spouse, the provision in subsection (d) [72-34-441(4)] requires the trustee to make a larger allocation to income to the extent necessary to qualify for the marital deduction. The requirement of Rev. Rul. 89-89 should also be satisfied if the IRA beneficiary designation permits the spouse to require the trustee to withdraw the necessary amount from the IRA and distribute it to her, even though the spouse never actually requires the trustee to do so. If such a provision is in the beneficiary designation, a distribution under subsection (d) [72-34-441(4)] should not be necessary.

Application of Section 104 [72-34-424]. Section 104(a) [72-34-424(1)] of this Act gives a trustee who is acting under the prudent investor rule the power to adjust from principal to income if, considering the portfolio as a whole and not just receipts from deferred compensation, the trustee determines that an adjustment is necessary. See Example (5) in the Comment following Section 104 [72-34-424].

Compiler's Comments

2011 Amendment: Chapter 285 in (1)(a) inserted third sentence referring to payment from separate fund; in (1)(b) at beginning substituted ""Separate fund" includes" for "including"; deleted former (4) that read: "(4) If, to obtain an estate tax marital deduction for a trust, a trustee allocates more of a payment to income than provided by this section, the trustee shall allocate to income the additional amount necessary to obtain the marital deduction"; inserted (4), (5), (6), and (7) relating to application of section and determination of internal income; and made minor changes in style. Amendment effective January 1, 2012.

Applicability — Transitional Matters: Section 3, Ch. 285, L. 2011, provided: "Section 72-34-441, as amended by [section 1], applies to a trust described in 72-34-441(4) on and after the following dates:

(1) if the trust is not funded as of [the effective date of section 1] [January 1, 2012], the date of the decedent's death;

(2) if the trust is initially funded in the calendar year beginning January 1, 2012, the date of the decedent's death; or

(3) if the trust is not described in subsection (1) or (2), January 1, 2012."

72-34-442. Receipts from liquidating assets — allocation.

Official Comments

Prior Acts. Section 11 [72-34-412] of the 1962 Act allocates receipts from "property subject to depletion" to income in an amount "not in excess of 5%" of the asset's inventory value. The 1931 Act has a similar 5% rule that applies when the trustee is under a duty to change the form of the investment. The 5% rule imposes on a trust the obligation to pay a fixed annuity to the income beneficiary until the asset is exhausted. Under both the 1931 and 1962 Acts the balance of each year's receipts is added to principal. A fixed payment can produce unfair results. The remainder beneficiary receives all of the receipts from unexpected growth in the asset, e.g., if royalties on a patent or copyright increase significantly. Conversely, if the receipts diminish more rapidly than expected, most of the amount received by the trust will be allocated to income and little to principal. Moreover, if the annual payments remain the same for the life of the asset, the amount allocated to principal will usually be less than the original inventory value. For these reasons, Section 410 [72-34-442] abandons the annuity approach under the 5% rule.

Lottery payments. The reference in subsection (a) [72-34-442(1)] to rights to receive payments under an arrangement that does not provide for the payment of interest includes state lottery prizes and similar fixed amounts payable over time that are not deferred compensation arrangements covered by Section 409 [72-34-441].

Compiler's Comments

2005 Amendment: Chapter 513 in (2) substituted "85%" for "10%". Amendment effective April 28, 2005.

72-34-443. Receipts from mineral interests and other natural resources — allocation.

Official Comments

Prior Acts. The 1962 Act allocates to principal as a depletion allowance, 27-½% of the gross receipts, but not more than 50% of the net receipts after paying expenses. The Internal Revenue Code no longer provides for a 27-½% depletion allowance, although the major oil-producing States have retained the 27-½% provision in their principal and income acts (Texas amended its Act in 1993, but did not change the depletion provision). Section 9 of the 1931 Act allocates all of the net proceeds received as consideration for the "permanent severance of natural resources from the lands" to principal.

Section 411 [72-34-443] allocates 90% of the net receipts to principal and 10% to income. A depletion provision that is tied to past or present Code provisions is undesirable because it causes a large portion of the oil and gas receipts to be paid out as income. As wells are depleted, the amount received by the income beneficiary falls drastically. Allocating a larger portion of the receipts to principal enables the trustee to acquire other income producing assets that will continue to produce income when the mineral reserves are exhausted.

Application of Sections 403 and 408 [72-34-435 and 72-34-440]. This section applies to the extent that the trustee does not account separately for receipts from minerals and other natural resources under Section 403 [72-34-435] or allocate all of the receipts to principal under Section 408 [72-34-440].

Open mine doctrine. The purpose of Section 411(c) [72-34-443(3)] is to abolish the "open mine doctrine" as it may apply to the rights of an income beneficiary and a remainder beneficiary in receipts from the production of minerals from land owned or leased by a trust. Instead, such receipts are to be allocated to or between principal and income in accordance with the provisions of this Act. For a discussion of the open mine doctrine, see generally 3A Austin W. Scott & William F. Fratcher, The Law of Trusts § 239.3 (4th ed. 1988), and Nutter v. Stockton, 626 P.2d 861 (Okla. 1981).

Effective date provision. Section 9(b) of the 1962 Act provides that the natural resources provision does not apply to property interests held by the trust on the effective date of the Act, which reflects concerns about the constitutionality of applying a retroactive administrative provision to interests in real estate, based on the opinion in the Oklahoma case of Franklin v. Margay Oil Corporation, 153 P.2d 486, 501 (Okla. 1944). Section 411(d) permits a trustee to use either the method provided for in this Act or the method used before the Act takes effect. Lawyers in jurisdictions other than Oklahoma may conclude that retroactivity is not a problem as to property situated in their States, and this provision permits trustees to decide, based on advice from counsel in States whose law may be different from that of Oklahoma, whether they may apply this provision retroactively if they conclude that to do so is in the best interests of the beneficiaries.

If the property is in a State other than the State where the trust is administered, the trustee must be aware that the law of the property's situs may control this question. The outcome turns on a variety of questions: whether the terms of the trust specify that the law of a State other than the situs of the property shall govern the administration of the trust, and whether the courts will follow the terms of the trust; whether the trust's asset is the land itself or a leasehold interest in the land (as it frequently is with oil and gas property); whether a leasehold interest or its proceeds should be classified as real property or personal property, and if as personal property, whether applicable state law treats it as a movable or an immovable for conflict of laws purposes. See 5A Austin W. Scott & William F. Fratcher, The Law of Trusts §§ 648, at 531, 533-534; § 657, at 600 (4th ed. 1989).

72-34-444. Receipts from sale of timber and related products — allocation.

Official Comments

Scope of section. The rules in Section 412 [72-34-444] are intended to apply to net receipts from the sale of trees and by-products from harvesting and processing trees without regard to the kind of trees that are cut or whether the trees are cut before or after a particular number of years of growth. The rules apply to the sale of trees that are expected to produce lumber for building purposes, trees sold as pulpwood, and Christmas and other ornamental trees. Subsection (a) [72-34-444(1)] applies to net receipts from property owned by the trustee and property leased by the trustee. The Act is not intended to prevent a tenant in possession of the property from using wood that he cuts on the property for personal, noncommercial purposes, such as a Christmas tree, firewood, mending old fences or building new fences, or making repairs to structures on the property.

Under subsection (a) [72-34-444(1)], the amount of net receipts allocated to income depends upon whether the amount of timber removed is more or less than the rate of growth. The method of determining the amount of timber removed and the rate of growth is up to the trustee, based on methods customarily used for the kind of timber involved.

Application of Sections 403 and 408 [72-34-435 and 72-34-440]. This section applies to the extent that the trustee does not account separately for net receipts from the sale of timber and related products under Section 403 [72-34-435] or allocate all of the receipts to principal under Section 408 [72-34-440]. The option to account for net receipts separately under Section 403 [72-34-435] takes into consideration the possibility that timber harvesting operations may have been conducted before the timber property became subject to the trust, and that it may make sense to continue using accounting methods previously established for the property. It also permits a trustee to use customary accounting practices for timber operations even if no harvesting occurred on the property before it became subject to the trust.

72-34-445. Increasing income in order to maintain marital deduction.

Official Comments

Prior Acts' Conflict with Uniform Prudent Investor Act [Title 72, chapter 34, part 6]. Section 2(b) of the Uniform Prudent Investor Act [72-34-603(2)] provides that "[a] trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole . . . ." The underproductive property provisions in Section 12 [72-34-412, now repealed] of the 1962 Act and Section 11 of the 1931 Act give the income beneficiary a right to receive a portion of the proceeds from the sale of underproductive property as "delayed income." In each Act the provision applies on an asset by asset basis and not by taking into consideration the trust portfolio as a whole, which conflicts with the basic precept in Section 2(b) of the Prudent Investor Act [72-34-603(2)]. Moreover, in determining the amount of delayed income, the prior Acts do not permit a trustee to take into account the extent to which the trustee may have distributed principal to the income beneficiary, under principal invasion provisions in the terms of the trust, to compensate for insufficient income from the unproductive asset. Under Section 104(b)(7) [72-34-424(7)(g)] of this Act, a trustee must consider prior distributions of principal to the income beneficiary in deciding whether and to what extent to exercise the power to adjust conferred by Section 104(a) [72-34-424(1)].

Duty to make property productive of income. In order to implement the Uniform Prudent Investor Act [Title 72, chapter 34, part 6], this Act abolishes the right to receive delayed income from the sale proceeds of an asset that produces little or no income, but it does not alter existing state law regarding the income beneficiary's right to compel the trustee to make property productive of income. As the law continues to develop in this area, the duty to make property productive of current income in a particular situation should be determined by taking into consideration the performance of the portfolio as a whole and the extent to which a trustee makes principal distributions to the income beneficiary under the terms of the trust and adjustments between principal and income under Section 104 [72-34-424] of this Act.

Trusts for which the value of the right to receive income is important for tax reasons may be affected by Reg. § 1.7520-3(b)(2)(v) Example (1), § 20.7520-3(b)(2)(v) Examples (1) and (2), and § 25.7520-3(b)(2)(v) Examples (1) and (2), which provide that if the income beneficiary does not have the right to compel the trustee to make the property productive, the income interest is considered unproductive and may not be valued actuarially under those sections.

Marital deduction trusts. Subsection (a) [72-34-445(1)] draws on language in Reg. § 20.2056(b)-5(f)(4) and (5) to enable a trust for a spouse to qualify for a marital deduction if applicable state law is unclear about the spouse's right to compel the trustee to make property productive of income. The trustee should also consider the application of Section 104 [72-34-424] of this Act and the provisions of Restatement of Trusts 3d: Prudent Investor Rule § 240, at 186, app. § 240, at 252 (1992). Example (6) in the Comment to Section 104 [72-34-424] describes a situation involving the payment from income of carrying charges on unproductive real estate in which Section 104 [72-34-424] may apply.

Once the two conditions have occurred - insufficient beneficial enjoyment from the property and the spouse's demand that the trustee take action under this section - the trustee must act; but instead of the formulaic approach of the 1962 Act, which is triggered only if the trustee sells the property, this Act permits the trustee to decide whether to make the property productive of income, convert it, transfer funds from principal to income, or to take some combination of those actions. The trustee may rely on the power conferred by Section 104(a) [72-34-424(1)] to adjust from principal to income if the trustee decides that it is not feasible or appropriate to make the property productive of income or to convert the property. Given the purpose of Section 413 [72-34-445], the power under Section 104(a) [72-34-424(1)] would be exercised to transfer principal to income and not to transfer income to principal.

Section 413 [72-34-445] does not apply to a so-called "estate" trust, which will qualify for the marital deduction, even though the income may be accumulated for a term of years or for the life of the surviving spouse, if the terms of the trust require the principal and undistributed income to be paid to the surviving spouse's estate when the spouse dies. Reg. § 20.2056(c)-2(b)(1)(iii).

72-34-446. Transactions in derivatives — allocations of receipts and disbursements — options to buy or sell property — allocation of amounts received or paid.

Official Comments

Scope and application. It is difficult to predict how frequently and to what extent trustees will invest directly in derivative financial instruments rather than participating indirectly through investment entities that may utilize these instruments in varying degrees. If the trust participates in derivatives indirectly through an entity, an amount received from the entity will be allocated under Section 401 [72-34-433] and not Section 414 [72-34-446]. If a trustee invests directly in derivatives to a significant extent, the expectation is that receipts and disbursements related to derivatives will be accounted for under Section 403 [72-34-435]; if a trustee chooses not to account under Section 403 [72-34-435], Section 414(b) [72-34-446(2)] provides the default rule. Certain types of option transactions in which trustees may engage are dealt with in subsection (c) [72-34-446(3)] to distinguish those transactions from ones involving options that are embedded in derivative financial instruments.

Definition of "derivative." "Derivative" is a difficult term to define because new derivatives are invented daily as dealers tailor their terms to achieve specific financial objectives for particular clients. Since derivatives are typically contract-based, a derivative can probably be devised for almost any set of objectives if another party can be found who is willing to assume the obligations required to meet those objectives.

The most comprehensive definition of derivative is in the Exposure Draft of a Proposed Statement of Financial Accounting Standards titled "Accounting for Derivative and Similar Financial Instruments and for Hedging Activities," which was released by the Financial Accounting Standards Board (FASB) on June 20, 1996 (No. 162-B). The definition in Section 414(a) [72-34-446(1)] is derived in part from the FASB definition. The purpose of the definition in subsection (a) [72-34-446(1)] is to implement the substantive rule in subsection (b) [72-34-446(2)] that provides for all receipts and disbursements to be allocated to principal to the extent the trustee elects not to account for transactions in derivatives under Section 403 [72-34-435]. As a result, it is much shorter than the FASB definition, which serves much more ambitious objectives.

A derivative is frequently described as including futures, forwards, swaps and options, terms that also require definition, and the definition in this Act avoids these terms. FASB used the same approach, explaining in paragraph 65 of the Exposure Draft:

The definition of derivative financial instrument in this Statement includes those financial instruments generally considered to be derivatives, such as forwards, futures, swaps, options, and similar instruments. The Board considered defining a derivative financial instrument by merely referencing those commonly understood instruments, similar to paragraph 5 of Statement 119, which says that "... a derivative financial instrument is a futures, forward, swap, or option contract, or other financial instrument with similar characteristics." However, the continued development of financial markets and innovative financial instruments could ultimately render a definition based on examples inadequate and obsolete. The Board, therefore, decided to base the definition of a derivative financial instrument on a description of the common characteristics of those instruments in order to accommodate the accounting for newly developed derivatives. (Footnote omitted.)

Marking to market. A gain or loss that occurs because the trustee marks securities to market or to another value during an accounting period is not a transaction in a derivative financial instrument that is income or principal under the Act - only cash receipts and disbursements, and the receipt of property in exchange for a principal asset, affect a trust's principal and income accounts.

Receipt of property other than cash. If a trustee receives property other than cash upon the settlement of a derivatives transaction, that property would be principal under Section 404(2) [72-34-436(2)].

Options. Options to which subsection (c) [72-34-446(3)] applies include an option to purchase real estate owned by the trustee and a put option purchased by a trustee to guard against a drop in value of a large block of marketable stock that must be liquidated to pay estate taxes. Subsection (c) [72-34-446(3)] would also apply to a continuing and regular practice of selling call options on securities owned by the trust if the terms of the option require delivery of the securities. It does not apply if the consideration received or given for the option is something other than cash or property, such as cross-options granted in a buy-sell agreement between owners of an entity.

Compiler's Comments

2013 Amendment: Chapter 264 in (3) in last sentence substituted "settlor" for "trustor". Amendment effective October 1, 2013.

Severability: Section 161, Ch. 264, L. 2013, was a severability clause.

72-34-447. Payments from collateral financial assets and payments in exchange for interest in asset-backed security — allocation.

Official Comments

Scope of section. Typical asset-backed securities include arrangements in which debt obligations such as real estate mortgages, credit card receivables and auto loans are acquired by an investment trust and interests in the trust are sold to investors. The source for payments to an investor is the money received from principal and interest payments on the underlying debt. An asset-backed security includes an "interest only" or a "principal only" security that permits the investor to receive only the interest payments received from the bonds, mortgages or other assets that are the collateral for the asset-backed security, or only the principal payments made on those collateral assets. An asset-backed security also includes a security that permits the investor to participate in either the capital appreciation of an underlying security or in the interest or dividend return from such a security, such as the "Primes" and "Scores" issued by Americus Trust. An asset-backed security does not include an interest in a corporation, partnership, or an investment trust described in the Comment to Section 402 [72-34-434], whose assets consist significantly or entirely of investment assets. Receipts from an instrument that do not come within the scope of this section or any other section of the Act would be allocated entirely to principal under the rule in Section 103(a)(4) [72-34-423(1)(d)], and the trustee may then consider whether and to what extent to exercise the power to adjust in Section 104 [72-34-424], taking into account the return from the portfolio as whole and other relevant factors.

72-34-448. Disbursements from income.

Official Comments

Trustee fees. The regular compensation of a trustee or the trustee's agent includes compensation based on a percentage of either principal or income or both.

Insurance premiums. The reference in paragraph (4) [72-34-448(4)] to "recurring" premiums is intended to distinguish premiums paid annually for fire insurance from premiums on title insurance, each of which covers the loss of a principal asset. Title insurance premiums would be a principal disbursement under Section 502(a)(5) [72-34-449(1)(e)].

Regularly recurring taxes. The reference to "regularly recurring taxes assessed against principal" includes all taxes regularly imposed on real property and tangible and intangible personal property.

72-34-449. Disbursements from principal.

Official Comments

Environmental expenses. All environmental expenses are payable from principal, subject to the power of the trustee to transfer funds to principal from income under Section 504 [72-34-451]. However, the Drafting Committee decided that it was not necessary to broaden this provision to cover other expenditures made under compulsion of governmental authority. See generally the annotation at 43 A.L.R.4th 1012 (Duty as Between Life Tenant and Remainderman with Respect to Cost of Improvements or Repairs Made Under Compulsion of Governmental Authority).

Environmental expenses paid by a trust are to be paid from principal under Section 502(a)(7) [72-34-449(1)(g)] on the assumption that they will usually be extraordinary in nature. Environmental expenses might be paid from income if the trustee is carrying on a business that uses or sells toxic substances, in which case environmental cleanup costs would be a normal cost of doing business and would be accounted for under Section 403 [72-34-435]. In accounting under that Section, environmental costs will be a factor in determining how much of the net receipts from the business is trust income. Paying all other environmental expenses from principal is consistent with this Act's approach regarding receipts - when a receipt is not clearly a current return on a principal asset, it should be added to principal because over time both the income and remainder beneficiaries benefit from this treatment. Here, allocating payments required by environmental laws to principal imposes the detriment of those payments over time on both the income and remainder beneficiaries.

Under Sections 504(a) and 504(b)(5) [72-34-451(1) and (2)(e)], a trustee who makes or expects to make a principal disbursement for an environmental expense described in Section 502(a)(7) [72-34-449(1)(g)] is authorized to transfer an appropriate amount from income to principal to reimburse principal for disbursements made or to provide a reserve for future principal disbursements.

The first part of Section 502(a)(7) [72-34-449(1)(g)] is based upon the definition of an "environmental remediation trust" in Treas. Reg. § 301.7701-4(e)(as amended in 1996). This is not because the Act applies to an environmental remediation trust, but because the definition is a useful and thoroughly vetted description of the kinds of expenses that a trustee owning contaminated property might incur. Expenses incurred to comply with environmental laws include the cost of environmental consultants, administrative proceedings and burdens of every kind imposed as the result of an administrative or judicial proceeding, even though the burden is not formally characterized as a penalty.

Title proceedings. Disbursements that are made to protect a trust's property, referred to in Section 502(a)(4) [72-34-449(1)(d)], include an "action to assure title" that is mentioned in Section 13(c)(2) [72-34-416(3)(b)(iv), now repealed] of the 1962 Act.

Insurance premiums. Insurance premiums referred to in Section 502(a)(5) [72-34-449(1)(e)] include title insurance premiums. They also include premiums on life insurance policies owned by the trust, which represent the trust's periodic investment in the insurance policy. There is no provision in the 1962 Act for life insurance premiums.

Taxes. Generation-skipping transfer taxes are payable from principal under subsection (a)(6) [72-34-449(1)(f)].

72-34-450. Assets subject to depreciation — transfer from income to principal of portion of net cash receipts.

Official Comments

Prior Acts. The 1931 Act has no provision for depreciation. Section 13(a)(2) [72-34-466(1)(b), now repealed] of the 1962 Act provides that a charge shall be made against income for ". . . a reasonable allowance for depreciation on property subject to depreciation under generally accepted accounting principles . . . ." That provision has been resisted by many trustees, who do not provide for any depreciation for a variety of reasons. One reason relied upon is that a charge for depreciation is not needed to protect the remainder beneficiaries if the value of the land is increasing; another is that generally accepted accounting principles may not require depreciation to be taken if the property is not part of a business. The Drafting Committee concluded that the decision to provide for depreciation should be discretionary with the trustee. The power to transfer funds from income to principal that is granted by this section is a discretionary power of administration referred to in Section 103(b) [72-34-423(2)], and in exercising the power a trustee must comply with Section 103(b) [72-34-423(2)].

One purpose served by transferring cash from income to principal for depreciation is to provide funds to pay the principal of an indebtedness secured by the depreciable property. Section 504(b)(4) [72-34-451(2)(d)] permits the trustee to transfer additional cash from income to principal for this purpose to the extent that the amount transferred from income to principal for depreciation is less than the amount of the principal payments.

72-34-451. Transfer from income to principal in anticipation of principal disbursement.

Official Comments

Prior Acts. The sources of Section 504 [72-34-451] are Section 13(b) [72-34-416(2), now repealed] of the 1962 Act, which permits a trustee to "regularize distributions," if charges against income are unusually large, by using "reserves or other reasonable means" to withhold sums from income distributions; Section 13(c)(3) [72-34-416(3)(c), now repealed] of the 1962 Act, which authorizes a trustee to establish an allowance for depreciation out of income if principal is used for extraordinary repairs, capital improvements and special assessments; and Section 12(3) of the 1931 Act, which permits the trustee to spread income expenses of unusual amount "throughout a series of years." Section 504 [72-34-451] contains a more detailed enumeration of the circumstances in which this authority may be used, and includes in subsection (b)(4) [72-34-451(2)(d)] the express authority to use income to make principal payments on a mortgage if the depreciation charge against income is less than the principal payments on the mortgage.

72-34-452. Payment of taxes.

Official Comments

Electing Small Business Trusts. An Electing Small Business Trust (ESBT) is a creature created by Congress in the Small Business Job Protection Act of 1996 (P.L. 104-188). For years beginning after 1996, an ESBT may qualify as an S corporation stockholder even if the trustee does not distribute all of the trust's income annually to its beneficiaries. The portion of an ESBT that consists of the S corporation stock is treated as a separate trust for tax purposes (but not for trust accounting purposes), and the S corporation income is taxed directly to that portion of the trust even if some or all of that income is distributed to the beneficiaries.

A trust normally receives a deduction for distributions it makes to its beneficiaries. Subsection (d) [72-34-452(4)] takes into account the possibility that an ESBT may not receive a deduction for trust accounting income that is distributed to the beneficiaries. Only limited guidance has been issued by the Internal Revenue Service, and it is too early to anticipate all of the technical questions that may arise, but the powers granted to a trustee in Sections 506 and 104 [72-34-453 and 72-34-424] to make adjustments are probably sufficient to enable a trustee to correct inequities that may arise because of technical problems.

Compiler's Comments

2011 Amendment: Chapter 285 in (3) at end after "paid" deleted "proportionately as follows"; in (3)(a) after "allocated" inserted "only"; in (3)(b) at end after "that" deleted "both of the following apply" and after "allocated" inserted "only"; deleted former (3)(b)(ii) that read: "(ii) the trust's share of the entity's taxable income exceeds the total receipts described in subsection (3)(a) and subsection (3)(b)(i)"; inserted (3)(c) requiring payment of tax proportionately from principal and income; inserted (3)(d) requiring tax payment from principal if tax exceeds total receipts; deleted former (4) that read: "(4) For purposes of this section, receipts allocated to principal or income must be reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax"; inserted (4) requiring adjustment of income or principal receipts when trust receives deduction for payment to beneficiary; and made minor changes in style. Amendment effective January 1, 2012.

72-34-453. Adjustments between principal and income in certain cases.

Official Comments

Discretionary adjustments. Section 506(a) [72-34-453(1)] permits the fiduciary to make adjustments between income and principal because of tax law provisions. It would permit discretionary adjustments in situations like these: (1) A fiduciary elects to deduct administration expenses that are paid from principal on an income tax return instead of on the estate tax return; (2) a distribution of a principal asset to a trust or other beneficiary causes the taxable income of an estate or trust to be carried out to the distributee and relieves the persons who receive the income of any obligation to pay income tax on the income; or (3) a trustee realizes a capital gain on the sale of a principal asset and pays a large state income tax on the gain, but under applicable federal income tax rules the trustee may not deduct the state income tax payment from the capital gain in calculating the trust's federal capital gain tax, and the income beneficiary receives the benefit of the deduction for state income tax paid on the capital gain. See generally Joel C. Dobris, Limits on the Doctrine of Equitable Adjustment in Sophisticated Postmortem Tax Planning, 66 Iowa L. Rev. 273 (1981).

Section 506(a)(3) [72-34-453(1)(c)] applies to a qualified Subchapter S trust (QSST) whose income beneficiary is required to include a pro rata share of the S corporation's taxable income in his return. If the QSST does not receive a cash distribution from the corporation that is large enough to cover the income beneficiary's tax liability, the trustee may distribute additional cash from principal to the income beneficiary. In this case the retention of cash by the corporation benefits the trust principal. This situation could occur if the corporation's taxable income includes capital gain from the sale of a business asset and the sale proceeds are reinvested in the business instead of being distributed to shareholders.

Mandatory adjustment. Subsection (b) [72-34-453(2)] provides for a mandatory adjustment from income to principal to the extent needed to preserve an estate tax marital deduction or charitable contributions deduction. It is derived from New York's EPTL § 11-1.2(A), which requires principal to be reimbursed by those who benefit when a fiduciary elects to deduct administration expenses on an income tax return instead of the estate tax return. Unlike the New York provision, subsection (b) [72-34-453(2)] limits a mandatory reimbursement to cases in which a marital deduction or a charitable contributions deduction is reduced by the payment of additional estate taxes because of the fiduciary's income tax election. It is intended to preserve the result reached in Estate of Britenstool v. Commissioner, 46 T.C. 711 (1966), in which the Tax Court held that a reimbursement required by the predecessor of EPTL § 11-1.2(A) resulted in the estate receiving the same charitable contributions deduction it would have received if the administration expenses had been deducted for estate tax purposes instead of for income tax purposes. Because a fiduciary will elect to deduct administration expenses for income tax purposes only when the income tax reduction exceeds the estate tax reduction, the effect of this adjustment is that the principal is placed in the same position it would have occupied if the fiduciary had deducted the expenses for estate tax purposes, but the income beneficiaries receive an additional benefit. For example, if the income tax benefit from the deduction is $30,000 and the estate tax benefit would have been $20,000, principal will be reimbursed $20,000 and the net benefit to the income beneficiaries will be $10,000.

Irrevocable grantor trusts. Under Sections 671-679 of the Internal Revenue Code (the "grantor trust" provisions), a person who creates an irrevocable trust for the benefit of another person may be subject to tax on the trust's income or capital gains, or both, even though the settlor is not entitled to receive any income or principal from the trust. Because this is now a well-known tax result, many trusts have been created to produce this result, but there are also trusts that are unintentionally subject to this rule. The Act does not require or authorize a trustee to distribute funds from the trust to the settlor in these cases because it is difficult to establish a rule that applies only to trusts where this tax result is unintended and does not apply to trusts where the tax result is intended. Settlors who intend this tax result rarely state it as an objective in the terms of the trust, but instead rely on the operation of the tax law to produce the desired result. As a result it may not be possible to determine from the terms of the trust if the result was intentional or unintentional. If the drafter of such a trust wants the trustee to have the authority to distribute principal or income to the settlor to reimburse the settlor for taxes paid on the trust's income or capital gains, such a provision should be placed in the terms of the trust. In some situations the Internal Revenue Service may require that such a provision be placed in the terms of the trust as a condition to issuing a private letter ruling.

CHAPTER 38
MONTANA UNIFORM TRUST CODE

Chapter Official Comments

PREFATORY NOTE

The Uniform Trust Code (2000) is the first national codification of the law of trusts. The primary stimulus to the Commissioners' drafting of the Uniform Trust Code is the greater use of trusts in recent years, both in family estate planning and in commercial transactions, both in the United States and internationally. This greater use of the trust, and consequent rise in the number of day-to-day questions involving trusts, has led to a recognition that the trust law in many States is thin. It has also led to a recognition that the existing Uniform Acts relating to trusts, while numerous, are fragmentary. The Uniform Trust Code will provide States with precise, comprehensive, and easily accessible guidance on trust law questions. On issues on which States diverge or on which the law is unclear or unknown, the Code will for the first time provide a uniform rule. The Code also contains a number of innovative provisions.

Default Rule: Most of the Uniform Trust Code consists of default rules that apply only if the terms of the trust fail to address or insufficiently cover a particular issue. Pursuant to Section 105 [72-38-105], a drafter is free to override a substantial majority of the Code's provisions. The exceptions are scheduled in Section 105(b) [72-38-105(2)].

Innovative Provisions: Much of the Uniform Trust Code is a codification of the common law of trusts. But the Code does contain a number of innovative provisions. Among the more significant are specification of the rules of trust law that are not subject to override in the trust's terms (Section 105) [72-38-105], the inclusion of a comprehensive article on representation of beneficiaries (Article 3) [Title 72, ch. 38, pt. 3], rules on trust modification and termination that will enhance flexibility (Sections 410-417) [72-38-410 through 72-38-417], and the inclusion of an article collecting the special rules pertaining to revocable trusts (Article 6) [Title 72, ch. 38, pt. 6].

Models for Drafting: While the Uniform Trust Code is the first comprehensive Uniform Act on the subject of trusts, comprehensive trust statutes are already in effect in several States. Notable examples include the statutes in California, Georgia, Indiana, Texas, and Washington, all of which were referred to in the drafting process. Most influential was the 1986 California statute, found at Division 9 of the California Probate Code (Sections 15000 *et seq.*), which was used by the Drafting Committee as its initial model.

Existing Uniform Laws on Trust Law Subjects: Certain older Uniform Acts are incorporated into the Uniform Trust Code. Others, addressing more specialized topics, will continue to be available for enactment in free-standing form.

The following Uniform Acts are incorporated into or otherwise superseded by the Uniform Trust Code:

Uniform Probate Code Article VII — Originally approved in 1969, Article VII has been enacted in about 15 jurisdictions. Article VII, although titled "Trust Administration," is a modest statute, addressing only a limited number of topics. Article VII is superseded by the Uniform Trust Code. Its provisions on jurisdiction are incorporated into Article 2 of the Code, and its provision on trustee liability to persons other than beneficiaries are replaced by Section 1010.

Uniform Prudent Investor Act (1994) — This Act has been enacted in 35 jurisdictions. This Act, and variant forms enacted in a number of other States, has displaced the older "prudent man" standard, bringing trust law into line with modern investment practice. States that have enacted the Uniform Prudent Investor Act are encouraged to recodify it as part of their enactment of the Uniform Trust Code. A place for this is provided in Article 9.

Uniform Trustee Powers Act (1964) — This Act has been enacted in 16 States. The Act contains a list of specific trustee powers and deals with other selected issues, particularly relations of a trustee with persons other than beneficiaries. The Uniform Trustee Powers Act is outdated and is entirely superseded by the Uniform Trust Code, principally at Sections 815, 816, and 1012. States enacting the Uniform Trust Code should repeal their existing trustee powers legislation.

Uniform Trusts Act (1937) — This largely overlooked Act of similar name was enacted in only six States, none within the past several decades. Despite a title suggesting comprehensive coverage of its topic, this Act, like Article VII of the UPC, addresses only a limited number of topics. These include the duty of loyalty, the registration and voting of securities, and trustee liability to persons other than beneficiaries. States enacting the Uniform Trust Code should repeal this earlier namesake.

The following Uniform Acts are not affected by enactment of the Uniform Trust Code and do not need to be amended or repealed:

Uniform Common Trust Fund Act — Originally approved in 1938, this Act has been enacted in 34 jurisdictions. The Uniform Trust Code does not address the subject of common trust funds. In recent years, many banks have replaced their common trust funds with mutual funds that may also be available to non-trust customers. The Code addresses investment in mutual funds at Section 802(f).

Uniform Custodial Trust Act (1987) — This Act has been enacted in 14 jurisdictions. This Act allows standard trust provisions to be automatically incorporated into the terms of a trust simply by referring to the Act. This Act is not displaced by the Uniform Trust Code but complements it.

Uniform Management of Institutional Funds Act (1972) — This Act has been enacted in 47 jurisdictions. It governs the administration of endowment funds held by charitable, religious, and other eleemosynary institutions. The Uniform Management of Institutional Funds Act establishes a standard of prudence for use of appreciation on assets, provides specific authority for the making of investments, authorizes the delegation of this authority, and specifies a procedure, through either donor consent or court approval, for removing restrictions on the use of donated funds.

Uniform Principal and Income Act (1997) — The 1997 Uniform Principal and Income Act is a major revision of the widely enacted Uniform Act of the same name approved in 1962. Because this Act addresses issues with respect both to decedent's estates and trusts, a jurisdiction enacting the revised Uniform Principal and Income Act may wish to include it either as part of this Code or as part of its probate laws.

Uniform Probate Code — Originally approved in 1969, and enacted in close to complete form in about 20 States but influential in virtually all, the UPC overlaps with trust topics in several areas. One area of overlap, already mentioned, is UPC Article VII. Another area of overlap concerns representation of beneficiaries. UPC Section 1-403 provides principles of representation for achieving binding judicial settlements of matters involving both estates and trusts. The Uniform Trust Code refines these representation principles, and extends them to nonjudicial settlement agreements and to optional notices and consents. *See* Uniform Trust Code, Section 111 and Article 3. A final area of overlap between the UPC and trust law concerns rules of construction. The UPC, in Article II, Part 7, extends certain of the rules on the construction of wills to trusts and other nonprobate instruments. The Uniform Trust Code similarly extends to trusts the rules on the construction of wills. Unlike the UPC, however, the Trust Code does not prescribe the exact rules. Instead, Section 112 of the Uniform Trust Code is an optional provision applying to trusts whatever rules the enacting jurisdiction already has in place on the construction of wills.

Uniform Statutory Rule Against Perpetuities — Originally approved in 1986, this Act has been enacted in 27 jurisdictions. The Act reforms the durational limit on when property interests, including interests created under trusts, must vest or fail. The Uniform Trust Code does not limit the duration of trusts or alter the time when interests must otherwise vest, but leaves this issue to other state law. The Code may be enacted without change regardless of the status of the perpetuities law in the enacting jurisdiction.

Uniform Supervision of Trustees for Charitable Purposes Act (1954) — This Act, which has been enacted in four States, is limited to mechanisms for monitoring the actions of charitable trustees. Unlike the Uniform Trust Code, the Supervision of Trustees for Charitable Purposes Act does not address the substantive law of charitable trusts.

Uniform Testamentary Additions to Trusts Act — This Act is available in two versions: the 1960 Act, with 24 enactments; and the 1991 Act, with 20 enactments through 1999. As its name suggests, this Act validates pourover devises to trusts. Because it validates provisions in wills, it is incorporated into the Uniform Probate Code, not into the Uniform Trust Code.

Role of Restatement of Trusts: The Restatement (Second) of Trusts was approved by the American Law Institute in 1957. Work on the Restatement Third began in the late 1980s. The portion of Restatement Third relating to the prudent investor rule and other investment topics was completed and approved in 1990. A tentative draft of the portion of Restatement Third relating to the rules on the creation and validity of trusts was approved in 1996, and the portion relating to the office of trustee, trust purposes, spendthrift provisions and the rights of creditors was approved in 1999. The Uniform Trust Code was drafted in close coordination with the writing of the Restatement Third.

Overview of Uniform Trust Code

The Uniform Trust Code consists of 11 articles. The substance of the Code is focused in the first 10 articles; Article 11 is primarily an effective date provision.

Article 1 [Title 72, ch. 38, pt. 1] — General Provisions and Definitions — In addition to definitions, this article addresses miscellaneous but important topics. The Uniform Trust Code is primarily default law. A settlor, subject to certain limitations, is free to draft trust terms departing from the provisions of this Code. The settlor, if minimum contacts are present, may in addition designate the trust's principal place of administration; the trustee, if certain standards are met, may transfer the principal place of administration to another State or country. To encourage nonjudicial resolution of disputes, the Uniform Trust Code provides more certainty for when such settlements are binding. While the Code does not prescribe the exact rules to be applied to the construction of trusts, it does extend to trusts whatever rules the enacting jurisdiction has on the construction of wills. The Uniform Trust Code, although comprehensive, does not legislate on every issue. Its provisions are supplemented by the common law of trusts and principles of equity.

Article 2 [Title 72, ch. 38, pt. 2] — Judicial Proceedings — This article addresses selected issues involving judicial proceedings concerning trusts, particularly trusts having contacts with more than one State or country. The courts in the trust's principal place of administration have jurisdiction over both the trustee and the beneficiaries as to any matter relating to the trust. Optional provisions on subject-matter jurisdiction and venue are provided. The minimal coverage of this article was deliberate. The Drafting Committee concluded that most issues related to jurisdiction and procedure are not appropriate to a Trust Code, but are best left to other bodies of law.

Article 3 [Title 72, ch. 38, pt. 3] — Representation — This article deals with the representation of beneficiaries and other interested persons, both by fiduciaries (personal representatives, guardians and conservators), and through what is known as virtual representation. The representation principles of the article apply to settlement of disputes, whether by a court or nonjudicially. They apply for the giving of required notices. They apply for the giving of consents to certain actions. The article also authorizes a court to appoint a representative if the court concludes that representation of a person might otherwise be inadequate. The court may appoint a representative to represent and approve a settlement on behalf of a minor, incapacitated, or unborn person or person whose identity or location is unknown and not reasonably ascertainable.

Article 4 [Title 72, ch. 38, pt. 4] — Creation, Validity, Modification and Termination of Trust — This article specifies the requirements for creating, modifying and terminating trusts.

Most of the requirements relating to creation of trusts (Sections 401 through 409) [72-38-401 through 72-38-409] track traditional doctrine, including requirements of intent, capacity, property, and valid trust purpose. The Uniform Trust Code articulates a three-part classification system for trusts: noncharitable, charitable, and honorary. Noncharitable trusts, the most common type, require an ascertainable beneficiary and a valid purpose. Charitable trusts, on the other hand, by their very nature are created to benefit the public at large. The so called honorary or purposes trust, although unenforceable at common law, is valid and enforceable under this Code despite the absence of an ascertainable beneficiary. The most common example is a trust for the care of an animal.

Sections 410 through 417 [72-38-410 through 72-38-417] provide a series of interrelated rules on when a trust may be terminated or modified other than by its express terms. The overall objective of these sections is to enhance flexibility consistent with the principle that preserving the settlor's intent is paramount. Termination or modification may be allowed upon beneficiary consent if the court concludes that the trust or a particular provision no longer serves a material purpose or if the settlor concurs; by the court in response to unanticipated circumstances or to remedy ineffective administrative terms; or by the court or trustee if the trust is of insufficient size to justify continued administration under its existing terms. Trusts may be reformed to correct a mistake of law or fact, or modified to achieve the settlor's tax objectives. Trusts may be combined or divided. Charitable trusts may be modified or terminated under cy pres to better achieve the settlor's charitable purposes.

Article 5 [Title 72, ch. 38, pt. 5] — Creditor's Claims; Spendthrift and Discretionary Trusts — This article addresses the validity of a spendthrift provision and other issues relating to the rights of creditors to reach the trust to collect a debt. To the extent a trust is protected by a spendthrift provision, a beneficiary's creditor may not reach the beneficiary's interest until distribution is made by the trustee. To the extent not protected by a spendthrift provision, a creditor can reach the beneficiary's interest, subject to the court's power to limit the award. Certain categories of claims are exempt from a spendthrift restriction, including certain governmental claims and claims for child support or alimony. Other issues addressed in this article include creditor claims against discretionary trusts; creditor claims against a settlor, whether the trust is revocable or irrevocable; and the rights of creditors when a trustee fails to make a required distribution within a reasonable time.

Article 6 [Title 72, ch. 38, pt. 6] — Revocable Trusts — This short article deals with issues of significance not totally settled under current law. The basic policy of this article and of the Uniform Trust Code in general is to treat the revocable trust as the functional equivalent of a will. The article specifies a standard of capacity, provides that a trust is presumed revocable unless its terms provide otherwise, prescribes the procedure for revocation or amendment of a revocable trust, addresses the rights of beneficiaries during the settlor's lifetime, and provides a statute of limitations on contests.

Article 7 [Title 72, ch. 38, pt. 7] — Office of Trustee — This article contains a series of default rules dealing with the office of trustee, all of which may be modified in the terms of the trust. Rules are provided on acceptance of office and bonding. The role of the cotrustee is addressed, including the extent that one cotrustee may delegate to another, and the extent to which one cotrustee can be held liable for actions of another trustee. Also covered are changes in trusteeship, including the circumstances when a vacancy must be filled, the procedure for resignation, the grounds for removal, and the process for appointing a successor trustee. Finally, standards are provided for trustee compensation and reimbursement for expenses.

Article 8 [Title 72, ch. 38, pt. 8] — Duties and Powers of Trustee — This article states the fundamental duties of a trustee and enumerates the trustee's powers. The duties listed are not new, although some of the particulars have changed over the years. This article was drafted where possible to conform to the Uniform Prudent Investor Act. The Uniform Prudent Investor Act prescribes a trustee's responsibilities with respect to the management and investment of trust property. This article also addresses a trustee's duties regarding distributions to beneficiaries.

Article 9 [Title 72, ch. 38, pt. 9] — Uniform Prudent Investor Act — This article provides a place for a jurisdiction to enact, reenact or codify its version of the Uniform Prudent Investor Act. States adopting the Uniform Trust Code which have previously enacted the Uniform Prudent Investor Act are encouraged to reenact their version of the Prudent Investor Act in this article.

Article 10 [Title 72, ch. 38, pt. 10] — Liability of Trustees and Rights of Persons Dealing With Trustees — Sections 1001 through 1009 [72-38-1001 through 72-38-1009] list the remedies for breach of trust, describe how money damages are to be determined, provide a statute of limitations on claims against a trustee, and specify other defenses, including consent of a beneficiary and recognition of and limitations on the effect of an exculpatory clause. Sections 1010 through 1013 [72-38-1010 through 72-38-1013] address trustee relations with persons other than beneficiaries. The objective is to encourage third parties to engage in commercial transactions with trustees to the same extent as if the property were not held in trust.

Article 11 [Title 72, ch. 38, pt. 11] — Miscellaneous Provisions — The Uniform Trust Code is intended to have the widest possible application, consistent with constitutional limitations. The Code applies not only to trusts created on or after the effective date, but also to trusts in existence on the date of enactment.

The Drafting Committee was assisted by numerous officially designated advisors and observers, representing an array of organizations. In addition to the American Bar Association advisors listed above, advisors and observers who attended a majority of the Drafting Committee meetings include Edward C. Halbach, Jr., Reporter, Restatement (Third) of Trust Law; Kent H. McMahan, American College of Trust and Estate Counsel; Alex Misheff, American Bankers Association; and Lawrence W. Waggoner, Reporter, Restatement (Third) of Property: Wills and Other Donative Transfers. Significant input was also received from the Joint Editorial Board for Uniform Trusts and Estates Acts and the Committee on State Laws of the American College of Trust and Estate Counsel.

Chapter Compiler's Comments

Severability: Section 161, Ch. 264, L. 2013, was a severability clause.

Effective Date: Section 163, Ch. 264, L. 2013, provided: "[This act] is effective October 1, 2013."

Application to Existing Relationships: Section 164, Ch. 264, L. 2013, provided: "(1) Except as otherwise provided in [this act], on [the effective date of this act]:

(a) [this act] applies to all trusts created before, on, or after [the effective date of this act];

(b) [this act] applies to all judicial proceedings concerning trusts commenced on or after [the effective date of this act];

(c) [this act] applies to judicial proceedings concerning trusts commenced before [the effective date of this act] unless the court finds that application of a particular provision of [this act] would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of [this act] does not apply and the superseded law applies;

(d) any rule of construction or presumption provided in [this act] applies to trust instruments executed before [the effective date of this act] unless there is a clear indication of a contrary intent in the terms of the trust; and

(e) an act done before [the effective date of this act] is not affected by [this act].

(2) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before [the effective date of this act], that statute continues to apply to the right even if it has been repealed or superseded." Effective October 1, 2013.

Source — Explanation of Official Comments: The text of the former Montana Trust Code (Title 72, ch. 33 through 36, MCA, now repealed) was proposed by a joint committee of the State Bar of Montana and the Montana Bankers Association and was enacted by Ch. 685, L. 1989. Professor E. Edwin Eck of the University of Montana (now University of Montana-Missoula) School of Law was the lawyer chairman of the Joint Committee on Trust Law Revision. The Committee began work in 1986 and completed its proposal in November 1987.

The former Montana Trust Code was based in substantial part on the California Trust Law, California Probate Code sections 15000 through 18201, which was adopted by California in 1986 and became operative in California on July 1, 1987. The official comments that followed each section cited the corresponding California section, if any. If the Montana section constituted a change in substance from the corresponding California provision, the official comment included a discussion of the change. If the Montana section was based upon a statute of a state other than California, that state's statute was cited in the official comment.

Part 1

General Provisions, Definitions, Constructive and Resulting Trusts, and Notice of Proposed Action by Trustee

Part Official Comments

The Uniform Trust Code is primarily a default statute. Most of the Code's provisions can be overridden in the terms of the trust. The provisions not subject to override are scheduled in Section 105(b) [72-38-105(2)]. These include the duty of a trustee to act in good faith and with regard to the purposes of the trust, public policy exceptions to enforcement of spendthrift provisions, the requirements for creating a trust, and the authority of the court to modify or terminate a trust on specified grounds.

The remainder of the article specifies the scope of the Code (Section 102) [72-38-102], provides definitions (Section 103) [72-38-103], and collects provisions of importance not amenable to codification elsewhere in the Uniform Trust Code. Sections 106 [72-38-106] and 107 [72-38-107] focus on the sources of law that will govern a trust. Section 106 [72-38-106] clarifies that despite the Code's comprehensive scope, not all aspects of the law of trusts have been codified. The Uniform Trust Code is supplemented by the common law of trusts and principles of equity. Section 107 [72-38-107] addresses selection of the jurisdiction or jurisdictions whose laws will govern the trust. A settlor, absent overriding public policy concerns, is free to select the law that will determine the meaning and effect of a trust's terms.

Changing a trust's principal place of administration is sometimes desirable, particularly to lower a trust's state income tax. Such transfers are authorized in Section 108 [72-38-108]. The trustee, following notice to the "qualified beneficiaries," defined in Section 103(13) [72-38-103(16)], may without approval of court transfer the principal place of administration to another State or country if a qualified beneficiary does not object and if the transfer is consistent with the trustee's duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries. The settlor, if minimum contacts are present, may also designate the trust's principal place of administration.

Sections 104 [72-38-104] and 109 through 111 [72-38-109 through 72-38-111] address procedural issues. Section 104 [72-38-104] specifies when persons, particularly persons who work in organizations, are deemed to have acquired knowledge of a fact. Section 109 [72-38-109] specifies the methods for giving notice and excludes from the Code's notice requirements persons whose identity or location is unknown and not reasonably ascertainable. Section 110 [72-38-110] allows beneficiaries with remote interests to request notice of actions, such as notice of a trustee resignation, which are normally given only to the qualified beneficiaries.

Section 111 [72-38-111] ratifies the use of nonjudicial settlement agreements. While the judicial settlement procedures may be used in all court proceedings relating to the trust, the nonjudicial settlement procedures will not always be available. The terms of the trust may direct that the procedures not be used, or settlors may negate or modify them by specifying their own methods for obtaining consents. Also, a nonjudicial settlement may include only terms and conditions a court could properly approve.

The Uniform Trust Code does not prescribe the rules of construction to be applied to trusts created under the Code. The Code instead recognizes that enacting jurisdictions are likely to take a diversity of approaches, just as they have with respect to the rules of construction applicable to wills. Section 112 [72-38-112] accommodates this variation by providing that the State's specific rules on construction of wills, whatever they may be, also apply to the construction of trusts.

Part Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

No Unjust Enrichment When Contract Existed — Defendant Not at Fault — Constructive Trust Not Raised by Plaintiff or Considered by Court: The District Court did not err in determining that the defendants were not unjustly enriched. Neither party disputed the existence of a contract involving the property at issue. Because it was undisputed that a contract existed, the plaintiff's unjust enrichment arguments were not well taken by the Supreme Court. In short, because the District Court found no fault or misconduct on the part of the defendant, the Supreme Court did not impose an unjust enrichment recovery against him. The Supreme Court also acknowledged that a constructive trust may be imposed in the absence of any wrongdoing on the part of the defendant, but since the plaintiff did not argue in the District Court or on appeal for the imposition of a constructive trust, the Supreme Court declined to impose one. Welu v. Twin Hearts Smiling Horses, Inc., 2016 MT 347, 386 Mont. 98, 386 P.3d 937, distinguishing Robertus v. Candee, 205 Mont. 403, 670 P.2d 540 (1983).

Date of Formation of Constructive Trust — Question of Fact — Summary Judgment Based on Statute of Limitations Reversed: Since 1884, the Roman Catholic Church has operated the St. Labre School for children of the Northern Cheyenne Tribe. Since 1952, St. Labre School has raised millions of dollars through a direct mail campaign. The tribe filed suit against the church related to the school's fundraising efforts, alleging constructive trust and unjust enrichment claims. Applying the 1989 Trust Code (now repealed), the District Court concluded that if a constructive trust had formed, it was created by law in 1952 when the school started the fundraising campaign, and that any claims arising 3 years before the filing of the lawsuit were barred by the statute of limitations. On appeal, the Supreme Court concluded that the creation of a constructive trust was a disputed material fact and therefore not appropriate for summary judgment. The court remanded the matter for the District Court to determine when the tribe's claims accrued. N. Cheyenne Tribe v. Roman Catholic Church, et al., 2013 MT 24, 368 Mont. 330, 296 P.3d 450.

Evidence of Bad Acts — No Prerequisite to Imposing Constructive Trust Under 1989 Trust Code — Summary Judgment Reversed: Since 1884, the Roman Catholic Church has operated the St. Labre School for children of the Northern Cheyenne Tribe. Since 1952, the school has raised millions of dollars through a direct mail campaign. The tribe filed suit against the church related to the school's fundraising efforts, alleging constructive trust and unjust enrichment claims. The District Court granted the church summary judgment based on its conclusion that imposition of a constructive trust required the tribe to show misconduct by the school, which the tribe had not done. Following the tribe's appeal, the Supreme Court concluded that misconduct is not a prerequisite to imposing a constructive trust. Accordingly, it reversed the District Court's grant of summary judgment and remanded the case to allow the tribe to develop its claims. N. Cheyenne Tribe v. Roman Catholic Church, et al., 2013 MT 24, 368 Mont. 330, 296 P.3d 450.

Living Trust — Definitions — Classification of Property Subject to Trust: Clifford and his wife Mary established a living trust for the benefit of their family. The trust classified property as either "marital" or "separate". Marital property transferred to the trust would become part of the marital trust estate and would go to the surviving spouse on the death of either Clifford or Mary. Separate property of either Clifford or Mary would become part of the separate trust estate and would be distributed according to the trust, with the residue going to the family bypass trust. The trust required the trustee to distribute $10,000 from Clifford's separate trust to each of his children. In order to determine whether joint bank account and certain certificates of deposit were available for distribution by the separate trust, the Supreme Court examined the terms of the trust and definitions used in the trust. Because the trust was silent as to the treatment of jointly held personal property and the definitions in the trust were ambiguous as to the terms "marital property" and "separate property", the Supreme Court relied upon external evidence to determine the intent of Clifford and Mary. The Supreme Court found that the circumstances concerning the creation and use of the accounts and certificates during their lifetime indicated an intent that the accounts and certificates were joint and not separate property, in that Clifford and Mary placed money generated by their mutual efforts into the accounts and certificates and, for at least one of the accounts, the bank had issued the passbook and statements of account in both their names. The Supreme Court held that the District Court had properly characterized Clifford and Mary's joint bank account and certificates of deposit as part of the marital trust estate and therefore not available for distribution from Clifford's separate trust estate. In re Estate of Dern, 279 M 138, 928 P2d 123, 53 St. Rep. 1087 (1996).

Living Trust — Judicial Construction of Amendment so as to Give Effect to All Provisions: Clifford and his wife Mary established a living trust for the benefit of their family. The trust documents provided that major modifications to the trust should be made through the formal amendment process but that minor modifications could be made through trust minutes. Other trust documents provided that amendments had to be made by Clifford and Mary acting together, and the first page of the trust minutes provided that instructions to successor trustees must be signed and dated by the trust settlors. The District Court found that the fourth trust minute, amending other trust documents so as to convey the 120-acre farm on which Clifford and Mary lived to Mary, to be valid and binding. The Supreme Court held that the fourth trust minute, which was signed only by Clifford, was invalid because a construction of all of the other provisions of the trust dealing with amendments and the provisions of 1-4-101 required that the fourth trust minute be signed by both Clifford and Mary. Consequently, the Supreme Court held that the farm remained in the separate property trust and was conveyed to the children of Clifford and Mary and not to Mary alone. In re Estate of Dern, 279 M 138, 928 P2d 123, 53 St. Rep. 1087 (1996).

Living Trust — Judicial Construction of Trust Documents — Determination of Share in Cotenancy: Clifford and his wife Mary established a living trust for the benefit of their family. The trust documents established a family bypass trust to be funded by the remainder of Clifford's separate trust and the remainder of Clifford's interest in the marital trust estate. All of the property in Clifford's separate trust had been bequeathed, so it was necessary to determine Clifford's interest in the marital trust estate in order to determine the amount in the family bypass trust. Expenses for Clifford's funeral were to be paid from the "trust estate", and because the only money in the "trust estate" was in the marital trust estate, the Supreme Court concluded that the funeral expenses had to be deducted from the marital trust estate. The District Court determined and the Supreme Court agreed that Clifford's interest as a cotenant in the remaining money in the marital trust estate was the interest of a joint tenant entitled under 70-1-307 to an equal share in certain accounts in a bank because there was no proof to the contrary. The Supreme Court concluded that Clifford was a joint tenant in an account at the credit union and, although there is a presumption that the shares of either a joint tenant or tenant in common are equal, Clifford's children had presented sufficient proof, through proof of unequal contributions by Clifford and Mary to the account, to rebut the presumption. The Supreme Court held that Clifford did not intend to give his unequal contribution to the credit union account to Mary as a gift but intended that his unequal contribution to the credit union account be used to fund the marital trust estate and that the marital trust estate, minus funeral expenses, costs, and attorney fees, be used as the principal of the family bypass trust for the benefit of Clifford's children. In re Estate of Dern, 279 M 138, 928 P2d 123, 53 St. Rep. 1087 (1996), followed in Tipp v. Skjelset, 285 M 274, 947 P2d 480, 54 St. Rep. 1147 (1997), and Flood v. Kalinyaprak, 2004 MT 15, 319 M 280, 84 P3d 27 (2004).

72-38-101. Short title.

Compiler's Comments

Source: The language in this section relates to the language in 72-33-101 (now repealed).

72-38-102. Scope.

Official Comments

The Uniform Trust Code, while comprehensive, applies only to express trusts. Excluded from the Code's coverage are resulting and constructive trusts, which are not express trusts but remedial devices imposed by law. For the requirements for creating an express trust and the methods by which express trusts are created, see Sections 401-402 [72-38-401 and 72-38-402]. The Code does not attempt to distinguish express trusts from other legal relationships with respect to property, such as agencies and contracts for the benefit of third parties. For the distinctions, see Restatement (Third) of Trusts §§ 2, 5 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 2, 5-16C (1959).

The Uniform Trust Code is directed primarily at trusts that arise in an estate planning or other donative context, but express trusts can arise in other contexts. For example, a trust created pursuant to a divorce action would be included, even though such a trust is not donative but is created pursuant to a bargained-for exchange. Commercial trusts come in numerous forms, including trusts created pursuant to a state business trust act and trusts created to administer specified funds, such as to pay a pension or to manage pooled investments. Commercial trusts are often subject to special-purpose legislation and case law, which in some respects displace the usual rules stated in this Code. *See* John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce,* 107 Yale L.J. 165 (1997).

Express trusts also may be created by means of court judgment or decree. Examples include trusts created to hold the proceeds of personal injury recoveries and trusts created to hold the assets of a protected person in a conservatorship proceeding. *See, e.g.,* Uniform Probate Code § 5-411(a)(4).

Compiler's Comments

Source: This section modifies section 102 of the Uniform Law Commission's Uniform Trust Code by adding the last sentence regarding constructive or resulting trusts.

72-38-103. Definitions.

Official Comments

A definition of "action" (paragraph (1)) [72-38-103(1)] is included for drafting convenience, to avoid having to clarify in the numerous places in the Uniform Trust Code where reference is made to an "action" by the trustee that the term includes a failure to act.

The definition of "ascertainable standard" (paragraph (2)) [72-38-103(2)] was added to the Code by a 2004 amendment. The term was previously used only in and defined in Section 814 [72-38-814]. Other 2004 amendments add the term to Sections 103(11) [72-38-103(13)] and 504 [72-38-504], necessitating the need to move the definition in Section 814 [72-38-814] to the list of defined terms in Section 103 [72-38-103] and thereby make it applicable throughout the Code.

"Beneficiary" (paragraph (3)) [72-38-103(3)] refers only to a beneficiary of a trust as defined in the Uniform Trust Code. In addition to living and ascertained individuals, beneficiaries may be unborn or unascertained. Pursuant to Section 402(b) [72-38-402(2)], a trust is valid only if a beneficiary can be ascertained now or in the future. The term "beneficiary" includes not only beneficiaries who received their interests under the terms of the trust but also beneficiaries who received their interests by other means, including by assignment, exercise of a power of appointment, resulting trust upon the failure of an interest, gap in a disposition, operation of an antilapse statute upon the predecease of a named beneficiary, or upon termination of the trust. The fact that a person incidentally benefits from the trust does not mean that the person is a beneficiary. For example, neither a trustee nor persons hired by the trustee become beneficiaries merely because they receive compensation from the trust. *See* Restatement (Third) of Trusts Section 48 cmt. c (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 126 cmt. c (1959).

While the holder of a power of appointment is not considered a trust beneficiary under the common law of trusts, holders of powers are classified as beneficiaries under the Uniform Trust Code. Holders of powers are included on the assumption that their interests are significant enough that they should be afforded the rights of beneficiaries. A power of appointment as used in state trust law and this Code is as defined in state property law and not federal tax law although there is considerable overlap between the two definitions.

A power of appointment is authority to designate the recipients of beneficial interests in property. *See* Restatement (Second) of Property: Donative Transfers Section 11.1 (1986). A power is either general or nongeneral and either presently exercisable or not presently exercisable. A general power of appointment is a power exercisable in favor of the holder of the power, the power holder's creditors, the power holder's estate, or the creditors of the power holder's estate. *See* Restatement (Second) of Property: Donative Transfers Section 11.4 (1986). All other powers are nongeneral. A power is presently exercisable if the power holder can currently create an interest, present or future, in an object of the power. A power of appointment is not presently exercisable if exercisable only by the power holder's will or if its exercise is not effective for a specified period of time or until occurrence of some event. *See* Restatement (Second) of Property: Donative Transfers Section 11.5 (1986). Powers of appointment may be held in either a fiduciary or nonfiduciary capacity. The definition of "beneficiary" excludes powers held by a trustee but not powers held by others in a fiduciary capacity.

While all categories of powers of appointment are included within the definition of "beneficiary," the Uniform Trust Code elsewhere makes distinctions among types of powers. Under Section 302 [72-38-302], the holder of a testamentary general power of appointment may represent and bind persons whose interests are subject to the power. A "power of withdrawal" (paragraph (11)) [72-38-103(13)] is defined as a presently exercisable general power of appointment other than a power exercisable by a trustee and limited by an ascertainable standard, or a power which is exercisable by another person only upon consent of the trustee or a person holding an adverse interest. The exception for a power exercisable by a trustee that is limited by an ascertainable standard was added in 2004. For a discussion of this amendment, see the comment on the 2004 Amendment to Section 504 [72-38-504], which made a related change.

The definition of "beneficiary" includes only those who hold beneficial interests in the trust. Because a charitable trust is not created to benefit ascertainable beneficiaries but to benefit the community at large (*see* Section 405(a)) [72-38-405(1)], persons receiving distributions from a charitable trust are not beneficiaries as that term is defined in this Code. However, pursuant to Section 110(b) [72-38-110(2)], also granted rights of a qualified beneficiary under the Code are charitable organizations expressly designated to receive distributions under the terms of a charitable trust but only if there [are] beneficial interests sufficient to satisfy the definition of qualified beneficiary for a noncharitable trust.

The Uniform Trust Code leaves certain issues concerning beneficiaries to the common law. Any person with capacity to take and hold legal title to intended trust property has capacity to be a beneficiary. *See* Restatement (Third) of Trusts Section 43 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 116-119 (1959). Except as limited by public policy, the extent of a beneficiary's interest is determined solely by the settlor's intent. *See* Restatement (Third) of Trusts Section 49 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 127-128 (1959). While most beneficial interests terminate upon a beneficiary's death, the interest of a beneficiary may devolve by will or intestate succession the same as a corresponding legal interest. *See* Restatement (Third) of Trusts Section 55(1) (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 140, 142 (1959).

Under the Uniform Trust Code, when a trust has both charitable and noncharitable beneficiaries only the charitable portion qualifies as a "charitable trust" (paragraph (4)) [72-38-103(4)]. The great majority of the Code's provisions apply to both charitable and noncharitable trusts without distinction. The distinctions between the two types of trusts are found in the requirements relating to trust creation and modification. Pursuant to Sections 405 [72-38-405] and 413 [72-38-413], a charitable trust must have a charitable purpose and charitable trusts may be modified or terminated under the doctrine of cy pres. Also, Section 411 [72-38-411] allows a noncharitable trust to in certain instances be terminated by its beneficiaries while charitable trusts do not have beneficiaries in the usual sense. To the extent of these distinctions, a split-interest trust is subject to two sets of provisions, one applicable to the charitable interests, the other the noncharitable.

For discussion of the definition of "conservator" (paragraph (5)) [72-38-103(5)], see the definition of "guardian" (paragraph (7)) [72-38-103(7)].

To encourage trustees to accept and administer trusts containing real property, the Uniform Trust Code contains several provisions designed to limit exposure to possible liability for violation of "environmental law" (paragraph (6)) [72-38-103(6)]. Section 701(c)(2) [72-38-701(3)(b)] authorizes a nominated trustee to investigate trust property to determine potential liability for violation of environmental law or other law without accepting the trusteeship. Section 816(13) [72-38-816(13)] grants a trustee comprehensive and detailed powers to deal with property involving environmental risks. Section 1010(b) [72-38-1010(2)] immunizes a trustee from personal liability for violation of environmental law arising from the ownership and control of trust property.

Under the Uniform Trust Code, a "guardian" (paragraph (7)) [72-38-103(7)] makes decisions with respect to personal care; a "conservator" (paragraph (5)) [72-38-103(5)] manages property. The terminology used is that employed in Article V of the Uniform Probate Code, and in its free-standing Uniform Guardianship and Protective Proceedings Act. Enacting jurisdictions not using these terms in the defined sense should substitute their own terminology. For this reason, both terms have been placed in brackets. The definition of "guardian" accommodates those jurisdictions which allow appointment of a guardian by a parent or spouse in addition to appointment by a court. Enacting jurisdictions which allow appointment of a guardian solely by a court should delete the bracketed language "a parent, or a spouse."

The phrase "interests of the beneficiaries" (paragraph (8)) [72-38-103(9)] is used with some frequency in the Uniform Trust Code. The definition clarifies that the interests are as provided in the terms of the trust and not as determined by the beneficiaries. Absent authority to do so in the terms of the trust, Section 108 prohibits a trustee from changing a trust's principal place of administration if the transfer would violate the trustee's duty to administer the trust at a place appropriate to the interests of the beneficiaries. Section 706(b) [72-38-706(2)] conditions certain of the grounds for removing a trustee on the court's finding that removal of the trustee will best serve the interests of the beneficiaries. Section 801 [72-38-801] requires the trustee to administer the trust in the interests of the beneficiaries, and Section 802 [72-38-802] makes clear that a trustee may not place its own interests above those of the beneficiaries. Section 808(d) [72-38-808(4), now repealed] requires the holder of a power to direct who is subject to a fiduciary obligation to act with regard to the interests of the beneficiaries. Section 1002(b) [72-38-1002(2)] may impose greater liability on a cotrustee who commits a breach of trust with reckless indifference to the interests of the beneficiaries. Section 1008 invalidates an exculpatory term to the extent it relieves a trustee of liability for breach of trust committed with reckless indifference to the interests of the beneficiaries.

"Jurisdiction" (paragraph (9)) [72-38-103(10)], when used with reference to a geographic area, includes a state or country but is not necessarily so limited. Its precise scope will depend on the context in which it is used. "Jurisdiction" is used in Sections 107 [72-38-107] and 403 [72-38-403] to refer to the place whose law will govern the trust. The term is used in Section 108 [72-38-108] to refer to the trust's principal place of administration. The term is used in Section 816 [72-38-816] to refer to the place where the trustee may appoint an ancillary trustee and to the place in whose courts the trustee can bring and defend legal proceedings.

The definition of "property" (paragraph (12)) [72-38-103(15)] is intended to be as expansive as possible and to encompass anything that may be the subject of ownership. Included are choses in action, claims, and interests created by beneficiary designations under policies of insurance, financial instruments, and deferred compensation and other retirement arrangements, whether revocable or irrevocable. Any such property interest is sufficient to support creation of a trust. *See* Section 401 [72-38-401] comment.

Due to the difficulty of identifying beneficiaries whose interests are remote and contingent, and because such beneficiaries are not likely to have much interest in the day-to-day affairs of the trust, the Uniform Trust Code uses the concept of "qualified beneficiary" (paragraph

(13)) [72-38-103(16)] to limit the class of beneficiaries to whom certain notices must be given or consents received. The definition of qualified beneficiaries is used in Section 705 [72-38-705] to define the class to whom notice must be given of a trustee resignation. The term is used in Section 813 [72-38-813] to define the class to be kept informed of the trust's administration. Section 417 [72-38-417] requires that notice be given to the qualified beneficiaries before a trust may be combined or divided. Actions which may be accomplished by the consent of the qualified beneficiaries include the appointment of a successor trustee as provided in Section 704 [72-38-704]. Prior to transferring a trust's principal place of administration, Section 108(d) [72-38-108(4)] requires that the trustee give at least 60 days notice to the qualified beneficiaries.

The qualified beneficiaries consist of the beneficiaries currently eligible to receive a distribution from the trust together with those who might be termed the first-line remaindermen. These are the beneficiaries who would become eligible to receive distributions were the event triggering the termination of a beneficiary's interest or of the trust itself to occur on the date in question. Such a terminating event will typically be the death or deaths of the beneficiaries currently eligible to receive the income. Should a qualified beneficiary be a minor, incapacitated, or unknown, or a beneficiary whose identity or location is not reasonably ascertainable, the representation and virtual representation principles of Article 3 [Title 72, ch. 38, pt. 3] may be employed, including the possible appointment by the court of a representative to represent the beneficiary's interest.

The qualified beneficiaries who take upon termination of the beneficiary's interest or of the trust can include takers in default of the exercise of a power of appointment. The term can also include the persons entitled to receive the trust property pursuant to the exercise of a power of appointment. Because the exercise of a testamentary power of appointment is not effective until the testator's death and probate of the will, the qualified beneficiaries do not include appointees under the will of a living person. Nor would the term include the objects of an unexercised inter vivos power.

Charitable trusts and trusts for a valid noncharitable purpose do not have beneficiaries in the usual sense. However, certain persons, while not technically beneficiaries, do have an interest in seeing that the trust is enforced. Section 110 [72-38-110] expands the definition of qualified beneficiaries to encompass this wider group. Section 110(b) [72-38-110(2)] grants the rights of qualified beneficiaries to charitable organizations expressly designated under the terms of a charitable trust and whose beneficial interests are sufficient to satisfy the definition of qualified beneficiary for a noncharitable trust. Section 110(c) [72-38-110(3)] also grants the rights of qualified beneficiaries to a person appointed by the terms of the trust or by the court to enforce a trust created for an animal or other noncharitable purpose. Section 110(d) [72-38-110(4)] is an optional provision granting the rights of a qualified beneficiary with respect to a charitable trust to the attorney general of the enacting jurisdiction.

The definition of "revocable" (paragraph (14)) [72-38-103(17)] clarifies that revocable trusts include only trusts whose revocation is substantially within the settlor's control. The fact that the settlor becomes incapacitated does not convert a revocable trust into an irrevocable trust. The trust remains revocable until the settlor's death or the power of revocation is released. The consequences of classifying a trust as revocable are many. The Uniform Trust Code contains provisions relating to liability of a revocable trust for payment of the settlor's debts (Section 505) [72-38-505], the standard of capacity for creating a revocable trust (Section 601) [72-38-601], the procedure for revocation (Section 602) [72-38-602], the subjecting of the beneficiaries' rights to the settlor's control (Section 603) [72-38-603], the period for contesting a revocable trust (Section 604) [72-38-604], the power of the settlor of a revocable trust to direct the actions of a trustee (Section 808(a)) [72-38-808(1), now repealed], notice to the qualified beneficiaries upon the settlor's death (Section 813(b)) [72-38-813(2)], and the liability of a trustee of a revocable trust for the obligations of a partnership of which the trustee is a general partner (Section 1011(d)) [72-38-1011(3)].

Because under Section 603(b) [72-38-603(2)] the holder of a power of withdrawal has the rights of a settlor of a revocable trust, the definition of "power of withdrawal" (paragraph (11)) [72-38-103(13)], and "revocable" (paragraph (14)) [72-38-103(17)] are similar. Both exclude individuals who can exercise their power only with the consent of the trustee or person having an adverse interest although the definition of "power of withdrawal" excludes powers subject to an ascertainable standard, a limitation which is not present in the definition of "revocable."

The definition of "settlor" (paragraph (15)) [72-38-103(18)] refers to the person who creates, or contributes property to, a trust, whether by will, self-declaration, transfer of property to another person as trustee, or exercise of a power of appointment. For the requirements for creating a trust, see Section 401 [72-38-401]. Determining the identity of the "settlor" is usually not an issue. The same person will both sign the trust instrument and fund the trust. Ascertaining the identity of the settlor becomes more difficult when more than one person signs the trust instrument or funds the trust. The fact that a person is designated as the "settlor" by the terms of the trust is not necessarily determinative. For example, the person who executes the trust instrument may be acting as the agent for the person who will be funding the trust. In that case, the person funding the trust, and not the person signing the trust instrument, will be the settlor. Should more than one person contribute to a trust, all of the contributors will ordinarily be treated as settlors in proportion to their respective contributions, regardless of which one signed the trust instrument. *See* Section 602(b) [72-38-602(2)].

In the case of a revocable trust employed as a will substitute, gifts to the trust's creator are sometimes made by placing the gifted property directly into the trust. To recognize that such a donor is not intended to be treated as a settlor, the definition of "settlor" excludes a contributor to a trust that is revocable by another person or over which another person has a power of withdrawal. Thus, a parent who contributes to a child's revocable trust would not be treated as one of the trust's settlors. The definition of settlor would treat the child as the sole settlor of the trust to the extent of the child's proportionate contribution. Pursuant to Section 603(b) [72-38-603(2)], the child's power of withdrawal over the trust would also result in the child being treated as the settlor with respect to the portion of the trust attributable to the parent's contribution.

Ascertaining the identity of the settlor is important for a variety of reasons. It is important for determining rights in revocable trusts. *See* Sections 505(a)(1), (3) [72-38-505(1)(a), (1)(c)] (creditor claims against settlor of revocable trust), 602 [72-38-602] (revocation or modification of revocable trust), and 604 [72-38-604] (limitation on contest of revocable trust). It is also important for determining rights of creditors in irrevocable trusts. *See* Section 505(a)(2) [72-38-505(1)(b)] (creditors of settlor can reach maximum amount trustee can distribute to settlor). While the settlor of an irrevocable trust traditionally has no continuing rights over the trust except for the right under Section 411 [72-38-411] to terminate the trust with the beneficiaries' consent, the Uniform Trust Code also authorizes the settlor of an irrevocable trust to petition for removal of the trustee and to enforce or modify a charitable trust. *See* Sections 405(c) [72-38-405(3)] (standing to enforce charitable trust), 413 [72-38-413] (doctrine of cy pres), and 706 [72-38-706] (removal of trustee).

"Spendthrift provision" (paragraph (16)) [72-38-103(19)] means a term of a trust which restrains the transfer of a beneficiary's interest, whether by a voluntary act of the beneficiary or by an action of a beneficiary's creditor or assignee, which at least as far as the beneficiary is concerned, would be involuntary. A spendthrift provision is valid under the Uniform Trust Code only if it restrains both voluntary and involuntary transfer. For a discussion of this requirement and the effect of a spendthrift provision in general, see Section 502 [72-38-502]. The insertion of a spendthrift provision in the terms of the trust may also constitute a material purpose sufficient to prevent termination of the trust by agreement of the beneficiaries under Section 411 [72-38-411], although the Code does not presume this result.

"Terms of a trust" (paragraph (18)) [72-38-103(21)] is a defined term used frequently in the Uniform Trust Code. While the wording of a written trust instrument is almost always the most important determinant of a trust's terms, the definition is not so limited. Oral statements, the situation of the beneficiaries, the purposes of the trust, the circumstances under which the trust is to be administered, and, to the extent the settlor was otherwise silent, rules of construction, all may have a bearing on determining a trust's meaning. *See* Restatement (Third) of Trusts Section 4 cmt. a (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 4 cmt. a (1959). If a trust established by order of court is to be administered as an express trust, the terms of the trust are determined from the court order as interpreted in light of the general rules governing interpretation of judgments. *See* Restatement (Third) of Trusts Section 4 cmt. f (Tentative Draft No. 1, approved 1996).

A manifestation of a settlor's intention does not constitute evidence of a trust's terms if it would be inadmissible in a judicial proceeding in which the trust's terms are in question. *See* Restatement (Third) of Trusts Section 4 cmt. b (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 4 cmt. b (1959). *See also* Restatement (Third) Property: Donative Transfers Sections 10.2, 11.1-11.3 (Tentative Draft No. 1, approved 1995). For example, in many states a trust of real property is unenforceable unless evidenced by a writing, although Section 407 of this Code does not so require, leaving this issue to be covered by separate statute if the enacting jurisdiction so elects. Evidence otherwise relevant to determining the terms of a trust may also be excluded under other principles of law, such as the parol evidence rule.

"Trust instrument" (paragraph (19)) [72-38-103(22)] is a subset of the definition of "terms of a trust" (paragraph (18)) [72-38-103(21)], referring to only such terms as are found in an instrument executed by the settlor. Section 403 [72-38-403] provides that a trust is validly created if created in compliance with the law of the place where the trust instrument was executed. Pursuant to Section 604(a)(2) [72-38-604(1)(b)], the contest period for a revocable trust can be shortened by providing the potential contestant with a copy of the trust instrument plus other information. Section 813(b)(1) [72-38-813(2)(a)] requires that the trustee upon request furnish a beneficiary with a copy of the trust instrument. To allow a trustee to administer a trust with some dispatch without concern about liability if the terms of a trust instrument are contradicted by evidence outside of the instrument, Section 1006 [72-38-1006] protects a trustee from liability to the extent a breach of trust resulted from reasonable reliance on those terms. Section 1013 [72-38-1013] allows a trustee to substitute a certification of trust in lieu of providing a third person with a copy of the trust instrument. Section 1106(a)(4) [Title 72, ch. 38 Chapter Compiler's Comments] provides that unless there is a clear indication of a contrary intent, rules of construction and presumptions provided in the Uniform Trust Code apply to trust instruments executed before the effective date of the Code.

The definition of "trustee" (paragraph (20)) [72-38-103(23)] includes not only the original trustee but also an additional and successor trustee as well as a cotrustee. Because the definition of trustee includes trustees of all types, any trustee, whether original or succeeding, single or cotrustee, has the powers of a trustee and is subject to the duties imposed on trustees under the Uniform Trust Code. Any natural person, including a settlor or beneficiary, has capacity to act as trustee if the person has capacity to hold title to property free of trust. *See* Restatement (Third) of Trusts Section 32 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 89 (1959). State banking statutes normally impose additional requirements before a corporation can act as trustee.

2004 Amendment. Section 103(2) [72-38-103(2)] adds a definition of "ascertainable standard." The term was formerly used only in Section 814 [72-38-814]. Other 2004 amendments add the term to Sections 103(11) [72-38-103(13)] and 504 [72-38-504]. The amendment moves into this section the definition previously found in Section 814 [72-38-814], thereby making it apply generally throughout the Code. Adding this definition required the renumbering of all subsequent definitions in the Section and corrections to cross-references to this Section throughout the Code and comments.Section 103(11) [72-38-103(13)], the definition of "power of withdrawal," is amended to exclude a possible inference that the term includes a discretionary power in a trustee to make distributions for the trustee's own benefit which is limited by an ascertainable standard. For an explanation of the reason for this amendment, see the comment to the 2004 amendment to Section 504 [72-38-504], which addresses a related issue.

Clarifying language is added to Section 103(13) [72-38-103(16)], the definition of "qualified beneficiary," to make clear that the second category in the definition refers to termination of an interest that is not associated with termination of the trust.

Compiler's Comments

2021 Amendment: Chapter 325 in definition of terms of a trust substituted current definition for former definition that read: ""Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding." Amendment effective October 1, 2021.

Source: This section modifies section 103 in the Uniform Law Commission's Uniform Trust Code by adding definitions of interested person, permissible distributee, and principal place of administration.

The language in this section relates to the language in 72-33-108 (now repealed) and 72-34-201 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Business Trust Providing for Issuance of Certificates to Beneficiaries Not Considered Legitimate Trust: A husband and wife attended a financial planning seminar, paid $2,400 for a "trust establishment kit", and created the Ruby Mountain Trust, consisting of their 500-plus-acre farm, various buildings, livestock, and personal property. Upon transfer of the property to the trust, they then issued 100 certificates of beneficial interest to themselves and their three children. They maintained a 2% interest, 98% went to the children, and the children were named beneficiaries. The trust was not irrevocable and contained no distribution clause. Following its creation, the trust hired the husband as a caretaker, paying him $20 an hour for farming and management services, and the husband and wife were authorized as comanagers to write checks against the trust account without prior approval of the trustees. The couple also entered into a lease and rental agreement with the trust under which they leased farming equipment to the trust and paid rent for continuing to live in the farmhouse. The trust paid the debt obligations of the farm, much of which was subsequently subdivided, generating over $1 million for the trust. The couple paid no gift tax when the farm was put in trust and no self-employment taxes. They adopted the fair market value of the subdivided land as the basis of the trust, later claiming that only $5,000 for each beneficiary had been distributed while the remainder of the subdivision proceeds had been reinvested in the trust by means of improvements to it, and asserted that income from the lot sales was not taxable until paid to the beneficiaries. Following an audit, the Department of Revenue took issue with the couple's land development activities, including: (1) the issuance of certificates of beneficial interest in exchange for the land; (2) the degree of control maintained by the couple over the trust corpus; and (3) the transfer of the property at a "stepped-up" basis by conducting the fair market value appraisal after the subdivision improvements when the property should have been valued at the carryover book value, i.e., the historical cost of the farmland prior to the value-added improvements, which was considered an attempt to avoid capital gains taxes. The Department disallowed the trust for tax purposes and imputed trust income and expenses to the couple's individual tax returns. STAB agreed with the Department, and the District Court affirmed. On appeal, the Supreme Court also affirmed, holding that a legitimate trust under Montana law does not include a business trust that provides for certificates to be issued to beneficiaries. Because the trust was void, transfer of property to the trust was void as well, and the trust must be disregarded for tax purposes. The couple was correctly assessed individual taxes on the trust income. Ruby Mtn. Trust v. Dept. of Revenue, 2000 MT 166, 300 M 297, 3 P3d 654, 57 St. Rep. 688 (2000).

Characteristics of Illegitimate Business Trust: A business trust that provides for certificates to be issued to beneficiaries does not constitute a legitimate trust under Montana law. Although a business trust may not have directors or officers like a corporation, the trustees may function in nearly the same manner as a corporation for business purposes. Earmarks of a business trust that are not usually found in an ordinary trust include: (1) centralized management; (2) continuity of life more typical of a business entity; (3) transferability of interests; and (4) limited personal liability. In a business trust, the relationship of the grantor to the property transferred does not differ in any material way before and after the creation of the trust. Although a taxpayer has a legal right to minimize or avoid taxes by any legal means, when the form of a transaction has not altered any cognizable economic relationships, that form will be disregarded and the tax law applied according to the substance of the transaction. In this case, plaintiffs' establishment of a business trust in an effort to avoid paying taxes by transferring personal property to the trust and issuance of units or certificates of beneficial interest, resulting in little material change in economic ownership or reality before and after creation of the trust, were properly disregarded for tax purposes, and plaintiffs were correctly held individually responsible for trust income and expenses. Ruby Mtn. Trust v. Dept. of Revenue, 2000 MT 166, 300 M 297, 3 P3d 654, 57 St. Rep. 688 (2000). See also Morrissey v. Comm'r of Internal Revenue, 296 US 344, 80 L Ed 2d 263, 56 S Ct 289 (1935), and 26 CFR 301.7701-4(b), which classifies a business trust as an abusive trust for tax purposes.

72-38-104. Knowledge.

Official Comments

This section specifies when a person is deemed to know a fact. Subsection (a) [72-38-104(1)] states the general rule. Subsection (b) [72-38-104(2)] provides a special rule dealing with notice to organizations. Pursuant to subsection (a) [72-38-104(1)], a fact is known to a person if the person had actual knowledge of the fact, received notification of it, or had reason to know of the fact's existence based on all of the circumstances and other facts known to the person at the time. Under subsection (b) [72-38-104(2)], notice to an organization is not necessarily achieved by giving notice to a branch office. Nor does the organization necessarily acquire knowledge at the moment the notice arrives in the organization's mailroom. Rather, the organization has notice or knowledge of a fact only when the information is received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention had the organization exercised reasonable diligence.

"Know" is used in its defined sense in Sections 109 [72-38-109] (methods and waiver of notice), 305 [72-38-305] (appointment of representative), 604(b) [72-38-604(2)] (limitation on contest of revocable trust), 812 [72-38-812] (collecting trust property), 1009 [72-38-1009] (nonliability of trustee upon beneficiary's consent, release, or ratification), and 1012 [72-38-1012] (protection of person dealing with trustee). But as to certain actions, a person is charged with knowledge of facts the person would have discovered upon reasonable inquiry. *See* Section 1005 [72-38-1005] (limitation of action against trustee following report of trustee).

This section is based on Uniform Commercial Code § 1-202 (2000 Annual Meeting Draft).

72-38-105. Default and mandatory rules.

Official Comments

Subsection (a) [72-38-105(1)] emphasizes that the Uniform Trust Code is primarily a default statute.

While this Code provides numerous procedural rules on which a settlor may wish to rely, the settlor is generally free to override these rules and to prescribe the conditions under which the trust is to be administered. With only limited exceptions, the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary are as specified in the terms of the trust. Subsection (b) [72-38-105(2)] lists the items not subject to override in the terms of the trust. Because subsection (b) [72-38-105(2)] refers specifically to other sections of the Code, enacting jurisdictions modifying these other sections may also need to modify subsection (b) [72-38-105(2)].

Subsection (b)(1) [72-38-105(2)(a)] confirms that the requirements for a trust's creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor. For the requirements for creating a trust, see Sections 401-409 [72-38-401 through 72-38-409]. Subsection (b)(12) [72-38-105(2)(j)] makes clear that the settlor may not reduce any otherwise applicable period of limitations for commencing a judicial proceeding. *See* Sections 604 [72-38-604] (period of limitations for contesting validity of revocable trust), and 1005 [72-38-1005] (period of limitation on action for breach of trust). Similarly, a settlor may not so negate the responsibilities of a trustee that the trustee would no longer be acting in a fiduciary capacity. Subsection (b)(2) [72-38-105(2)(b)] provides that the terms may not eliminate a trustee's duty to act in good faith and in accordance with the purposes of the trust and the interests of the beneficiaries. For this duty, see Sections 801 [72-38-801] and 814(a) [72-38-814(1)]. Subsection (b)(3) [72-38-105(2)(c)] provides that the terms may not eliminate the requirement that a trust and its terms must be for the benefit of the beneficiaries. Subsection (b)(3) [72-38-105(2)(c)] also provides that the terms may not eliminate the requirement that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve. Subsections (b)(2)-(3) [72-38-105(2)(b) and (2)(c)] are echoed in Sections 404 [72-38-404] (trust and its terms must be for benefit of beneficiaries; trust must have a purpose that is lawful, not contrary to public policy, and possible to achieve), 801 [72-38-801] (trustee must administer trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries), 802(a) [72-38-802(1)] (trustee must administer trust solely in interests of the beneficiaries), 814 [72-38-814] (trustee must exercise discretionary power in good faith and in accordance with its terms and purposes and the interests of the beneficiaries), and 1008 [72-38-1008] (exculpatory term unenforceable to extent it relieves trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust and the interests of the beneficiaries).

The terms of a trust may not deny a court authority to take such action as necessary in the interests of justice, including requiring that a trustee furnish bond. Subsection (b)(6), (13) [72-38-105(2)(f), (2)(k)]. Additionally, should the jurisdiction adopting this Code enact the optional provisions on subject-matter jurisdiction and venue, subsection (b)(14) [72-38-105(2)(l)] similarly provides that such provisions cannot be altered in the terms of the trust. The power of the court to modify or terminate a trust under Sections 410 through 416 [72-38-410 through 72-38-416] is not subject to variation in the terms of the trust. Subsection (b)(4) [72-38-105(2)(d)]. However, all of these Code sections involve situations which the settlor could have addressed had the settlor had sufficient foresight. These include situations where the purpose of the trust has been achieved, a mistake was made in the trust's creation, or circumstances have arisen that were not anticipated by the settlor.

Section 813 [72-38-813] imposes a general obligation to keep the beneficiaries informed as well as several specific notice requirements. Subsections (b)(8) and (b)(9) [not adopted], which were placed in brackets and made optional provisions by a 2004 amendment, specify limits on the settlor's ability to waive these information requirements. With respect to beneficiaries age 25 or older, a settlor may dispense with all of the requirements of Section 813 [72-38-813] except for the duties to inform the beneficiaries of the existence of the trust, of the identity of the trustee, and to provide a beneficiary upon request with such reports as the trustee may have prepared. Among the specific requirements that a settlor may waive include the duty to provide a beneficiary upon request with a copy of the trust instrument (Section 813(b)(1)) [72-38-813(2)(a)], and the requirement that the trustee provide annual reports to the qualified beneficiaries (Section 813(c)) [72-38-813(3)]. The furnishing of a copy of the entire trust instrument and preparation of annual reports may be required in a particular case, however, if such information is requested by a beneficiary and is reasonably related to the trust's administration.

Responding to the desire of some settlors that younger beneficiaries not know of the trust's bounty until they have reached an age of maturity and self-sufficiency, subsection (b)(8) [not adopted] allows a settlor to provide that the trustee need not even inform beneficiaries under age 25 of the existence of the trust. However, pursuant to subsection (b)(9) [not adopted], if the younger beneficiary learns of the trust and requests information, the trustee must respond. More generally, subsection (b)(9) [not adopted] prohibits a settlor from overriding the right provided to a beneficiary in Section 813(a) [72-38-813(1)] to request from the trustee of an irrevocable trust copies of trustee reports and other information reasonably related to the trust's administration.

During the drafting of the Uniform Trust Code, the drafting committee discussed and rejected a proposal that the ability of the settlor to waive required notice be based on the nature of the beneficiaries' interest and not on the beneficiaries' age. Advocates of this alternative approach concluded that a settlor should be able to waive required notices to the remainder beneficiaries, regardless of their age. Enacting jurisdictions preferring this alternative should substitute the language "adult and current or permissible distributees of trust income or principal" for the reference to "qualified beneficiaries" in subsection (b)(8) [not adopted]. They should also delete the reference to beneficiaries "who have attained the age of 25 years."

Waiver by a settlor of the trustee's duty to keep the beneficiaries informed of the trust's administration does not otherwise affect the trustee's duties. The trustee remains accountable to the beneficiaries for the trustee's actions.

Neither subsection (b)(8) nor (b)(9) [not adopted] apply to revocable trusts. The settlor of a revocable trust may waive all reporting to the beneficiaries, even in the event the settlor loses capacity. If the settlor is silent about the subject, reporting to the beneficiaries will be required upon the settlor's loss of capacity. *See* Section 603 [72-38-603].

In conformity with traditional doctrine, the Uniform Trust Code limits the ability of a settlor to exculpate a trustee from liability for breach of trust. The limits are specified in Section 1008 [72-38-1008]. Subsection (b)(10) [72-38-105(2)(h)] of this section provides a cross-reference. Similarly, subsection (b)(7) [72-38-105(2)(g)] provides a cross-reference to Section 708(b) [72-38-708(2)], which limits the binding effect of a provision specifying the trustee's compensation.

Finally, subsection (b)(11) [72-38-105(2)(i)] clarifies that a settlor is not free to limit the rights of third persons, such as purchasers of trust property. Subsection (b)(5) [72-38-105(2)(e)] clarifies that a settlor may not restrict the rights of a beneficiary's creditors except to the extent a spendthrift restriction is allowed as provided in Article 5 [Title 72, ch. 38, pt. 5].

2001 Amendment. By amendment in 2001, subsections (b) (3), (8) and (9) [72-38-105(2)(c); not adopted] were revised. The language in subsection (b)(3) [72-38-105(2)(c)] "that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve" is new. This addition clarifies that the settlor may not waive this common law requirement, which is codified in the Code at Section 404 [72-38-404].

Subsections (b)(8) and (9) [not adopted] formerly provided:

(8) the duty to notify the qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, and of their right to request trustee's reports and other information reasonably related to the administration of the trust;

(9) the duty to respond to the request of a beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust.

The amendment clarifies that the information requirements not subject to waiver are requirements specified in Section 813 [72-38-813] of the Code.

2003 Amendment. By amendment in 2003, subsection (b)(8) [not adopted] was revised. Under the previous provision, as amended in 2001, the presence of two "excepts" in the same sentence, the first in the introductory language to subsection (b) [not adopted] and the second at the beginning of subsection (b)(8) [not adopted], has caused considerable confusion. The revision eliminates the second "except" in (b)(8) [not adopted] without changing the meaning of the provision.

2004 Amendment. Sections 105(b)(8) and 105(b)(9) [not adopted] address the extent to which a settlor may waive trustee notices and other disclosures to beneficiaries that would otherwise be required under the Code. These subsections have generated more discussion in jurisdictions considering enactment of the UTC than have any other provisions of the Code. A majority of the enacting jurisdictions have modified these provisions but not in a consistent way. This lack of agreement and resulting variety of approaches is expected to continue as additional states enact the Code.

Placing these sections in brackets signals that uniformity is not expected. States may elect to enact these provisions without change, delete these provisions, or enact them with modifications. In Section 105(b)(9) [not adopted], an internal bracket has been added to make clear that an enacting jurisdiction may limit to the qualified beneficiaries the obligation to respond to a beneficiary's request for information.

The placing of these provisions in brackets does not mean that the Drafting Committee recommends that an enacting jurisdiction delete Sections 105(b)(8) and 105(b)(9) [not adopted]. The Committee continues to believe that Sections 105(b)(8) and (b)(9) [not adopted], enacted as is, represent the best balance of competing policy considerations. Rather, the provisions were placed in brackets out of a recognition that there is a lack of consensus on the extent to which a settlor ought to be able to waive reporting to beneficiaries, and that there is little chance that the states will enact Sections 105(b)(8) and (b)(9) [not adopted] with any uniformity.

The policy debate is succinctly stated in Joseph Kartiganer & Raymond H. Young, *The UTC: Help for Beneficiaries and Their Attorneys,* Prob. & Prop., Mar./April 2003, at 18, 20:

The beneficiaries' rights to information and reports are among the most important provisions in the UTC. They also are among the provisions that have attracted the most attention. The UTC provisions reflect a compromise position between opposing viewpoints.

Objections raised to beneficiaries' rights to information include the wishes of some settlors who believe that knowledge of trust benefits would not be good for younger beneficiaries, encouraging them to take up a life of ease rather than work and be productive citizens. Sometimes trustees themselves desire secrecy and freedom from interference by beneficiaries.

The policy arguments on the other side are: that the essence of the trust relationship is accounting to the beneficiaries; that it is wise administration to account and inform beneficiaries, to avoid the greater danger of the beneficiary learning of a breach or possible breach long after the event; and that there are practical difficulties with secrecy (for example, the trustee must tell a child that he or she is not eligible for financial aid at college because the trust will pay, and must determine whether to accumulate income at high income tax rates or pay it out for inclusion in the beneficiary's own return). Furthermore, there is the practical advantage of a one-year statute of limitations when the beneficiary is informed of the trust transactions and advised of the bar if no claim is made within the year. UTC §§ 1005. In the absence of notice, the trustee is exposed to liability until five years after the trustee ceases to serve, the interests of beneficiaries end, or the trust terminates. UTC §§ 1005(c).

2005 Amendment. Subsection (b)(2) [72-38-105(2)(b)] is revised to make the language consistent with the corresponding duties in Sections 801 [72-38-801] and 814(a) [72-38-814(1)], which require that a trustee act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. Previously, subsection (b)(2) [72-38-105(2)(b)] provided that the settlor could not waive the duty of a trustee to act in good faith and in accordance with the purposes of the trust. The amendment adds that also cannot waive the obligation to act in accordance with the terms of the trust and the interests of the beneficiaries.

The purpose of the amendment is to make the language consistent, not to change the substance of the section. Absent some other restriction, a settlor is always free to specify the trust's terms to which the trustee must comply. Also, "interests of the beneficiaries" is a defined term in Section 103(8) [72-38-103(9)] meaning the beneficial interests as provided in the terms of the trust, which the settlor is also free to specify.

Compiler's Comments

2021 Amendment: Chapter 325 in (2)(b) at beginning inserted "subject to 72-40-113, 72-40-115, and 72-40-116". Amendment effective October 1, 2021.

Source: This section modifies section 105 in the Uniform Law Commission's Uniform Trust Code by removing two optional subsections that state: "[(8) the duty under Section 813(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports;]

[(9) the duty under Section 813(a) to respond to the request of a [qualified] beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust;]".

Case Notes

Medicaid — Trust Principal Not Countable Asset — No Ability to Terminate Trust: The petitioner's estate appealed a District Court order affirming an administrative law judge's proposed order that trust principal consisting of a jointly owned home constituted a countable asset for the purposes of the petitioner's Medicaid eligibility. The dispositive issue on appeal was whether there were any circumstances under which the trust's principal could be returned to the petitioner or used for her benefit. The Supreme Court reversed and remanded the case, concluding there were no circumstances under which payment from the trust's corpus could be made for the petitioner's benefit. The express terms of the trust disclaimed the petitioner's ability to terminate the trust. These terms took precedence over the Uniform Trust Code's default provisions, and a court could not recognize as legitimate any attempt by the petitioner to terminate or modify the trust. In re Estate of Scheidecker v. Dept. of Public Health and Human Services, 2021 MT 158, 404 Mont. 407, 490 P.3d 87.

72-38-106. Common law of trusts — principles of equity.

Official Comments

The Uniform Trust Code codifies those portions of the law of express trusts that are most amenable to codification. The Code is supplemented by the common law of trusts, including principles of equity. To determine the common law and principles of equity in a particular state, a court should look first to prior case law in the state and then to more general sources, such as the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution. The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. It also includes the traditional and broad equitable jurisdiction of the court, which the Code in no way restricts.

The statutory text of the Uniform Trust Code is also supplemented by these Comments, which, like the Comments to any Uniform Act, may be relied on as a guide for interpretation. *See Acierno v. Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform Commercial Code); *Yale University v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act); 2 Norman Singer, Statutory Construction Section 52.05 (6th ed. 2000); Jack Davies, Legislative Law and Process in a Nutshell Section 55-4 (2d ed. 1986).

Comment Amended in 2005.

Compiler's Comments

Source: The language in this section relates to the language in 72-33-103 (now repealed).

72-38-107. Governing law.

Official Comments

This section provides rules for determining the law that will govern the meaning and effect of particular trust terms. The law to apply to determine whether a trust has been validly created is determined under Section 403 [72-38-403].

Paragraph (1) [72-38-107(1)] allows a settlor to select the law that will govern the meaning and effect of the terms of the trust. The jurisdiction selected need not have any other connection to the trust. The settlor is free to select the governing law regardless of where the trust property may be physically located, whether it consists of real or personal property, and whether the trust was created by will or during the settlor's lifetime. This section does not attempt to specify the strong public policies sufficient to invalidate a settlor's choice of governing law. These public policies will vary depending upon the locale and may change over time.

Paragraph (2) [72-38-107(2)] provides a rule for trusts without governing law provisions - the meaning and effect of the trust's terms are to be determined by the law of the jurisdiction having the most significant relationship to the matter at issue. Factors to consider in determining the governing law include the place of the trust's creation, the location of the trust property, and the domicile of the settlor, the trustee, and the beneficiaries. *See* Restatement (Second) of Conflict of Laws §§ 270 cmt. c and 272 cmt. d (1971). Other more general factors that may be pertinent in particular cases include the relevant policies of the forum, the relevant policies of other interested jurisdictions and degree of their interest, the protection of justified expectations and certainty, and predictability and uniformity of result. *See* Restatement (Second) of Conflict of Laws § 6 (1971). Usually, the law of the trust's principal place of administration will govern administrative matters and the law of the place having the most significant relationship to the trust's creation will govern the dispositive provisions.

This section is consistent with and was partially patterned on the Hague Convention on the Law Applicable to Trusts and on their Recognition, signed on July 1, 1985. Like this section, the Hague Convention allows the settlor to designate the governing law. Hague Convention art. 6. Absent a designation, the Convention provides that the trust is to be governed by the law of the place having the closest connection to the trust. Hague Convention art. 7. The Convention also lists particular public policies for which the forum may decide to override the choice of law that would otherwise apply. These policies are protection of minors and incapable parties, personal and proprietary effects of marriage, succession rights, transfer of title and security interests in property, protection of creditors in matters of insolvency, and, more generally, protection of third parties acting in good faith. Hague Convention art. 15.

For the authority of a settlor to designate a trust's principal place of administration, see Section 108(a) [72-38-108(1)].

Compiler's Comments

Source: The language in this section relates to the language in 72-33-103 (now repealed).

72-38-108. Principal place of administration.

Official Comments

This section prescribes rules relating to a trust's principal place of administration. Locating a trust's principal place of administration will ordinarily determine which court has primary if not exclusive jurisdiction over the trust. It may also be important for other matters, such as payment of state income tax or determining the jurisdiction whose laws will govern the trust. *See* Section 107 [72-38-107] comment.

Because of the difficult and variable situations sometimes involved, the Uniform Trust Code does not attempt to further define principal place of administration. A trust's principal place of administration ordinarily will be the place where the trustee is located. Determining the principal place of administration becomes more difficult, however, when cotrustees are located in different states or when a single institutional trustee has trust operations in more than one state. In such cases, other factors may become relevant, including the place where the trust records are kept or trust assets held, or in the case of an institutional trustee, the place where the trust officer responsible for supervising the account is located.

A concept akin to principal place of administration is used by the Office of the Comptroller of the Currency. Reserves that national banks are required to deposit with state authorities is based on the location of the office where trust assets are primarily administered. *See* 12 C.F.R. Section 9.14(b).

Under the Uniform Trust Code, the fixing of a trust's principal place of administration will determine where the trustee and beneficiaries have consented to suit (Section 202) [72-38-203], and the rules for locating venue within a particular state (Section 204) [72-38-205]. It may also be considered by a court in another jurisdiction in determining whether it has jurisdiction, and if so, whether it is a convenient forum.

A settlor expecting to name a trustee or cotrustees with significant contacts in more than one state may eliminate possible uncertainty about the location of the trust's principal place of administration by specifying the jurisdiction in the terms of the trust. Under subsection (a) [72-38-108(1)], a designation in the terms of the trust is controlling if (1) a trustee is a resident of or has its principal place of business in the designated jurisdiction, or (2) all or part of the administration occurs in the designated jurisdiction. Designating the principal place of administration should be distinguished from designating the law to determine the meaning and effect of the trust's terms, as authorized by Section 107 [72-38-107]. A settlor is free to designate one jurisdiction as the principal place of administration and another to govern the meaning and effect of the trust's provisions.

Subsection (b) [72-38-108(2)] provides that a trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries. "Interests of the beneficiaries," defined in Section 103(8) [72-38-103(9)], means the beneficial interests provided in the terms of the trust. Ordinarily, absent a substantial change or circumstances, the trustee may assume that the original place of administration is also the appropriate place of administration. The duty to administer the trust at an appropriate place may also dictate that the trustee not move the trust.

Subsections (c)-(f) [72-38-108(3)-(6)] provide a procedure for changing the principal place of administration to another state or country. Such changes are often beneficial. A change may be desirable to secure a lower state income tax rate, or because of relocation of the trustee or beneficiaries, the appointment of a new trustee, or a change in the location of the trust investments. The procedure for transfer specified in this section applies only in the absence of a contrary provision in the terms of the trust. *See* Section 105 [72-38-105]. To facilitate transfer in the typical case, where all concur that a transfer is either desirable or is at least not harmful, a transfer can be accomplished without court approval unless a qualified beneficiary objects. To allow the qualified beneficiaries sufficient time to review a proposed transfer, the trustee must give the qualified beneficiaries at least 60 days prior notice of the transfer. Notice must be given not only to qualified beneficiaries as defined in Section 103(13) [72-38-103(16)] but also to those granted the rights of qualified beneficiaries under Section 110 [72-38-110]. To assure that those receiving notice have sufficient information upon which to make a decision, minimum contents of the notice are specified. If a qualified beneficiary objects, a trustee wishing to proceed with the transfer must seek court approval.

In connection with a transfer of the principal place of administration, the trustee may transfer some or all of the trust property to a new trustee located outside of the state. The appointment of a new trustee may also be essential if the current trustee is ineligible to administer the trust in the new place. Subsection (f) [72-38-108(6)] clarifies that the appointment of the new trustee must comply with the provisions on appointment of successor trustees as provided in the terms of the trust or under Section 704 [72-38-704]. Absent an order of succession in the terms of the trust, Section 704(c) [72-38-704(3)] provides the procedure for appointment of a successor trustee of a noncharitable trust, and Section 704(d) [not adopted] the procedure for appointment of a successor trustee of a charitable trust.

While transfer of the principal place of administration will normally change the governing law with respect to administrative matters, a transfer does not normally alter the controlling law with respect to the validity of the trust and the construction of its dispositive provisions. *See* 5A Austin W. Scott & William F. Fratcher, The Law of Trusts Section 615 (4th ed. 1989).

Compiler's Comments

Source: The language in this section relates to the language in 72-35-103 (now repealed).

72-38-109. Methods and waiver of notice.

Official Comments

Subsection (a) [72-38-109(1)] clarifies that notices under the Uniform Trust Code may be given by any method likely to result in its receipt by the person to be notified. The specific methods listed in the subsection are illustrative, not exhaustive. Subsection (b) [72-38-109(2)] relieves a trustee of responsibility for what would otherwise be an impossible task, the giving of notice to a person whose identity or location is unknown and not reasonably ascertainable by the trustee. The section does not define when a notice is deemed to have been sent or delivered or person deemed to be unknown or not reasonably ascertainable, the drafters preferring to leave this issue to the enacting jurisdiction's rules of civil procedure.

Under the Uniform Trust Code, certain actions can be taken upon unanimous consent of the beneficiaries or qualified beneficiaries. *See* Sections 411[72-38-411] (termination of noncharitable irrevocable trust) and 704 [72-38-704] (appointment of successor trustee). Subsection (b) [72-38-109(2)] of this section only authorizes waiver of notice. A consent required from a beneficiary in order to achieve unanimity is not waived because the beneficiary is missing. But the fact a beneficiary cannot be located may be a sufficient basis for a substitute consent to be given by another person on the beneficiary's behalf under the representation principles of Article 3 [Title 72, ch. 38, pt. 3].

To facilitate administration, subsection (c) [72-38-109(3)] allows waiver of notice by the person to be notified or sent the document. Among the notices and documents to which this subsection can be applied are notice of a proposed transfer of principal place of administration (Section 108(d)) [72-38-108(4)] or of a trustee's report (Section 813(c))[72-38-813(3)]. This subsection also applies to notice to qualified beneficiaries of a proposed trust combination or division (Section 417) [72-38-417], of a temporary assumption of duties without accepting trusteeship (Section 701(c)(1)) [72-38-701(3)(a)], and of a trustee's resignation (Section 705(a)(1)) [72-38-705(1)(a)].

Notices under the Uniform Trust Code are nonjudicial. Pursuant to subsection (d) [72-38-109(4), adopted as modified], notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure [72-38-208 through 72-38-212].

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 3, Ch. 564, L. 2023. Amendment effective October 1, 2023.

Source: This section modifies section 109 of the Uniform Law Commission's Uniform Trust Code by adding subsection (1)(c).

The language in this section relates to the language in Title 72, chapter 35, part 2 (now repealed) and 72-35-306 (now repealed).

72-38-110. Others treated as qualified beneficiaries.

Official Comments

Under the Uniform Trust Code, certain notices need be given only to the "qualified" beneficiaries. For the definition of "qualified beneficiary," see Section 103(13) [72-38-103(16)]. Among these notices are notice of a transfer of the trust's principal place of administration (Section 108(d)) [72-38-108(4)], notice of a trust division or combination (Section 417) [72-38-417], notice of a trustee resignation (Section 705(a)(1)) [72-38-705(1)(a)], and notice of a trustee's annual report (Section 813(c)) [72-38-813(3)]. Subsection (a) [72-38-110(1)] of this section authorizes other beneficiaries to receive one or more of these notices by filing a request for notice with the trustee.

Under the Code, certain actions, such as the appointment of a successor trustee, can be accomplished by the consent of the qualified beneficiaries. *See, e.g.*, Section 704 [72-38-704] (filling vacancy in trusteeship). Subsection (a) [72-38-110(1)] only addresses notice, not required consent. A person who requests notice under subsection (a) [72-38-110(1)] does not thereby acquire a right to participate in actions that can be taken only upon consent of the qualified beneficiaries.

Charitable trusts do not have beneficiaries in the usual sense. However, certain persons, while not technically beneficiaries, do have an interest in seeing that the trust is enforced. In the case of a charitable trust, this includes the state's attorney general and charitable organizations expressly designated to receive distributions under the terms of the trust. Under subsection (b) [72-38-110(2)], charitable organizations expressly designated in the terms of the trust to receive distributions and who would qualify as a qualified beneficiary were the trust noncharitable, are granted the rights of qualified beneficiaries under the Code. Because the charitable organization must be expressly named in the terms of the trust and must be designated to receive distributions, excluded are organizations that might receive distributions in the trustee's discretion but that are not named in the trust's terms. Requiring that the organization have an interest similar to that of a beneficiary of a private trust also denies the rights of a qualified beneficiary to organizations holding remote remainder interests. For further discussion of the definition of "qualified beneficiary," see Section 103 [72-38-103] comment.

Subsection (c) [72-38-110(3)] similarly grants the rights of qualified beneficiaries to persons appointed by the terms of the trust or by the court to enforce a trust created for an animal or other trust with a valid purpose but no ascertainable beneficiary. For the requirements for creating such trusts, see Sections 408 and 409 [72-38-408 and 72-38-409].

"Attorney general" is placed in brackets in subsection (d) [72-38-110(4), adopted as modified] to accommodate jurisdictions which grant enforcement authority over charitable trusts to another designated official. Because states take various approaches to enforcement of charitable trusts, by a 2004 amendment subsection (d) [72-38-110(4), adopted as modified] was placed in brackets in its entirety. For a discussion, see 2004 Amendment below.

Subsection (d) [72-38-110(4), adopted as modified] does not limit other means by which the attorney general or other designated official can enforce a charitable trust.

2001 Amendment. By amendment in 2001, "charitable organization expressly designated to receive distributions" was substituted for "charitable organization expressly entitled to receive benefits" in subsection (b) [72-38-110(2)]. The amendment conforms the language of this section to terminology used elsewhere in the Code.

2004 Amendment. Subsection (b) [72-38-110(2)] is amended to better conform this provision to the Drafting Committee's intent. Charitable trusts do not have beneficiaries in the usual sense. Yet, such trusts are often created to benefit named charitable organizations. Under this amendment, which is based on the definition of qualified beneficiary in Section 103 [72-38-103], a designated charitable organization has the rights of a qualified beneficiary only if it holds an interest similar to that of a qualified beneficiary in a noncharitable trust. The effect of the amendment is to exclude charitable organizations that might receive distributions in the trustee's discretion even though not expressly mentioned in the trust's terms. Also denied the rights of qualified beneficiaries are charitable organizations that hold only remote remainder interests.

The previous version of subsection (b) [72-38-110(2)] had a similar intent but the language could be read more broadly.

The placing of subsection (d) [72-38-110(4), adopted as modified] in brackets recognizes that the role of the attorney general in the enforcement of charitable trusts varies greatly in the states. In some states, the legislature may prefer that the attorney general be granted the rights of a qualified beneficiary. In other states, the attorney general may play a lesser role in enforcement. The expectation is that states considering enactment will adapt this provision to the particular role that the attorney general plays in the enforcement of charitable trusts in their state. Some states may prefer to delete this provision. Other states might provide that the attorney general has the rights of a qualified beneficiary only for trusts in which no charitable organization has been designated to receive distributions. Yet other states may prefer to enact the provision without change.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 4, Ch. 564, L. 2023. Amendment effective October 1, 2023.

Source: This section modifies section 110 of the Uniform Law Commission's Uniform Trust Code by adding the exception in subsection (1) and adding subsections (4)(b) and (4)(c).

The language in this section relates to the language in 72-33-703 (now repealed), 72-33-705 (now repealed), and 72-34-425 (now repealed).

72-38-111. Nonjudicial settlement agreements.

Official Comments

While the Uniform Trust Code recognizes that a court may intervene in the administration of a trust to the extent its jurisdiction is invoked by interested persons or otherwise provided by law (*see* Section 201(a)) [not adopted], resolution of disputes by nonjudicial means is encouraged. This section facilitates the making of such agreements by giving them the same effect as if approved by the court. To achieve such certainty, however, subsection (c) [72-38-111(3)] requires that the nonjudicial settlement must contain terms and conditions that a court could properly approve. Under this section, a nonjudicial settlement cannot be used to produce a result not authorized by law, such as to terminate a trust in an impermissible manner.

Trusts ordinarily have beneficiaries who are minors, incapacitated, unborn or unascertained. Because such beneficiaries cannot signify their consent to an agreement, binding settlements can ordinarily be achieved only through the application of doctrines such as virtual representation or appointment of a guardian ad litem, doctrines traditionally available only in the case of judicial settlements. The effect of this section and the Uniform Trust Code more generally is to allow for such binding representation even if the agreement is not submitted for approval to a court. For the rules on representation, including appointments of representatives by the court to approve particular settlements, see Article 3 [Title 72, ch. 38, pt. 3].

Subsection (d) [72-38-111(4)] is a nonexclusive list of matters to which a nonjudicial settlement may pertain. Other matters which may be made the subject of a nonjudicial settlement are listed in the Article 3 [Title 72, ch. 38, pt. 3] General Comment. The fact that the trustee and beneficiaries may resolve a matter nonjudicially does not mean that beneficiary approval is required. For example, a trustee may resign pursuant to Section 705 [72-38-705] solely by giving notice to the qualified beneficiaries and any cotrustees. But a nonjudicial settlement between the trustee and beneficiaries will frequently prove helpful in working out the terms of the resignation.

Because of the great variety of matters to which a nonjudicial settlement may be applied, this section does not attempt to precisely define the "interested persons" whose consent is required to obtain a binding settlement as provided in subsection (a). However, the consent of the trustee would ordinarily be required to obtain a binding settlement with respect to matters involving a trustee's administration, such as approval of a trustee's report or resignation.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 5, Ch. 564, L. 2023. Amendment effective October 1, 2023.

2015 Amendment: Chapter 55 in (2) substituted "subsection (3)" for "subsection (4)(c)". Amendment effective October 1, 2015.

Source: This section modifies section 111 of the Uniform Law Commission's Uniform Trust Code by adding the exception in subsection (3).

The language in this section relates to the language in 72-34-336 (now repealed).

72-38-112. Rules of construction.

Official Comments

This section is patterned after Restatement (Third) of Trusts § 25(2) and comment e (Tentative Draft No. 1, approved 1996), although this section, unlike the Restatement, also applies to irrevocable trusts. The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor's death. Given this functional equivalence between the revocable trust and a will, the rules for interpreting the disposition of property at death should be the same whether the individual has chosen a will or revocable trust as the individual's primary estate planning instrument. Over the years, the legislatures of the States and the courts have developed a series of rules of construction reflecting the legislative or judicial understanding of how the average testator would wish to dispose of property in cases where the will is silent or insufficiently clear. Few legislatures have yet to extend these rules of construction to revocable trusts, and even fewer to irrevocable trusts, although a number of courts have done so as a matter of judicial construction. *See* Restatement (Third) of Trusts § 25, Reporter's Notes to cmt. d and e (Tentative Draft No. 1, approved 1996).

Because of the wide variation among the States on the rules of construction applicable to wills, this Code does not attempt to prescribe the exact rules to be applied to trusts but instead adopts the philosophy of the Restatement that the rules applicable to trusts ought to be the same, whatever those rules might be. Rules of construction are not the same as constructional preferences. A constructional preference is general in nature, providing general guidance for resolving a wide variety of ambiguities. An example is a preference for a construction that results in a complete disposition and avoid illegality. Rules of construction, on the other hand, are specific in nature, providing guidance for resolving specific situations or construing specific terms. Unlike a constructional preference, a rule of construction, when applicable, can lead to only one result. *See* Restatement (Third) of Property: Donative Transfers § 11.3 and cmt. b (Tentative Draft No. 1, approved 1995).

Rules of construction attribute intention to individual donors based on assumptions of common intention. Rules of construction are found both in enacted statutes and in judicial decisions. Rules of construction can involve the meaning to be given to particular language in the document, such as the meaning to be given to "heirs" or "issue." Rules of construction also address situations the donor failed to anticipate. These include the failure to anticipate the predecease of a beneficiary or to specify the source from which expenses are to be paid. Rules of construction can also concern assumptions as to how a donor would have revised donative documents in light of certain events occurring after execution. These include rules dealing with the effect of a divorce and whether a specific devisee will receive a substitute gift if the subject matter of the devise is disposed of during the testator's lifetime.

Instead of enacting this section, a jurisdiction enacting this Code may wish to enact detailed rules on the construction of trusts, either in addition to its rules on the construction of wills or as part of one comprehensive statute applicable to both wills and trusts. For this reason and to encourage this alternative, the section has been made optional. For possible models, see Uniform Probate Code, Article 2, Parts 7 and 8, which was added to the UPC in 1990, and California Probate Code §§ 21101-21630, enacted in 1994.

Compiler's Comments

Source: The language in this section relates to the language in 72-33-106 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Interpretation of Trust Agreement — Plain Language Controls: After the death of the sole beneficiary of an irrevocable inter vivos trust, the daughter of the sole beneficiary, whom the sole beneficiary had given up for adoption, claimed that she was a descendent of the sole beneficiary as defined under the trust and was entitled to distribution of the trust proceeds. The District Court determined that the daughter should be included in the trust distribution. On appeal, the Supreme Court reversed, concluding that the trust language, which defined an adopted child as the descendant of the adopting parents, made no distinction between children adopted into and adopted out of a family. The daughter was not a descendant of the sole beneficiary because she was adopted and was therefore regarded under the plain language of the trust as the descendant of her adoptive parents. In re Kincaid Gift Trust, 2012 MT 119, 365 Mont. 179, 278 P.3d 1026.

Conflict Between Bankruptcy Discharge and Intent of Revocable Trust — Intent Controls: In 1989, the respondent executed a promissory note for $100,000 plus interest in favor of his stepsister but never made any payment on the promissory note. Later, the respondent's mother, Ms. Ward, amended her revocable trust to provide that before the respondent received any distribution from her trust, his share would be decreased, and the stepsister's share increased, by any amounts he owed the stepsister at the time of Ms. Ward's death. In 2005, the respondent filed for Chapter 7 bankruptcy. Four years later, Ms. Ward passed away and the trustee filed a petition in District Court to determine the appropriate amounts to distribute. The District Court concluded that the respondent's share should be reduced by the amount he owed his stepsister on the date of Ms. Ward's death, $298,356.16. The respondent appealed, contending that the debt had been discharged in his 2005 bankruptcy. The Supreme Court disagreed, holding that the plain language of the trust document controlled and that the bankruptcy provisions were inapplicable. In re Ward Revocable Trust, 2011 MT 308, 363 Mont. 72, 265 P.3d 1260.

Establishment of Museum From Charitable Trust Proceeds Not Considered Precatory Language Secondary to General Philanthropic Trust Purposes: Alberta Bair's will established a charitable trust and directed the board overseeing the trust proceeds to establish, improve, and maintain a museum to display the family's historical artifacts. The District Court concluded that the will language directing establishment of a museum was authorized in a precatory clause and that the board had the discretion whether to create a museum. The Supreme Court disagreed. The clear language of the trust agreement established that although the trust was created for general philanthropic purposes, the creation of a museum was the primary purpose of the trust, and the District Court committed reversible error in holding that the trust agreement did not require establishment of a museum. In re Bair Family Trust, 2008 MT 144, 343 M 138, 183 P3d 61 (2008), followed in Lane v. Caler, 2013 MT 108, 370 Mont. 30, 299 P.3d 827. See also In re Estate of Bolinger, 284 M 114, 943 P2d 981 (1997).

72-38-113. Insurable interest of trustee.

Official Comments

Every state requires, either as a matter of statutory or common law, that a purchaser of life insurance on another individual have an insurable interest in the life of the insured. See generally Robert H. Jerry, II & Douglas R. Richmond, Understanding Insurance Law, §§ 40, 43 (LexisNexis Publishing, 4 ed., 2007), at 273-77, 293-98. The definition of insurable interest became a matter of widespread concern among trust and estate planners after *Chawla ex rel Giesinger v. Transamerica Occidental Life Insurance Co.*, 2005 WL 405405 (E.D. Va. 2005), aff'd in part, vac'd in part, 440 F.3d 639 (4th Cir. 2006), where a Virginia federal district court applying Maryland law held that a trust did not have an insurable interest in the life of the insured who was the settlor and the creator of the trust. This portion of the district court's decision was subsequently vacated by the Fourth Circuit when holding that the district court's decision should be affirmed on other grounds, but the appellate decision did not question or criticize the district court's insurable interest analysis. The Maryland legislature subsequently enacted a statute in the state's insurance code clarifying the circumstances when a trustee or trust has an insurable interest in another's life, and several other states have enacted various forms of statutory clarification designed to address the "*Chawla* problem." During this process, the American College of Trust and Estate Counsel, among others, expressed the opinion that it would be best if a uniform approach could be fashioned in resolving the matter.

Consequently, the Uniform Law Commission, after studying the issue, decided to clarify the issue with respect to the Uniform Trust Code (UTC) and established a drafting committee for that purpose. The drafting committee, consisting of knowledgeable Conference members, was assisted by representatives from the American Bar Association, the American College of Trust and Estate Counsel, and the American Council of Life Insurers, consumer advocates, and other interested parties. This amendment resulted from their efforts and is designed to be inserted at the end of Article 1 of the UTC as Section 113 [72-38-113]. In keeping with the charge to the committee, the purpose of the amendment is to clarify when, for purposes of the Code, a trustee has an insurable interest in an individual whose life is to be the subject of an insurance policy to fund the trust. Clarification of this area of law that was subjected to uncertainty by the *Chawla* decision will provide a reliable basis upon which trust and estate planning practitioners may draft trust instruments that involve the eventual payment of expected death benefits.

It should be noted that the entire amendment is placed in brackets to indicate that each state should consider whether it is needed or its adoption would be appropriate. In some states *Chawla* may not present serious problems under pre-existing insurable interest law because it may be clear that a trustee already has an appropriate insurable interest for estate planning purposes. In other states, *Chawla* would present problems but, as indicated above, the state may have already addressed the issue so that the amendment may not be needed. Currently there are at least ten states that have enacted legislation on the subject (Delaware, Florida, Illinois, Georgia, Maine, Maryland, Minnesota, South Dakota, Virginia, and Washington). In those states that do need to respond to *Chawla* (plus those that may want to revisit the matter) the amendment offers a reasonable solution that has the support of many in the estate planning field, as well as the life insurance industry.

With regard to language of the amendment, subsection (a) provides that the term "settlor" is limited to a person who *executes* the trust instrument. This is narrower than the UTC definition of "settlor," which, in addition to the person who executes the trust instrument, would include a person who merely contributes property to the trust. See UTC Section 103(15) [72-38-103(18)]. As explained in the comment to Section 103(15) [72-38-103(18)], the broader definition serves a useful purpose in connection with the UTC generally; however, none of those situations relates to the issue of whose life should properly be the subject of a life insurance policy that is used to fund a trust. Moreover, to use the broader definition would needlessly complicate the issue of whose life should be the subject of insurance because it would be rare, if ever, that a life insurance policy used to fund a trust for estate planning purposes would be on the life of someone other than the settlor signing the trust or someone in whose life that settlor would have an insurable interest. Because there are situations in which a trust instrument will be executed by a fiduciary or agent for the creator of the trust, subsection (a) [72-38-113(1)] also makes clear that in such circumstances the fiduciary or agent is deemed to be the equivalent of the settlor.

Subsection (b) [72-38-113(2)] carries forward the widely approved rule that the time at which insurable interest in a life insurance policy is determined is the date the policy is issued, otherwise understood as the inception of the policy. Thus, if on the date the policy is issued the trustee has an insurable interest in the individual whose life is insured, the policy is not subject to being declared void for lack of such an interest. Under the reasoning that an individual has an unlimited insurable interest in his or her own life, subsection (b) [72-38-113(2)] provides that a trustee has an insurable interest in the settlor's own life. If an individual, as settlor, has created a trust to hold a life insurance policy on his or her own life, has funded that trust with the policy or with money to pay its premiums, and has selected the trustee of the trust, it follows that the trustee should have the same insurable interest that the settlor has in his or her own life. Similarly, recognizing that an individual may purchase insurance on the life of anyone in whom that individual has an insurable interest up to, generally speaking, the amount of that interest, subsection (b) [72-38-113(2)] provides that the trustee has an insurable interest in an individual in whom the settlor has, or would have had if living at the time the policy was issued, an insurable interest.

Moreover, paragraph (1) of subsection (b) [72-38-113(2)(a)] addresses the *Chawla* issue by referring to the jurisdiction's insurance code or other law regarding insurable interest as a separate, independent source of law for determining whether a trustee has an insurable interest in the life of an individual on whose life the trust has purchased insurance. This means that the trustee would be entitled to apply for and purchase an insurance policy not only on the life of a settlor but also on the life of any other individual in whom the settlor has an insurable interest, e.g., the spouse or children of the settlor, in the enacting jurisdiction. Exactly whose lives may be insured depends on the law of the enacting jurisdiction. In short, the amendment does not change the enacting jurisdiction's pre-existing law of insurable interest.

Paragraph (2) of subsection (b) [72-38-113(2)(b)] addresses a somewhat different issue, although it also references the insurable interest law of the enacting jurisdiction. It is designed to ensure that irrevocable life insurance trusts (ILITs) are created to serve *bona fide* estate planning purposes by restricting who may be a beneficiary of insurance proceeds from a policy purchased to fund an ILIT. It establishes the requirement that the proceeds of such a life insurance policy used to fund the trust be payable primarily to certain types of trust beneficiaries. As to the latter, paragraph (2) [72-38-113(2)(b)] contains bracketed language designed to provide states with a choice with regard to who those beneficiaries might be.

One choice may be exercised by deleting all the brackets, and all the language contained within the brackets, in paragraph (2) of subsection (b) [this is the version adopted in Montana]. By doing so, the class of beneficiaries for whom the insurance proceeds must primarily benefit is limited to those who, in the enacting state, have an insurable interest in the life of the settlor. Depending on the law of the jurisdiction, this could mean that only those individuals traditionally recognized as having an insurable interest, such as spouses and their children, would qualify, or it could mean that additional family members, such as siblings, grandchildren, grandparents, and perhaps others, have an insurable interest in the life of the settlor. In some other jurisdictions, the law may not be clear on this point. In these jurisdictions, estate planners generally may be concerned that strictly tying the class of beneficiaries to the state's insurable interest law might unduly restrict their ability to provide appropriate legal services to their clients. To help alleviate this concern, an alternative is offered to clarify the law in these jurisdictions. To exercise this choice, the enacting jurisdiction need only remove the brackets while retaining the language contained therein, thereby adopting the language as part of the amendment.

Removing the brackets and retaining the bracketed language in paragraph (2) of subsection (b) [not adopted] clarifies and broadens to a limited extent the class of individuals for whom the insurance must primarily benefit. By including anyone who is related to the settlor or other insured by blood or law within the third degree, the amendment makes clear that not only parents and their children would fall in the required beneficiary category, but also that siblings, grandparents, grandchildren, great-grandparents, great-grandchildren, aunts, uncles, nephews, and nieces would also qualify. Lineal consanguinity, to use the more technical term for relation by blood, is the relationship between individuals when one directly descends from the other. Each generation in this direct line constitutes a degree. Collateral consanguinity refers to the relationship between individuals who descend from a common ancestor but not from each other. The civil law method of calculating degree of collateral consanguinity, which is used in most states, counts the number of generations from one individual, e.g., the insured, up to the common ancestor and then down to the other individual. See 1 RESTATEMENT (THIRD) OF PROPERTY (Wills and Other Donative Transfers) § 2.4 cmt. *k* (1999).

The following table identifies the relatives of an insured within three degrees of lineal and collateral consanguinity using the civil law method, with each row representing a generation.

			Great-Grandparents (3)
		Grandparents (2)	
	Parents (1)	Aunts and Uncles (3)	
INSURED	Sisters and Brothers (2)		
Children (1)	Nieces and Nephews (3)		
Grandchildren (2)			
Great-Grandchildren (3)			

The reference in subparagraph (B)(i) [not adopted] to relation by "law"—if that term is interpreted to have the same legal meaning as the term "affinity"—may extend the category of beneficiaries that must be primarily benefited to in-laws. If that is the case, degrees of relationship by law or affinity should be computed in the same manner as degrees of relationship by consanguinity. See State v. Hooper, 140 Kan. 481, 37 P.2d 52 (1934) (explaining, for example, that a husband has the same relation, by affinity, to his wife's blood relatives as she has to them by consanguinity, and vice versa). This would mean that a son- or daughter-in-law of the insured would be related in the first degree and a brother- or sister-in-law of the insured would be related in the second degree. A father- or mother-in-law would be related to the insured in the first degree, whereas an aunt- or uncle-in-law would be related to the insured in the third degree. See State v. Allen, 304 N.W.2d 203, at 207 (Iowa 1981) (listing authorities on how to compute degrees of relation).

At the very least, the term "law" should be interpreted to include the relation between spouses and the relation between an adoptive parent and adopted child, if they were not already included under subparagraph (A) [72-38-113(2)(b)]. Additionally, in case there is any doubt as to whether an adopted grandchild, i.e., a child adopted by an insured's child, is sufficiently related to the insured, as a biological grandchild might be, to have an insurable interest under subparagraph

(A) [72-38-113(2)(b)], the reference in (B)(i) [not adopted] may ensure that the adopted grandchild falls within the required category of beneficiaries. This is because the adopted grandchild arguably would, at the very least, be related by affinity to the insured in the second degree, just as a biological child of the insured's child would be related by blood in the second degree to the insured. In other words, the adopted grandchild would be treated in the same manner as a biological grandchild for purposes of the amendment.

Stepchildren, who may not otherwise have an insurable interest in the life of the settlor or other insured under subparagraph (A) [72-38-113(2)(b)] or who may not be included under subparagraph (B)(i) [not adopted], depending on the interpretation given to the term "law," are specifically included in subparagraph (B)(ii) [not adopted] to ensure that they occupy the same status as any other child of the settlor, biological or adopted.

The reason for the modifying language "if not already included under subparagraph (A)" found in subparagraph (B) of paragraph (2) of subsection (b) [not adopted] is to make it clear that there is no negative implication with regard to anyone related within the third degree to the insured and who would be included by virtue of the adopting jurisdiction's insurable interest law referred to in subparagraph (A) [72-38-113(2)(b)]. In other words, some of the people, but not all, included under subparagraph (A) [72-38-113(2)(b)] will be related to the person whose life is insured within the third degree and the modifying language is designed to make it clear that subparagraph (B)(i) [not adopted] merely adds any others so related. The same reasoning applies to stepchildren. The adopting jurisdiction may already include them under its insurable interest law referred to in subparagraph (A) [72-38-113(2)(b)]. If not, however, subparagraph (B)(ii) [not adopted] makes sure they are included in the category of people for whom the insurance policy proceeds must primarily benefit.

Although estate planners expressed concern were a jurisdiction to delete subparagraph (B) [not adopted] because they felt doing so would unduly limit their ability to serve their clients' needs, there was a general consensus that including those identified in subparagraph (B) [not adopted] should suffice for the great majority of estate plans. Thus, estate planners strongly support the adoption of the language in subparagraph (B) [not adopted].

It should also be noted that, regardless of the decision relating to the choices presented by the bracketed language in paragraph (2) of subsection (b) [not adopted], the test concerning whether the beneficiaries designated in paragraph (2) [72-38-113(2)(b)] are the primary beneficiaries of the policy proceeds takes place at the inception of the life insurance policy, i.e., when the policy is issued. The fact that there may be contingent trust beneficiaries or that the proceeds would be payable to different beneficiaries based on subsequent events or conditions is not relevant to the determination. One need only identify those trust beneficiaries that would receive the policy proceeds were the insured life to expire immediately after the policy is issued and the trust were to terminate at the same time. Among these beneficiaries, the proceeds must be payable primarily to those specified in paragraph (2) of subsection (b) [72-38-113(2)(b)]. If that is so, the condition is satisfied and may not be challenged thereafter or on the basis that subsequent events might change who would receive the proceeds.

As for the term "primarily," it will often be the case that one is able to calculate that more than fifty percent of the policy proceeds will be payable to the required class of beneficiaries under paragraph (2) [72-38-113(2)(b)], but this may not always be the situation. For example, if the purpose of the trust is to provide a lifetime benefit to a spouse or funds for children to obtain an education, the amount may be indeterminate. This, however, does not mean that the policy proceeds are not primarily for the benefit of these individuals if upon the inception of the policy they are the people who will immediately and mainly benefit from the trust, even though there are others not designated in paragraph (2) [72-38-113(2)(b)] who may also benefit concurrently or benefit subsequently upon the satisfaction of some condition in the future. In short, the term is intended to be applied in a common sense manner rather than in a hyper-technical manner that would require that a precise dollar amount be payable to certain beneficiaries.

Finally, the amendment is drafted as it would appear in the UTC were it to be part of the Code when the latter is enacted or as it would appear as an amendment to a previously enacted version of the Code. In either case, since Section 1106 [Title 72, ch. 38 Chapter Compiler's Comments] of the UTC, as originally drafted, already deals with the applicability of the UTC to trusts existing at the time of enactment, there may be no need to address that issue in this amendment. However, if an issue should arise regarding which trusts *and* life insurance policies are subject to the amendment, the following language [not adopted] may be helpful in resolving that issue:

This section applies to any trust existing before, on, or after the effective date of this section, regardless of the effective date of the governing instrument under which the trust was created, but only as to a life insurance policy that is in force and for which an insured is alive on or after the effective date of this section.

Compiler's Comments

Source: This section modifies section 113 of the Uniform Law Commission's Uniform Trust Code by removing an optional subsection (2)(B) that states that the life insurance proceeds are primarily for the benefit of one or more of the trust beneficiaries that have: "(B) a substantial interest engendered by love and affection in the continuation of the life of the insured and, if not already included under subparagraph (A), who are:

(i) related within the third degree or closer, as measured by the civil law system of determining degrees of relation, either by blood or law, to the insured; or

(ii) stepchildren of the insured."

72-38-120. Resulting trust upon failure of trust.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in 72-33-216 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Handwritten "Irrevocable Trust Reserving Income for Life" — Failure for Lack of Transfer of Property — No Resulting Trust or Constructive Trust Imposed: In anticipation of remarriage, the decedent, an attorney, drafted a handwritten document purporting to "sell, assign and convey" various mineral interests to a trust for the benefit of his daughters from his first marriage. The decedent never transferred or conveyed the named mineral interests to the trust or otherwise delivered the trust property to the named trustee. At the time of death, his wife, as personal representative of the estate, refused to convey the alleged trust property upon request of the daughters. The daughters sued, maintaining that the handwritten trust document was testamentary in nature and that therefore the personal representative must fund the testamentary trust with the mineral interests owned by the decedent at the time of his death. The personal representative argued that the document was not a valid testamentary trust and was intended to create an inter vivos trust, which was never executed by conveying or otherwise transferring the interests to the trust or the trustee. The District Court granted summary judgment for the daughters, concluding that the handwritten trust document was testamentary. The Supreme Court reversed, holding that the inter vivos trust document failed because of the lack of a transfer of property to the trust during the decedent's lifetime. The document was not testamentary because the document did not first and foremost express a clear and unmistakable intent that the trust would not take effect until the testator's death. Rather, the document convincingly displays all attributes of an inter vivos transaction that the trustor intended would take place at the time that the document was drafted or soon thereafter. Even if a resulting trust was imposed, the result would be the same, with the mineral interests returning to the trustor's estate. The other type of involuntary trust, a constructive trust, was not argued by the daughters and is therefore not available as an equitable remedy. Cate-Schweyen v. Cate, 2000 MT 345, 303 M 232, 15 P3d 467, 57 St. Rep. 1478 (2000).

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

No Affirmative Duty to Disclose Unfunded Trust — Trustee Obligations Inapplicable When No Trust Exists: Brevig contended that the District Court should have imposed a constructive trust to remedy McCormick's alleged violation of various statutes relating to the duties of a trustee, including failing the duty to notify Brevig that the trust was unfunded, thereby allowing McCormick to wrongfully acquire a ranch and partnership interest under a will. However, McCormick took possession of the ranch and partnership interest pursuant to a validly executed will, so there was no duty to notify Brevig of the invalidity of the trust. Further, it would be inappropriate to subject McCormick to the statutory obligations of a trustee when no trust ever came into existence. There was simply no evidence to justify submitting the issues for jury consideration, so the District Court properly granted summary judgment to McCormick on both issues. McCormick v. Brevig, 1999 MT 86, 294 M 144, 980 P2d 603, 56 St. Rep. 355 (1999), followed in Cate-Schweyen v. Cate, 2000 MT 345, 303 M 232, 15 P3d 467, 57 St. Rep. 1478 (2000).

Award of Trust Property in Dissolution Action: Items of personal property were placed in trust for the husband and children of the marriage, but the house and land were not made part of the trust, and there is no evidence that they were held in the resulting trust. The language of the trust agreement was unambiguous and clearly stated which property was placed in the trust. The District Court correctly held that the husband voluntarily gave up interest in the trust and that therefore the award of the trust property to the wife was proper. In re Marriage of Malquist, 234 M 419, 763 P2d 1116, 45 St. Rep. 2020 (1988).

Determination of Resulting Trust on Intestate Succession: In this case it was possible for the District Court to have declared a resulting trust on behalf of defendants and/or plaintiffs. An intent to create a trust could have been implied from the circumstances surrounding the conveyances. Hubbard's statement that he wanted the property to go to his "children" could also have been regarded as sufficiently definite to include his children as a class or his children at the time of the conveyances. However, the Trial Court held instead that it was immaterial whether a trust was created because, under a resulting trust, the property would vest in the estate. The result would be the same regardless of whether a trust was found, so that it was not an abuse of discretion to pass the property by intestacy. Eckart v. Hubbard, 184 M 320, 602 P2d 988 (1979).

Elements of Proof to Establish Resulting Trust: Evidence supported establishment of a resulting trust where the consideration was paid at the time or before the time that legal title passed to the alleged trustee, in that the funds and the pickup truck traded in, used for the initial downpayment on a new truck, belonged to the defendant. Firemen's Ins. Co. of Newark, N.J. v. Show, 110 F. Supp. 523 (D.C. Mont. 1953).

Parol Express Trusts — Sufficiency of Moral Obligation as Consideration: As applied to a parol express trust, unenforceable under 72-24-102 (now repealed), a moral obligation is a sufficient consideration for the transfer of realty to prevent creditors who have not acquired a valid lien thereon prior to the transfer from having it set aside. McLaughlin v. Corcoran, 104 M 590, 69 P2d 597 (1937).

Intention Immaterial: The constructive trust declared by 72-20-111 (now repealed) is based upon the fundamental idea of fraud or wrongdoing in the trustee, independently of any actual or presumed intention to create a trust, while in all species of resulting trusts, intention is an essential element. Meagher v. Harrington, 78 M 457, 254 P 432 (1927).

72-38-121. Resulting trust upon full performance of trust.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in 72-33-217 (now repealed).

72-38-122. Purchase money resulting trust.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in 72-33-218 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Claim of Resulting or Constructive Trust Barred by Judicial Estoppel and Clean Hands Doctrine: The parents created a family corporation and made their four children equal, sole shareholders through transfers and gifts. When two medical malpractice suits were filed against the father, he claimed that he had no right to or control over the corporation's assets. In a separate action, two sisters instituted a shareholder derivative action and petitioned for judicial review of their brother's fiduciary duties. The brother called a special meeting to issue additional stock to himself and to transfer property back to the parents, but the sisters objected and the brother was enjoined from doing so. The parents then claimed that the property was held in a resulting or constructive trust, and the District Court ordered that the assets and stock be conveyed to the parents. The sisters appealed, and the Supreme Court reversed. Both the sisters and the plaintiffs in the medical malpractice action relied to their detriment on the father's judicial declaration that he had no right to or control over the corporate assets, and the father was thus barred by judicial estoppel and the clean hands doctrine from raising equitable claims that a resulting or constructive trust existed. Judicial estoppel binds a party to that party's judicial declarations and precludes the party from taking a position inconsistent with the previous declaration in a subsequent action or proceeding. The clean hands doctrine provides that a party must not expect relief in equity unless the party comes into court with clean hands. The evidence here showed that the parents knowingly transferred assets to the family corporation to circumvent creditors and avoid estate taxes, and the Supreme Court will not aid a party whose claim had its inception in the party's wrongdoing, whether the victim of the wrongdoing is the other party or a third party. Kauffman-Harmon v. Kauffman, 2001 MT 238, 307 M 45, 36 P3d 408 (2001).

Resulting Trust Proportionate to Amount of Purchase Price Paid and Payments May Not Be Intended as Gift: The lower court granted Fifer's motion for summary judgment and awarded him certain real property under a resulting trust, finding that he had paid most of the purchase price. The Supreme Court held that a question of fact existed as to whether Fifer intended that a resulting trust not be created and whether his payments were made on behalf of the plaintiff Neset as a gift. In addition, the Supreme Court held that a resulting trust could be created only in proportion to the amount of Fifer's payments to the total purchase price. Neset v. Fifer, 283 M 527, 942 P2d 712, 54 St. Rep. 777 (1997). See also U.S. v. Nava, 404 F3d 1119 (9th Cir. 2005).

Supreme Court Indicates Clean Hands Doctrine Not Part of Balancing Test of Weighing Unjust Enrichment Against Relief to One Attempting to Avoid Child Support: Fifer argued that the lower court was correct in awarding him certain real property under the theory of resulting trust because although he had placed the property in Neset's name to avoid child support obligations, she knew of his intent and therefore did not have clean hands. The Supreme Court indicated that on remand if the lower court decided that a resulting trust existed, it should not consider whether or not Neset had clean hands in using the statutorily required balancing test of weighing unjust enrichment to Neset by awarding her the property that was purportedly paid for by Fifer. If, after resolving fact issues, the lower court determined that a purchase money resulting trust was created, it was to weigh the proper factors in determining if the exception in subsection (2)(c) of 72-33-218 (now repealed) applied. Neset v. Fifer, 283 M 527, 942 P2d 712, 54 St. Rep. 777 (1997).

Purchase Money Resulting Trust Not Created: Johnson entered into two agreements with the Collins Agency, one to build an apartment complex for the agency using a FmHA loan obtained by the agency and to then buy the complex from the agency and the second to hold the agency harmless from any claim by the original architect on the project. Johnson operated the complex and expended some money on the complex for several years while the parties tried to have the loan transferred to Johnson. The loan transfer was never approved and Johnson sued to have a part of the property conveyed to him or, in the alternative, for damages. A purchase money resulting trust is created when a transfer of property is made to one person and the purchase price is paid by another. The Supreme Court held that the facts did not support the creation of a purchase money resulting trust because, despite Johnson's contribution, the agency remained the debtor on the loan. Johnson v. Kenneth D. Collins Agency, Inc., 263 M 137, 865 P2d 312, 50 St. Rep. 1749 (1993), distinguished in Neset v. Fifer, 283 M 527, 942 P2d 712, 54 St. Rep. 777 (1997). See also U.S. v. Nava, 404 F3d 1119 (9th Cir. 2005).

Creation of Purchase Money Resulting Trust — Intent: Father and son established a practice whereby father placed his property in son's name and son quitclaimed it back to father when father sold it. Father located the property, negotiated for its purchase, paid for the property and all improvements, collected rents, paid all insurance and property taxes, maintained the property, and treated it as his own by taking exclusive possession, excepting renters, and using it for his business while son bore none of the expenses associated with the property. These facts established clearly and convincingly that a purchase money resulting trust was intended and created. Hilliard v. Hilliard, 255 M 487, 844 P2d 54, 49 St. Rep. 1080 (1992).

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Presumption of Resulting Trust — When Overcome by Presumption of Gift Between Parties Closely Related: The plaintiff transferred money to her nephew and his wife, who used the sums to purchase real estate. The plaintiff contended the money tendered was a loan to her nephew, but after his death, his wife refused to repay any of the sums or relinquish title to the real estate, claiming the property came to her as the result of a gift from the plaintiff to her nephew. In this action by the plaintiff to secure title to the real property, the defendant, who is the wife of the plaintiff's nephew, contended that the transfer of funds from aunt to nephew raised a presumption that the transfer was intended as a gift because of the familial relationship between the two. Section 72-24-104 (now repealed) provides that when a transfer of real property is made to one person but consideration is paid by another, a trust is presumed to result in favor of the person by or for whom the payment is made. However, this presumption is supplanted by the rebuttable presumption of gift in cases where the parties stand in close relation to one another, such as husband and wife or parent and child. The Supreme Court has refused to extend this presumption to more distant relationships than those mentioned; therefore, the presumption of gift does not apply to the present transfer from aunt to nephew. Since no presumption of gift arose under the facts of this case and because the plaintiff advanced the entire purchase price of the real property while title passed to her nephew and his wife, a resulting trust in favor of the plaintiff is presumed. Peterson v. Kabrich, 213 M 401, 691 P2d 1360, 41 St. Rep. 2196

(1984), followed, with respect to degree of relationship implying presumption of gift, in Niemen v. Howell, 234 M 471, 764 P2d 854, 45 St. Rep. 2058 (1988).

Resulting Trust in Favor of Debtor No Protection From Federal Tax Liability: In a federal tax liability case, the U.S. District Court had occasion to consider Montana law on resulting trusts. Under the law of Montana, when a transfer of property is made to one person but the consideration is paid by another, a resulting trust may arise and there is a presumption to that effect. Noting that the law was unclear whether or not there is a Montana presumption of a gift arising out of the parent-child relationship of the parties involved, the court held that the evidence rebutted any such presumption of a son-to-parents gift in this case. The son's absolute dominion over the property, coupled with the lack of assertion by the parents of any adverse claim prior to the attachment of the lien, plus the affirmative evidence of an intent on the part of the son to conceal from creditors, was sufficient. The property in question was subject to a resulting trust in favor of the son. The resulting trust did not shield the son from tax liability. Bretz v. U.S., 37 St. Rep. 1457 (D.C. Mont. 1980) (apparently not reported in Federal Supplement).

Mother and Son: Where son conveyed real property to his mother who had advanced large sums of money to him over many years, a constructive trust will not be imposed because the confidential relationship between grantor and grantee who are relatives is not sufficient by itself to create a resulting trust making the mother a constructive trustee of the property absent clear and convincing proof of fraud or undue influence. Mahaffey v. DeLeeuw, 168 M 274, 542 P2d 103 (1975).

Laches:

The plaintiff's claim of a resulting trust in real property, raised after a period of 24 years and after the principal parties were dead, warrants the application of the doctrine of laches. Adair v. Capital Inv. Co., 165 M 26, 525 P2d 548 (1974).

In an action in ejectment in which defendant sought to establish a resulting trust in property conveyed to his wife, the consideration for which was paid by him, held that, by waiting 10 years before asserting his claim, the wife in the interim having secured a divorce, remarried and died, she in her lifetime paying the taxes, rented it, and in every way treated it as her own, he was guilty of such laches as precluded his right to appeal to a Court of Equity for relief. Clary v. Fleming, 60 M 246, 198 P 546 (1921). See also First St. Bank v. Mussigbrod, 83 M 68, 271 P 695 (1928).

Conveyances Between Persons in Confidential Relationships: In suit by beneficiaries to recover from deceased's brother stock allegedly belonging to estate, exception to the general rule raising the presumption of gift in favor of the person to whom property is transferred when the person making payment and transferee stand in confidential relation did not apply to transfer from deceased to brother. Detra v. Bartoletti, 150 M 210, 433 P2d 485 (1967).

Presumption of Trust:

A trust is presumed to result in favor of the person by or for whom such payment is made. Poepping v. Monson, 138 M 38, 353 P2d 325, 354 P2d 183 (1960).

Where consideration for a transfer of property was paid and title taken in the name of another, a trust is presumed to result in favor of the person advancing the money. Campanello v. Mercer, 124 M 528, 227 P2d 312 (1951).

Elements of Proof to Establish Resulting Trust: In an action by a judgment creditor to enforce a judgment lien against real property recorded in the name of the wife of the judgment debtor, in order for plaintiff to establish a prima facie case under the theory expressed in 72-24-104 (now repealed), it must be proved that funds belonging to the husband judgment debtor were used for the purchase of the property. Beard v. Myers, 136 M 350, 347 P2d 719 (1959).

Notice of Trust: When a transfer of realty is made to one person and the consideration is paid by another, a trust is presumed to arise in favor of the person making the payment, but trust property cannot be followed and impressed with a trust against one who is a bona fide purchaser for value without notice. Zier v. Osten, 135 M 484, 342 P2d 1076 (1959).

Presumption of Gift From Parent to Child: Where the presumption of a resulting trust, arising from 72-24-104 (now repealed), is contradicted by the presumption of a gift arising from the purchase of real property by a parent with title placed in the child's name, the latter overrides the former and a gift is conclusively presumed. Platts v. Platts, 134 M 474, 334 P2d 722 (1959).

Resulting or Constructive Trusts:

When a resulting trust is claimed in less than all the land conveyed, it must be shown that the cestui que trust furnished an aliquot part of the consideration for the purchase of a definite part of or interest in the property. Platts v. Platts, 134 M 474, 334 P2d 722 (1959).

Involuntary trusts are either resulting or constructive trusts. Under 72-24-104 (now repealed), when a transfer of real property is made to one person and the consideration thereof is paid by another, the trust presumed to result in favor of the person by whom such payment is made is called a resulting trust. Such presumption is not indulged where, as in the instant case, the conveyance is made by the husband to the wife. In such case the presumption, disputable in character, is that the transfer was intended as a gift. Lewis v. Bowman, 113 M 68, 121 P2d 162 (1942).

Presumption of Gift From Husband to Wife:

In an action by an ex-husband to impose a trust on property purchased together with ex-wife during coverture, the ex-husband failed to prove facts to overcome the presumption of a gift to the ex-wife, and the rule in Montana is that a transfer of property from one spouse to the other is presumed to be a gift. (Associate Justices Bottomly and Angstman dissenting.) Dial v. Dial, 131 M 310, 310 P2d 610 (1957).

In an action by a judgment creditor to set aside an alleged fraudulent transfer of real property made by husband to wife the day before judgment was rendered, where it appeared that, ever since purchase thereof 15 years before with the wife's money, she had the equitable title thereto, bare legal title having been placed by mistake in the husband, the gift presumption was rebuttable and property purchased with the wife's money became part of her separate estate and her separate equitable estate was not subject to execution under levy by the husband's creditors. (No showing that creditor was misled and injured by title remaining so long.) Kranjcec v. Belinak, 114 M 26, 132 P2d 150 (1942).

Voluntary Advancement: Where the husband already owned a fee simple title and the wife voluntarily made an advancement to him for the express purpose of enabling him to pay off a mortgage, it does not give rise to a trust under 72-24-104 (now repealed). Baird v. Baird, 125 M 122, 232 P2d 348 (1951).

Created by Operation of Law:

Under 72-24-104 (now repealed) where a transfer of realty is made by one person and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made, the trust being created by operation of law; hence the contention that a trust estate in real property can be created only by an instrument in writing under Statute of Frauds is not meritorious. Whitcomb v. Koechel, 117 M 329, 158 P2d 496 (1945).

A resulting trust arises by operation of law from the fact that the consideration for the purchase of property was paid by, or on behalf of, one person and the title thereto taken in the name of another. Eisenberg v. Goldsmith, 42 M 563, 113 P 1127 (1911).

Presumption of Gift From Husband to Wife:

Where defendant husband in a divorce action prayed that the family home be adjudged to him on the ground that, although standing in his wife's name, he had paid for it, thus seeking to establish a trust, it was incumbent upon him to overcome the presumption that where the husband pays the consideration and title is taken in his wife's name, the transaction constitutes a gift. Since he delayed for 26 years to make serious claim of title, the Court's finding for the wife may not be held abuse of discretion. Lewis v. Lewis, 109 M 42, 94 P2d 211 (1939), followed in In re Estate of Lettengarver, 249 M 92, 813 P2d 468, 48 St. Rep. 593 (1991).

Where the parties to a transaction of the nature adverted to by 72-24-104 (now repealed) stand in close relationship, such as husband and wife, the presumption of a trust is supplanted by that of a gift. Bingham v. Nat'l Bank of Mont., 105 M 159, 72 P2d 90, 113 ALR 315 (1937).

Conveyances Between Persons in Confidential Relationships:

The rule expressed in 72-24-104 (now repealed) is subject to the exception that if the consideration is paid by one in close relationship to the transferee, such as husband and wife, parent and child, the rebuttable presumption that the transaction was a gift arises, such exception applying where the grantee is the grantor's son-in-law. McLaughlin v. Corcoran, 104 M 590, 69 P2d 597 (1937).

The rule declared by 72-24-104 (now repealed) that where real property is conveyed to one person and the consideration therefor is paid by another, a trust is presumed to result in favor of the person paying the consideration is subject to the exception that where the property is purchased by one with his own money and the title is placed by him in another to whom he stands in a confidential relation, such as husband, wife, parent, child, etc., the presumption, rebuttable in character, is that the conveyance is made as a gift. Humbird v. Arnet, 99 M 499, 44 P2d 756 (1935); Clary v. Fleming, 60 M 246, 198 P 546 (1921).

Where property is purchased by one with his own money and the title is placed by him in another with whom he stands in confidential relation, such as husband, wife, parent, child, or such other relation that the grantee may naturally have a claim upon the bounty of the grantor, the presumption, rebuttable in character, is that the conveyance is made as a gift. McQuay v. McQuay, 81 M 311, 263 P 683 (1928). See also Roman v. Albert, 81 M 393, 264 P 115 (1928).

Payment Must Be Made From Money of Beneficiary:

The one fundamental idea running through 72-24-104 (now repealed) is that the money paid was in fact the money of the person who claims the existence and benefit of the trust. It is immaterial whether the payment was made by him personally or for him by another, but in either instance the payment must have been made with his money. Humbird v. Arnet, 99 M 499, 44 P2d 756 (1935); Stauffacher v. Great Falls Pub. Serv. Co., 99 M 324, 43 P2d 647 (1935); Eisenberg v. Goldsmith, 42 M 563, 113 P 1127 (1911).

To create a resulting trust in real property under 72-24-104 (now repealed) it is not necessary that the person for whose benefit a conveyance (assignment of Sheriff's certificate of sale) is made must pay the money; if it is advanced by another for or on his behalf it is sufficient. McKenzie v. Evans, 96 M 1, 29 P2d 657 (1934).

Where, after the death of a mortgagor of real property, the cashier of a bank advised his widow to permit the property to be sold on foreclosure sale, and that he, acting for the bank, would buy it for her benefit, the money so advanced to be deemed a loan to her, and she acted upon such advice, a resulting trust was created in her favor. Marcellus v. Wright, 51 M 559, 154 P 714 (1916).

Time of Payment of Consideration as Affecting Trust:

The rule that to establish a resulting trust in real property the consideration must have been paid at or before the time that the legal title passes was met where foreign co-owners who had executed powers of attorney to their resident co-owner claimed a resulting trust in their favor in lands exchanged by their trustee for others included in a mortgage with knowledge of their trust character, equity and good conscience demanding that, under the circumstances, such consideration as they furnished should be considered as furnished in time to create a trust. First St. Bank v. Mussigbrod, 83 M 68, 271 P 695 (1928).

While in order to raise a resulting trust, the payment of money as consideration for the purchase of the property must have been made at the time or before the legal title to it passes to the party to be charged in the trust capacity, the fact that the contract of purchase entered into by defendant antedated the passing of title some weeks was immaterial. Feeley v. Feeley, 72 M 84, 231 P 908 (1924).

To create a resulting trust, the payment of money as consideration for the purchase of the property must have been made at the time or before the legal title passed to the party sought to be charged in the trust capacity. Eisenberg v. Goldsmith, 42 M 563, 113 P 1127 (1911); Lynch v. Herrig, 32 M 267, 80 P 240 (1905).

Doctrine Applicable to Personal Property: The provision of 72-24-104 (now repealed) declaring that a trust is presumed to result in favor of a person by or for whom the consideration for the transfer of real property is paid by another, being but declaratory of the common law under which the rule applied as well as the purchase of personal property, is controlling also where the property in question is personal. Meagher v. Harrington, 78 M 457, 254 P 432 (1927).

Resulting Trust:

Where in an action to quiet title to land defendant assignee of a mortgage thereon claimed that the land was held by plaintiff in trust for his benefit, but did not allege that the consideration which plaintiff paid to the mortgagor was paid in behalf of defendant and the title thus acquired taken in the name of plaintiff for defendant's use and benefit, his pleading did not state cause of action as for a resulting trust. Word v. Moore, 66 M 550, 214 P 79 (1923).

To raise a resulting trust in land the consideration for its purchase must have been paid at the time or before the legal title to it passed to the party sought to be charged in the trust capacity, payments made thereafter being insufficient for that purpose. MacGinniss Realty Co. v. Hinderager, 63 M 172, 206 P 436 (1922).

Declaratory of Common Law: This statute is but declaratory of the common law. Lynch v. Herrig, 32 M 267, 80 P 240 (1905). See Eisenberg v. Goldsmith, 42 M 563, 113 P 1127 (1911).

72-38-123. Constructive trust.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in 72-33-219 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Unjust Enrichment Prerequisite to Remedy of Constructive Trust — Elements Not Satisfied: A health care provider issued refunds for overpayment to a patient on two occasions by mailing prepaid debit cards issued through a bank in the amount of the refund due. The patient activated the first card but did not use either card to pay for goods, withdraw money at an ATM, or exchange the cards for cash at a bank. The patient sued the health care provider, requesting, in part, a constructive trust based on a claim of unjust enrichment. The District Court found that the first two elements for unjust enrichment were satisfied because the patient conferred a benefit on the health care provider by paying for medical services that were also paid for by insurance and the health care provider acknowledged its receipt of that benefit. However, the District Court found that the third element was not met because the health care provider did not retain the benefit. It provided for the refund of the overpayment to the patient through the prepaid debit card then by issuing a check. Because unjust enrichment had not occurred, the patient was not entitled to a constructive trust. The Supreme Court affirmed. Bratton v. Sisters of Charity of Leavenworth Health Sys., 2020 MT 86, 399 Mont. 490, 461 P.3d 127.

Constructive Trust — Unclean Hands — No Error: After a decedent's wife represented that she was unaware of any unrevoked testamentary instruments relating to her husband's death, she later filed a creditor claim against the estate based on a document purportedly having testamentary intent and sought to have the formal probate order modified or vacated. The wife then argued that the District Court should impose a constructive trust for her benefit because the decedent's children would be unjustly enriched, but the District Court's denial of the wife's request was not clearly erroneous because it had relied on her earlier representations when creating the probate order, and she did not object. In re Estate of Erickson, 2017 MT 260, 389 Mont. 147, 406 P.3d 1

Constructive Trust Created Due to Improper Change of Life Insurance Beneficiary During Dissolution Proceedings — Unjust Enrichment: A man improperly changed his life insurance beneficiary from his wife to his sister during the statutorily mandated restraining period of his dissolution proceedings, which prevented him from making any beneficiary changes. The man died 4 months after the divorce finalized. The District Court erred when it granted summary judgment to the sister, denying the imposition of a constructive trust on life insurance proceeds for the man's child because the change was invalid while the restraining order was in place. The sister, although she had done nothing wrong, was unjustly enriched by the disbursement of the life insurance proceeds to her, and the Supreme Court held that a constructive trust was created for the minor child, who otherwise would have received the insurance proceeds under the application of 72-2-814. Volk v. Goeser, 2016 MT 61, 382 Mont. 382, 367 P.3d 378.

Constructive Trust — Measure of Unjust Enrichment: When imposing a constructive trust, the court must consider whether the trust constitutes the appropriate measure of unjust enrichment, even when the parties have stipulated to the result. A party's constructive trust encompasses property only if in equity and conscience the property belongs to the party. LeMond v. Yellowstone Dev., LLC, 2014 MT 181, 375 Mont. 402, 336 P.3d 345.

Principles of Equity Properly Applied in Distribution of Property of Unmarried Cohabitants: LeFeber and Johnson acquired property during their long-term, intimate, exclusive relationship. The parties cohabited, but neither party claimed a common-law marriage. When the parties separated, LeFeber requested that the District Court declare a constructive trust in LeFeber's favor and order Johnson to convey real property to LeFeber. The court denied the request but also denied Johnson's claim that all the property had been gifted to Johnson. Instead, the court held that each party had an equitable right as tenants in common and granted each party an undivided half interest. LeFeber appealed, but the Supreme Court affirmed. LeFeber was unable to show that a constructive trust existed because establishment of a constructive trust depends only on a showing that the titleholder would be unjustly enriched if permitted to retain the title, and LeFeber could show no unjust enrichment on Johnson's part, including that Johnson would benefit from a wrongful act or had engaged in misconduct or fault to recover. The District Court correctly determined that neither party owned the property in its entirety and that each party had an equitable right to the property as tenants in common. Thus, the District Court properly exercised its power to make compensatory adjustments and to fashion appropriate relief according to ordinary principles of equity. LeFeber v. Johnson, 2009 MT 188, 351 M 75, 209 P3d 254 (2009). See also Flood v. Kalinyaprak, 2004 MT 15, 319 M 280, 84 P3d 27 (2004), and Anderson v. Woodward, 2009 MT 144, 350 M 343, 207 P3d 329 (2009).

Sufficient Finding of Undue Influence Over Parent — Constructive Trusts Properly Imposed and Damages Awarded: When Josephine became too ill to manage herself and her affairs, her daughter Melissa agreed to move in with Josephine and care for her. In the process, as Josephine's health steadily declined, Melissa used her confidential relationship with Josephine to manipulate Josephine and her finances, controlling Josephine's checking account, mail, and payment of bills and expenses. By the time Josephine died, Melissa had obtained title to all of Josephine's real property, sold Josephine's property in Ovando and Florida, encumbered the remaining property with over $175,000 in loans taken out in Josephine's name, used part of the loan proceeds to buy property in Missoula and Las Vegas, exhausted all cash in Josephine's house, repeatedly overdrawn Josephine's checking account, fraudulently cashed one of Josephine's certificates of deposit by forging Josephine's name to it, used and obtained credit cards in Josephine's name and charged the account to the credit limit, exhausted all of Josephine's savings, Social Security, retirement, and annuity income, retained rental income from Josephine's rental units without accounting for it, destroyed years of Josephine's financial records while keeping very few records after assuming control of Josephine's affairs, fabricated lease documents and forged signatures on them to obtain loans in Josephine's name, used Josephine's money to pay all personal bills and obligations, never informed her siblings or provided an accounting of expenditures of Josephine's income and assets, and refused to provide a copy of Josephine's will, answer questions, or provide any other information. Melissa's brother Robert obtained a copy of the will and commenced an action to recover assets of Josephine's estate from Melissa. The District Court held Melissa accountable for a money judgment of $177,000 and for other items, totaling nearly $400,000. The court imposed a constructive trust on all real property that Melissa had obtained from Josephine or purchased with loan proceeds obtained in Josephine's name and awarded Robert costs and attorney fees. Melissa appealed. The Supreme Court applied the criteria in In re Estate of Bradshaw, 2001 MT 92, 305 M 178, 24 P3d 211 (2001), and determined that Melissa had exercised undue influence over Josephine. It concluded that there were ample reasons for imposition of the constructive trusts because the properties were obtained through undue influence and would have unjustly enriched Melissa if she were allowed to retain title to the properties. The damage award was based on substantial evidence and did not constitute error. The award of attorney fees and costs was within the equitable powers of the District Court based on the extraordinary efforts by Melissa to conceal her use of Josephine's property and money, which required Robert to make substantial efforts to successfully uncover and prove Melissa's wrongful conduct. The District Court was affirmed on all issues. Monroe v. Marsden, 2009 MT 137, 350 M 327, 207 P3d 320 (2009).

Constructive Trust Created for Proceeds of Sale of Residence — Unjust Enrichment: A father conveyed a residence to one of his sons. When sale of the property was later contemplated, two daughters contested the retention of the sale proceeds by the son, asserting that the property had been conveyed to the son in order to provide an estate for another child who had suffered a serious brain injury in an automobile accident about 1 year prior to the conveyance of the property. The District Court imposed a constructive trust on the proceeds of the residence, and the son appealed. The Supreme Court affirmed. Although a constructive trust may be imposed because the titleholder obtained the title by fraud, accident, mistake, undue influence, violation of a trust, or other wrongful act, a constructive trust may also be imposed in cases in which a titleholder innocently obtained title to property but would be unjustly enriched if allowed to retain the title. Here, conveyance of the property to the son supported the creation of a constructive trust because there was never a transfer of an ownership interest in the property from father to son, and the father retained ownership of the property and paid taxes on the property until his death. Further, the son would have been unjustly enriched if allowed to keep the proceeds from sale of the residence. In re Estate of McDermott, 2002 MT 164, 310 M 435, 51 P3d 486 (2002).

Claim of Resulting or Constructive Trust Barred by Judicial Estoppel and Clean Hands Doctrine: The parents created a family corporation and made their four children equal, sole shareholders through transfers and gifts. When two medical malpractice suits were filed against the father, he claimed that he had no right to or control over the corporation's assets. In a separate action, two sisters instituted a shareholder derivative action and petitioned for judicial review of their brother's fiduciary duties. The brother called a special meeting to issue additional stock to himself and to transfer property back to the parents, but the sisters objected and the brother was enjoined from doing so. The parents then claimed that the property was held in a resulting or constructive trust, and the District Court ordered that the assets and stock be conveyed to the parents. The sisters appealed, and the Supreme Court reversed. Both the sisters and the plaintiffs in the medical malpractice action relied to their detriment on the father's judicial declaration that he had no right to or control over the corporate assets, and the father was thus barred by judicial estoppel and the clean hands doctrine from raising equitable claims that a resulting or constructive trust existed. Judicial estoppel binds a party to that party's judicial declarations and precludes the party from taking a position inconsistent with the previous declaration in a subsequent action or proceeding. The clean hands doctrine provides that a party must not expect relief in equity unless the party comes into court with clean hands. The evidence here showed that the parents knowingly transferred assets to the family corporation to circumvent creditors and avoid estate taxes, and the Supreme Court will not aid a party whose claim had its inception in the party's wrongdoing, whether the victim of the wrongdoing is the other party or a third party. Kauffman-Harmon v. Kauffman, 2001 MT 238, 307 M 45, 36 P3d 408 (2001).

Findings That Constructive Trust Improperly Administered Not Erroneous: Bradshaw placed an annuity in his mother's name to hold in trust for the benefit of others. Bradshaw later died intestate, leaving two minor children and no surviving spouse. The District Court concluded that the trust should have been expended on behalf of the minor children and found that the mother violated her fiduciary obligation by originally taking the position that the annuity was to be distributed among various members of Bradshaw's family and only later deciding that each of the minor children was also entitled to a share. Bradshaw's children were properly the beneficiaries of the trust, and the District Court did not err in finding the mother in violation of her duty as trust administrator. In re Estate of Bradshaw, 2001 MT 92, 305 M 178, 24 P3d 211 (2001).

Handwritten "Irrevocable Trust Reserving Income for Life" — Failure for Lack of Transfer of Property — No Resulting Trust or Constructive Trust Imposed: In anticipation of remarriage, the decedent, an attorney, drafted a handwritten document purporting to "sell, assign and convey" various mineral interests to a trust for the benefit of his daughters from his first marriage. The decedent never transferred or conveyed the named mineral interests to the trust or otherwise delivered the trust property to the named trustee. At the time of death, his wife, as personal representative of the estate, refused to convey the alleged trust property upon request of the daughters. The daughters sued, maintaining that the handwritten trust document was testamentary in nature and that therefore the personal representative must fund the testamentary trust with the mineral interests owned by the decedent at the time of his death. The personal representative argued that the document was not a valid testamentary trust and was intended to create an inter vivos trust, which was never executed by conveying or otherwise transferring the interests to the trust or the trustee. The District Court granted summary judgment for the daughters, concluding that the handwritten trust document was testamentary. The Supreme Court reversed, holding that the inter vivos trust document failed because of the lack of a transfer of property to the trust during the decedent's lifetime. The document was not testamentary because the document did not first and foremost express a clear and unmistakable intent that the trust would not take effect until the testator's death. Rather, the document convincingly displays all attributes of an inter vivos transaction that the trustor intended would take place at the time that the document was drafted or soon thereafter. Even if a resulting trust was imposed, the result would be the same, with the mineral interests returning to the trustor's estate. The other type of involuntary trust, a constructive trust, was not argued by the daughters and is therefore not available as an equitable remedy. Cate-Schweyen v. Cate, 2000 MT 345, 303 M 232, 15 P3d 467, 57 St. Rep. 1478 (2000).

Error in Failure of District Court to Impose Constructive Trust When Unjust Enrichment Would Result: Steve's parents advanced his wife Julie and him money to purchase marital property, and even though the advance was repaid, the parents retained title to the property and paid taxes and insurance on it. When the question arose as to division of the marital estate, the District Court concluded that a constructive trust should not be imposed because there was no evidence of fraud or other wrongful acts to support such a remedy. Although a constructive trust may be imposed because the titleholder obtained title by fraud, accident, mistake, undue influence, violation of a trust, or other wrongful act, these factors are not necessarily a prerequisite to imposing a constructive trust pursuant to 72-33-219 (now repealed). A constructive trust may also be imposed in cases when a titleholder innocently obtained title to property but would be unjustly enriched if allowed to retain title. In light of the fact that the initial purchase price was repaid, that Steve paid for improvements on the property, and that the parties acted as though Steve and Julie owned the property, the parents would have been unjustly enriched if they retained title. The District Court erred in not imposing a constructive trust in favor of Steve and Julie. The District Court was instructed to impose an equitable duty on Steve's parents to convey the property to Steve and Julie and to fully apportion the full value of the property when distributing the marital estate. In re Marriage of Moss, 1999 MT 62, 293 M 500, 977 P2d 322, 56 St. Rep. 257 (1999), followed in U.S. v. Nava, 404 F3d 1119 (9th Cir. 2005).

Statute of Frauds and Statute of Limitations Not Applicable to Constructive Trust: The husband argued that the statute of frauds and the statute of limitations for agreements not in writing barred his wife's claim to marital property. However, in this case, a constructive trust should have been created for the property. Constructive trusts arise by operation of law, so 70-20-101 did not bar the wife's claim because under 70-20-102, 70-20-101 may not be construed to prevent creation of a trust. Further, because the wife was not attempting to directly enforce a verbal agreement, the requirement in 27-2-202 that an action based on a contract, account, or promise not founded on an instrument in writing be brought within 5 years also did not apply. In re Marriage of Moss, 1999 MT 62, 293 M 500, 977 P2d 322, 56 St. Rep. 257 (1999).

Acts and Omissions of Plaintiff — Claim of Constructive Trust Negated: Johnson entered into two agreements with the Collins Agency, one to build an apartment complex for the agency using a FmHA loan obtained by the agency and to then buy the complex from the agency and the second to hold the agency harmless from any claim by the original architect on the project. Johnson operated the complex and expended some money on the complex for several years while the parties tried to have the loan transferred to Johnson. Johnson failed to hold the agency harmless from a claim by the former architect that resulted in a judgment against the agency. In addition, complex funds were taken by the IRS for income taxes owed by Johnson. The loan transfer was never approved, and Johnson sued to have a part of the property conveyed to him or, in the alternative, for damages. The Supreme Court held that in light of the acts and failures to act on Johnson's part, he had not established by clear and convincing evidence that the agency had an equitable duty to convey an interest in the complex to him. Johnson v. Kenneth D. Collins Agency, Inc., 263 M 137, 865 P2d 312, 50 St. Rep. 1749 (1993).

Constructive Trust — Third Party Receiving Property for Value to Have Notice of Transferor's Fraudulent Activity: The Taylors had invested over $126,000 with Holm, a Californian, and, when they became worried about their investment, contacted Holm and requested the return of their money. Subsequently, Holm contacted Lawrence and had her obtain a second mortgage on her home for $198,000 and give the money to him to be invested on her behalf. The next day, Holm instructed the bank where he had deposited the money to send two checks to the Taylors for the amount that they had invested with him. When Lawrence later tried to recover her money, she could not find Holm. She then sued the Taylors' estate on the basis that the money they received from Holm came from her check to Holm and should be returned to her because of the existence of a constructive trust. Lawrence argued that the money should be returned under the constructive trust theory because the Taylors had notice of Holm's fraudulent behavior and that the Taylors were not innocent transferees for value because the money given to them was for an antecedent debt. The Supreme Court held that the evidence did not support a finding that the Taylors were aware of Holm's activities and adopted the rule that "value" with respect to constructive trusts and innocent transferees includes a transfer to satisfy an antecedent obligation. Lawrence v. Clepper, 263 M 45, 865 P2d 1150, 50 St. Rep. 1699 (1993).

Proper Imposition of Constructive Trust for Person Not Party to Action: May bought six certificates of deposit (CDs) on which she and her three sisters were named as joint depositors. In 1985, sister Marie moved to Montana to take care of May. Without telling the other sisters, Marie cashed four CDs before May died and two the day after. A large part of the money was put into Marie's account or was unaccounted for. Sister Hazel sued Marie, and the court held that Marie: (1) committed fraud, undue influence, and a breach of trust; (2) was subject to a constructive trust; and (3) owed sister Cecelia, who was not a party to the action, and Hazel each one-third of the total value of the CDs. Though Cecelia was not a party, the court had jurisdiction to award Cecelia judgment for her one-third share. Cecelia's rights were identical to Hazel's, Cecelia's interests were adequately protected, and Marie's interests were not adversely affected by the fact Cecelia was not a party. Although jurisdiction over the person upon whom a trust is imposed is pivotal, not all potential beneficiaries need be parties. Howard v. Dalio, 249 M 316, 815 P2d 1150, 48 St. Rep. 755 (1991).

House Not Part of Marital Estate Under Constructive Trust Theory: The wife argued that the family home, purchased by the husband's parents, should be included in the marital estate on the basis of a constructive trust. The Supreme Court held that although the husband and wife had chosen the house and made the arrangements for the purchase, the husband's parents had title to the home and had assumed the rights and responsibilities of ownership. Under the facts, a constructive trust did not exist. In re Marriage of Owen, 244 M 306, 797 P2d 226, 47 St. Rep. 1634 (1990).

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

No Affirmative Duty to Disclose Unfunded Trust — Trustee Obligations Inapplicable When No Trust Exists: Brevig contended that the District Court should have imposed a constructive trust to remedy McCormick's alleged violation of various statutes relating to the duties of a trustee, including failing the duty to notify Brevig that the trust was unfunded, thereby allowing McCormick to wrongfully acquire a ranch and partnership interest under a will. However, McCormick took possession of the ranch and partnership interest pursuant to a validly executed will, so there was no duty to notify Brevig of the invalidity of the trust. Further, it would be inappropriate to subject McCormick to the statutory obligations of a trustee when no trust ever came into existence. There was simply no evidence to justify submitting the issues for jury consideration, so the District Court properly granted summary judgment to McCormick on both issues. McCormick v. Brevig, 1999 MT 86, 294 M 144, 980 P2d 603, 56 St. Rep. 355 (1999), followed in Cate-Schweyen v. Cate, 2000 MT 345, 303 M 232, 15 P3d 467, 57 St. Rep. 1478 (2000).

No Constructive Trust When Wife Awarded Home Purchased With Loan From Husband's Mother: In a divorce case, the wife was awarded the family home that had been purchased with money loaned to the husband by his mother. The lower court's decision that no constructive trust existed in the mother's favor was affirmed on appeal. The Supreme Court ruled that there had been no fraud on the wife's part and that the mother continued to lend money to her son after he had failed to secure the loans with the real estate, as she had requested. Gitto v. Gitto, 239 M 47, 778 P2d 906, 46 St. Rep. 1502 (1989).

Breach of Joint Venture Fiduciary Trust — Award of Investment Plus Interest Affirmed: Kelly and Rust agreed to purchase land, subdivide it, and sell it at a profit. Rust advanced Kelly $4,000 as one-half the purchase price. Kelly paid the $4,000 balance and recorded the deed, but did not include Rust on the recorded deed. Rust moved from the area and later attempted, through his agent, to purchase Kelly's interest in the land. The agent was told the land was already sold, so Rust brought an action to recover his investment plus interest. The trial court properly held that: (1) the parties had entered into a joint venture; (2) Kelly was required in equity to hold the property in a constructive trust; (3) Kelly breached the joint venture fiduciary duty and attempted to deprive Rust of his interest in the property; and (4) Rust was entitled to return of his $4,000 investment plus interest. Rust v. Kelly, 228 M 220, 741 P2d 786, 44 St. Rep. 1471 (1987).

Execution of Assignments of Notes and Deeds Under Wife's Power of Attorney — Husband's Desire to Make Assignments: On appeal by decedent's children from an order awarding certain estate property to decedent's wife when wife used power of attorney for husband to execute assignments of notes and deeds of trust to herself prior to husband's death, the Supreme Court held that there was sufficient evidence to uphold the transfer to the wife because she was acting as her husband's alter ego and it was undisputed that the husband desired to make assignments of the notes and deeds to his wife. In re Estate of Rogers, 223 M 78, 725 P2d 544, 43 St. Rep. 1545 (1986).

Execution and Delivery of Quitclaim Deed Supported in Evidence — Effect: The District Court found that a quitclaim deed was executed and delivered by the Morins to the Mapstons before a typewritten note was signed by Mapstons to convey the subject property to Morins. This central finding of fact was held to be clearly supported in the evidence. The legal effect of the finding is that the quitclaim deed constituted a gift to Mapstons, no consideration being necessary. The transfer vested all actual title which Morins then had, since no different intention was expressed or necessarily implied. The typewritten note cannot be specifically enforced by Morins because they had not received an adequate consideration for the contract and because the contract lacks mutuality. Moreover, no involuntary trust was created. Morin v. Mapston, 217 M 403, 705 P2d 118, 42 St. Rep. 1283 (1985).

Husband and Wife Joint Tenancy — Intentional Killing — Constructive Trust: A husband and wife were owners of real property as joint tenants with rights of survivorship. The intentional killing of the husband by the wife effected a severance of the joint tenancy with a one-half interest being retained by the wife and the remaining one-half interest passing to the estate of the decedent husband. Because the wife's interest vested at the creation of the joint tenancy, her retention of a one-half interest was not a benefit resulting from her killing of her husband. The court was not required to impose a constructive trust on the wife's interest, only upon the decedent husband's interest. With respect to the husband's estate, the wife was not entitled to any portion. In re Estate of Matye, 198 M 371, 645 P2d 955, 39 St. Rep. 1009 (1982).

Reliance on Trustee — Creation of Corporation — Gaining Advantage Through Fraud: Plaintiff's husband and defendant were brothers and partners in a ranching operation, although each owned the land individually. Plaintiff's husband died and defendant was named executor. A corporation was formed to operate the ranch on May 1, 1973. Both parties transferred all assets to the corporation. Defendant's family got 364 more shares than plaintiff, and defendant was named president of the corporation. Restrictions were placed on the valuation and transfer of stock. On May 29, 1975, plaintiff consulted her own attorney and for the first time fully realized her position. All corporate votes became deadlocked. On April 29, 1977, plaintiff filed suit to dissolve the corporation, alleging fraud and oppressive conduct by defendant and mistake at the formation. The court found that defendant occupied a position of trust and confidence in relation to plaintiff. He was executor of her husband's estate and partner to her husband at the date of death; that status imposed on defendant the duties of a trustee. At the time of incorporation, the unequal stock division was not believed to be of any particular legal or practical significance, so that the parties were mistaken as to legal effect. Defendant contended no mistake could be claimed, because plaintiff failed in her duty to fully read the documents before signing. However, the duty was not so much on plaintiff to discover as on defendant as trustee to fully disclose. In view of the fact that no disclosure was made, the mistake under which the parties were acting was evident. Because the result of incorporation was to give defendant control over plaintiff's assets, the trustee statutes were clearly violated. Defendant used his position to gain an advantage over plaintiff without fully disclosing the consequences and was guilty of fraud. Skierka v. Skierka Bros., Inc., 192 M 505, 629 P2d 214, 38 St. Rep. 754 (1981).

No Express or Constructive Trust: Testimony that decedent conveyed certain land to Lohrke and later made an oral statement that decedent wanted the land to go to his children was insufficient to create a voluntary or express trust involving real property. No constructive trust existed because Lohrke and decedent were close friends and the property was voluntarily transferred to Lohrke without his knowledge. A constructive trust requires fraud, mistake, undue influence, violation of a trust, or other wrongful acts. Eckart v. Hubbard, 184 M 320, 602 P2d 988 (1979).

What Constitutes Undue Influence: In determining the issue of undue influence, the Court may consider the confidential relationship of the person attempting to influence the donor, the physical and mental condition of the donor as it affects his ability to withstand the influence, the unnaturalness of the disposition as it relates to showing an unbalanced mind or a mind easily susceptible to undue influence, and demands and importunities as they may affect the particular donor, taking into consideration the time, place, and all surrounding circumstances. Cameron v. Cameron, 179 M 219, 587 P2d 939 (1978), followed in In re Estate of Bradshaw, 2001 MT 92, 305 M 178, 24 P3d 211 (2001).

Pastoral Relationship: Evidence supported findings of fraud and undue influence constituting pastor an involuntary trustee of land conveyed to him where the grantor had made substantial contributions to grantee's ministry, had financed a missionary trip for him, and had conveyed the land, intending it for use in the church work, on grantee's promise to reconvey a portion of it. However, the grantee had failed to keep promises to take grantor on the missionary trip and to reconvey a portion of the land, and the conveyance of land, prepared by grantee's attorney, had been to grantee and himself personally rather than to his church. Under these circumstances, cancellation of the conveyance was proper. Hensley v. Stevens, 156 M 486, 481 P2d 694 (1971).

Parent and Child:

Constructive trust would not be imposed on lands deeded son by aged mother in absence of evidence that son gained land by accident, mistake, undue influence, violation of trust, or other wrongful act or by constructive fraud. Bodine v. Bodine, 149 M 29, 422 P2d 650 (1967).

When daughter conveyed real property to her mother with the understanding that it was to be held in trust for her and the mother then deeded the property to another daughter with the understanding that it was to be held in trust for the first daughter, but there was no written trust agreement, a constructive trust would result. Opp v. Boggs, 121 M 131, 193 P2d 379 (1948), distinguished in Barrett v. Zenisek, 132 M 229, 315 P2d 1001 (1957).

Transfer in Contemplation of Death: When deceased, engaged in cattle partnership with his sister and her husband, during his last illness transferred bank account and interest in cattle to his sister and her husband, obligating them to pay all bills and expenses surrounding his illness and transfer some money to deceased's son, the sister and her husband were involuntary trustees of the property transferred from which they had paid expenses of deceased's last illness. Marshall v. Minlschmidt, 148 M 263, 419 P2d 486 (1966).

Joint Option to Purchase: Neighboring ranchers signed a writing, agreeing to become equal partners in purchase of adjoining grazing leases and ranch lands. Each contributed $1,000 to bind a 1-year purchase option covering lands and leases. The option and option payment were forfeited but they continued their joint activities. Nine months after forfeiture one partner purchased all for himself. A constructive trust was raised which purchaser could not revoke. He was required to convey an undivided one-half interest in the lands and leases to other partner subject to down-to-date accounting and reimbursement in net amount of purchase price found to be due from plaintiff to purchaser after accounting was completed from date of original agreement. Bradbury v. Nagelhus, 132 M 417, 319 P2d 503 (1957).

Burden of Proof to Establish Trust: The rule that to establish a trust the evidence must be clear, convincing, and practically free from doubt, a question determinable by the Trial Court, is especially applicable where plaintiff must establish his case largely by his own testimony as to conversations had between himself and a decedent (here his divorced wife) after the lapse of many years, or where parol evidence alone is relied upon. The burden of proving by clear and convincing evidence that a deed absolute on its face was intended as a mortgage is upon him who alleges the fact. Lewis v. Bowman, 113 M 68, 121 P2d 162 (1942), followed in In re Estate of Lettengarver, 249 M 92, 813 P2d 468, 48 St. Rep. 593 (1991).

Only Beneficiaries of Fiduciary Relationship Allowed to Object to Transaction: When a director of a corporate holder of an option to purchase mining property for $32,857.71 purchased the property for $12,000, subject to the option, through another corporation which he controlled, the corporate holder, its stockholders, and creditors could prevent him from making a profit and compel him to convey his rights to the corporate holder, but a third person purchasing the property from one who as a stockholder of the corporate holder redeemed it after a sale on execution is not one of the beneficiaries and had no standing or cause of action to question the director's purchase. N. Min. Corp. v. Cooke Min. Co., 123 F2d 9 (9th Cir. 1941).

Director of Corporation Occupies Fiduciary Relation: In an action to compel conveyance of property allegedly held in trust for plaintiff corporation by a director who had located several mining claims adjacent to the property of the company and needed for dumping waste rock, even though he claimed to be a "dummy" director, a figurehead who discharges no duties, he still owed it the duty not to act against its interests without prior warning for it to protect itself, and though he is not strictly a trustee, he occupies a fiduciary relation to the company, and cannot enrich himself at the expense of the stockholders. Golden Rod Min. Co. v. Bukvich, 108 M 569, 92 P2d 316 (1939).

Mandamus to Compel Payment by Official: Complaint for Writ of Mandate by a county high school against the County Treasurer to compel payment of money realized from the sale of a building purchased with high school funds and sold by County Commissioners as trustee when no longer needed for school purposes stated a cause of action on the theory of a resulting trust, although the pleading did not ask that such a trust be declared and was sufficient to authorize issuance of the Writ directing defendant to deposit the sale price to the credit of plaintiff. Incorporation as a county high school district after purchase of building did not affect its right. State ex rel. Gallatin County High School v. Brandenburg, 107 M 199, 82 P2d 593 (1938).

Constructive Trust:

Where property had been transferred and retransferred between members of the same family and by a partnership to a corporation composed of the same persons, all without any consideration being paid, and purchased by plaintiff at a bankruptcy sale, and on which defendant had a prior judgment lien, contention that one of the grantees was a trustee of a constructive trust was held not sustained by the evidence, it showing neither actual nor constructive fraud on the part of the alleged trustee. McLaughlin v. Corcoran, 104 M 590, 69 P2d 597 (1937).

Where a contract between the assignee of a mortgage on land and a lessee under a lease from the heirs of the mortgagors imposed no legal obligation whatever upon the lessee owing to the assignee but simply gave him an option to purchase the land during the term of the lease upon foreclosure, provided the lessee would pay the taxes and interest due and the mortgage was not foreclosed, and the lessee paid neither taxes nor interest but bought the property on tax sale, a constructive trust in the land in favor of the assignee did not arise, the lessee not having violated any duty owing by him to defendant. Word v. Moore, 66 M 550, 214 P 79 (1923).

The basis of a constructive trust is fraud, and such a trust arises when the legal title to property is obtained by a person in violation of some duty owed to the one who is equally entitled thereto, the property being held in hostility to his beneficial rights of ownership. Word v. Moore, 66 M 550, 214 P 79 (1923).

A constructive trust is created by operation of law, upon breach of a fiduciary relation by the person sought to be held, its basis being fraud, actual or constructive. MacGinniss Realty Co. v. Hinderager, 63 M 172, 206 P 436 (1922).

The evidence was held insufficient to show a constructive trust. Eisenberg v. Goldsmith, 42 M 563, 113 P 1127 (1911).

A constructive trust is created by operation of law, upon breach of a fiduciary relation by the person sought to be held. Eisenberg v. Goldsmith, 42 M 563, 113 P 1127 (1911).

Conveyances Between Persons in Confidential Relationships: The owner of lands mortgaged for a large amount conveyed them to a bank which subsequently became insolvent. Its receiver deeded them to his mother-in-law for an indeterminate amount of between $200 and $500 handed him by his wife, ostensibly in behalf of her mother. In an action to foreclose the mortgage, to have the grantee declared a trustee of a resulting trust and several later conveyances set aside as fraudulent, it was held that the money paid was that of the grantor and that, therefore, the grantee at once upon consummation of the transaction became such trustee, her only interest in the property until she made conveyance thereof being that of a holder of the legal title for the benefit of the grantor. Humbird v. Arnet, 99 M 499, 44 P2d 756 (1935).

Attaching Creditor: An attaching creditor is neither a purchaser nor an encumbrancer of real property for value within the meaning of 72-24-208 (now repealed), declaring that no resulting trust can prejudice the rights of such purchaser or encumbrancer; he succeeds to and acquires only the rights of the debtor at the time of the levy, subject to all the rights and equities of third persons which are capable of being enforced against the judgment debtor; the rule of caveat emptor applies. Stauffacher v. Great Falls Pub. Serv. Co., 99 M 324, 43 P2d 647 (1935).

Gift in Violation of Trust: One who takes personal property from a trustee by way of a gift made in violation of the latter's trust becomes an involuntary trustee thereof (72-20-301, now repealed), stands in the shoes of the trustee, and cannot assert the bar of the Statute of Limitations unless he repudiates the trust, and knowledge of such repudiation is gained by the cestui que trust. Davidson v. Stagg, 94 M 272, 22 P2d 152 (1933).

Pledge Mingled With Funds of Estate: The money pledged by tenant to protect estate against abatement of property rented for violations of law constituted a trust fund. Since it had been mingled with the funds of the estate without any attempt at segregation, the entire funds of the estate were impressed with the trust in favor of the tenant, and since the residuary legatees and devisees had received the trust fund on distribution, they were liable to him for the money pledged as involuntary trustees. Ryan v. Stagg, 89 M 390, 298 P 353 (1931).

No Application to Wrongful Occupation of Land: Sections 72-20-110 and 72-20-111 (now repealed), general in their nature, declaring who are involuntary trustees of things wrongfully detained from their owner or gained through fraud, etc., for the benefit of the person entitled thereto, have no application to a wrongful occupation of land after demand by its owner, except as to such occupation the provisions of 27-1-318 control. Kester v. Amon, 81 M 1, 261 P 288 (1927).

Fraud: The act of a tenant of mortgaged land in refusing to deliver possession thereof to the mortgagee on demand based on a provision in the mortgage entitling him to possession on failure of the mortgagor to pay one of the mortgage notes, resulting in ouster proceedings, did not fall within the statutory definition of either actual or constructive fraud. Hence, the contention of the mortgagee that the tenant by his wrongful act in withholding possession became a constructive trustee and that his possession after demand was the possession of the mortgagee cannot be sustained. Morton v. Union Cent. Life Ins. Co., 80 M 593, 261 P 278 (1927).

Intention Immaterial: The constructive trust declared by 72-20-111 (now repealed) is based upon the fundamental idea of fraud or wrongdoing in the trustee, independently of any actual or presumed intention to create a trust, while in all species of resulting trusts, intention is an essential element. Meagher v. Harrington, 78 M 457, 254 P 432 (1927).

Unlawful Bank Deposit: Where a deposit of trust funds is unlawfully made with the active participation of the bank, it becomes an involuntary trustee under the trust and may be compelled to place the trust estate in statu quo. Pethybridge v. First St. Bank of Livingston, 75 M 173, 243 P 569 (1926).

Bankrupt Settling Suit: While a bankrupt person, during the pendency of bankruptcy proceedings against him, may settle a suit brought by him, he holds any proceeds so received as trustee for his creditors, and, if the settlement is made with the present intent to misapply the proceeds, for any such misapplication the parties making payment must make reparation, if at the time of the settlement they had reasonable grounds for believing that the bankrupt person intended such a conversion, in view of 72-20-111, 72-20-301, and 72-20-302 (now repealed). Gunther v. Home Ins. Co., 286 F 396 (D.C. Mont. 1923), reversed on other grounds, 298 F 593 (1924).

Property Acquired With Partnership Funds Creates Trust: Where one of three partners engaged in the livestock business acquired patent to desert land used in the business and paid for it with partnership funds, the land was impressed with a resulting trust in favor of the three partners. Wilson v. Wilson, 64 M 533, 210 P 896 (1922), distinguished in Brownback v. Nelson, 122 M 525, 206 P2d 1017 (1949).

Husband and Wife: When a married woman owning separate property was desirous during a dangerous illness of conveying to her daughter, but consented to convey to her husband instead, on his promise to devise both this property and his own to the daughter and a son, the husband, on the death of the wife and the repudiation of his promise, occupies the position of an involuntary trustee for the benefit of the daughter, and the latter is the real party in interest on whom devolves the privilege of maintaining the appropriate action. Huffine v. Lincoln, 52 M 585, 160 P 820 (1916).

Unauthorized Sale: Where the receiver of a corporation sold certain of its property and thereafter the order appointing the receiver and authorizing a sale was reversed on appeal, the purchasers held the property and the proceeds of their sale thereof as involuntary trustees for the corporation, and the receiver held the purchase price as an involuntary trustee for the purchasers. Lutey v. Clark, 31 M 45, 77 P 305, 84 P 73 (1904).

Directors of Corporation: A resolution of four directors of a corporation voting three of their number salaries and giving them backpay, predicated on bylaws previously passed by five directors, including the first-mentioned four, was void under Title 72, ch. 20, part 2 (now repealed). McConnell v. Combination Min. & Mill. Co., 30 M 239, 76 P 194 (1904), modified on other grounds, McConnell v. Combination Min. & Mill. Co., 31 M 563, 79 P 248 (1905), and distinguished in Bentall v. Koenig Bros., Inc., 140 M 339, 372 P2d 91 (1962).

72-38-124. Resulting trusts — constructive trusts — statute of frauds.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code. The language in this section relates to the language in 72-33-220 (now repealed).

Case Notes

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Resulting Trust: Since a resulting trust in realty arises not out of a contract but by operation of law, it may be proved by parol evidence, the Statute of Frauds not applying. Campanello v. Mercer, 124 M 528, 227 P2d 312 (1951); Wilson v. Wilson, 64 M 533, 210 P 896 (1922).

72-38-130. Scope and effect of part — proposed action or inaction described.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code. The language in this section relates to the language in 72-34-425 (now repealed).

72-38-131. When use of notice authorized.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code. The language in this section relates to the language in 72-34-425 (now repealed).

72-38-132. Content of notice.

Compiler's Comments

2015 Amendments — Composite Section: Chapters 55 and 181 deleted former (5) that read: "(5) the time within which objections to the proposed action or inaction can be made, which must be at least 30 days from providing the notice of proposed action or notice of proposed inaction"; and made minor changes in style. Amendments effective October 1, 2015.

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code. The language in this section relates to the language in 72-34-425 (now repealed).

72-38-133. Objection to proposed action or inaction — petition — liability of trustee.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code. The language in this section relates to the language in 72-34-425 (now repealed).

72-38-134. Procedures not required.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

Part 2
Judicial Proceedings

Part Official Comments

General Comment This article addresses selected issues involving judicial proceedings concerning trusts, particularly trusts with contacts in more than one State or country. This article is not intended to provide comprehensive coverage of court jurisdiction or procedure with respect to trusts. These issues are better addressed elsewhere, for example in the State's rules of civil procedure or as provided by court rule. Section 201 [not adopted] makes clear that the jurisdiction of the court is available as invoked by interested persons or as otherwise provided by law. Proceedings involving the administration of a trust normally will be brought in the court at the trust's principal place of administration. Section 202 [72-38-203] provides that the trustee and beneficiaries are deemed to have consented to the jurisdiction of the court at the principal place of administration as to any matter relating to the trust. Sections 203 [72-38-201, adopted as modified] and 204 [72-38-205] are optional, bracketed provisions relating to subject-matter jurisdiction and venue.

Comment Section 201 of the Uniform Trust Code was not adopted and the Official Comment to Section 201 is included here:

While the Uniform Trust Code encourages the resolution of disputes without resort to the courts by providing such options as the nonjudicial settlement authorized by Section 111 [72-38-111], the court is always available to the extent its jurisdiction is invoked by interested persons. The jurisdiction of the court with respect to trust matters is inherent and historical and also includes the ability to act on its own initiative, to appoint a special master to investigate the facts of a case, and to provide a trustee with instructions even in the absence of an actual dispute.

Contrary to the trust statutes in some States, the Uniform Trust Code does not create a system of routine or mandatory court supervision. While subsection (b) [not adopted] authorizes a court to direct that a particular trust be subject to continuing court supervision, the court's intervention will normally be confined to the particular matter brought before it.

Subsection (c) [not adopted] makes clear that the court's jurisdiction may be invoked even absent an actual dispute. Traditionally, courts in equity have heard petitions for instructions and have issued declaratory judgments if there is a reasonable doubt as to the extent of the trustee's powers or duties. The court will not ordinarily instruct trustees on how to exercise discretion, however. *See* Restatement (Second) of Trusts §§ 187, 259 (1959). This section does not limit the court's equity jurisdiction. Beyond mentioning petitions for instructions and actions to declare rights, subsection (c) [not adopted] does not attempt to list the types of judicial proceedings involving trust administration that might be brought by a trustee or beneficiary. Such an effort is made in California Probate Code § 17200. Excluding matters not germane to the Uniform Trust Code, the California statute lists the following as items relating to the "internal affairs" of a trust: determining questions of construction; determining the existence or nonexistence of any immunity, power, privilege, duty, or right; determining the validity of a trust provision; ascertaining beneficiaries and determining to whom property will pass upon final or partial termination of the trust; settling accounts and passing upon the acts of a trustee, including the exercise of discretionary powers; instructing the trustee; compelling the trustee to report information about the trust or account to the beneficiary; granting powers to the trustee; fixing or allowing payment of the trustee's compensation or reviewing the reasonableness of the compensation; appointing or removing a trustee; accepting the resignation of a trustee; compelling redress of a breach of trust by any available remedy; approving or directing the modification or termination of a trust; approving or directing the combination or division of trusts; and authorizing or directing transfer of a trust or trust property to or from another jurisdiction.

Part Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Living Trust — Costs and Attorney Fees Awarded to Trustee From Trust — Judicial Construction of Trust Documents: Clifford Dern and his wife Mary established a living trust for the benefit of their family. Derril Dern, a cotrustee, refused to sign a quitclaim deed conveying various properties left to the trust beneficiaries, and Mary brought an action to determine the beneficiaries' rights. The District Court relied upon 25-10-103 for its determination that payment of costs was discretionary with the court. The Supreme Court held that 25-10-103 applies only in those situations in which costs are not otherwise provided for. In this case, article 3 of the trust documents states that the trustee may pay "expenses of administration" from the trust. In reliance on that language and on 72-33-631 (now repealed), the Supreme Court held that the fees were a necessary expense of the trust, given Derril's refusal to sign the deed. The Supreme Court also noted that 72-33-631 (now repealed) allows repayment of expenditures incurred by the trustee in administration of the trust, that that provision was patterned after a section of the California probate code, and that California decisions interpreting that section of the California probate code hold that reasonable attorney fees are considered necessary expenses of trust administration. The Supreme Court also pointed out that its decision to allow fees is further buttressed by decisions interpreting 72-12-206. Finally, because the trust documents provided that only expenses of the trust were to be paid from the "trust estate", without further delineation of what constitutes the "trust estate", the Supreme Court interpreted those words to mean the entire trust estate, and because the marital trust estate was the only remaining source of funding for the entire estate, the fees were to be paid from the marital trust estate. In re Estate of Dern, 279 M 138, 928 P2d 123, 53 St. Rep. 1087 (1996).

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Trustees of Dissolved Corporation: One of five statutory trustees in charge of the affairs of a dissolved corporation may not prosecute an appeal to the Supreme Court from an order appointing a receiver for the corporation against the wishes of his cotrustees, irrespective of whether unit or majority rule of action controls under certain statutes. Union Bank & Trust Co. of Helena v. Penwell, 99 M 255, 42 P2d 457 (1935).

72-38-201. Subject matter jurisdiction.

Official Comments

This section provides a means for distinguishing the jurisdiction of the court having primary jurisdiction for trust matters, whether denominated the probate court, chancery court, or by some other name, from other courts in a State that may on occasion resolve disputes concerning trusts. The section has been placed in brackets because the enacting jurisdiction may already address subject-matter jurisdiction by other statute or court rule. The topic also need not be addressed in States having unified court systems. For an explanation of types of proceedings which may be brought concerning the administration of a trust, see the Comment to Section 201 [not adopted; see Title 72, ch. 38, pt. 2 Official Comments].

Compiler's Comments

Source: While section 203 of the Uniform Law Commission's Uniform Trust Code addresses subject matter jurisdiction, this section substantially modifies section 203, which states: "(a) The [designate] court has exclusive jurisdiction of proceedings in this State brought by a trustee or beneficiary concerning the administration of a trust.

(b) The [designate] court has concurrent jurisdiction with other courts of this State of other proceedings involving a trust."

The language in this section relates to the language in 72-35-101 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

District Court Sitting in Probate — Lack of Subject Matter Jurisdiction Over Trust Code Issue: Two daughters sought to have the wife, Audrey, removed as trustee of their father's estate because of alleged mismanagement of the family trust. Before that action was addressed, Audrey petitioned the District Court under the closed probate proceedings to have herself removed as trustee and requested appointment of a corporate trustee successor. The two sisters moved to dismiss the petition on grounds that the court lacked subject matter jurisdiction. Without formally ruling on the motion to dismiss, the court concluded that Audrey's motion was properly filed under the original probate and proceeded to rule on other matters, including a motion for substitution of the judge. On appeal, the Supreme Court held that because Audrey was not attempting to reopen the probate proceedings or to relitigate any probate matter, Audrey's petition was a trust proceeding rather than a proceeding over the closed probate, and as such the District Court did not have subject matter jurisdiction to entertain Audrey's petition. The daughters' motion to dismiss should have been granted because a District Court sitting in probate has no jurisdiction over testamentary trusts that arise after probate is closed, so the case was remanded for further proceedings. In re Estate of Haugen, 2008 MT 304, 346 M 1, 192 P3d 1132 (2008). See also Stanley v. Lemire, 2006 MT 304, 334 M 489, 148 P3d 643 (2006).

Proper Imposition of Constructive Trust for Person Not Party to Action: May bought six certificates of deposit (CDs) on which she and her three sisters were named as joint depositors. In 1985, sister Marie moved to Montana to take care of May. Without telling the other sisters, Marie cashed four CDs before May died and two the day after. A large part of the money was put into Marie's account or was unaccounted for. Sister Hazel sued Marie, and the court held that Marie: (1) committed fraud, undue influence, and a breach of trust; (2) was subject to a constructive trust; and (3) owed sister Cecelia, who was not a party to the action, and Hazel each one-third of the total value of the CDs. Though Cecelia was not a party, the court had jurisdiction to award Cecelia judgment for her one-third share. Cecelia's rights were identical to Hazel's, Cecelia's interests were adequately protected, and Marie's interests were not adversely affected by the fact Cecelia was not a party. Although jurisdiction over the person upon whom a trust is imposed is pivotal, not all potential beneficiaries need be parties. Howard v. Dalio, 249 M 316, 815 P2d 1150, 48 St. Rep. 755 (1991).

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Testamentary Trustee's Duty to Make Account: Under 72-12-101 (now repealed), a testamentary trustee must account to the District Court sitting in probate, covering all his acts as trustee under the will, the method thereby provided being exclusive; the will governs the trusteeship and the time for its determination. Montgomery v. Gilbert, 111 M 250, 108 P2d 616 (1940).

Federal Court Without Jurisdiction: Federal Court was without jurisdiction to set aside decree of Probate Court of state when law provided ample means for revision and correction of probate decrees by Probate Courts themselves. Montgomery v. Gilbert, 77 F2d 39 (9th Cir. 1935).

Jurisdiction of District Court:

The District Court, sitting in probate in a proceeding by testamentary trustees seeking settlement of their accounts, has the same general jurisdiction and powers as are exercised by a Court of Equity over trusts. In re Harper's Estate, 98 M 356, 40 P2d 51 (1934).

Section 72-12-101 (now repealed) confers exclusive jurisdiction upon the District Court when sitting as a Probate Court to determine whether the purpose of the testamentary trust has been accomplished, wherever it has acquired jurisdiction of the estate by probate of the will which has created a trust to continue after final distribution. Philbrick v. Am. Bank & Trust Co., 58 M 376, 193 P 59 (1920).

72-38-202. Powers of court.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in 72-35-102 (now repealed).

72-38-203. Jurisdiction over trustees and beneficiaries.

Official Comments

This section clarifies that the courts of the principal place of administration have jurisdiction to enter orders relating to the trust that will be binding on both the trustee and beneficiaries. Consent to jurisdiction does not dispense with any required notice, however. With respect to jurisdiction over a beneficiary, the Comment to Uniform Probate Code § 7-103, upon which portions of this section are based, is instructive: It also seems reasonable to require beneficiaries to go to the seat of the trust when litigation has been instituted there concerning a trust in which they claim beneficial interests, much as the rights of shareholders of a corporation can be determined at a corporate seat. The settlor has indicated a principal place of administration by its selection of a trustee or otherwise, and it is reasonable to subject rights under the trust to the jurisdiction of the Court where the trust is properly administered.

The jurisdiction conferred over the trustee and beneficiaries by this section does not preclude jurisdiction by courts elsewhere on some other basis. Furthermore, the fact that the courts in a new State acquire jurisdiction under this section following a change in a trust's principal place of administration does not necessarily mean that the courts of the former principal place of administration lose jurisdiction, particularly as to matters involving events occurring prior to the transfer.

The jurisdiction conferred by this section is limited. Pursuant to subsection (b) [72-38-203(2)], until a distribution is made, jurisdiction over a beneficiary is limited to the beneficiary's interests in the trust. Personal jurisdiction over a beneficiary is conferred only upon the making of a distribution. Subsection (b) [72-38-203(3)] also gives the court jurisdiction over other recipients of distributions. This would include individuals who receive distributions in the mistaken belief they are beneficiaries.

For a discussion of jurisdictional issues concerning trusts, see 5A Austin W. Scott & William F. Fratcher, The Law of Trusts §§ 556-573 (4th ed. 1989).

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in 72-35-104 (now repealed).

72-38-204. Basis of jurisdiction over trust, trust property, and trust parties.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in 72-35-105 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Service of Process by Publication Proper When Diligent Inquiry Made for Heirs: Following service of process by publication, default judgment was entered against any potential heirs who failed to appear. The doctrine of laches precluded claimants from obtaining redistribution of an estate following distribution to heirs who timely appeared and litigated the distribution. In re Estate of Bovey, 2010 MT 217, 358 Mont. 14, 244 P.3d 716.

72-38-205. Venue.

Official Comments

This optional, bracketed section is made available for jurisdictions that conclude that venue for a judicial proceeding involving a trust is not adequately addressed in local rules of civil procedure. For jurisdictions enacting this section, general rules governing venue continue to apply in cases not covered by this section. This includes most proceedings where jurisdiction over a trust, trust property, or parties to a trust is based on a factor other than the trust's principal place of administration. The general rules governing venue also apply when the principal place of administration of a trust is in another locale, but jurisdiction is proper in the enacting State.

Compiler's Comments

Source: This section modifies section 204 of Uniform Law Commission's Uniform Trust Code by adding subsection (3).

The language in this section relates to the language in 72-35-106 (now repealed).

Case Notes

More Specific Statute Controls: Parties to a case over tortious management of a trust disagreed on venue. The District Court ruled, based on 72-38-205, for venue in the place of administration rather than in the place of the tort occurred, as 25-2-122 would call for. The Supreme Court affirmed the choice of venue, finding that 72-38-205 controlled as the more specific statute. Betts v. Gunlikson, 2019 MT 183, 396 Mont. 509, 445 P.3d 1223.

72-38-206. Rules of procedure in trust proceedings.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

72-38-207. Jury trial.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in 72-35-107 (now repealed).

72-38-208. Application.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in 72-35-201 (now repealed).

72-38-209. Notice — method and time of giving.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in Title 72, chapter 35, part 2 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Order Not Final When Time to Appeal Not Expired — Rules of Civil Procedure Applicable to Formal Probate Proceedings: An order becomes final only when the time to appeal has expired.

In this case, plaintiff bank asserted that the District Court's order approving a trust accounting was conclusive on all persons pursuant to 72-35-206 (now repealed), so the accounting could not be reopened on defendants' motion for a new trial. However, the time to appeal had not expired when defendants moved for a new trial, so the order was not final and the accounting was subject to a postjudgment motion for a new trial. Further, the Montana Rules of Civil Procedure supplied an appropriate mechanism for filing a motion after entry of a trust order because the rules apply to formal probate proceedings. Wells Fargo Bank, N.A. v. Kaml, 2008 MT 153, 343 M 240, 184 P3d 296 (2008).

72-38-210. Waiver of notice.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in Title 72, chapter 35, part 2 (now repealed).

72-38-211. Pleadings — when orders or notice binding one binds another — representation.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in Title 72, chapter 35, part 2 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Service of Notice of Entry of Order of Judgment on Trust Beneficiaries Required: Trust beneficiaries are indispensable parties to formal statutory proceedings who are considered to have "appeared" as a matter of law and are entitled to receive notice of the proceedings and notice of entry of the order of judgment. In this case, defendant trust beneficiaries did not move for a new trial until 11 years after entry of the order of judgment, but because defendants never received notice of the entry of the judgment as required by 72-35-306 (now repealed), the statute of limitations on filing postjudgment motions had not expired when their motion for a new trial was filed with the District Court and therefore was properly granted. Wells Fargo Bank, N.A. v. Kaml, 2008 MT 153, 343 M 240, 184 P3d 296 (2008).

72-38-212. Additional notice.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in 72-35-207 (now repealed).

72-38-213. Petitioners — grounds for petition.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in 72-35-301 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Partial Revocation of Trust Rendered Ineffective by Warranty Deed Absent Required Written Notification to Cotrustees: Cole, a California resident, established a revocable trust, naming himself as trustee and naming cotrustees, and deeded property in Montana to himself, but did not record the deed. The trust document allowed Cole to amend or revoke the trust at any time by filing written notice with the trustees. Cole later executed and recorded a handwritten warranty deed granting the property to his wife and him as joint tenants with the right of survivorship. The trust was amended to revoke all prior amendments, grant a life estate in the property to his wife, and obligate the trust to pay expenses associated with the property, with the remaining net trust income to be paid to his wife during her lifetime. The cotrustees were never notified as required in the original trust document. After Cole died, his widow filed an inheritance tax return naming herself as sole owner of the property based on the warranty deed. The trustees filed a petition for construction of the trust, requesting that the warranty deed be voided and that the property be declared an asset of the previous revocable trust. The District Court granted summary judgment to the trust, and the widow appealed. The Supreme Court held that because the record contained no evidence that Cole or anyone on his behalf served the trustees with written notice of the revocation, under California law, the partial revocation, via the warranty deed, was rendered ineffective. Summary judgment was affirmed. Cole v. Cole, 2003 MT 229, 317 M 197, 75 P3d 1280 (2003). See also Conservatorship of Irvine, 47 Calif. Rep. 2d 587 (Calif. Ct. App. 1995).

Sale of Ranch Within Trustee's Discretion — Motion to Withdraw Petition Authorizing Sale Properly Denied: Trustee Bragg sought but was denied a motion to withdraw her previously granted petition for declaration of right and authority to sell real property held in trust, contending that a review of the will as a whole revealed testator's intent to preserve the real property, a ranch, intact unless sale was necessary to maintain the widow's health and maintenance. The Supreme Court concluded that under the express terms of the trust, it was clearly within Bragg's authority to sell the ranch or any other asset consistent with her fiduciary duties and that because the sale was fair and reasonable, the District Court properly denied the motion to change the character of the trust investment from land to cash. In re George Trust, 253 M 341, 834 P2d 1378, 49 St. Rep. 424 (1992).

Trial Necessary on Facts in Support of Relief Not Specifically Requested: Former Rule 54(c), M.R.Civ.P. (now superseded), allows a court to grant relief to which a party is entitled even if such relief was not demanded in the party's pleading. However, the court may not grant relief not specifically requested when the facts and issues necessary to support that relief have not been tried and proved at trial. Therefore, the District Court's order to proceed with a sale of trust property was in error when the validity of the sale agreement and the equitable question of specific performance were never properly raised and litigated. In re George Trust, 253 M 341, 834 P2d 1378, 49 St. Rep. 424 (1992), following the rationale in Smith v. Zepp, 173 M 358, 567 P2d 923 (1977).

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Business Managers of Union — Administrative Remedy Against Them Unavailable — No Exhaustion Requirement: A union need not exhaust internal administrative remedies as a condition of filing suit in District Court when the union's claim for relief requested recovery of union money and property, a remedy not available through internal union procedures. Local Union No. 400 v. Bosh, 220 M 304, 715 P2d 36, 43 St. Rep. 388 (1986).

72-38-214. Commencement of proceedings.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.
The language in this section relates to the language in 72-35-302 (now repealed).

72-38-215. Dismissal of petition.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.
The language in this section relates to the language in 72-35-303 (now repealed).

72-38-216. Request for special notice.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.
The language in this section relates to the language in 72-35-307 (now repealed).

72-38-217. Request for copy of petition.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.
The language in this section relates to the language in 72-35-308 (now repealed).

72-38-218. Authority to make necessary orders — temporary trustee.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.
The language in this section relates to the language in 72-35-311 (now repealed).

72-38-219. Appeal.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.
The language in this section relates to the language in 72-35-312 (now repealed).

Case Notes

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Objection to Termination of Trust Barred by Laches: Where 4 years after appellant's appointment as trustee appellant objected to the termination of a trust on the grounds that the decree of distribution made 32 years earlier was based on fraud and offered no reasonable explanation for his failure to earlier file an objection, the appellant would be barred by laches from objecting to the petition for termination of the trust. In re Estate of Wallace v. McAlear, 186 M 18, 606 P2d 136 (1980).

72-38-220. Intermittent judicial intervention in trust administration.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in 72-35-314 (now repealed).

72-38-221. Enforcement of beneficiary's rights under charitable trust by attorney general.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in 72-35-315 (now repealed).

Part 3
Representation

Part Official Comments

This article deals with representation of beneficiaries, both representation by fiduciaries (personal representatives, trustees, guardians, and conservators), and what is known as virtual representation. Representation is a topic not adequately addressed under the trust law of most States. Representation is addressed in the Restatement (First) of Property §§ 180-186 (1936), but the coverage of this article is more complete.

Section 301 [72-38-301] is the introductory section, laying out the scope of the article. The representation principles of this article have numerous applications under this Code. The representation principles of the article apply for purposes of settlement of disputes, whether by a court or nonjudicially. They apply for the giving of required notices. They apply for the giving of consents to certain actions.

Sections 302-305 [72-38-302 through 72-38-305] cover the different types of representation. Section 302 [72-38-302] deals with representation by the holder of a general testamentary power of appointment. (Revocable trusts and presently exercisable general powers of appointment are covered by Section 603 [72-38-603], which grant the settlor or holder of the power all rights of the beneficiaries or persons whose interests are subject to the power). Section 303 [72-38-303] deals with representation by a fiduciary, whether of an estate, trust, conservatorship, or guardianship. The section also allows a parent without a conflict of interest to represent and bind a minor or unborn child. Section 304 [72-38-304] is the virtual representation provision. It provides for representation of and the giving of a binding consent by another person having a substantially identical interest with respect to the particular issue. Section 305 [72-38-305] authorizes the court to appoint a representative to represent the interests of unrepresented persons or persons for whom the court concludes the other available representation might be inadequate.

The provisions of this article are subject to modification in the terms of the trust. *See* Section 105 [72-38-105]. Settlors are free to specify their own methods for providing substituted notice and obtaining substituted consent.

72-38-301. Representation — basic effect.

Official Comments

This section is general and introductory, laying out the scope of the article.

Subsection (a) [72-38-301(1)] validates substitute notice to a person who may represent and bind another person as provided in the succeeding sections of this article. Notice to the substitute has the same effect as if given directly to the other person. Subsection (a) [72-38-301(1)] does not apply to notice of a judicial proceeding. Pursuant to Section 109(d) [72-38-109(4), adopted as modified], notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure [72-38-208 through 72-38-212], which may require that notice not only be given to the representative but also to the person represented. For a model statute for the giving of notice in such cases, see Unif. Probate Code Section 1-403(3). Subsection (a) [72-38-301(1)] may be used to facilitate the giving of notice to the qualified beneficiaries of a proposed transfer of principal place of administration (Section 108(d)) [72-38-108(4)], of a proposed trust combination or division (Section 417) [72-38-417], of a temporary assumption of duties without accepting trusteeship (Section 701(c)(1)) [72-38-701(3)(a)], of a trustee's resignation (Section 705(a)(1)) [72-38-705(1)(a)], and of a trustee's report (Section 813(c)) [72-38-813(3)].

Subsection (b) [72-38-301(2)] deals with the effect of a consent, whether by actual or virtual representation. Subsection (b) [72-38-301(2)] may be used to facilitate consent of the beneficiaries to modification or termination of a trust, with or without the consent of the settlor (Section 411) [72-38-411], agreement of the qualified beneficiaries on appointment of a successor trustee of a noncharitable trust (Section 704(c)(2)) [72-38-704(3)(b)], and a beneficiary's consent to or release or affirmance of the actions of a trustee (Section 1009) [72-38-1009]. A consent by a representative bars a later objection by the person represented, but a consent is not binding if the person represented raises an objection prior to the date the consent would otherwise become effective. The possibility that a beneficiary might object to a consent given on the beneficiary's behalf will not be germane in many cases because the person represented will be unborn or unascertained. However, the representation principles of this article will sometimes apply to adult and competent beneficiaries. For example, while the trustee of a revocable trust entitled to a pourover devise has authority under Section 303 to approve the personal representative's account on behalf of the trust beneficiaries, such consent would not be binding on a trust beneficiary who registers an objection. Subsection (b) [72-38-301(2)] implements cases such as *Barber v. Barber*, 837 P.2d 714 (Alaska 1992), which held that the a refusal to allow an objection by an adult competent remainder beneficiary violated due process.

Subsection (c) [72-38-301(3)] implements the policy of Sections 411 [72-38-411] and 602 [72-38-602] requiring express authority in the power of attorney or approval of court before the settlor's agent, conservator or guardian may consent on behalf of the settlor to the termination or revocation of the settlor's revocable trust.

2004 Amendment. For an explanation of the new subsection (d) and of the bracketed language in subsection (c), see the comment to the amendment to Section 411 [72-38-411].

Compiler's Comments

2015 Amendments — Composite Section: Chapter 55 in (3) substituted "72-38-411" for "72-38-410"; and in (4) substituted "72-38-411(1)" for "72-38-410(1)". Amendment effective October 1, 2015.

Chapter 181 inserted (5) concerning which provisions supersede in the event of a conflict. Amendment effective October 1, 2015.

72-38-302. Representation by holder of general testamentary power of appointment.

Official Comments

This section specifies the circumstances under which a holder of a general testamentary power of appointment may receive notices on behalf of and otherwise represent and bind persons whose interests are subject to the power, whether as permissible appointees, takers in default, or otherwise. Such representation is allowed except to the extent there is a conflict of interest with respect to the particular matter or dispute. Typically, the holder of a general testamentary power of appointment is also a life income beneficiary of the trust, oftentimes of a trust intended to qualify for the federal estate tax marital deduction. *See* I.R.C. § 2056(b)(5). Without the exception for conflict of interest, the holder of the power could act in a way that could enhance the holder's income interests to the detriment of the appointees or takers in default, whoever they may be.

72-38-303. Representation by fiduciaries and parents.

Official Comments

This section allows for representation of persons by their fiduciaries (conservators, guardians, agents, trustees, and personal representatives), a principle that has long been part of the law. Paragraph (6) [72-38-303(6)], which allows parents to represent their children, is more recent, having originated in 1969 upon approval of the Uniform Probate Code. This section is not limited to representation of beneficiaries. It also applies to representation of the settlor. Representation is not available if the fiduciary or parent is in a conflict position with respect to the particular matter or dispute, however. A typical conflict would be where the fiduciary or parent seeking to represent the beneficiary is either the trustee or holds an adverse beneficial interest.

Paragraph (2) [72-38-303(2)] authorizes a guardian to bind and represent a ward if a conservator of the ward's estate has not been appointed. Granting a guardian authority to represent the ward with respect to interests in the trust can avoid the need to seek appointment of a conservator.

This grant of authority to act with respect to the ward's trust interest may broaden the authority of a guardian in some States although not in States that have adopted the Section 1-403 of the Uniform Probate Code, from which this section was derived. Under the Uniform Trust Code, a "conservator" is appointed by the court to manage the ward's property, a "guardian" to make decisions with respect to the ward's personal affairs. *See* Section 103 [72-38-103].

Paragraph (3) [72-38-303(3)] authorizes an agent to represent a principal only to the extent the agent has authority to act with respect to the particular question or dispute. Pursuant to Sections 411 [72-38-411] and 602 [72-38-602], an agent may represent a settlor with respect to the amendment, revocation or termination of the trust only to the extent this authority is expressly granted either in the trust or the power. Otherwise, depending on the particular question or dispute, a general grant of authority in the power may be sufficient to confer the necessary authority.

Compiler's Comments

Source: This section modifies section 303 of the Uniform Law Commission's Uniform Trust Code by adding the order of priority listed in subsections (6)(a) through (6)(d).

72-38-304. Representation by person having substantially identical interest.

Official Comments

This section authorizes a person with a substantially identically [identical] interest with respect to a particular question or dispute to represent and bind an otherwise unrepresented minor, incapacitated or unborn individual, or person whose location is unknown and not reasonably ascertainable. This section is derived from Section 1-403(2)(iii) of the Uniform Probate Code, but with several modifications. Unlike the UPC, this section does not expressly require that the representation be adequate, the drafters preferring to leave this issue to the courts. Furthermore, this section extends the doctrine of virtual representation to representation of minors and incapacitated individuals. Finally, this section does not apply to the extent there is a conflict of interest between the representative and the person represented.

Restatement (First) of Property §§ 181 and 185 (1936) provide that virtual representation is inapplicable if the interest represented was not sufficiently protected. Representation is deemed sufficiently protective as long as it does not appear that the representative acted in hostility to the interest of the person represented. Restatement (First) of Property § 185 (1936). Evidence of inactivity or lack of skill is material only to the extent it establishes such hostility. Restatement (First) of Property § 185 cmt. b (1936).

Typically, the interests of the representative and the person represented will be identical. A common example would be a trust providing for distribution to the settlor's children as a class, with an adult child being able to represent the interests of children who are either minors or unborn. Exact identity of interests is not required, only substantial identity with respect to the particular question or dispute. Whether such identity is present may depend on the nature of the interest. For example, a presumptive remaindermen may be able to represent alternative remaindermen with respect to approval of a trustee's report but not with respect to interpretation of the remainder provision or termination of the trust. Even if the beneficial interests of the representative and person represented are identical, representation is not allowed in the event of conflict of interest. The representative may have interests outside of the trust that are adverse to the interest of the person represented, such as a prior relationship with the trustee or other beneficiaries. *See* Restatement (First) of Property § 185 cmt. d (1936).

72-38-305. Appointment of representative.

Official Comments

This section is derived from Section 1-403(4) of the Uniform Probate Code. However, this section substitutes "representative" for "guardian ad litem" to signal that a representative under this Code serves a different role. Unlike a guardian ad litem, under this section a representative can be appointed to act with respect to a nonjudicial settlement or to receive a notice on a beneficiary's behalf. Furthermore, in making decisions, a representative may consider general benefit accruing to living members of the family. "Representative" is placed in brackets in case the enacting jurisdiction prefers a different term. The court may appoint a representative to act for a person even if the person could be represented under another section of this article.

Compiler's Comments

Source: The language in this section relates to the language in 72-35-313 (now repealed).

Part 4
Creation, Validity, Modification, and Termination of Trust

Part Official Comments

Sections 401 [72-38-401] through 409 [72-38-409], which specify the requirements for the creation of a trust, largely codify traditional doctrine. Section 401 [72-38-401] specifies the methods by which trusts are created, that is, by transfer of property, self-declaration, or exercise of a power of appointment. Whatever method may have been employed, other requirements, including intention, capacity and, for certain types of trusts, an ascertainable beneficiary, also must be satisfied before a trust is created. These requirements are listed in Section 402 [72-38-402]. Section 403 [72-38-403] addresses the validity in the enacting jurisdiction of trusts created in other jurisdictions. A trust not created by will is validly created if its creation complied with the law of specified jurisdictions in which the settlor or trustee had a significant contact. Section 404 [72-38-404] forbids trusts for illegal or impossible purposes, and requires that a trust and its terms must be for the benefit of its beneficiaries. Section 405 [72-38-405] recites the permitted purposes of a charitable trust. Section 406 [72-38-406] lists some of the grounds for contesting a trust. Section 407 [not adopted] validates oral trusts. The remaining sections address what are often referred to as "honorary" trusts, although such trusts are valid and enforceable under this Code. Section 408 [72-38-408] covers a trust for the care of an animal; Section 409 [72-38-409] allows creation of a trust for another noncharitable purpose such as maintenance of a cemetery lot.

Sections 410 [72-38-410] through 417 [72-38-417] provide a series of interrelated rules on when a trust may be terminated or modified other than by its express terms. The overall objective of these sections is to enhance flexibility consistent with the principle that preserving the settlor's intent is paramount. Termination or modification may be allowed upon beneficiary consent if the court concludes that the trust or a particular provision no longer achieves a material purpose or if the settlor concurs (Section 411) [72-38-411], by the court in response to unanticipated circumstances or due to ineffective administrative terms (Section 412) [72-38-412], or by the court or trustee if continued administration under the trust's existing terms would be uneconomical (Section 414) [72-38-414]. A trust may be reformed to correct a mistake of law or fact (Section 415) [72-38-415], or modified to achieve the settlor's tax objectives (Section 416) [72-38-416]. Trusts may be combined or divided (Section 417) [72-38-417]. A trustee or beneficiary has standing to petition the court with respect to a proposed termination or modification (Section 410) [72-38-410].

Section 413 [72-38-413] codifies and at the same time modifies the doctrine of cy pres, at least as applied in most States. The Uniform Trust Code authorizes the court to apply cy pres not only if the original means becomes impossible or unlawful but also if the means become impracticable or wasteful. Section 413 [72-38-413] also creates a presumption of general charitable intent. Upon failure of the settlor's original plan, the court cannot divert the trust property to a noncharity unless the terms of the trust expressly so provide. Furthermore, absent a contrary provision in the terms of the trust, limits are placed on when a gift over to a noncharity can take effect upon failure or impracticality of the original charitable purpose. The gift over is effective only if, when the provision takes effect, the trust property is to revert to the settlor and the settlor is still living, or fewer than 21 years have elapsed since the date of the trust's creation.

The requirements for a trust's creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor. *See* Section 105(b)(1), (3) [72-38-105(2)(a), (2)(c)]. Nor may the settlor negate the court's ability to modify or terminate a trust as provided in Sections 410 [72-38-410] through 416 [72-38-416]. *See* Section 105(b)(4) [72-38-105(2)(d)]. However, a settlor is free to restrict or modify the trustee's power to terminate an uneconomic trust as provided in Sections 414 [72-38-414], and the trustee's power to combine and divide trusts as provided in Section 417 [72-38-417].

Part Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Contractual Directive From Joint Will Concerning Estate Residue Not Dispositive of Validity of Alternate Living Trust Inheritance Scheme: Spouses agreed in a joint will that the residue of the surviving spouse's estate was to be divided among six children. The surviving wife transferred most of her property into a living trust and named only four children as the beneficiaries. Because the will did not restrict the wife from transferring assets into a trust, the issue of whether the wife retained ownership of trust property as "residue" subject to the will's provisions related to the validity of the trust rather than to the interpretation of the will. In re Estate of Hedrick, 2014 MT 118, 375 Mont. 74, 324 P.3d 1202.

Dismissal Proper — Trustee of Invalid Trust Not Real Party in Interest: The plaintiff purchased real property from the defendants and requested that the defendants name him as a "trustee" in the deed based upon legal advice the plaintiff had received years ago in another state. Subsequently, the plaintiff, as a "trustee", sued the defendants for property damages and asserted numerous tort claims. The District Court granted summary judgment to the defendants under former Rule 17(a), M.R.Civ.P. (now superseded), on the basis that the plaintiff was not the trustee of any valid trust and, therefore, was not a real party in interest. The Supreme Court affirmed, concluding that the District Court properly determined that the plaintiff was not the trustee of a valid trust and that the plaintiff could have saved the lawsuit from dismissal simply by suing in the plaintiff's individual capacity, rather than as the "trustee" of an invalid trust. Boehm v. Cokedale, LLC, 2011 MT 224, 362 Mont. 65, 261 P.3d 994.

Living Trust — Judicial Construction of Amendment so as to Give Effect to All Provisions: Clifford and his wife Mary established a living trust for the benefit of their family. The trust documents provided that major modifications to the trust should be made through the formal amendment process but that minor modifications could be made through trust minutes. Other trust documents provided that amendments had to be made by Clifford and Mary acting together, and the first page of the trust minutes provided that instructions to successor trustees must be signed and dated by the trust settlors. The District Court found that the fourth trust minute, amending other trust documents so as to convey the 120-acre farm on which Clifford and Mary lived to Mary, to be valid and binding. The Supreme Court held that the fourth trust minute, which was signed only by Clifford, was invalid because a construction of all of the other provisions of the trust dealing with amendments and the provisions of 1-4-101 required that the fourth trust minute be signed by both Clifford and Mary. Consequently, the Supreme Court held that the farm remained in the separate property trust and was conveyed to the children of Clifford and Mary and not to Mary alone. In re Estate of Dern, 279 M 138, 928 P2d 123, 53 St. Rep. 1087 (1996).

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Property Transfer Required to Establish Trust — Trust Agreement Alone Insufficient: In a case applying the 1981 version of 72-20-107 and 72-20-108 (both now repealed) in determining whether a trust agreement itself would qualify as an instrument of conveyance to create a valid trust, the Supreme Court first noted that, absent a transfer of property, no trust of property is created. Here, the trust agreement in question did not properly describe the property within the document itself or attach a description as an exhibit when the document was signed; therefore, the trust failed to convey the property at its execution. An attachment could have validated the trust agreement as an instrument of conveyance only if the person executing the document were to have redelivered, confirmed, ratified, or adopted the transfer, but there was no evidence of that having occurred. The express trust at issue was invalid because there was no transfer of property into the trust. McCormick v. Brevig, 1999 MT 86, 294 M 144, 980 P2d 603, 56 St. Rep. 355 (1999), following In re Estate of Severson, 459 NW 2d 473 (Iowa 1990), and followed in Cate-Schweyen v. Cate, 2000 MT 345, 303 M 232, 15 P3d 467, 57 St. Rep. 1478 (2000).

Objection to Termination of Trust Barred by Laches: Where 4 years after appellant's appointment as trustee appellant objected to the termination of a trust on the grounds that the decree of distribution made 32 years earlier was based on fraud and offered no reasonable explanation for his failure to earlier file an objection, the appellant would be barred by laches from objecting to the petition for termination of the trust. In re Estate of Wallace v. McAlear, 186 M 18, 606 P2d 136 (1980).

Resulting Trust as Equitable Mortgage: When a conveyance is executed from the vendor direct to the lender to secure a loan of the purchase money made by him to the purchaser, the legal title is held not only for the lender as security but also in trust for the borrower for the purpose of finally having title go to him. Therefore, the transaction between the parties constitutes a resulting trust in the form of an equitable mortgage. Bermes v. Sylling, 179 M 448, 587 P2d 377 (1978).

Life Income Sole Purpose — Termination: Where sole purpose and object of trust was payment of income for life to testator's wife, mother, sister, and son, and such obligations were either fulfilled or no longer possible to fulfill, Trial Court properly terminated trust. Testamentary Trust of Child, 153 M 349, 457 P2d 447 (1969).

Reservation of Power of Revocation: The right to reserve the power to revoke and still establish a valid trust is well established in the law of trusts, and the right is recognized by 72-23-502 (now repealed). Investors Stock Fund, Inc. v. Roberts, 179 F. Supp. 185 (D.C. Mont. 1959), affirmed in 286 F2d 647 (9th Cir. 1961).

Forfeiture of Option: Neighboring ranchers signed a writing, agreeing to become equal partners in purchase of adjoining grazing leases and ranch lands. Each contributed $1,000 to bind a 1-year purchase option covering lands and leases. They forfeited the option and option payment but continued their joint activities. Nine months after forfeiture one partner purchased all for himself, taking title jointly with his wife, and they in turn deeded a portion to their son. The wife and son, as donees, were controlled by the donor's actions. Bradbury v. Nagelhus, 132 M 417, 319 P2d 503 (1957).

Involuntary Trust: An involuntary trust may be revoked only by agreement or by the Courts. Bradbury v. Nagelhus, 132 M 417, 319 P2d 503 (1957).

Revocation of Trust: Once there is acceptance, actual or presumed, a trust may be revoked only by agreement or by the Courts. Bradbury v. Nagelhus, 132 M 417, 319 P2d 503 (1957).

Breach of Law: A resulting trust does not spring from a contract between the parties but arises from a breach of law and the acts of the parties. State ex rel. Gallatin County High School v. Brandenburg, 107 M 199, 82 P2d 593 (1938).

Existence of Relationship: Section 72-20-208 (now repealed) by its express terms applies after the relation of trustee and beneficiary has been created, as distinguished from the operation of 28-2-804, in a case where the transactions under consideration were those whereby the relation of trustee and beneficiary was created. Hodgkiss v. Northland Petroleum Consol., 104 M 328, 67 P2d 811 (1937).

Statutes to Be Construed Together: In determining what constitutes a trust and the manner of its creation, 72-20-107 and 72-24-101 through 72-24-103 (now repealed) must be construed together. Hodgkiss v. Northland Petroleum Consol., 104 M 328, 67 P2d 811 (1937).

Security for Unpaid Balance: If a trust is created to secure to the beneficiary an unpaid balance due him, he can take advantage of it at any time before its rescission. Willoburn Ranch Co. v. Yegen, 45 M 254, 122 P 915 (1912).

72-38-401. Methods of creating trust.

Official Comments

This section is based on Restatement (Third) of Trusts Section 10 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts Section 17 (1959). Under the methods specified for creating a trust in this section, a trust is not created until it receives property. For what constitutes an adequate property interest, see Restatement (Third) of Trusts Sections 40-41 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 74-86 (1959). The property interest necessary to fund and create a trust need not be substantial. A revocable designation of the trustee as beneficiary of a life insurance policy or employee benefit plan has long been understood to be a property interest sufficient to create a trust. *See* Section 103(12) [72-38-103(15)] ("property" defined). Furthermore, the property interest need not be transferred contemporaneously with the signing of the trust instrument. A trust instrument signed during the settlor's lifetime is not rendered invalid simply because the trust was not created until property was transferred to the trustee at a much later date, including by contract after the settlor's death. A pourover devise to a previously unfunded trust is also valid and may constitute the property interest creating the trust. *See* Unif. Testamentary Additions to Trusts Act Section 1 (1991), *codified at* Uniform Probate Code Section 2-511 (pourover devise to trust valid regardless of existence, size, or character of trust corpus). *See also* Restatement (Third) of Trusts Section 19 (Tentative Draft No. 1, approved 1996).

While this section refers to transfer of property to a trustee, a trust can be created even though for a period of time no trustee is in office. *See* Restatement (Third) of Trusts Section 2 cmt. g (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 2 cmt. i (1959). A trust can also be created without notice to or acceptance by a trustee or beneficiary. *See* Restatement (Third) of Trusts Section 14 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 35-36 (1959).

The methods specified in this section are not exclusive. Section 102 [72-38-102] recognizes that trusts can also be created by special statute or court order. *See also* Restatement (Third) of Trusts Section 1 cmt. a (Tentative Draft No. 1, approved 1996); Unif. Probate Code Section 2-212 (elective share of incapacitated surviving spouse to be held in trust on terms specified in statute); Unif. Probate Code Section 5-411(a)(4) (conservator may create trust with court approval); Restatement (Second) of Trusts Section 17 cmt. i (1959) (trusts created by statutory right to bring wrongful death action).

A trust can also be created by a promise that creates enforceable rights in a person who immediately or later holds these rights as trustee. *See* Restatement (Third) of Trusts Section 10(e) (Tentative Draft No. 1, approved 1996). A trust thus created is valid notwithstanding that the trustee may resign or die before the promise is fulfilled. Unless expressly made personal, the promise can be enforced by a successor trustee. For examples of trusts created by means of promises enforceable by the trustee, see Restatement (Third) of Trusts Section 10 cmt. g (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 14 cmt. h, 26 cmt. n (1959).

A trust created by self-declaration is best created by reregistering each of the assets that comprise the trust into the settlor's name as trustee. However, such reregistration is not necessary to create the trust. *See, e.g., In re Estate of Heggstad,* 20 Cal. Rptr. 2d 433 (Ct. App. 1993); Restatement (Third) of Trusts Section 10 cmt. e (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 17 cmt. a (1959). A declaration of trust can be funded merely by attaching a schedule listing the assets that are to be subject to the trust without executing separate instruments of transfer. But such practice can make it difficult to later confirm title with third party transferees and for this reason is not recommended.

While a trust created by will may come into existence immediately at the testator's death and not necessarily only upon the later transfer of title from the personal representative, Section 701 [72-38-701] makes clear that the nominated trustee does not have a duty to act until there is an acceptance of the trusteeship, express or implied. To avoid an implied acceptance, a nominated testamentary trustee who is monitoring the actions of the personal representative but who has not yet made a final decision on acceptance should inform the beneficiaries that the nominated trustee has assumed only a limited role. The failure so to inform the beneficiaries could result in liability if misleading conduct by the nominated trustee causes harm to the trust beneficiaries. *See* Restatement (Third) of Trusts Section 35 cmt. b (Tentative Draft No. 2, approved 1999).

While this section confirms the familiar principle that a trust may be created by means of the exercise of a power of appointment (paragraph (3)) [72-38-401(3)], this Code does not legislate comprehensively on the subject of powers of appointment but addresses only selected issues. *See* Sections 302 [72-38-302] (representation by holder of general testamentary power of appointment); 505(b) [72-38-505(2)] (creditor claims against holder of power of withdrawal); and 603(b) [72-38-603(2)] (rights of holder of power of withdrawal). For the law on powers of appointment generally, see Restatement (Second) of Property: Donative Transfers Sections 11.1-24.4 (1986); Restatement (Third) of Property: Wills and Other Donative Transfers (in progress).

Compiler's Comments

Source: The language in this section relates to the language in 72-33-201 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

General Power of Attorney — Authority to Transfer Funds by and to Holder of Power of Attorney Within Scope: The decedent was diagnosed with cancer and given a month to live. A month later, he was admitted to the hospital, where he signed a general durable power of attorney authorizing his longtime companion. She later transferred funds from his bank account to her own account pursuant to the decedent's wishes. The decedent's brother filed suit and argued that the transfers were for her own personal benefit, and therefore she exceeded the authority granted to her in the power of attorney. At trial, however, the District Court examined the plain language of the power of attorney, which did not prohibit or limit the companion's authority to make the transfers of funds, and ruled in her favor. On appeal, the Supreme Court affirmed. In re Estate of Cook, 2020 MT 240, 401 Mont. 374, 472 P.3d 1179.

Express Trust Relationship Between Hutterite Colony and Colony Members: The District Court overruled a hearings examiner's findings that an express trust existed between an incorporated Hutterite Colony and the colony members. On appeal, the Supreme Court applied neutral secular principles of law to this church property dispute and reversed. All colony property was held in the name of the corporation under a communal property arrangement wherein all colony members shared their productivity and no one owned individual property. The articles of incorporation provided that the colony was devoted exclusively to agricultural pursuits for the livelihood of its members, and corporate assets were held in trust for the benefit of colony members and their heirs. Thus, an express trust existed between the colony and its members, and as trustee, the colony had a duty to administer the trust in the interest of its members as beneficiaries. The hearings examiner's findings that a trust existed was supported by substantial credible evidence, and the District Court erred in overturning those findings. In re Fair Hearing of Hofer v. Dept. of Public Health and Human Services, 2005 MT 302, 329 M 368, 124 P3d 1098 (2005), following Second Int'l Baha'i Council v. Chase, 2005 MT 30, 326 M 41, 106 P3d 1168 (2005), and followed in part and distinguished in part in New Hope Lutheran Ministry v. Faith Lutheran Church of Great Falls, Inc., 2014 MT 69, 374 Mont. 229, 328 P.3d 586.

Handwritten "Irrevocable Trust Reserving Income for Life" — Failure for Lack of Transfer of Property — No Resulting Trust or Constructive Trust Imposed: In anticipation of remarriage, the decedent, an attorney, drafted a handwritten document purporting to "sell, assign and convey" various mineral interests to a trust for the benefit of his daughters from his first marriage. The decedent never transferred or conveyed the named mineral interests to the trust or otherwise delivered the trust property to the named trustee. At the time of death, his wife, as personal representative of the estate, refused to convey the alleged trust property upon request of the daughters. The daughters sued, maintaining that the handwritten trust document was testamentary in nature and that therefore the personal representative must fund the testamentary trust with the mineral interests owned by the decedent at the time of his death. The personal representative argued that the document was not a valid testamentary trust and was intended to create an inter vivos trust, which was never executed by conveying or otherwise transferring the interests to the trust or the trustee. The District Court granted summary judgment for the daughters, concluding that the handwritten trust document was testamentary. The Supreme Court reversed, holding that the inter vivos trust document failed because of the lack of a transfer of property to the trust during the decedent's lifetime. The document was not testamentary because the document did not first and foremost express a clear and unmistakable intent that the trust would not take effect until the testator's death. Rather, the document convincingly displays all attributes of an inter vivos transaction that the trustor intended would take place at the time that the document was drafted or soon thereafter. Even if a resulting trust was imposed, the result would be the same, with the mineral interests returning to the trustor's estate. The other type of involuntary trust, a constructive trust, was not argued by the daughters and is therefore not available as an equitable remedy. Cate-Schweyen v. Cate, 2000 MT 345, 303 M 232, 15 P3d 467, 57 St. Rep. 1478 (2000).

Transfer of Property for Creation of Trust Not Included in General Power of Attorney: Jameison appointed her granddaughter, Bolich, as "true and lawful attorney", granting her authority to generally act in Jameison's stead "in all matters affecting my business or property". Bolich created a trust agreement naming Jameison the income beneficiary for life and Bolich as trustee and designating Jameison's two daughters as income beneficiaries during their lives in the event that they survived Jameison. The trust agreement provided for distribution of the trust principal for the health, maintenance, and welfare of the income beneficiaries at the trustee's discretion, and upon the death of the last income beneficiary, the trust was to dissolve, with the remainder distributed to Bolich or her estate. Bolich then conveyed all of Jameison's real property, including over 30 parcels, and personal property, including several certificates of deposit and promissory notes, to herself. Jameison died a few months later, and one daughter died shortly thereafter. Over 7 years later, Bolich distributed $100 in trust income to the remaining daughter, who was unhappy with the accounting and challenged the validity of the trust agreement, moving for summary judgment on grounds that Bolich did not have authority under the power of attorney to create it, citing a lack of evidence of Jameison's intent to create the trust and the fact that the trust agreement and conveyance documents were signed solely by Bolich and not by Jameison. The District Court found that Bolich's assertions regarding Jameison's intent were purely speculative and that Bolich had failed to produce any evidence that Jameison had intended to create the trust. The court concluded that the general power of attorney did not specifically authorize Bolich to create the trust and that Bolich exceeded her authority in doing so. The trust was invalidated and terminated, and the estate was distributed pursuant to the laws of intestacy. Bolich appealed. The Supreme Court affirmed. In this case, the power of attorney was broad and general but did not grant authority to create a trust, reflect Jameison's intent to create a trust, or even mention a trust, so Bolich's transfer of Jameison's property to herself as trustee was not warranted by the terms actually used in the power of attorney or as a means of executing other authority. The trust was not created by one of the methods in 72-33-201 (now repealed) and was invalid. Bolich's argument that the trust was ratified pursuant to 28-10-211 by Jameison's oral authorization also failed because ratification of a trust must be accomplished in writing pursuant to 72-33-208 (now repealed). Absent material facts regarding the validity of the trust, summary judgment invalidating the trust was proper. In re Trust of Jameison v. Bolich, 2000 MT 190, 300 M 418, 8 P3d 83, 57 St. Rep. 753 (2000), distinguishing McLaren Gold Mines Co. v. Morton, 124 M 382, 224 P2d 975 (1951).

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Delivery by Trustee of Trust Document to Trustor's Attorney: T.K. Laursen executed a deed conveying real property to his son Orville. On the same day, Orville executed a document acknowledging that the property had been conveyed to him to be held in trust for his father. T.K. Laursen did not sign the second document. The trust document was delivered by Orville to T.K. Laursen's lawyer. In a dispute over the legal ownership of the property, the Supreme Court ruled that the fact that the trust document had been given to T.K. Laursen's attorney for safekeeping was an act that tended to show that T.K. intended a trust to be created. McCaffrey v. Laursen, 215 M 305, 697 P2d 103, 42 St. Rep. 378 (1985).

Acceptance of Mineral Interest Assignment Presumed Because Beneficial to Trust: In 1954, Fitzpatrick and three other parties entered into an operating agreement concerning the working interest in an oil and gas lease. The agreement included a clause giving each party a preferential right to purchase the working interest of any other party. In 1969, Fitzpatrick divided his interest into three parts. He assigned one-third to his wife, reserved one-third in himself, and assigned one-third in four equal parts to four trusts which he had created for his four children. In 1972, Fitzpatrick signed a quitclaim assignment of whatever working interest he had to Youngblood, successor in interest to one of the four parties to the 1954 agreement. Youngblood had acquired similar quitclaim assignments from the other two parties to the original agreement. Believing that he owned 100% of the working interest in the lease, Youngblood began development of oil and gas wells on the land. The land became productive in 1972. In 1975, Youngblood, concerned about whether or not he had acquired all of Fitzpatrick's interest, had Fitzpatrick and his wife sign letters to ratify that Youngblood had acquired all their working interest in 1972. The Fitzpatrick children, as beneficiaries of the trusts, refused to sign similar letters. Youngblood then filed an action to quiet title to the working interest in him. The District Court found for Youngblood, ruling that the 1969 assignment was invalid for failure of delivery, failure of acceptance, and for retention of dominion and control over the working interest by Fitzpatrick. The Supreme Court reversed. The court ruled that Fitzpatrick's intent in making the 1969 assignment was to transfer income from oil and gas production to his wife and four children and that delivery was therefore complete. Acceptance of the assignment may be presumed because the net effect of the assignment was beneficial to the trusts. The court further ruled that there was not sufficient evidence that Fitzpatrick retained dominion and control over the working interests after the 1969 assignment. Finally the court ruled that the parties did not intend the preferential purchase clause to apply to a transfer without consideration between family members, so Youngblood was not entitled to enforce that clause. Exeter Exploration Co. v. Fitzpatrick, 202 M 209, 661 P2d 1255, 40 St. Rep. 38 (1983).

Delivery of Property: When a mother upon her deathbed delivered a quantity of jewelry to her daughter-in-law with instruction to turn it over to her surviving husband to be in turn delivered to their sons when old enough to appreciate the gift, the result of the transaction was the creation of a voluntary trust, which was not terminated by the death of the father before the trust was executed, the Court in such a case having power to appoint a trustee to carry it out. Stagg v. Stagg, 90 M 180, 300 P 539 (1931).

Stockholders' Agreement: An agreement between preferred stockholders that each should lend a certain proportion of a sum of money to the corporation, and that certain shares of common stock held by one of their number in trust for distribution as a bonus to parties lending such money should immediately upon making the loan become the property of the lenders, and be divided according to the proportion of said sum lent by each, did not create a trust or make the holder of the certificates of stock a trustee for the benefit of his fellow signers; the mere fact that the holder of the stock retained possession of the certificates representing such stock as a mere stakeholder does not make him such a trustee. Crosby v. Robbins, 56 M 179, 182 P 122 (1919); Asbury v. Robbins, 56 M 195, 182 P 126 (1919); Hanson v. Robbins, 56 M 196, 182 P 126 (1919).

Elements of Express Trust: An instrument claimed by plaintiff to have created an express trust in real property in his favor which neither indicated an intention on the part of the plaintiff to create a trust nor showed that defendant was accepting or acknowledging the existence of one, nor the purpose of its creation, nor what disposition defendant was to make of the property, was insufficient to constitute the latter a trustee as alleged. Mantle v. White, 47 M 234, 132 P 22 (1913).

Attorney General's Opinions

Highway Right-of-Way — Abandonment vs. Sale — Funds Held in Trust: The Code provisions regarding abandonment are to be followed when the Highway Commission (now Transportation Commission) relinquishes a right-of-way easement. Under the facts giving rise to this opinion, the Highway Department (now Department of Transportation) received $1.8 million from the Anaconda Company to be used for alternative traffic facilities upon abandonment of the right-of-way. The Highway Department (now Department of Transportation) has authority to hold such funds in trust for Butte-Silver Bow. 38 A.G. Op. 57 (1979).

72-38-402. Requirements for creation.

Official Comments

Subsection (a) [72-38-402(1)] codifies the basic requirements for the creation of a trust. To create a valid trust, the settlor must indicate an intention to create a trust. *See* Restatement (Third) of Trusts Section 13 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 23 (1959). But only such manifestations of intent as are admissible as proof in a judicial proceeding may be considered. *See* Section 103(18) [72-38-103(21)] ("terms of a trust" defined).

To create a trust, a settlor must have the requisite mental capacity. To create a revocable or testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have capacity during lifetime to transfer the property free of trust. *See* Section 601 (capacity of settlor to create revocable trust), and *see generally* Restatement (Third) of Trusts Section 11 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 18-22 (1959); and Restatement (Third) of Property: Wills and Other Donative Transfers Section 8.1 (Tentative Draft No. 3, 2001).

Subsection (a)(3) [72-38-402(1)(c)] requires that a trust, other than a charitable trust, a trust for the care of an animal, or a trust for another valid noncharitable purpose, have a definite beneficiary. While some beneficiaries will be definitely ascertained as of the trust's creation, subsection (b) [72-38-402(2)] recognizes that others may be ascertained in the future as long as this occurs within the applicable perpetuities period. The definite beneficiary requirement does not prevent a settlor from making a disposition in favor of a class of persons. Class designations are valid as long as the membership of the class will be finally determined within the applicable perpetuities period. For background on the definite beneficiary requirement, see Restatement (Third) of Trusts Sections 44-46 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 112-122 (1959).

Subsection (a)(4) [72-38-402(1)(d)] recites standard doctrine that a trust is created only if the trustee has duties to perform. *See* Restatement (Third) of Trusts Section 2 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 2 (1959). Trustee duties are usually active, but a validating duty may also be passive, implying only that the trustee has an obligation not to interfere with the beneficiary's enjoyment of the trust property. Such passive trusts, while valid under this Code, may be terminable under the enacting jurisdiction's Statute of Uses. *See* Restatement (Third) of Trusts Section 6 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 67-72 (1959).

Subsection (a)(5) [72-38-402(1)(e)] addresses the doctrine of merger, which, as traditionally stated, provides that a trust is not created if the settlor is the sole trustee and sole beneficiary of *all* beneficial interests. The doctrine of merger has been inappropriately applied by the courts in some jurisdictions to invalidate self-declarations of trust in which the settlor is the sole life beneficiary but other persons are designated as beneficiaries of the remainder. The doctrine of merger is properly applicable only if all beneficial interests, both life interests and remainders, are vested in the same person, whether in the settlor or someone else. An example of a trust to which the doctrine of merger would apply is a trust of which the settlor is sole trustee, sole beneficiary for life, and with the remainder payable to the settlor's probate estate. On the doctrine of merger generally, see Restatement (Third) of Trusts Section 69 (Tentative Draft No. 3, 2001); Restatement (Second) of Trusts Section 341 (1959).

Subsection (c) [72-38-402(3)] allows a settlor to empower the trustee to select the beneficiaries even if the class from whom the selection may be made cannot be ascertained. Such a provision would fail under traditional doctrine; it is an imperative power with no designated beneficiary capable of enforcement. Such a provision is valid, however, under both this Code and the Restatement, if there is at least one person who can meet the description. If the trustee does not exercise the power within a reasonable time, the power fails and the property will pass by resulting trust. *See* Restatement (Third) of Trusts Section 46 (Tentative Draft No. 2, approved

1999). *See also* Restatement (Second) of Trusts Section 122 (1959); Restatement (Second) of Property: Donative Transfers Section 12.1 cmt. e (1986).

Compiler's Comments

Source: This section modifies section 402 of the Uniform Law Commission's Uniform Trust Code by adding subsection (4) regarding a conservation easement.

The language in this section relates to the language in 72-33-202 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Handwritten "Irrevocable Trust Reserving Income for Life" — Failure for Lack of Transfer of Property — No Resulting Trust or Constructive Trust Imposed: In anticipation of remarriage, the decedent, an attorney, drafted a handwritten document purporting to "sell, assign and convey" various mineral interests to a trust for the benefit of his daughters from his first marriage. The decedent never transferred or conveyed the named mineral interests to the trust or otherwise delivered the trust property to the named trustee. At the time of death, his wife, as personal representative of the estate, refused to convey the alleged trust property upon request of the daughters. The daughters sued, maintaining that the handwritten trust document was testamentary in nature and that therefore the personal representative must fund the testamentary trust with the mineral interests owned by the decedent at the time of his death. The personal representative argued that the document was not a valid testamentary trust and was intended to create an inter vivos trust, which was never executed by conveying or otherwise transferring the interests to the trust or the trustee. The District Court granted summary judgment for the daughters, concluding that the handwritten trust document was testamentary. The Supreme Court reversed, holding that the inter vivos trust document failed because of the lack of a transfer of property to the trust during the decedent's lifetime. The document was not testamentary because the document did not first and foremost express a clear and unmistakable intent that the trust would not take effect until the testator's death. Rather, the document convincingly displays all attributes of an inter vivos transaction that the trustor intended would take place at the time that the document was drafted or soon thereafter. Even if a resulting trust was imposed, the result would be the same, with the mineral interests returning to the trustor's estate. The other type of involuntary trust, a constructive trust, was not argued by the daughters and is therefore not available as an equitable remedy. Cate-Schweyen v. Cate, 2000 MT 345, 303 M 232, 15 P3d 467, 57 St. Rep. 1478 (2000).

Transfer of Property for Creation of Trust Not Included in General Power of Attorney: Jameison appointed her granddaughter, Bolich, as "true and lawful attorney", granting her authority to generally act in Jameison's stead "in all matters affecting my business or property". Bolich created a trust agreement naming Jameison the income beneficiary for life and Bolich as trustee and designating Jameison's two daughters as income beneficiaries during their lives in the event that they survived Jameison. The trust agreement provided for distribution of the trust principal for the health, maintenance, and welfare of the income beneficiaries at the trustee's discretion, and upon the death of the last income beneficiary, the trust was to dissolve, with the remainder distributed to Bolich or her estate. Bolich then conveyed all of Jameison's real property, including over 30 parcels, and personal property, including several certificates of deposit and promissory notes, to herself. Jameison died a few months later, and one daughter died shortly thereafter. Over 7 years later, Bolich distributed $100 in trust income to the remaining daughter, who was unhappy with the accounting and challenged the validity of the trust agreement, moving for summary judgment on grounds that Bolich did not have authority under the power of attorney to create it, citing a lack of evidence of Jameison's intent to create the trust and the fact that the trust agreement and conveyance documents were signed solely by Bolich and not by Jameison. The District Court found that Bolich's assertions regarding Jameison's intent were purely speculative and that Bolich had failed to produce any evidence that Jameison had intended to create the trust. The court concluded that the general power of attorney did not specifically authorize Bolich to create the trust and that Bolich exceeded her authority in doing so. The trust was invalidated and terminated, and the estate was distributed pursuant to the laws of intestacy. Bolich appealed. The Supreme Court affirmed. In this case, the power of attorney was broad and general but did not grant authority to create a trust, reflect Jameison's intent to create a trust, or even mention a trust, so Bolich's transfer of Jameison's property to herself as trustee was not warranted by the terms actually used in the power of attorney or as a means of executing other authority. The trust was not created by one of the methods in 72-33-201 (now repealed) and was invalid. Bolich's argument that the trust was ratified pursuant to 28-10-211 by Jameison's oral authorization also failed because ratification of a trust must be accomplished in writing pursuant to 72-33-208 (now repealed). Absent material facts regarding the validity of the trust, summary judgment invalidating the trust was proper. In re Trust of Jameison v. Bolich, 2000 MT 190, 300 M 418, 8 P3d 83, 57 St. Rep. 753 (2000), distinguishing McLaren Gold Mines Co. v. Morton, 124 M 382, 224 P2d 975 (1951).

Precatory Language Not Sufficient to Create Trust: The children of the testator brought an action to have the District Court declare that the language of the will, which left everything to the testator's father or in the event of his death to the testator's stepmother and which stated that the testator had confidence that his father or stepmother would use the estate in the best interests of his children, in reality created a trust in behalf of the testator's children. The Supreme Court, stating that the principles of trust law existing before the adoption of the new trust code were still applicable, held that the language used by the decedent clearly and unambiguously made an outright gift to his father and in default to his stepmother and specifically excluded his children and that therefore the statement of the reasons for doing so by the decedent did not limit the testamentary gift and a trust was not created. In re Estate of Bolinger, 284 M 114, 943 P2d 981, 54 St. Rep. 799 (1997).

Whether Language in Will Creates Trust Is Question of Law and Is Determined by Intent of Testator — Burden to Prove Existence of Trust on Party Claiming Trust's Existence — Legal Principles Existing Before Adoption of New Trust Code Still Applicable: The children of the testator brought an action to have the District Court declare that the language of the will, which left everything to the testator's father or in the event of his death to the testator's stepmother and which stated that the testator had confidence that his father or stepmother would use the estate in the best interests of his children, in reality created a trust in behalf of the testator's children. The Supreme Court, stating that the principles of trust law existing before the adoption of the new trust code were still applicable, held that the question of whether any specific language in the will created a trust was a question of law for a court to decide and that a trust can be created only if the court finds that the testator intended to create a trust. The Supreme Court further stated that the object therefore of a judicial interpretation of a will is to ascertain the intention of the testator deduced from a consideration of the whole instrument and a comparison of its various parts in light of the situation and circumstances surrounding the testator when the instrument was framed. The Supreme Court also affirmed earlier cases holding that the burden of proof to establish the existence of a trust is on the party who claims it and must be founded on clear and convincing evidence. In re Estate of Bolinger, 284 M 114, 943 P2d 981, 54 St. Rep. 799 (1997).

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Property Transfer Required to Establish Trust — Trust Agreement Alone Insufficient: In a case applying the 1981 version of 72-20-107 and 72-20-108 (both now repealed) in determining whether a trust agreement itself would qualify as an instrument of conveyance to create a valid trust, the Supreme Court first noted that, absent a transfer of property, no trust of property is created. Here, the trust agreement in question did not properly describe the property within the document itself or attach a description as an exhibit when the document was signed; therefore, the trust failed to convey the property at its execution. An attachment could have validated the trust agreement as an instrument of conveyance only if the person executing the document were to have redelivered, confirmed, ratified, or adopted the transfer, but there was no evidence of that having occurred. The express trust at issue was invalid because there was no transfer of property into the trust. McCormick v. Brevig, 1999 MT 86, 294 M 144, 980 P2d 603, 56 St. Rep. 355 (1999), following In re Estate of Severson, 459 NW 2d 473 (Iowa 1990), and followed in Cate-Schweyen v. Cate, 2000 MT 345, 303 M 232, 15 P3d 467, 57 St. Rep. 1478 (2000).

Delivery by Trustee of Trust Document to Trustor's Attorney: T.K. Laursen executed a deed conveying real property to his son Orville. On the same day, Orville executed a document acknowledging that the property had been conveyed to him to be held in trust for his father. T.K. Laursen did not sign the second document. The trust document was delivered by Orville to T.K. Laursen's lawyer. In a dispute over the legal ownership of the property, the Supreme Court ruled that the fact that the trust document had been given to T.K. Laursen's attorney for safekeeping was an act that tended to show that T.K. intended a trust to be created. McCaffrey v. Laursen, 215 M 305, 697 P2d 103, 42 St. Rep. 378 (1985).

Intent to Create — May Be Express or Implied: Intent to establish a voluntary trust may be express or implied. However, clear and convincing evidence establishing intent is required. McCaffrey v. Laursen, 215 M 305, 697 P2d 103, 42 St. Rep. 378 (1985).

Intention to Create: The transaction between an insolvent grain warehouseman and the state Department of Agriculture, whereby the former did no more than assent to the taking over of its property (other than stored grain) by the Department, may not, in an action for the conversion of such property, be held to show the creation of a trust in the Department in favor of holders of unredeemed storage tickets where the complaint did not disclose an intention on the part of the supposed trustor to create a trust or a designation of the beneficiaries (72-20-107 and 72-20-108, now repealed). Hence, the District Court did not err in sustaining a demurrer (demurrer abolished, former Rule 7(c), M.R.Civ.P., now superseded) to the complaint seeking to recover on the theory that at the time of its seizure by the Sheriff, plaintiff was entitled to the possession of the property. (Associate Justices Matthews and Ford dissenting.) Dept. of Agriculture, Labor and Industry v. DeVore, 91 M 47, 6 P2d 125 (1931).

72-38-403. Trusts created in other jurisdictions.

Official Comments

The validity of a trust created by will is ordinarily determined by the law of the decedent's domicile. No such certainty exists with respect to determining the law governing the validity of inter vivos trusts. Generally, at common law a trust was created if it complied with the law of the state having the most significant contacts to the trust. Contacts for making this determination include the domicile of the trustee, the domicile of the settlor at the time of trust creation, the location of the trust property, the place where the trust instrument was executed, and the domicile of the beneficiary. *See* 5A Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts Sections 597, 599 (4th ed. 1987). Furthermore, if the trust has contacts with two or more states, one of which would validate the trust's creation and the other of which would deny the trust"s validity, the tendency is to select the law upholding the validity of the trust. *See* 5A Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts Section 600 (4th ed. 1987).

Section 403 [72-38-403] extends the common law rule by validating a trust if its creation complies with the law of any of a variety of states in which the settlor or trustee had significant contacts. Pursuant to Section 403 [72-38-403], a trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation the settlor was domiciled, had a place of abode, or was a national; the trustee was domiciled or had a place of business; or any trust property was located.

Section 403 [72-38-403] is comparable to Section 2-506 of the Uniform Probate Code, which validates wills executed in compliance with the law of a variety of places in which the testator had a significant contact. Unlike the UPC, however, Section 403 [72-38-403] is not limited to execution of the instrument but applies to the entire process of a trust's creation, including compliance with the requirement that there be trust property. In addition, unlike the UPC, Section 403 [72-38-403] validates a trust valid under the law of the domicile or place of business of the designated trustee, or if valid under the law of the place where any of the trust property is located.

The section does not supersede local law requirements for the transfer of real property, such that title can be transferred only by recorded deed.

Compiler's Comments

Source: The language in this section relates to the language in Title 72, chapter 35, part 4 (now repealed).

72-38-404. Trust purposes.

Official Comments

For an explication of the requirement that a trust must not have a purpose that is unlawful or against public policy, see Restatement (Third) of Trusts §§ 27-30 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts §§ 59-65 (1959). A trust with a purpose that is unlawful or against public policy is invalid. Depending on when the violation occurred, the trust may be invalid at its inception or it may become invalid at a later date. The invalidity may also affect only particular provisions. Generally, a trust has a purpose which is illegal if (1) its performance involves the commission of a criminal or tortious act by the trustee; (2) the settlor's purpose in creating the trust was to defraud creditors or others; or (3) the consideration for the creation of the trust was illegal. *See* Restatement (Third) of Trusts § 28 cmt. a (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 60 cmt. a (1959). Purposes violative of public policy include those that tend to encourage criminal or tortious conduct, that interfere with freedom to marry or encourage divorce, that limit religious freedom, or which are frivolous or capricious. *See* Restatement (Third) of Trusts § 29 cmt. d-h (Tentative Draft No. 2, 1999); Restatement (Second) of Trusts § 62 (1959).

Pursuant to Section 402(a) [72-38-402(1)], a trust must have an identifiable beneficiary unless the trust is of a type that does not have beneficiaries in the usual sense, such as a charitable trust or, as provided in Sections 408 [72-38-408] and 409 [72-38-409], trusts for the care of an animal or other valid noncharitable purpose. The general purpose of trusts having identifiable beneficiaries is to benefit those beneficiaries in accordance with their interests as defined in the trust's terms. The requirement of this section that a trust and its terms be for the benefit of its beneficiaries, which is derived from Restatement (Third) of Trusts § 27(2) (Tentative Draft No. 2, approved 1999), implements this general purpose. While a settlor has considerable latitude in specifying how a particular trust purpose is to be pursued, the administrative and other nondispositive trust terms must reasonably relate to this purpose and not divert the trust property to achieve a trust purpose that is invalid, such as one which is frivolous or capricious. *See* Restatement (Third) of Trusts § 27 cmt. b (Tentative Draft No. 2, approved 1999).

Section 412(b) [72-38-412(2)], which allows the court to modify administrative terms that are impracticable, wasteful, or impair the trust's administration, is a specific application of the requirement that a trust and its terms be for the benefit of the beneficiaries. The fact that a settlor suggests or directs an unlawful or other inappropriate means for performing a trust does not invalidate the trust if the trust has a substantial purpose that can be achieved by other methods. *See* Restatement (Third) of Trusts § 28 cmt. e (Tentative Draft No. 2, approved 1999).

Compiler's Comments

Source: The language in this section relates to the language in 72-33-204 (now repealed).

Case Notes

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Equal Protection — Discrimination in Private Trust Not Illegal Absent State Action: A trust that was created to provide stipends to male members of Future Farmers of America and 4-H clubs, although clearly discriminatory, did not violate the equal protection clause of the United States Constitution. A private person may dispose of his money or property as he wishes and in so doing may lawfully discriminate without offending the due process clause as long as the state and its instrumentalities are not involved. In re Will of Cram, 186 M 37, 606 P2d 145 (1980).

Conveyance by Trustee Under Will:

A will devising one-half of the residuary estate to a trustee with directions to pay income to testator's daughter for a certain period and directing trustee to "convey and transfer the corpus" as provided therein was not invalid under 72-24-103 (now repealed) as being a trust to convey. In re Strode's Estate, 118 M 540, 167 P2d 579 (1946).

Testator creating a trust and having the right to say to whom the real property shall belong may also provide in the trust that the trustee at the termination thereof shall convey the property. In re Strode's Estate, 118 M 540, 167 P2d 579 (1946).

Trustee of Express Trust Allowed to Maintain Action in His Own Name: When a collection agent took assignments of claims against a debtor "in trust", he could maintain suit thereon in his own name as trustee of express trust. Rae v. Cameron, 112 M 159, 114 P2d 1060 (1941), overruling Streetbeck v. Benson, 107 M 110, 80 P2d 861 (1938) and N. Mont. Ass'n of Credit Men v. Hauge, 111 M 56, 105 P2d 1102 (1940).

72-38-405. Charitable purposes — enforcement.

Official Comments

The required purposes of a charitable trust specified in subsection (a) [72-38-405(1)] restate the well-established categories of charitable purposes listed in Restatement (Third) of Trusts § 28 (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts § 368 (1959), which ultimately derive from the Statute of Charitable Uses, 43 Eliz. I, c.4 (1601). The directive to the courts to validate purposes the achievement of which are beneficial to the community has proved to be remarkably adaptable over the centuries. The drafters concluded that it should not be disturbed.

Charitable trusts are subject to the restriction in Section 404 [72-38-404] that a trust purpose must be legal and not contrary to public policy. This would include trusts that involve invidious discrimination. *See* Restatement (Third) of Trusts § 28 cmt. f (Tentative Draft No. 3, 2001).

Under subsection (b) [72-38-405(2)], a trust that states a general charitable purpose does not fail if the settlor neglected to specify a particular charitable purpose or organization to receive distributions. The court may instead validate the trust by specifying particular charitable purposes or recipients, or delegate to the trustee the framing of an appropriate scheme. *See* Restatement (Second) of Trusts § 397 cmt. d (1959). Subsection (b) [72-38-405(2)] of this section is a corollary to Section 413 [72-38-413], which states the doctrine of cy pres. Under Section 413(a) [72-38-413(1)], a trust failing to state a general charitable purpose does not fail upon failure of the particular means specified in the terms of the trust. The court must instead apply the trust property in a manner consistent with the settlor's charitable purposes to the extent they can be ascertained.

Subsection (b) [72-38-405(2)] does not apply to the long-established estate planning technique of delegating to the trustee the selection of the charitable purposes or recipients. In that case, judicial intervention to supply particular terms is not necessary to validate the creation of the trust. The necessary terms instead will be supplied by the trustee. *See* Restatement (Second) of Trusts § 396 (1959). Judicial intervention under subsection (b) [72-38-405(2)] will become necessary only if the trustee fails to make a selection. *See* Restatement (Second) of Trusts § 397 cmt. d (1959). Pursuant to Section 110(b) [72-38-110(2)], the charitable organizations selected by the trustee would not have the rights of qualified beneficiaries under this Code because they are not expressly designated to receive distributions under the terms of the trust.

Contrary to Restatement (Second) of Trusts § 391 (1959), subsection (c) [72-38-405(3)] grants a settlor standing to maintain an action to enforce a charitable trust. The grant of standing to the settlor does not negate the right of the state attorney general or persons with special interests to enforce either the trust or their interests. For the law on the enforcement of charitable trusts, see Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. Hawaii L. Rev. 593 (1999).

Compiler's Comments

Source: This section modifies section 405 of the Uniform Law Commission's Uniform Trust Code by modifying subsection (c) [72-38-405(3)], which states: "(c) The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust."

The language in this section relates to the language in Title 72, chapter 33, part 5 (now repealed).

Case Notes

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Charitable Trust: A trustee of property dedicated to a charitable purpose is obligated to follow the directions of the trustor and to use ordinary care and diligence in the execution of the trust. Howard v. Sisters of Charity of Leavenworth, 193 F. Supp. 191 (D.C. Mont. 1961).

72-38-406. Creation of trust induced by fraud, duress, or undue influence.

Official Comments

This section is a specific application of Restatement (Third) of Trusts § 12 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts § 333 (1959), which provide that a trust can be set aside or reformed on the same grounds as those which apply to a transfer of property not in trust, among which include undue influence, duress, and fraud, and mistake. This section addresses undue influence, duress, and fraud. For reformation of a trust on grounds of mistake, see Section 415 [72-38-415]. See also Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3 (Tentative Draft No. 3, approved 2001), which closely tracks the language above. Similar to a will, the invalidity of a trust on grounds of undue influence, duress, or fraud may be in whole or in part.

Compiler's Comments

Source: The language in this section relates to the language in 72-33-202 (now repealed).

Case Notes

Two Contested Wills and Trusts — Appointment of Neutral Representative — Undue Influence, Fraud, or Duress: The decedent executed a will and trust in 2010 leaving the majority of her estate to her niece, with whom she shared a close relationship. In 2012, the decedent executed a new will leaving a sizable portion of her estate to her housekeeper and handyman. The decedent died a year later. The housekeeper petitioned for probate of the 2012 will, and the niece objected and cross-petitioned for probate of the 2010 will. The District Court appointed a neutral personal representative to serve as a special fiduciary to the decedent's trust. A jury found that the 2012 will was procured by undue influence, fraud, or duress. However, the District Court rejected the niece's requests to receive fees and costs and to admit the 2010 will and trust because the special verdict form did not ask the jury to make any findings on the 2010 will or trust. On appeal by both parties, the Supreme Court affirmed in part, upholding the District Court's appointment of a neutral personal representative and special fiduciary, admission of settlement document evidence because one party opened the door to the line of questioning, and suppression of testimony by the decedent's attorneys relating to her dispositional intentions. The Supreme Court also found that while the District Court erred in precluding testimony because a party violated a sequestration order, numerous professional witnesses and friends of the decedent provided similar testimony. The Supreme Court held that the will contestants have the burden of establishing undue influence, fraud, or duress and that the jury properly found that the 2012 will was procured in this manner. However, the Supreme Court found that the District Court erred in refusing to admit the 2010 will to probate and in finding that the niece was statutorily barred from recovering attorney fees. In re Estate of Edwards, 2017 MT 93, 387 Mont. 274, 393 P.3d 639.

72-38-407. Statute of frauds.

Official Comments

[Note: Section 407 in the Uniform Trust Code allows for the creation of an oral trust, as established by clear and convincing evidence. This section was not adopted.]

While it is always advisable for a settlor to reduce a trust to writing, the Uniform Trust Code follows established law in recognizing oral trusts. Such trusts are viewed with caution, however. The requirement of this section that an oral trust can be established only by clear and convincing evidence is a higher standard than is in effect in many States. *See* Restatement (Third) of Trusts § 20 Reporter's Notes (Tentative Draft No. 1, approved 1996).

Absent some specific statutory provision, such as a provision requiring that transfers of real property be in writing, a trust need not be evidenced by a writing. States with statutes of frauds or other provisions requiring that the creation of certain trusts must be evidenced by a writing may wish specifically to cite such provisions.

For the Statute of Frauds generally, see Restatement (Second) of Trusts §§ 40-52 (1959). For a description of what the writing must contain, assuming that a writing is required, see Restatement (Third) of Trusts § 22 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 46-49 (1959). For a discussion of when the writing must be signed, see Restatement (Third) of Trusts § 23 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 41-42 (1959). For the law of oral trusts, see Restatement (Third) of Trusts § 20 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 43-45 (1959).

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code. Section 407 of the Uniform Law Commission's Uniform Trust Code specifically allows oral trusts and states: **"SECTION 407. EVIDENCE OF ORAL TRUST.** Except as required by a statute other than this [Code], a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence."

The language in this section relates to the language in 72-33-208 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Transfer of Property for Creation of Trust Not Included in General Power of Attorney: Jameison appointed her granddaughter, Bolich, as "true and lawful attorney", granting her authority to generally act in Jameison's stead "in all matters affecting my business or property". Bolich created a trust agreement naming Jameison the income beneficiary for life and Bolich as trustee and designating Jameison's two daughters as income beneficiaries during their lives in the event that they survived Jameison. The trust agreement provided for distribution of the trust principal for the health, maintenance, and welfare of the income beneficiaries at the trustee's discretion, and upon the death of the last income beneficiary, the trust was to dissolve, with the remainder distributed to Bolich or her estate. Bolich then conveyed all of Jameison's real property, including over 30 parcels, and personal property, including several certificates of deposit and promissory notes, to herself. Jameison died a few months later, and one daughter died shortly thereafter. Over 7 years later, Bolich distributed $100 in trust income to the remaining daughter, who was unhappy with the accounting and challenged the validity of the trust agreement, moving for summary judgment on grounds that Bolich did not have authority under the power of attorney to create it, citing a lack of evidence of Jameison's intent to create the trust and the fact that the trust agreement and conveyance documents were signed solely by Bolich and not by Jameison. The District Court found that Bolich's assertions regarding Jameison's intent were purely speculative and that Bolich had failed to produce any evidence that Jameison had intended to create the trust. The court concluded that the general power of attorney did not specifically authorize Bolich to create the trust and that Bolich exceeded her authority in doing so. The trust was invalidated and terminated, and the estate was distributed pursuant to the laws of intestacy. Bolich appealed. The Supreme Court affirmed. In this case, the power of attorney was broad and general but did not grant authority to create a trust, reflect Jameison's intent to create a trust, or even mention a trust, so Bolich's transfer of Jameison's property to herself as trustee was not warranted by the terms actually used in the power of attorney or as a means of executing other authority. The trust was not created by one of the methods in 72-33-201 (now repealed) and was invalid. Bolich's argument that the trust was ratified pursuant to 28-10-211 by Jameison's oral authorization also failed because ratification of a trust must be accomplished in writing pursuant to 72-33-208 (now repealed). Absent material facts regarding the validity of the trust, summary judgment invalidating the trust was proper. In re Trust of Jameison v. Bolich, 2000 MT 190, 300 M 418, 8 P3d 83, 57 St. Rep. 753 (2000), distinguishing McLaren Gold Mines Co. v. Morton, 124 M 382, 224 P2d 975 (1951).

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

No Express or Constructive Trust: Testimony that decedent conveyed certain land to Lohrke and later made an oral statement that decedent wanted the land to go to his children was insufficient to create a voluntary or express trust involving real property. No constructive trust existed because Lohrke and decedent were close friends and the property was voluntarily transferred to Lohrke without his knowledge. A constructive trust requires fraud, mistake, undue influence, violation of a trust, or other wrongful acts. Eckart v. Hubbard, 184 M 320, 602 P2d 988 (1979).

Statute of Frauds: A trust created by operation of law does not come under the Statute of Frauds and may be proved by parol evidence. Cremer v. Cremer Rodeo Land and Livestock Co., 181 M 87, 592 P2d 485 (1979).

Writing Required in Express Trust:

Where there was no writing embodying an alleged "specific understanding and agreement", there could be no enforcement of a trust since, as the trust was pleaded, it was based on parol and void under the Statute of Frauds. Platts v. Platts, 134 M 474, 334 P2d 722 (1959).

Where, in an action to compel a reconveyance of certain trust property on the ground that the purpose of the trust had been fully accomplished, defendant in his answer recognized the original contract by which the trust was created and the property conveyed as valid but set up title to the property by virtue of a subsequent contract, he could not thereafter contend that the original contract was void because it was not in writing. Willoburn Ranch Co. v. Yegen, 49 M 101, 140 P 231 (1914).

An express trust cannot be based upon an oral agreement. Lynch v. Herrig, 32 M 267, 80 P 240 (1905).

Resulting Trust: Since a resulting trust in realty arises not out of a contract but by operation of law, it may be proved by parol evidence, the Statute of Frauds not applying. Campanello v. Mercer, 124 M 528, 227 P2d 312 (1951); Wilson v. Wilson, 64 M 533, 210 P 896 (1922).

Elements of Proof to Establish Resulting Trust: Where it is sought to establish a resulting trust by reason of a conveyance made by or on behalf of a husband to his wife, the evidence establishing such trust must be clear, convincing, and practically free from doubt, especially so where the wife is dead and the husband must establish his case by his own testimony as to oral conversations between himself and deceased. Humbird v. Arnet, 99 M 499, 44 P2d 756 (1935); Clary v. Fleming, 60 M 246, 198 P 546 (1921).

Writing Not Required: A voluntary trust may be created orally when the subject matter is personal property; it is a device by which the donor effectuates a gift either of property or of its beneficial use and enjoyment to a designated donee. Stagg v. Stagg, 90 M 180, 300 P 539 (1931).

Created by Operation of Law: When a transfer of real property is made to one person and the consideration therefor is paid by or for another, a trust is presumed to result in favor of him by or for whom such payment is made; such resulting trust is created by operation of law and not by contract and may be proved by parol evidence. McQuay v. McQuay, 81 M 311, 263 P 683 (1928).

72-38-408. Trust for care of animal.

Official Comments

This section and the next section of the Code validate so called honorary trusts. Unlike honorary trusts created pursuant to the common law of trusts, which are arguably no more than powers of appointment, the trusts created by this and the next section are valid and enforceable.

For a discussion of the common law doctrine, see Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 124 (1959).

This section addresses a particular type of honorary trust, the trust for the care of an animal. Section 409 [72-38-409] specifies the requirements for trusts without ascertainable beneficiaries that are created for other noncharitable purposes. A trust for the care of an animal may last for the life of the animal. While the animal will ordinarily be alive on the date the trust is created, an animal may be added as a beneficiary after that date as long as the addition is made prior to the settlor's death. Animals in gestation but not yet born at the time of the trust's creation may also be covered by its terms. A trust authorized by this section may be created to benefit one designated animal or several designated animals.

Subsection (b) [72-38-408(2)] addresses enforcement. Noncharitable trusts ordinarily may be enforced by their beneficiaries. Charitable trusts may be enforced by the State's attorney general or by a person deemed to have a special interest. *See* Restatement (Second) of Trusts § 391 (1959). But at common law, a trust for the care of an animal or a trust without an ascertainable beneficiary created for a noncharitable purpose was unenforceable because there was no person authorized to enforce the trustee's obligations.

Sections 408 [72-38-408] and 409 [72-38-409] close this gap. The intended use of a trust authorized by either section may be enforced by a person designated in the terms of the trust or, if none, by a person appointed by the court. In either case, Section 110(b) [72-38-110(2)] grants to the person appointed the rights of a qualified beneficiary for the purpose of receiving notices and providing consents. If the trust is created for the care of an animal, a person with an interest in the welfare of the animal has standing to petition for an appointment. The person appointed by the court to enforce the trust should also be a person who has exhibited an interest in the animal's welfare. The concept of granting standing to a person with a demonstrated interest in the animal's welfare is derived from the Uniform Guardianship and Protective Proceedings Act, which allows a person interested in the welfare of a ward or protected person to file petitions on behalf of the ward or protected person. *See, e.g.*, Uniform Probate Code §§ 5-210(b), 5-414(a).

Subsection (c) [72-38-408(3)] addresses the problem of excess funds. If the court determines that the trust property exceeds the amount needed for the intended purpose and that the terms of the trust do not direct the disposition, a resulting trust is ordinarily created in the settlor or settlor's successors in interest. *See* Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 124 (1959). Successors in interest include the beneficiaries under the settlor's will, if the settlor has a will, or in the absence of an effective will provision, the settlor's heirs. The settlor may also anticipate the problem of excess funds by directing their disposition in the terms of the trust. The disposition of excess funds is within the settlor's control. *See* Section 105(a) [72-38-105(1)]. While a trust for an animal is usually not created until the settlor's death, subsection (a) [72-38-408(1)] allows such a trust to be created during the settlor's lifetime. Accordingly, if the settlor is still living, subsection (c) [72-38-408(3)] provides for distribution of excess funds to the settlor, and not to the settlor's successors in interest.

Should the means chosen not be particularly efficient, a trust created for the care of an animal can also be terminated by the trustee or court under Section 414 [72-38-414]. Termination of a trust under that section, however, requires that the trustee or court develop an alternative means for carrying out the trust purposes. *See* Section 414(c) [72-38-414(3)].

This section and the next section are suggested by Section 2-907 of the Uniform Probate Code, but much of this and the following section is new.

72-38-409. Noncharitable trust without ascertainable beneficiary.

Official Comments

This section authorizes two types of trusts without ascertainable beneficiaries; trusts for general but noncharitable purposes, and trusts for a specific noncharitable purpose other than the care of an animal, on which see Section 408 [72-38-408]. Examples of trusts for general noncharitable purposes include a bequest of money to be distributed to such objects of benevolence as the trustee might select. Unless such attempted disposition was interpreted as charitable, at common law the disposition was honorary only and did not create a trust. Under this section, however, the disposition is enforceable as a trust for a period of up to 21 years, although that number is placed in brackets to indicate that States may wish to select a different time limit.

The most common example of a trust for a specific noncharitable purpose is a trust for the care of a cemetery plot. The lead-in language to the section recognizes that some special purpose trusts, particularly those for care of cemetery plots, are subject to other statutes. Such legislation will typically endeavor to facilitate perpetual care as opposed to care limited to 21 years as under this section.

For the requirement that a trust, particularly the type of trust authorized by this section, must have a purpose that is not capricious, see Section 404 [72-38-404] Comment. For examples of the types of trusts authorized by this section, see Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts § 62 cmt. w and § 124 (1959). The case law on capricious purposes is collected in 2 Austin W. Scott & William F. Fratcher, The Law of Trusts § 124.7 (4th ed. 1987).

This section is similar to Section 408 [72-38-408], although less detailed. Much of the Comment to Section 408 [72-38-408] also applies to this section.

72-38-410. Modification or termination of trust — proceedings for approval or disapproval.

Official Comments

Subsection (a) [72-38-410(1)] lists the grounds on which trusts typically terminate. For a similar formulation, see Restatement (Third) of Trusts Section 61 (Tentative Draft No. 3, approved 2001). Terminations under subsection (a) [72-38-410(1)] may be in either in whole or in part. Other types of terminations, all of which require action by a court, trustee, or beneficiaries, are covered in Sections 411-414 [72-38-411 through 72-38-414], which also address trust modification. Of these sections, all but Section 411 [72-38-411] apply to charitable trusts and all but Section 413 [72-38-413] apply to noncharitable trusts.

Withdrawal of the trust property is not an event terminating a trust. The trust remains in existence although the trustee has no duties to perform unless and until property is later contributed to the trust.

Subsection (b) [72-38-410(2)] specifies the persons who have standing to seek court approval or disapproval of proposed trust modifications, terminations, combinations, or divisions. An approval or disapproval may be sought for an action that does not require court permission, including a petition questioning the trustee's distribution upon termination of a trust under $50,000 (Section 414) [72-38-414], and a petition to approve or disapprove a proposed trust division or consolidation (Section 417) [72-38-417]. Subsection (b) [72-38-410(2)] makes the settlor an interested person with respect to a judicial proceeding brought by the beneficiaries under Section 411 [72-38-411] to terminate or modify a trust. Contrary to Restatement (Second) of Trusts Section 391 (1959), subsection (b) [72-38-410(2)] grants a settlor standing to petition the court under Section 413 [72-38-413] to apply cy pres to modify the settlor's charitable trust.

2004 Amendment. For an explanation of why a portion of subsection (b) [72-38-410(2)] has been placed in brackets, see the comment to the 2004 Amendment to Section 411 [72-38-411].

Compiler's Comments

Source: The language in this section relates to the language in Title 72, chapter 33, part 4 (now repealed).

72-38-411. Modification or termination of irrevocable trust by consent.

Official Comments

This section describes the circumstances in which termination or modification of a noncharitable irrevocable trust may be compelled by the beneficiaries, with or without the concurrence of the settlor. For provisions governing modification or termination of trusts without the need to seek beneficiary consent, see Sections 412 [72-38-412] (modification or termination due to unanticipated circumstances or inability to administer trust effectively), 414 [72-38-414] (termination or modification of uneconomic noncharitable trust), and 416 [72-38-416] (modification to achieve settlor's tax objectives). If the trust is revocable by the settlor, the method of revocation specified in Section 602 applies.

Subsection (a) [72-38-411(1)], which was placed in brackets pursuant to a 2004 amendment, states the test for termination or modification by the beneficiaries with the concurrence of the settlor. For an explanation of why subsection (a) [72-38-411(1)] has been placed in brackets, see the 2004 comment at the end of this section.

Subsection (b) [72-38-411(2)] states the test for termination or modification by unanimous consent of the beneficiaries without the concurrence of the settlor. The rules on trust termination in Subsections (a)-(b) [72-38-411(1)-(2)] carries forward the *Claflin* rule, first stated in the famous case of *Claflin v. Claflin*, 20 N.E. 454 (Mass. 1889). Subsection (c) [72-38-411(3)] addresses the effect of a spendthrift provision. Subsection (d) [72-38-411(4)] directs how the trust property is to be distributed following a termination under either subsection (a) [72-38-411(1)] or (b)

[72-38-411(2)]. Subsection (e) [72-38-411(5)] creates a procedure for judicial approval of a proposed termination or modification when the consent of less than all of the beneficiaries is available.

Under this section, a trust may be modified or terminated over a trustee's objection. However, pursuant to Section 410 [72-38-410], the trustee has standing to object to a proposed termination or modification.

The settlor's right to join the beneficiaries in terminating or modifying a trust under this section does not rise to the level of a taxable power. *See* Treas. Reg. Section 20.2038-1(a)(2). No gift tax consequences result from a termination as long as the beneficiaries agree to distribute the trust property in accordance with the value of their proportionate interests.

The provisions of Article 3 [Title 72, ch. 38, pt. 3] on representation, virtual representation and the appointment and approval of representatives appointed by the court apply to the determination of whether all beneficiaries have signified consent under this section. The authority to consent on behalf of another person, however, does not include authority to consent over the other person's objection. *See* Section 301(b) [72-38-301(2)]. Regarding the persons who may consent on behalf of a beneficiary, see Sections 302 [72-38-302] through 305 [72-38-305]. A consent given by a representative is invalid to the extent there is a conflict of interest between the representative and the person represented. Given this limitation, virtual representation of a beneficiary's interest by another beneficiary pursuant to Section 304 [72-38-304] will rarely be available in a trust termination case, although it should be routinely available in cases involving trust modification, such as a grant to the trustee of additional powers. If virtual or other form of representation is unavailable, Section 305 [72-38-305] of the Code permits the court to appoint a representative who may give the necessary consent to the proposed modification or termination on behalf of the minor, incapacitated, unborn, or unascertained beneficiary. The ability to use virtual and other forms of representation to consent on a beneficiary's behalf to a trust termination or modification has not traditionally been part of the law, although there are some notable exceptions. *Compare* Restatement (Second) Section 337(1) (1959) (beneficiary must not be under incapacity), *with Hatch v. Riggs National Bank*, 361 F.2d 559 (D.C. Cir. 1966) (guardian ad litem authorized to consent on beneficiary's behalf).

Subsection (a) [72-38-411(1)] also addresses the authority of an agent, conservator, or guardian to act on a settlor's behalf. Consistent with Section 602 [72-38-602] on revocation or modification of a revocable trust, the section assumes that a settlor, in granting an agent general authority, did not intend for the agent to have authority to consent to the termination or modification of a trust, authority that could be exercised to radically alter the settlor's estate plan. In order for an agent to validly consent to a termination or modification of the settlor's revocable trust, such authority must be expressly conveyed either in the power or in the terms of the trust.

Subsection (a) [72-38-411(1)], however, does not impose restrictions on consent by a conservator or guardian, other than prohibiting such action if the settlor is represented by an agent. The section instead leaves the issue of a conservator's or guardian's authority to local law. Many conservatorship statutes recognize that termination or modification of the settlor's trust is a sufficiently important transaction that a conservator should first obtain the approval of the court supervising the conservatorship. *See, e.g.*, Unif. Probate Code Section 5-411(a)(4). Because the Uniform Trust Code uses the term "conservator" to refer to the person appointed by the court to manage an individual's property (*see* Section 103(5) [72-38-103(5)]), a guardian may act on behalf of a settlor under this section only if a conservator has not been appointed.

Subsection (a) [72-38-411(1)] is similar to Restatement (Third) of Trusts Section 65(2) (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts Section 338(2) (1959), both of which permit termination upon joint action of the settlor and beneficiaries. Unlike termination by the beneficiaries alone under subsection (b) [72-38-411(2)], termination with the concurrence of the settlor does not require a finding that the trust no longer serves a material purpose. No finding of failure of material purpose is required because all parties with a possible interest in the trust's continuation, both the settlor and beneficiaries, agree there is no further need for the trust. Restatement Third goes further than subsection (b) of this section [72-38-411(2)] and Restatement Second, however, in also allowing the beneficiaries to compel termination of a trust that still serves a material purpose if the reasons for termination outweigh the continuing material purpose.

Subsection (b) [72-38-411(2)], similar to Restatement Third but not Restatement Second, allows modification by beneficiary action. The beneficiaries may modify any term of the trust if the modification is not inconsistent with a material purpose of the trust. Restatement Third, though, goes further than this Code in also allowing the beneficiaries to use trust modification as a basis for removing the trustee if removal would not be inconsistent with a material purpose of the trust. Under the Code, however, Section 706 [72-38-706] is the exclusive provision on removal of trustees. Section 706(b)(4) [72-38-706(2)(d)] recognizes that a request for removal upon unanimous agreement of the qualified beneficiaries is a factor for the court to consider, but before removing the trustee the court must also find that such action best serves the interests of all the beneficiaries, that removal is not inconsistent with a material purpose of the trust, and that a suitable cotrustee or successor trustee is available. *Compare* Section 706(b)(4) [72-38-706(2)(d)], *with* Restatement (Third) Section 65 cmt. f (Tentative Draft No. 3, approved 2001).

The requirement that the trust no longer serve a material purpose before it can be terminated by the beneficiaries does not mean that the trust has no remaining function. In order to be material, the purpose remaining to be performed must be of some significance:

Material purposes are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to the beneficiary's management skills, judgment, or level of maturity. Thus, a court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose. Restatement (Third) of Trusts Section 65 cmt. d (Tentative Draft No. 3, approved 2001).

Subsection (c) [72-38-411(3), adopted as modified] of this section deals with the effect of a spendthrift provision on the right of a beneficiary to concur in a trust termination or modification. By a 2004 amendment, subsection (c) has been placed in brackets and thereby made optional. Spendthrift terms have sometimes been construed to constitute a material purpose without inquiry into the intention of the particular settlor. For examples, see Restatement (Second) of Trusts Section 337 (1959); George G. Bogert & George T. Bogert, The Law of Trusts and Trustees Section 1008 (Rev. 2d ed. 1983); and 4 Austin W. Scott & William F. Fratcher, The Law of Trusts Section 337 (4th ed. 1989). This result is troublesome because spendthrift provisions are often added to instruments with little thought. Subsection (c), similar to Restatement (Third) of Trusts Section 65 cmt. e (Tentative Draft No. 3, approved 2001), does not negate the possibility that continuation of a trust to assure spendthrift protection might have been a material purpose of the particular settlor. The question of whether that was the intent of a particular settlor is instead a matter of fact to be determined on the totality of the circumstances.

Subsection (d) [72-38-411(4)] recognizes that the beneficiaries' power to compel termination of the trust includes the right to direct how the trust property is to be distributed. While subsection (a) [72-38-411(1)] requires the settlor's consent to terminate an irrevocable trust, the settlor does not control the subsequent distribution of the trust property. Once termination has been approved, how the trust property is to be distributed is solely for the beneficiaries to decide.

Subsection (e) [72-38-411(5)], similar to Restatement (Third) of Trusts Section 65 cmt. c (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts Sections 338(2) & 340(2) (1959), addresses situations in which a termination or modification is requested by less than all the beneficiaries, either because a beneficiary objects, the consent of a beneficiary cannot be obtained, or representation is either unavailable or its application uncertain. Subsection (e) [72-38-411(5)] allows the court to fashion an appropriate order protecting the interests of the nonconsenting beneficiaries while at the same time permitting the remainder of the trust property to be distributed without restriction. The order of protection for the nonconsenting beneficiaries might include partial continuation of the trust, the purchase of an annuity, or the valuation and cashout of the interest.

2003 Amendment. The amendment, which adds the language "modification or" to subsection (a) [72-38-411(1)], fixes an inadvertent omission. It was the intent of the drafting committee that an agent with authority or a conservator or guardian with the approval of the court be able to participate not only in a decision to terminate a trust but also in a decision to modify it.

2004 Amendments.Section 411(a), Section 301(d), and Conforming Changes to Sections 301(c) and 410(b). Section 411(a) [72-38-411(1)] was amended in 2004 on the recommendation of the Estate and Gift Taxation Committee of the American College of Trust and Estate Counsel (ACTEC). Enacting jurisdictions now have several options all of which are indicated by brackets:

- delete subsection (a) [72-38-411(1)], meaning that the state's prior law would control on this issue.
- require court approval of the modification or termination.

- make the provision prospective and applicable only to irrevocable trusts created on or after the effective date or to revocable trusts that become irrevocable on or after the effective date of the provision.
- enact subsection (a) [72-38-411(1)] in its original form.

Section 411(a) [72-38-411(1)], as originally drafted did not require that a court approve a joint decision of the settlor and beneficiaries to terminate or modify an irrevocable trust. The ACTEC Committee was concerned that:

- Section 411(a) [72-38-411(1)], without amendment, could potentially result in the taxation for federal estate tax purposes of irrevocable trusts created in states which previously required that a court approve a settlor/beneficiary termination or modification; and
- Because of the ability of a settlor under Section 301[72-38-301] to represent and bind a beneficiary with respect to a termination or modification of an irrevocable trust, Section 411(a) [72-38-411(1)] might result in inclusion of the trust in the settlor's gross estate. New Section 301(d) [72-38-301(4)] eliminates the possibility of such representation.

The Drafting Committee recommends that all jurisdictions enact the amendment to Section 301(d) [72-38-301(4)]. The Drafting Committee recommends that jurisdictions conform Section 411(a) [72-38-411(1)] to prior law on whether or not court approval is necessary for the settlor and beneficiaries to jointly terminate or modify an irrevocable trust. If prior law is in doubt, the enacting jurisdiction may wish to make Section 411(a) [72-38-411(1)] prospective only. The enacting jurisdiction may also elect to delete Section 411(a) [72-38-411(1)].

States electing to delete Section 411(a) [72-38-411(1)] should also delete the cross-references to Section 411 found in Sections 301(c) [72-38-301(3)] and 410(b) [72-38-410(2)]. These cross-references have therefore been placed in brackets. States electing to delete Section 411(a) [72-38-411(1)] should also not enact Section 301(d) [72-38-301(4)], which for this reason has similarly been placed in brackets.

Section 411(c) Section 411(c) [72-38-411(3), adopted as modified], which by the 2004 amendment was placed in brackets and therefore made optional, provides that a spendthrift provision is not presumed to constitute a material purpose of the trust. Several states that have enacted the Code have not agreed with the provision and have either deleted it or have reversed the presumption. Given these developments, the Drafting Committee concluded that uniformity could not be achieved. The Joint Editorial Board for Uniform Trusts and Estates Acts, however, is of the view that the better approach is to enact subsection (c) in its original form for the reasons stated in the comment to this Section.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 6, Ch. 564, L. 2023. Amendment effective October 1, 2023.

Source: This section modifies section 411 of the Uniform Law Commission's Uniform Trust Code by adding a requirement for the attorney general's consent in subsections (1) and (2), by reversing the presumption in subsection (3) so that a spendthrift provision is presumed to constitute a material purpose of the trust, and by prescribing the distribution of a charitable trust in subsection (4). The language in this section relates to the language in 72-33-406 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Medicaid — Trust Principal Not Countable Asset — No Ability to Terminate Trust: The petitioner's estate appealed a District Court order affirming an administrative law judge's proposed order that trust principal consisting of a jointly owned home constituted a countable asset for the purposes of the petitioner's Medicaid eligibility. The dispositive issue on appeal was whether there were any circumstances under which the trust's principal could be returned to the petitioner or used for her benefit. The Supreme Court reversed and remanded the case, concluding there were no circumstances under which payment from the trust's corpus could be made for the petitioner's benefit. The express terms of the trust disclaimed the petitioner's ability to terminate the trust. These terms took precedence over the Uniform Trust Code's default provisions, and a court could not recognize as legitimate any attempt by the petitioner to terminate or modify the trust. In re Estate of Scheidecker v. Dept. of Public Health and Human Services, 2021 MT 158, 404 Mont. 407, 490 P.3d 87.

Termination of Family Trusts Proper Given Disintegration of Family — Distribution of Trust Property to Parents Affirmed: During the marriage, the parents set up two irrevocable trusts, with the children as beneficiaries, and each parent received annual distributions from one trust. When the marriage disintegrated, the husband moved to reclassify the corpuses of the trusts as marital assets and to distribute the trust assets between husband and wife. The District Court agreed that the purposes of the family trusts, which were for estate planning tools and to avoid probate and inheritance taxes, were no longer viable, so the court dissolved the trusts and distributed the trust assets between husband and wife pending appeal. The Supreme Court applied 72-33-413 (now repealed) and affirmed. Continuation of the trusts would have substantially impaired the purposes of the trusts, given the limited existence of other marital assets and the children's limited contributions of labor toward the acquisition and development of the trust property. Both husband and wife could possibly have experienced extreme detriment if the trust assets were not distributed as marital property, and the District Court did not err in doing so. In re Marriage of Epperson, 2005 MT 46, 326 M 142, 107 P3d 1268 (2005).

Material Purpose of Trust Frustrated — Modification of Trust for Appointment of Corporate Sole Trustee Proper: Eggebrecht died, leaving a wife and two young children. His wife was appointed personal representative of his intestate estate. Shortly after he died, Eggebrecht's parents filed several creditor's claims against the estate and sought to have a will, executed 10 years earlier, admitted to probate. The will left everything to Eggebrecht's brother and sisters and purported to disinherit any future spouse. Following lengthy litigation, the parties instead agreed to create an irrevocable trust, with the children as beneficiaries, the wife and mother as trustees, and the wife and both parents as trust advisers. About 3 years later, the wife sought funds from the trust to meet the children's needs, but her requests for disbursements were denied by the parents. The wife then petitioned to modify the trust, offering to resign as joint trustee and requesting substitution of a corporate trustee. One of the children gained majority during the pendency of the action and joined the suit with the wife, also expressing the belief that the solution was to have a corporate trustee administer the trust. The District Court found, and the Supreme Court agreed, that the true material purpose of the trust was to benefit the children by giving them support and maintenance and that that purpose was frustrated as a result of the joint trustees' inability to work together. Therefore, the reasons for modifying the trust to allow appointment of a corporate trustee outweighed the material purpose of having a trust adviser position, and the District Court properly exercised its discretion in eliminating the trust adviser position and appointing a corporate sole trustee. In re Eggebrecht Irrevocable Trust v. Eggebrecht, 2000 MT 189, 300 M 409, 4 P3d 1207, 57 St. Rep. 748 (2000).

72-38-412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively.

Official Comments

This section broadens the court's ability to apply equitable deviation to terminate or modify a trust. Subsection (a) [72-38-412(1)] allows a court to modify the dispositive provisions of the trust as well as its administrative terms. For example, modification of the dispositive provisions to increase support of a beneficiary might be appropriate if the beneficiary has become unable to provide for support due to poor health or serious injury. Subsection (a) [72-38-412(1)] is similar to Restatement (Third) of Trusts Section 66(1) (Tentative Draft No. 3, approved 2001), except that this section, unlike the Restatement, does not impose a duty on the trustee to petition the court if the trustee is aware of circumstances justifying judicial modification. The purpose of the "equitable deviation" authorized by subsection (a) [72-38-412(1)] is not to disregard the settlor's intent but to modify inopportune details to effectuate better the settlor's broader purposes. Among other things, equitable deviation may be used to modify administrative or dispositive terms due to the failure to anticipate economic change or the incapacity of a beneficiary. For numerous illustrations, see Restatement (Third) of Trusts Section 66 cmt. b (Tentative Draft No. 3, approved 2001). While it is necessary that there be circumstances not anticipated by the settlor before the court may grant relief under subsection (a) [72-38-412(1)], the circumstances may have been in existence when the trust was created. This section thus complements Section 415 [72-38-415], which allows for reformation of a trust based on mistake of fact or law at the creation of the trust.

Subsection (b) [72-38-412(2)] broadens the court's ability to modify the administrative terms of a trust. The standard under subsection (b) [72-38-412(2)] is similar to the standard for applying cy pres to a charitable trust. *See* Section 413(a) [72-38-413(1)]. Just as a charitable trust may be modified if its particular charitable purpose becomes impracticable or wasteful, so can the administrative terms of any trust, charitable or noncharitable. Subsections (a) [72-38-412(1)] and (b) [72-38-412(2)] are not mutually exclusive. Many situations justifying modification of administrative terms under subsection (a) [72-38-412(1)] will also justify modification under subsection (b) [72-38-412(2)]. Subsection (b) [72-38-412(2)] is also an application of the requirement in Section 404 [72-38-404] that a trust and its terms must be for the benefit of its beneficiaries. *See also* Restatement (Third) of Trusts Section 27(2) & cmt. b (Tentative Draft No. 2, approved 1999). Although the settlor is granted considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose which is for the benefit of its beneficiaries precludes unreasonable restrictions on the use of trust property. An owner's freedom to be capricious about the use of the owner's own property ends when the property is impressed with a trust for the benefit of others. *See* Restatement (Second) of Trusts Section 124 cmt. g (1959). Thus, attempts to impose unreasonable restrictions on the use of trust property will fail. *See* Restatement (Third) of Trusts Section 27 Reporter's Notes to cmt. b (Tentative Draft No. 2, approved 1999). Subsection (b), unlike subsection (a), does not have a direct precedent in the common law, but various states have insisted on such a measure by statute. *See, e.g.*, Mo. Rev. Stat. Section 456.590.1.

Upon termination of a trust under this section, subsection (c) [72-38-412(3)] requires that the trust be distributed in a manner consistent with the purposes of the trust. As under the doctrine of cy pres, effectuating a distribution consistent with the purposes of the trust requires an examination of what the settlor would have intended had the settlor been aware of the unanticipated circumstances. Typically, such terminating distributions will be made to the qualified beneficiaries, often in proportion to the actuarial value of their interests, although the section does not so prescribe. For the definition of qualified beneficiary, see Section 103(13) [72-38-103(16)].

Modification under this section, because it does not require beneficiary action, is not precluded by a spendthrift provision.

72-38-413. Cy pres.

Official Comments

Subsection (a) [72-38-413(1)] codifies the court's inherent authority to apply cy pres. The power may be applied to modify an administrative or dispositive term. The court may order the trust terminated and distributed to other charitable entities. Partial termination may also be ordered if the trust property is more than sufficient to satisfy the trust's current purposes. Subsection (a) [72-38-413(1)], which is similar to Restatement (Third) of Trusts § 67 (Tentative Draft No. 3, approved 2001), modifies the doctrine of cy pres by presuming that the settlor had a general charitable intent when a particular charitable purpose becomes impossible or impracticable to achieve. Traditional doctrine did not supply that presumption, leaving it to the courts to determine whether the settlor had a general charitable intent. If such an intent is found, the trust property is applied to other charitable purposes. If not, the charitable trust fails. *See* Restatement (Second) of Trusts § 399 (1959). In the great majority of cases the settlor would prefer that the property be used for other charitable purposes. Courts are usually able to find a general charitable purpose to which to apply the property, no matter how vaguely such purpose may have been expressed by the settlor. Under subsection (a) [72-38-413(1)], if the particular purpose for which the trust was created becomes impracticable, unlawful, impossible to achieve, or wasteful, the trust does not fail. The court instead must either modify the terms of the trust or distribute the property of the trust in a manner consistent with the settlor's charitable purposes.

The settlor, with one exception, may mandate that the trust property pass to a noncharitable beneficiary upon failure of a particular charitable purpose. Responding to concerns about the clogging of title and other administrative problems caused by remote default provisions upon failure of a charitable purpose, subsection (b) [72-38-413(2)] invalidates a gift over to a noncharitable beneficiary upon failure of a particular charitable purpose unless the trust property is to revert to a living settlor or fewer than 21 years have elapsed since the trust's creation. Subsection (b) [72-38-413(2)] will not apply to a charitable lead trust, under which a charity receives payments for a term certain with a remainder to a noncharity. In the case of a charitable lead trust, the settlor's particular charitable purpose does not fail upon completion of the specified trust term and distribution of the remainder to the noncharity. Upon completion of the specified trust term, the settlor's particular charitable purpose has instead been fulfilled. For a discussion of the reasons for a provision such as subsection (b) [72-38-413(2)], see Ronald Chester, *Cy Pres of Gift Over: The Search for Coherence in Judicial Reform of Failed Charitable Trusts*, 23 Suffolk U. L. Rev. 41 (1989).

The doctrine of cy pres is applied not only to trusts, but also to other types of charitable dispositions, including those to charitable corporations. This section does not control dispositions made in nontrust form. However, in formulating rules for such dispositions, the courts often refer to the principles governing charitable trusts, which would include this Code.

For the definition of charitable purpose, see Section 405(a) [72-38-405(1)]. Pursuant to Sections 405(c) [72-38-405(3)] and 410(b) [72-38-410(2)], a petition requesting a court to enforce a charitable trust or to apply cy pres may be maintained by a settlor. Such actions can also be maintained by a cotrustee, the state attorney general, or by a person having a special interest in the charitable disposition. *See* Restatement (Second) of Trusts § 391 (1959).

Compiler's Comments

Source: The language in this section relates to the language in 72-33-504 (now repealed).

72-38-414. Modification or termination of uneconomic trust.

Official Comments

Subsection (a) [72-38-414(1), adopted as modified] assumes that a trust with a value of $50,000 or less is sufficiently likely to be inefficient to administer that a trustee should be able to terminate it without the expense of a judicial termination proceeding. The amount has been placed in brackets to signal to enacting jurisdictions that they may wish to designate a higher or lower figure. Because subsection (a) [72-38-414(1)] is a default rule, a settlor is free to set a higher or lower figure or to specify different procedures or to prohibit termination without a court order. *See* Section 105 [72-38-105] and Article 4 [Title 72, ch. 38, pt. 4] General Comment.

Subsection (b) [72-38-414(2)] allows the court to modify or terminate a trust if the costs of administration would otherwise be excessive in relation to the size of the trust. The court may terminate a trust under this section even if the settlor has forbidden it. See Section 105(b)(4) [72-38-105(2)(d)]. Judicial termination under this subsection may be used whether or not the trust is larger or smaller than $50,000.

When considering whether to terminate a trust under either subsection (a) [72-38-414(1)] or (b) [72-38-414(2)], the trustee or court should consider the purposes of the trust. Termination under this section is not always wise. Even if administrative costs may seem excessive in relation to the size of the trust, protection of the assets from beneficiary mismanagement may indicate that the trust be continued. The court may be able to reduce the costs of administering the trust by appointing a new trustee.

Upon termination of a trust under this section, subsection (c) [72-38-414(3)] requires that the trust property be distributed in a manner consistent with the purposes of the trust. In addition to outright distribution to the beneficiaries, Section 816(21) [72-38-816(21)] authorizes payment to be made by a variety of alternate payees. Distribution under this section will typically be made to the qualified beneficiaries in proportion to the actuarial value of their interests.

Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the "trustee" could constitute a breach of trust. The drafters of the Uniform Trust Code concluded that easements for conservation or preservation are sufficiently different from the typical cash and securities found in small trusts that they should be excluded from this section, and subsection (d) [not adopted] so provides. Most creators of such easements, it was surmised, would prefer that the easement be continued unchanged even if the easement, and hence the trust, has a relatively low market value. For the law of conservation easements, see Restatement (Third) of Property: Servitudes §1.6 (2000).

While this section is not directed principally at honorary trusts, it may be so applied. *See* Sections 408 [72-38-408], 409 [72-38-409].

Because termination of a trust under this section is initiated by the trustee or ordered by the court, termination is not precluded by a spendthrift provision.

Compiler's Comments

Source: This section modifies section 414 of the Uniform Law Commission's Uniform Trust Code by increasing the value in subsection (1) from $50,000 to $100,000 and by removing subsection (d), which states: "(d) This section does not apply to an easement for conservation or preservation."

The language in this section relates to the language in 72-33-412 (now repealed).

72-38-415. Reformation to correct mistakes.

Official Comments

Reformation of inter vivos instruments to correct a mistake of law or fact is a long-established remedy. Restatement (Third) of Property: Donative Transfers Section 12.1 (Tentative Draft No. 1, approved 1995), which this section copies, clarifies that this doctrine also applies to wills.

This section applies whether the mistake is one of expression or one of inducement. A mistake of expression occurs when the terms of the trust misstate the settlor's intention, fail to include a term that was intended to be included, or include a term that was not intended to be included. A mistake in the inducement occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law. *See* Restatement (Third) of Property: Donative Transfers Section 12.1 cmt. i (Tentative Draft No. 1, approved 1995). Mistakes of expression are frequently caused by scriveners' errors while mistakes of inducement often trace to errors of the settlor.

Reformation is different from resolving an ambiguity. Resolving an ambiguity involves the interpretation of language already in the instrument. Reformation, on the other hand, may involve the addition of language not originally in the instrument, or the deletion of language originally included by mistake, if necessary to conform the instrument to the settlor's intent. Because reformation may involve the addition of language to the instrument, or the deletion of language that may appear clear on its face, reliance on extrinsic evidence is essential. To guard against the possibility of unreliable or contrived evidence in such circumstance, the higher standard of clear and convincing proof is required. *See* Restatement (Third) of Property: Donative Transfers Section 12.1 cmt. e (Tentative Draft No. 1, approved 1995).

In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intention even though it contradicts an apparent plain meaning of the text. The objective of the plain meaning rule, to protect against fraudulent testimony, is satisfied by the requirement of clear and convincing proof. *See* Restatement (Third) of Property: Donative Transfers Section 12.1 cmt. d and Reporter's Notes (Tentative Draft No. 1, approved 1995). *See also* John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. Pa. L. Rev. 521 (1982).

For further discussion of the rule of this section and its application to illustrative cases, see Restatement (Third) of Property: Donative Transfers Section 12.1 cmts. and Reporter's Notes (Tentative Draft No. 1, approved 1995).

2011 Amendment. This section was revised by technical amendment in 2011. The amendment better conforms the language of the section to the language of the Restatement (Third) of Property provision on which the section is based.

72-38-416. Modification to achieve settlor's tax objectives.

Official Comments

This section is copied from Restatement (Third) of Property: Donative Transfers § 12.2 (Tentative Draft No. 1, approved 1995). "Modification" under this section is to be distinguished from the "reformation" authorized by Section 415 [72-38-415]. Reformation under Section 415 [72-38-415] is available when the terms of a trust fail to reflect the donor's original, particularized intention. The mistaken terms are then reformed to conform to this specific intent. The modification authorized here allows the terms of the trust to be changed to meet the settlor's tax-saving objective as long as the resulting terms, particularly the dispositive provisions, are not inconsistent with the settlor's probable intent. The modification allowed by this subsection is similar in concept to the cy pres doctrine for charitable trusts (*see* Section 413 [72-38-413]), and the deviation doctrine for unanticipated circumstances (*see* Section 412 [72-38-412]).

Whether a modification made by the court under this section will be recognized under federal tax law is a matter of federal law. Absent specific statutory or regulatory authority, binding recognition is normally given only to modifications made prior to the taxing event, for example, the death of the testator or settlor in the case of the federal estate tax. *See* Rev. Rul. 73-142, 1973-1 C.B. 405. Among the specific modifications authorized by the Internal Revenue Code or Service include the revision of split-interest trusts to qualify for the charitable deduction, modification of a trust for a noncitizen spouse to become eligible as a qualified domestic trust, and the splitting of a trust to utilize better the exemption from generation-skipping tax.

For further discussion of the rule of this section and the relevant case law, see Restatement (Third) of Property: Donative Transfers § 12.2 cmts. and Reporter's Notes (Tentative Draft No. 1, approved 1995).

72-38-417. Combination and division of trusts.

Official Comments

This section, which authorizes the combination or division of trusts, is subject to contrary provision in the terms of the trust. *See* Section 105 [72-38-105] and Article 4 [Title 72, ch. 38, pt. 4] General Comment. Many trust instruments and standardized estate planning forms include comprehensive provisions governing combination and division of trusts. Except for the requirement that the qualified beneficiaries receive advance notice of a proposed combination or division, this section is similar to Restatement (Third) of Trusts § 68 (Tentative Draft No. 3, approved 2001).

This section allows a trustee to combine two or more trusts even though their terms are not identical. Typically the trusts to be combined will have been created by different members of the same family and will vary on only insignificant details, such as the presence of different perpetuities savings periods. The more the dispositive provisions of the trusts to be combined differ from each other the more likely it is that a combination would impair some beneficiary's interest, hence the less likely that the combination can be approved. Combining trusts may prompt more efficient trust administration and is sometimes an alternative to terminating an uneconomic trust as authorized by Section 414 [72-38-414]. Administrative economies promoted by combining trusts include a potential reduction in trustees' fees, particularly if the trustee charges a minimum fee per trust, the ability to file one trust income tax return instead of multiple returns, and the ability to invest a larger pool of capital more effectively. Particularly if the terms of the trust are identical, available administrative economies may suggest that the trustee has a responsibility to pursue a combination. *See* Section 805 [72-38-805] (duty to incur only reasonable costs).

Division of trusts is often beneficial and, in certain circumstances, almost routine. Division of trusts is frequently undertaken due to a desire to obtain maximum advantage of exemptions available under the federal generation-skipping tax. While the terms of the trusts which result from such a division are identical, the division will permit differing investment objectives to be pursued and allow for discretionary distributions to be made from one trust and not the other. Given the substantial tax benefits often involved, a failure by the trustee to pursue a division might in certain cases be a breach of fiduciary duty. The opposite could also be true if the division is undertaken to increase fees or to fit within the small trust termination provision. *See* Section 414 [72-38-414].

This section authorizes a trustee to divide a trust even if the trusts that result are dissimilar. Conflicts among beneficiaries, including differing investment objectives, often invite such a division, although as in the case with a proposed combination of trusts, the more the terms of the divided trusts diverge from the original plan, the less likely it is that the settlor's purposes would be achieved and that the division could be approved.

This section does not require that a combination or division be approved either by the court or by the beneficiaries. Prudence may dictate, however, that court approval under Section 410 [72-38-410] be sought and beneficiary consent obtained whenever the terms of the trusts to be combined or the trusts that will result from a division differ substantially one from the other. For the provisions relating to beneficiary consent or ratification of a transaction, or release of trustee from liability, see Section 1009 [72-38-1009].

While the consent of the beneficiaries is not necessary before a trustee may combine or divide trusts under this section, advance notice to the qualified beneficiaries of the proposed combination or division is required. This is consistent with Section 813 [72-38-813], which requires that the trustee keep the beneficiaries reasonably informed of trust administration, including the giving of advance notice to the qualified beneficiaries of several specified actions that may have a major impact on their interests.

Numerous States have enacted statutes authorizing division of trusts, either by trustee action or upon court order. For a list of these statutes, see Restatement (Third) Property: Donative Transfers § 12.2 Statutory Note (Tentative Draft No. 1, approved 1995). Combination or division has also been authorized by the courts in the absence of authorizing statute. *See, e.g., In re Will of Marcus*, 552 N.Y.S. 2d 546 (Surr. Ct.1990) (combination); *In re Heller Inter Vivos Trust*, 613 N.Y.S. 2d 809 (Surr. Ct. 1994) (division); and *BankBoston v. Marlow*, 701 N.E. 2d 304 (Mass. 1998) (division).

For a provision authorizing a trustee, in distributing the assets of the divided trust, to make non-pro-rata distributions, see Section 816(22) [72-38-816(22)].

Compiler's Comments

Source: The language in this section relates to the language in 72-33-415 (now repealed) and 72-33-416 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Characterization of Succeeding Beneficiaries as Remaindermen Not Error: In deciding that good cause did not exist to warrant division of a trust, the District Court described the succeeding beneficiaries as remaindermen. Two trust primary beneficiaries contended that the court erred in its description because the primary beneficiaries did not have life estates in the trust, to which they would succeed, but rather had a perpetual interest in the trust. The primary beneficiaries asserted that the court's misunderstanding of the nature of the succeeding beneficiaries' interests granted greater protection to the succeeding beneficiaries than was granted by the trust itself. On appeal, the Supreme Court noted that the primary beneficiaries' interest in the trust was not perpetual because the trust was designed to terminate upon the death of the last primary beneficiary, at which time the corpus would be distributed to the beneficiaries who succeeded to the primary beneficiaries' interests or to their assigns. It was understandable that the District Court would use the analogy of remaindermen to describe the succeeding beneficiaries, and the Supreme Court found no error in the analogy. In re Stevens Revocable Trust, 2005 MT 106, 327 M 39, 112 P3d 972 (2005).

Trust Matters Subject to Summary Judgment: Two sons, Thomas and William, sought to divide their mother's trust but failed to present sufficient evidence that good cause existed for the division. The District Court granted summary judgment to two other sons who were respondents. Thomas and William appealed on grounds that 72-33-416 (now repealed) necessitates a trial whenever trustees and beneficiaries have a disagreement about a trust, because of the inherent discretion in trust decisions, making summary judgment inappropriate for nearly all trust matters. The Supreme Court disagreed. Not every situation involving family disagreements or moves by beneficiaries will necessarily constitute good cause for a trust decision. Here, Thomas and William were unable to demonstrate that the District Court's conclusion that good cause did not exist was incorrect. Because trust matters are subject to the same principles of summary judgment as other matters, absent a showing of good cause to divide the trust, summary judgment for respondents was proper. In re Stevens Revocable Trust, 2005 MT 106, 327 M 39, 112 P3d 972 (2005).

Part 5

Creditor's Claims — Spendthrift and Discretionary Trusts

Part Official Comments

General Comment This article addresses the validity of a spendthrift provision and the rights of creditors, both of the settlor and beneficiaries, to reach a trust to collect a debt. Sections 501 [72-38-501] and 502 [72-38-502] state the general rules. Section 501 [72-38-501] applies if the trust does not contain a spendthrift provision or the spendthrift provision, if any, does not apply to the beneficiary's interest. Section 502 [72-38-502] states the effect of a spendthrift provision. Unless a claim is being made by an exception creditor, a spendthrift provision bars a beneficiary's creditor from reaching the beneficiary's interest until distribution is made by the trustee. An exception creditor, however, can reach the beneficiary's interest subject to the court's power to limit the relief. Section 503 [not adopted] lists the categories of exception creditors whose claims are not subject to a spendthrift restriction. Sections 504 [72-38-504] through 507 [72-38-507] address special categories in which the rights of a beneficiary's creditors are the same whether or not the trust contains a spendthrift provision. Section 504 [72-38-504] deals with discretionary trusts and trusts for which distributions are subject to a standard. Section 505 [72-38-505] covers creditor claims against a settlor, whether the trust is revocable or irrevocable, and if revocable, whether the claim is made during the settlor's lifetime or incident to the settlor's death. Section 506 [72-38-506] provides a creditor with a remedy if a trustee fails to make a mandated distribution within a reasonable time. Section 507 [72-38-507] clarifies that although the trustee holds legal title to trust property, that property is not subject to the trustee's personal debts.

The provisions of this article relating to the validity and effect of a spendthrift provision and the rights of certain creditors and assignees to reach the trust may not be modified by the terms of the trust. *See* Section 105(b)(5) [72-38-105(2)(e), adopted without reference to this part].

This article does not supersede state exemption statutes nor an enacting jurisdiction's Uniform Fraudulent Transfers Act which, when applicable, invalidates any type of gratuitous transfer, including transfers into trust.

Comment Amended in 2004

Comment Section 503 of the Uniform Trust Code was not adopted and the Official Comment to Section 503 is included here:

This section exempts the claims of certain categories of creditors from the effects of a spendthrift restriction and specifies the remedies such exemption creditors may take to satisfy their claims.

The exception in subsection (b)(1) [not adopted] for judgments or orders to support a beneficiary's child or current or former spouse is in accord with Restatement (Third) of Trusts Section 59(a) (Tentative Draft No. 2, approved 1999), Restatement (Second) of Trusts Section 157(a) (1959), and numerous state statutes. It is also consistent with federal bankruptcy law, which exempts such support orders from discharge. The effect of this exception is to permit the claimant for unpaid support to attach present or future distributions that would otherwise be made to the beneficiary. Distributions subject to attachment include distributions required by the express terms of the trust, such as mandatory payments of income, and distributions the trustee has otherwise decided to make, such as through the exercise of discretion. Subsection (b)(1) [not adopted], unlike Section 504 [72-38-504], does not authorize the spousal or child claimant to compel a distribution from the trust. Section 504 [72-38-504] authorizes a spouse or child claimant to compel a distribution to the extent the trustee has abused a discretion or failed to comply with a standard for distribution.

Subsection (b)(1) [not adopted] refers both to "support" and "maintenance" in order to accommodate differences among the States in terminology employed. No difference in meaning between the two terms is intended.

The definition of "child" in subsection (a) [not adopted] accommodates the differing approaches States take to defining the class of individuals eligible for child support, including such issues as whether support can be awarded to stepchildren. However the State making the award chooses to define "child" will be recognized under this Code, whether the order sought to be enforced was entered in the same or different State. For the definition of "state," which includes Puerto Rico and other American possessions, see Section 103(17) [72-38-103(20)].

The definition of "child" in subsection (a) [not adopted] is not exclusive. The definition clarifies that a "child" includes an individual awarded child support in any state. The definition does not expressly include but neither does it exclude persons awarded child support in some other country or political subdivision, such as a Canadian province.

The exception in subsection (b)(2) [not adopted] for a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust is in accord with Restatement (Third) of Trusts Section 59(b) (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 157(c) (1959). This exception allows a beneficiary of modest means to overcome an obstacle preventing the beneficiary's obtaining services essential to the protection or enforcement of the beneficiary's rights under the trust. *See* Restatement (Third) of Trusts Section 59 cmt. d (Tentative Draft No. 2, approved 1999).

Subsection (b)(3) [not adopted] which is similar to Restatement (Third) of Trusts Section 59 cmt. a (Tentative Draft No. 2, approved 1999), exempts certain governmental claims from a spendthrift restriction. Federal preemption guarantees that certain federal claims, such as claims by the Internal Revenue Service, may bypass a spendthrift provision no matter what this Code might say. The case law and relevant Internal Revenue Code provisions on the exception for federal tax claims are collected in George G. Bogert & George T. Bogert, The Law of Trusts and Trustees Section 224 (Rev. 2d ed. 1992); and 2A Austin W. Scott & William F. Fratcher, The Law of Trusts Section 157.4 (4th ed. 1987). Regarding claims by state governments, this subsection recognizes that States take a variety of approaches with respect to collection, depending on whether the claim is for unpaid taxes, for care provided at an institution, or for other charges. Acknowledging this diversity, subsection (c) [not adopted] does not prescribe a rule, but refers to other statutes of the State on whether particular claims are subject to or exempted from spendthrift provisions.

Unlike Restatement (Third) of Trusts Section 59(2) (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 157(b) (1959), this Code does not create an exception to the spendthrift restriction for creditors who have furnished necessary services or supplies to the beneficiary. Most of these cases involve claims by governmental entities, which the drafters concluded are better handled by the enactment of special legislation as authorized by subsection (b)(3) [not adopted]. The drafters also declined to create an exception for tort claimants. For a discussion of the exception for tort claims, which has not generally been recognized, see Restatement (Third) of Trusts Section 59 Reporter's Notes to cmt. a (Tentative Draft No. 2, approved 1999). For a discussion of other exceptions to a spendthrift restriction, recognized in some States, see George G. Bogert & George T. Bogert, The Law of Trusts and Trustees Section 224 (Rev. 2d ed. 1992); and 2A Austin W. Scott & William F. Fratcher, The Law of Trusts Sections 157-157.5 (4th ed. 1987).

Subsection (c) [not adopted] provides that the only remedy available to an exception creditor is attachment of present or future distributions of present or future distributions. Depending on other creditor law of the state, additional remedies may be available should a beneficiary's interest not be subject to a spendthrift provision. Section 501 [72-38-501], which applies in such situations, provides that the creditor may reach the beneficiary's interest under that section by attachment or "other means." Subsection (c) [not adopted], similar to Section 501 [72-38-501], clarifies that the court has the authority to limit the creditor's relief as appropriate under the circumstances.

2005 Amendment. The amendment rewrote this section. The section previously provided:

SECTION 503. EXCEPTIONS TO SPENDTHRIFT PROVISION.(a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another State.

(b) Even if a trust contains a spendthrift provision, a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance, or a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust, may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary.

(c) A spendthrift provision is unenforceable against a claim of this State or the United States to the extent a statute of this State or federal law so provides.

Part Compiler's Comments

Source: The Montana Uniform Trust Code did not adopt Section 503 (Exceptions to Spendthrift Provision) of the Uniform Law Commission's Uniform Trust Code.

Part Case Notes

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Spendthrift Provision Valid — Exemption From Collection by Creditors: In a case of first impression, the Supreme Court held spendthrift provisions in trusts to be valid. In this case, the beneficiary's attempted assignment of trust income to his creditors was invalid, though the creditors could execute against the income after payment of the income to the beneficiary. A lower court order directing trustee to pay the trust income directly to the creditors was reversed. Section 72-24-210 (now repealed) did not apply because: (1) the trust was made up of personal property and three contracts for deed, which under the doctrine of equitable conversion are personal property to the seller; and (2) the trust provided that any income not distributed was to be added to principal, thus providing a direction for accumulation. Lundgren v. Hoglund, 219 M 295, 711 P2d 809, 42 St. Rep. 2031 (1985).

Trustee's Right to Appeal Court Order When Trustee Not a Party: Trustee-bank could appeal from court order directing trustee to pay all income due beneficiary to beneficiary's judgment creditors, even though the trustee was not a party to the action between the beneficiary and creditors. The trustee had a fiduciary duty to preserve and protect the trust assets. Lundgren v. Hoglund, 219 M 295, 711 P2d 809, 42 St. Rep. 2031 (1985).

72-38-501. Rights of beneficiary's creditor or assignee.

Official Comments

This section applies only if the trust does not contain a spendthrift provision or the spendthrift provision does not apply to a particular beneficiary's interest. A settlor may subject to spendthrift protection the interests of certain beneficiaries but not others. A settlor may also subject only a portion of the trust to spendthrift protection such as an interest in the income but not principal. For the effect of a spendthrift provision on creditor claims, see Section 503 [not adopted].

Absent a valid spendthrift provision, a creditor may ordinarily reach the interest of a beneficiary the same as any other of the beneficiary's assets. This does not necessarily mean that the creditor can collect all distributions made to the beneficiary. The interest may be too indefinite or contingent for the creditor to reach or the interest may qualify for an exemption under the state's general creditor exemption statutes. *See* (Third) of Trusts §56 (2003); Restatement (Second) of

Trusts §§147-149, 162 (1959). Other creditor law of the State may limit the creditor to a specified percentage of a distribution. *See, e.g.*, Cal. Prob. Code Section 15306.5. This section does not prescribe the procedures ("other means") for reaching a beneficiary's interest or of priority among claimants, leaving those issues to the enacting State's laws on creditor rights. The section does clarify, however, that an order obtained against the trustee, whatever state procedure may have been used, may extend to future distributions whether made directly to the beneficiary or to others for the beneficiary's benefit. By allowing an order to extend to future payments, the need for the creditor periodically to return to court will be reduced.

Because proceedings to satisfy a claim are equitable in nature, the second sentence of this section ratifies the court's discretion to limit the award as appropriate under the circumstances. In exercising its discretion to limit relief, the court may appropriately consider the circumstances of a beneficiary and the beneficiary's family. *See* Restatement (Third) of Trusts Section 56 cmt. e (Tentative Draft No. 2, approved 1999).

2005 Amendment. A 2005 amendment changes "protected by" to "subject to" in the first sentence of the section. No substantive change is intended. The amendment was made to negate an implication that this section allowed an exception creditor to reach a beneficiary's interest even though the trust contained a spendthrift provision. The list of exception creditors and their remedies are contained in Section 503 [not adopted]. Clarifying changes are also made in the comments and unnecessary language on creditor remedies omitted.

72-38-502. Spendthrift provision.

Official Comments

Under this section, a settlor has the power to restrain the transfer of a beneficiary's interest, regardless of whether the beneficiary has an interest in income, in principal, or in both. Unless one of the exceptions under this article applies, a creditor of the beneficiary is prohibited from attaching a protected interest and may only attempt to collect directly from the beneficiary after payment is made. This section is similar to Restatement (Third) of Trusts § 58 (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts §§ 152-153 (1959). For the definition of spendthrift provision, see Section 103(15).

For a spendthrift provision to be effective under this Code, it must prohibit both the voluntary and involuntary transfer of the beneficiary's interest, that is, a settlor may not allow a beneficiary to assign while prohibiting a beneficiary's creditor from collecting, and vice versa. *See* Restatement (Third) of Trusts § 58 cmt. b (Tentative Draft No. 2, approved 1999). *See also* Restatement (Second) of Trusts § 152(2) (1959). A spendthrift provision valid under this Code will also be recognized as valid in a federal bankruptcy proceeding. *See* 11 U.S.C. § 541(c)(2).

Subsection (b) [72-38-502(2)], which is derived from Texas Property Code § 112.035(b), allows a settlor to provide maximum spendthrift protection simply by stating in the instrument that all interests are held subject to a "spendthrift trust" or words of similar effect.

A disclaimer, because it is a refusal to accept ownership of an interest and not a transfer of an interest already owned, is not affected by the presence or absence of a spendthrift provision. Most disclaimer statutes expressly provide that the validity of a disclaimer is not affected by a spendthrift protection. *See, e.g.*, Uniform Probate Code § 2-801(a). Releases and exercises of powers of appointment are also not affected because they are not transfers of property. *See* Restatement (Third) of Trusts § 58 cmt. c (Tentative Draft No. 2, approved 1999).

A spendthrift provision is ineffective against a beneficial interest retained by the settlor. *See* Restatement (Third) of Trusts §58(2), (Tentative Draft No. 2, approved 1999). This is a necessary corollary to Section 505(a)(2) [72-38-505(1)(b)], which allows a creditor or assignee of the settlor to reach the maximum amount that can be distributed to or for the settlor's benefit. This right to reach the trust applies whether or not the trust contains a spendthrift provision.

A valid spendthrift provision makes it impossible for a beneficiary to make a legally binding transfer, but the trustee may choose to honor the beneficiary's purported assignment. The trustee may recommence distributions to the beneficiary at anytime. The beneficiary, not having made a binding transfer, can withdraw the beneficiary's direction but only as to future payments. *See* Restatement (Third) of Trusts § 58 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 152 cmt. i (1959).

72-38-504. Discretionary trusts — effect of standard.

Official Comments

This section addresses the ability of a beneficiary's creditor to reach the beneficiary's discretionary trust interest, whether or not the exercise of the trustee's discretion is subject to a standard. This section, similar to the Restatement, eliminates the distinction between discretionary and support trusts, unifying the rules for all trusts fitting within either of the former categories. *See* Restatement (Third) of Trusts Section 60 Reporter's Notes to cmt. a (Tentative Draft No. 2, approved 1999). By eliminating this distinction, the rights of a creditor are the same whether the distribution standard is discretionary, subject to a standard, or both. Other than for a claim by a child, spouse or former spouse, a beneficiary's creditor may not reach the beneficiary's interest. Eliminating this distinction affects only the rights of creditors. The affect of this change is limited to the rights of creditors. It does not affect the rights of a beneficiary to compel a distribution. Whether the trustee has a duty in a given situation to make a distribution depends on factors such as the breadth of the discretion granted and whether the terms of the trust include a support or other standard. *See* Section 814 [72-38-814] comment.

For a discussion of the definition of "child" in subsection (a), see Section 503 Comment [not adopted; comment included in Title 72, ch. 38, pt. 5 comments].

Subsection (b) [72-38-504(1)], which establishes the general rule, forbids a creditor from compelling a distribution from the trust, even if the trustee has failed to comply with the standard of distribution or has abused a discretion. Under subsection (d) [72-38-504(2)], the power to force a distribution due to an abuse of discretion or failure to comply with a standard belongs solely to the beneficiary. Under Section 814(a) [72-38-814(1)], a trustee must always exercise a discretionary power in good faith and with regard to the purposes of the trust and the interests of the beneficiaries.

Subsection (c) [not adopted] creates an exception for support claims of a child, spouse, or former spouse who has a judgment or order against a beneficiary for support or maintenance. While a creditor of a beneficiary generally may not assert that a trustee has abused a discretion or failed to comply with a standard of distribution, such a claim may be asserted by the beneficiary's child, spouse, or former spouse enforcing a judgment or court order against the beneficiary for unpaid support or maintenance. The court must direct the trustee to pay the child, spouse or former spouse such amount as is equitable under the circumstances but not in excess of the amount the trustee was otherwise required to distribute to or for the benefit of the beneficiary. Before fixing this amount, the court having jurisdiction over the trust should consider that in setting the respective support award, the family court has already considered the respective needs and assets of the family. The Uniform Trust Code does not prescribe a particular procedural method for enforcing a judgment or order against the trust, leaving that matter to local collection law.

Subsection (e) [72-38-504(3)], which was added by a 2004 amendment, is discussed below.

2004 Amendment Section 504(e) [72-38-504(3)], 103(11) [72-38-103(13)] Trusts are frequently drafted in which a trustee is also a beneficiary. A common example is what is often referred to as a bypass trust, under which the settlor's spouse will frequently be named as both trustee and beneficiary. An amount equal to the exemption from federal estate tax will be placed in the bypass trust, and the trustee, who will often be the settlor's spouse, will be given discretion to make distributions to the beneficiaries, a class which will usually include the spouse/trustee. To prevent the inclusion of the trust in the spouse-trustee's gross estate, the spouse's discretion to make distributions for the spouse's own benefit will be limited by an ascertainable standard relating to health, education, maintenance, or support.

The UTC, as previously drafted, did not specifically address the issue of whether a creditor of a beneficiary may reach the beneficial interest of a beneficiary who is also a trustee. However, Restatement (Third) of Trusts §60, comment g, which was approved by the American law Institute in 1999, provides that the beneficial interest of a beneficiary/trustee may be reached by the beneficiary/trustee's creditors. Because the UTC is supplemented by the common law (see UTC Section 106 [72-38-106]), this Restatement rule might also apply in states enacting the UTC. The drafting committee has concluded that adoption of the Restatement rule would unduly disrupt standard estate planning and should be limited. Consequently, Section 504 [72-38-504] is amended to provide that the provisions of this section, which generally prohibit a creditor of a beneficiary from reaching a beneficiary's discretionary interest, apply even if the beneficiary is also a trustee or cotrustee. The beneficiary-trustee is protected from creditor claims to the extent the beneficiary-trustee's discretion is protected by an ascertainable standard as defined in the relevant Internal Revenue Code sections. The result is that the beneficiary's trustee's interest is protected to the extent it is also exempt from federal estate tax. The amendment thereby achieves its main purpose, which is to protect the trustee-beneficiary of a bypass trust from creditor claims.

The protection conferred by this subsection, however, is no greater than if the beneficiary had not been named trustee. If an exception creditor can reach the beneficiary's interest under some other provision, the interest is not insulated from creditor claims by the fact the beneficiary is or becomes a trustee.

In addition, the definition of "power of withdrawal" in Section 103 [72-38-103(13)] is amended to clarify that a power of withdrawal does not include a power exercisable by the trustee that is limited by an ascertainable standard. The purpose of this amendment is to preclude a claim that the power of a trustee-beneficiary to make discretionary distributions for the trustee-beneficiary's own benefit results in an enforceable claim of the trustee-beneficiary's creditors to reach the trustee-beneficiary's interest as provided in Section 505(b) [72-38-505(2)]. Similar to the amendment to Section 504 [72-38-504], the amendment to "power of withdrawal" is being made because of concerns that Restatement (Third) of Trusts Section 60, comment g, otherwise might allow a beneficiary-trustee's creditors to reach the trustee's beneficial interest.

The Code does not specifically address the extent to which a creditor of a trustee/beneficiary may reach a beneficial interest of a beneficiary/trustee that is not limited by an ascertainable standard.

For the definition of "ascertainable standard," see Section 103(2) [72-38-103(2)].

Compiler's Comments

Source: This section modifies section 504 of the Uniform Law Commission's Uniform Trust Code by removing a definition of "child" applicable to the section and by removing an exception for a trustee who fails to comply with a standard of distribution or abuses a discretion.

72-38-505. Creditor's claim against settlor.

Official Comments

Subsection (a)(1) [72-38-505(1)(a)] states what is now a well accepted conclusion, that a revocable trust is subject to the claims of the settlor's creditors while the settlor is living. *See* Restatement (Third) of Trusts Section 25 cmt. e (Tentative Draft No. 1, approved 1996). Such claims were not allowed at common law, however. *See* Restatement (Second) of Trusts Section 330 cmt. o (1959). Because a settlor usually also retains a beneficial interest that a creditor may reach under subsection (a)(2), the common law rule, were it retained in this Code, would be of little significance. *See* Restatement (Second) of Trusts Section 156(2) (1959).

Subsection (a)(2) [72-38-505(1)(b)], which is based on Restatement (Third) of Trusts Section 58(2) and cmt. e (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 156 (1959), follows traditional doctrine in providing that a settlor who is also a beneficiary may not use the trust as a shield against the settlor's creditors. The drafters of the Uniform Trust Code concluded that traditional doctrine reflects sound policy. Consequently, the drafters rejected the approach taken in States like Alaska and Delaware, both of which allow a settlor to retain a beneficial interest immune from creditor claims. *See* Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability*, 35 Real Prop. Prob. & Tr. J. 479 (2000); John E. Sullivan, III, *Gutting the Rule Against Self-Settled Trusts: How the Delaware Trust Law Competes with Offshore Trusts*, 23 Del. J. Corp. L. 423 (1998). Under the Code, whether the trust contains a spendthrift provision or not, a creditor of the settlor may reach the maximum amount that the trustee could have paid to the settlor-beneficiary. If the trustee has discretion to distribute the entire income and principal to the settlor, the effect of this subsection is to place the settlor's creditors in the same position as if the trust had not been created. For the definition of "settlor," see Section 103(15) [72-38-103(18)].

This section does not address possible rights against a settlor who was insolvent at the time of the trust's creation or was rendered insolvent by the transfer of property to the trust. This subject is instead left to the State's law on fraudulent transfers. A transfer to the trust by an insolvent settlor might also constitute a voidable preference under federal bankruptcy law.

Subsection (a)(3) [72-38-505(1)(c)] recognizes that a revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges. However, in accordance with traditional doctrine, the assets of the settlor's probate estate must normally first be exhausted before the assets of the revocable trust can be reached. This section does not attempt to address the procedural issues raised by the need first to exhaust the decedent's probate estate before reaching the assets of the revocable trust. Nor does this section address the priority of creditor claims or liability of the decedent's other nonprobate assets for the decedent's debts and other charges. Subsection (a)(3) [72-38-505(1)(c)], however, does ratify the typical pourover will, revocable trust plan. As long as the rights of the creditor or family member claiming a statutory allowance are not impaired, the settlor is free to shift liability from the probate estate to the revocable trust. Regarding other issues associated with potential liability of nonprobate assets for unpaid claims, see Section 6-102 of the Uniform Probate Code, which was added to that Code in 1998.

Subsection (b)(1) [72-38-505(2)(a)] treats a power of withdrawal as the equivalent of a power of revocation because the two powers are functionally identical. This is also the approach taken in Restatement (Third) of Trusts Section 56 cmt. b (Tentative Draft No. 2, approved 1999). If the power is unlimited, the property subject to the power will be fully subject to the claims of the power holder's creditors, the same as the power holder's other assets. If the power holder retains the power until death, the property subject to the power may be liable for claims and statutory allowances to the extent the power holder's probate estate is insufficient to satisfy those claims and allowances. For powers limited either in time or amount, such as a right to withdraw a $10,000 annual exclusion contribution within 30 days, this subsection would limit the creditor to the $10,000 contribution and require the creditor to take action prior to the expiration of the 30-day period.

Upon the lapse, release, or waiver of a power of withdrawal, the property formerly subject to the power will normally be subject to the claims of the power holder's creditors and assignees the same as if the power holder were the settlor of a now irrevocable trust. Pursuant to subsection (a)(2) [72-38-505(1)(b)], a creditor or assignee of the power holder generally may reach the power holder's entire beneficial interest in the trust, whether or not distribution is subject to the trustee's discretion. However, following the lead of Arizona Revised Statutes Section 14-7705(g) and Texas Property Code Section 112.035(e), subsection (b)(2) [72-38-505(2)(b)] creates an exception for trust property which was subject to a Crummey or five and five power. Upon the lapse, release, or waiver of a power of withdrawal, the holder is treated as the settlor of the trust only to the extent the value of the property subject to the power at the time of the lapse, release, or waiver exceeded the greater of the amounts specified in IRC Sections 2041(b)(2) or 2514(e) [greater of 5% or $5,000], or IRC Section 2503(b) [$10,000 in 2001].

The Uniform Trust Code does not address creditor issues with respect to property subject to a special power of appointment or a testamentary general power of appointment. For creditor rights against such interests, see Restatement (Property) Second: Donative Transfers Sections 13.1-13.7 (1986).

Compiler's Comments

Source: This section modifies section 505 of the Uniform Law Commission's Uniform Trust Code by adding language regarding the trustee's discretionary authority in subsection (1)(b).

The language in this section relates to the language in 72-36-302 (now repealed).

72-38-506. Overdue distribution.

Official Comments

The effect of a spendthrift provision is generally to insulate totally a beneficiary's interest until a distribution is made and received by the beneficiary. *See* Section 502 [72-38-502]. But this section, along with several other sections in this article, recognizes exceptions to this general rule. Whether a trust contains a spendthrift provision or not, a trustee should not be able to avoid creditor claims against a beneficiary by refusing to make a distribution required to be made by the express terms of the trust. On the other hand, a spendthrift provision would become largely a nullity were a beneficiary's creditors able to attach all required payments as soon as they became due. This section reflects a compromise between these two competing principles. A creditor can reach a mandatory distribution, including a distribution upon termination, if the trustee has failed to make the payment within a reasonable time after the designated distribution date. Following this reasonable period, payments mandated by the express terms of the trust are in effect being held by the trustee as agent for the beneficiary and should be treated as part of the beneficiary's personal assets.

This section is similar to Restatement (Third) of Trusts Section 58 cmt. d (Tentative Draft No. 2, approved 1999).

2001 Amendment. By amendment in 2001, "designated distribution date" was substituted for "required distribution date" in subsection (b) [72-38-506(2)]. The amendment conforms the language of this section to terminology used elsewhere in the Code.

2005 Amendment. The amendment adds a clarifying definition of "mandatory distribution" in subsection (a) [72-38-506(1)], which is based on an Ohio proposal. The amendment:

- tracks the traditional understanding that a mandatory distribution includes a provision requiring that a beneficiary be paid the income of a trust or receive principal upon termination;
- correlates the definition of "mandatory distribution" in this section to the broad definition of discretionary trust used in Section 504 [72-38-504]. Under both Sections 504 [72-38-504] and 506

[72-38-506], a trust is discretionary even if the discretion is expressed in the form of a standard, such as a provision directing a trustee to pay for a beneficiary's support;

- addresses the situation where the terms of the trust couple language of discretion with language of direction. An example of such a provision is "my trustees shall, in their absolute discretion, distribute such amounts as are necessary for the beneficiary's support." Despite the presence of the imperative "shall," the provision is discretionary, not mandatory. For a more elaborate example of such a discretionary "shall" provision, see Marsman. Nasca, 573 N.E. 2d 1025 (Mass. Ct. App. 1991).
- is clarifying. No change of substance is intended by this amendment. This amendment merely clarifies that a mandatory distribution is to be understood in its traditional sense such as a provision requiring that the beneficiary receive an income or receive principal upon termination of the trust.

72-38-507. Personal obligations of trustee.

Official Comments

Because the beneficiaries of the trust hold the beneficial interest in the trust property and the trustee holds only legal title without the benefits of ownership, the creditors of the trustee have only a personal claim against the trustee. *See* Restatement (Third) § 5 cmt. k (Tentative Draft No.1, approved 1996); Restatement (Second) of Trusts § 12 cmt. a (1959). Similarly, a personal creditor of the trustee who attaches trust property to satisfy the debt does not acquire title as a bona fide purchaser even if the creditor is unaware of the trust. *See* Restatement (Second) of Trusts § 308 (1959). The protection afforded by this section is consistent with that provided by the Bankruptcy Code. Property in which the trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. 11 U.S.C. § 541(d).

The exemption of the trust property from the personal obligations of the trustee is the most significant feature of Anglo-American trust law by comparison with the devices available in civil law countries. A principal objective of the Hague Convention on the Law Applicable to Trusts and on their Recognition is to protect the Anglo-American trust with respect to transactions in civil law countries. *See* Hague Convention art. 11. *See also* Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis,* 73 N.Y.U. L. Rev. 434 (1998); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce,* 107 Yale L.J. 165, 179-80 (1997).

Part 6
Revocable Trusts

Part Official Comments

This article deals with issues of significance not totally settled under prior law. Because of the widespread use in recent years of the revocable trust as an alternative to a will, this short article is one of the more important articles of the Code. This article and the other articles of the Code treat the revocable trust as the functional equivalent of a will. Section 601 [72-38-601] provides that the capacity standard for wills applies in determining whether the settlor had capacity to create a revocable trust. Section 602 [72-38-602], after providing that a trust is presumed revocable unless stated otherwise, prescribes the procedure for revocation or amendment, whether the trust contains one or several settlors. Section 603 [72-38-603] provides that while a trust is revocable and the settlor has capacity, the rights of the beneficiaries are subject to the settlor's control. Section 604 [72-38-604] prescribes a statute of limitations on contest of revocable trusts.

Sections 601 [72-38-601] and 604 [72-38-604], because they address requirements relating to creation and contest of trusts, are not subject to alteration or restriction in the terms of the trust. *See* Section 105 [72-38-105]. Sections 602 [72-38-602] and 603 [72-38-603], by contrast, are not so limited and are fully subject to the settlor's control.

Part Case Notes

Trust Agreement to Divide Trust Into Revocable and Irrevocable Trusts Upon Death of Spouse — Intent of Parties: A husband and wife executed a trust agreement, which provided that upon the death of either spouse, the trust would be split into a revocable trust for the surviving spouse and an irrevocable trust for the children of the marriage. After the wife passed, the husband did not divide the trust as provided by the agreement and later remarried. After the husband passed, the new wife and children disputed how to divide the trust assets. The District Court concluded that the new wife did not have any interest in the trust's assets. On appeal, the Supreme Court reversed, holding that a portion of the trust was subject to modification, and remanded for the District Court to calculate the amount of assets at the time of the first wife's death and to distribute them equally to the revocable and irrevocable trusts as outlined in the trust agreement. In re Estate of McClure, 2016 MT 253, 385 Mont. 130, 381 P.3d 566.

72-38-601. Capacity of settlor of revocable trust.

Official Comments

This section is patterned after Restatement (Third) of Trusts § 11(1) (Tentative Draft No. 1, approved 1996). The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor's death. To solidify the use of the revocable trust as a device for transferring property at death, the settlor usually also executes a pourover will. The use of a pourover will assures that property not transferred to the trust during life will be combined with the property the settlor did manage to convey. Given this primary use of the revocable trust as a device for disposing of property at death, the capacity standard for wills rather than that for lifetime gifts should apply. The application of the capacity standard for wills does not mean that the revocable trust must be executed with the formalities of a will. There are no execution requirements under this Code for a trust not created by will, and a trust not containing real property may be created by an oral statement. *See* Section 407 and Comment [Section 407 expressly allows oral trusts; 72-38-407 as adopted does not].

The Uniform Trust Code does not explicitly spell out the standard of capacity necessary to create other types of trusts, although Section 402 [72-38-402] does require that the settlor have capacity. This section includes a capacity standard for creation of a revocable trust because of the uncertainty in the case law and the importance of the issue in modern estate planning. No such uncertainty exists with respect to the capacity standard for other types of trusts. To create a testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have the capacity that would be needed to transfer the property free of trust. *See generally* Restatement (Third) of Trusts § 11 (Tentative Draft No. 1, approved 1996); Restatement (Third) of Property: Wills and Other Donative Transfers § 8.1 (Tentative Draft No. 3, approved 2001).

72-38-602. Revocation or amendment of revocable trust.

Official Comments

Subsection (a) [72-38-602(1)], which provides that a settlor may revoke or modify a trust unless the terms of the trust expressly state that the trust is irrevocable, changes the common law. Most States follow the rule that a trust is presumed irrevocable absent evidence of contrary intent. *See* Restatement (Second) of Trusts § 330 (1959). California, Iowa, Montana, Oklahoma, and Texas presume that a trust is revocable. The Uniform Trust Code endorses this minority approach, but only for trusts created after its effective date. This Code presumes revocability when the instrument is silent because the instrument was likely drafted by a nonprofessional, who intended the trust as a will substitute. The most recent revision of the Restatement of Trusts similarly reverses the former approach. A trust is presumed revocable if the settlor has retained a beneficial interest. *See* Restatement (Third) of Trusts § 63 cmt. c (Tentative Draft No. 3, approved 2001). Because professional drafters habitually spell out whether or not a trust is revocable, subsection (a) [72-38-602(1)] will have limited application.

A power of revocation includes the power to amend. An unrestricted power to amend may also include the power to revoke a trust. *See* Restatement (Third) of Trusts § 63 cmt. g (Tentative Draft No. 3, approved 2001); Restatement (Second) of Trusts § 331 cmt. g and h (1959).

Subsection (b) [72-38-602(2)], which is similar to Restatement (Third) of Trusts § 63 cmt. k (Tentative Draft No. 3, approved 2001), provides default rules for revocation or amendment of a trust having several settlors. The settlor's authority to revoke or modify the trust depends on whether the trust contains community property. To the extent the trust contains community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses. The purpose of this provision, and the reason for the use of joint trusts in community property States, is to preserve the community character of property transferred to the trust. While community property does not prevail in a majority of States, contributions of community property to trusts created in noncommunity property States does occur. This is due to the mobility of settlors, and the fact that community property retains its community character when a couple move from a community to a noncommunity State. For this reason, subsection (b) [72-38-602(2)], and its provision on contributions of community property, should be enacted in all States, whether community or noncommunity.

With respect to separate property contributed to the trust, or all property of the trust if none of the trust property consists of community property, subsection (b) [72-38-602(2)] provides that each settlor may revoke or amend the trust as to the portion of the trust contributed by that settlor. The inclusion of a rule for contributions of separate property does not mean that the drafters of this Code concluded that the use of joint trusts should be encouraged. The rule is included because of the widespread use of joint trusts in noncommunity property States in recent years. Due to the desire to preserve the community character of trust property, joint trusts are a necessity in community property States. Unless community property will be contributed to the trust, no similarly important reason exists for the creation of a joint trust in a noncommunity property State. Joint trusts are often poorly drafted, confusing the dispositive provisions of the respective settlors. Their use can also lead to unintended tax consequences. *See* Melinda S. Merk, *Joint Revocable Trusts for Married Couples Domiciled in Common-Law Property States,* 32 Real Prop. Prob. & Tr. J. 345 (1997).

Subsection (b) [72-38-602(2)] does not address the many technical issues that can arise in determining the settlors' proportionate contribution to a joint trust. Most problematic are contributions of jointly-owned property. In the case of joint tenancies in real estate, each spouse would presumably be treated as having made an equal contribution because of the right to sever the interest and convert it into a tenancy in common. This is in contrast to joint accounts in financial institutions, ownership of which in most States is based not on fractional interest but on actual dollar contribution. *See, e.g.,* Uniform Probate Code § 6-211. Most difficult may be determining a contribution rule for entireties property. In *Holdener v. Fieser,* 971 S.W. 2d 946 (Mo. Ct. App. 1998), the court held that a surviving spouse could revoke the trust with respect to the entire interest but did not express a view as to revocation rights while both spouses were living.

Subsection (b)(3) [72-38-602(2)(c)] requires that the other settlor or settlors be notified if a joint trust is revoked by less than all of the settlors. Notifying the other settlor or settlors of the revocation or amendment will place them in a better position to protect their interests. If the revocation or amendment by less than all of the settlors breaches an implied agreement not to revoke or amend the trust, those harmed by the action can sue for breach of contract. If the trustee fails to notify the other settlor or settlors of the revocation or amendment, the parties aggrieved by the trustee's failure can sue the trustee for breach of trust.

Subsection (c) [72-38-602(3), adopted as modified], which is similar to Restatement (Third) of Trusts § 63 cmt. h and i (Tentative Draft No. 3, approved 2001), specifies the method of revocation and amendment. Revocation of a trust differs fundamentally from revocation of a will. Revocation of a will, because a will is not effective until death, cannot affect an existing fiduciary relationship. With a trust, however, because a revocation will terminate an already existing fiduciary relationship, there is a need to protect a trustee who might act without knowledge that the trust has been revoked. There is also a need to protect trustees against the risk that they will misperceive the settlor's intent and mistakenly assume that an informal document or communication constitutes a revocation when that was not in fact the settlor's intent. To protect trustees against these risks, drafters habitually insert provisions providing that a revocable trust may be revoked only by delivery to the trustee of a formal revoking document. Some courts require strict compliance with the stated formalities. Other courts, recognizing that the formalities were inserted primarily for the trustee's and not the settlor's benefit, will accept other methods of revocation as long as the settlor's intent is clear. *See* Restatement (Third) of Trusts § 63 Reporter's Notes to cmt. h-j (Tentative Draft No. 3, approved 2001).

This Code tries to effectuate the settlor's intent to the maximum extent possible while at the same time protecting a trustee against inadvertent liability. While notice to the trustee of a revocation is good practice, this section does not make the giving of such notice a prerequisite to a trust's revocation. To protect a trustee who has not been notified of a revocation or amendment, subsection (g) [72-38-602(7)] provides that a trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust, as unamended, was still in effect. However, to honor the settlor's intent, subsection (c) [72-38-602(3)] generally honors a settlor's clear expression of intent even if inconsistent with stated formalities in the terms of the trust.

Under subsection (c) [72-38-602(3), adopted as modified], the settlor may revoke or amend a revocable trust by substantial compliance with the method specified in the terms of the trust or by a later will or codicil or any other method manifesting clear and convincing evidence of the settlor's intent. Only if the method specified in the terms of the trust is made exclusive is use of the other methods prohibited. Even then, a failure to comply with a technical requirement, such as required notarization, may be excused as long as compliance with the method specified in the terms of the trust is otherwise substantial.

While revocation of a trust will ordinarily continue to be accomplished by signing and delivering a written document to the trustee, other methods, such as a physical act or an oral statement coupled with a withdrawal of the property, might also demonstrate the necessary intent. These less formal methods, because they provide less reliable indicia of intent, will often be insufficient, however. The method specified in the terms of the trust is a reliable safe harbor and should be followed whenever possible.

Revocation or amendment by will is mentioned in subsection (c) [72-38-602(3), adopted as modified] not to encourage the practice but to make clear that it is not precluded by omission. *See* Restatement (Third) of Property: Will and Other Donative Transfers § 7.2 cmt. e (Tentative Draft No. 3, approved 2001), which validates revocation or amendment of will substitutes by later will. Situations do arise, particularly in death-bed cases, where revocation by will may be the only practicable method. In such cases, a will, a solemn document executed with a high level of formality, may be the most reliable method for expressing intent. A revocation in a will ordinarily becomes effective only upon probate of the will following the testator's death. For the cases, see Restatement (Third) of Trusts § 63 Reporter's Notes to cmt. h-i (Tentative Draft No. 3, approved 2001).

A residuary clause in a will disposing of the estate differently than the trust is alone insufficient to revoke or amend a trust. The provision in the will must either be express or the will must dispose of specific assets contrary to the terms of the trust. The substantial body of law on revocation of Totten trusts by will offers helpful guidance. The authority is collected in William H. Danne, Jr., *Revocation of Tentative ("Totten") Trust of Savings Bank Account by Inter Vivos Declaration or Will,* 46 A.L.R. 3d 487 (1972).

Subsection (c) [72-38-602(3)] does not require that a trustee concur in the revocation or amendment of a trust. Such a concurrence would be necessary only if required by the terms of the trust. If the trustee concludes that an amendment unacceptably changes the trustee's duties, the trustee may resign as provided in Section 705 [72-38-705].

Subsection (d) [72-38-602(4)], providing that upon revocation the trust property is to be distributed as the settlor directs, codifies a provision commonly included in revocable trust instruments.

A settlor's power to revoke is not terminated by the settlor's incapacity. The power to revoke may instead be exercised by an agent under a power of attorney as authorized in subsection (e) [72-38-602(5)], by a conservator or guardian as authorized in subsection (f) [72-38-602(6)], or by the settlor personally if the settlor regains capacity.

Subsection (e) [72-38-602(5)], which is similar to Restatement (Third) of Trusts § 63 cmt. l (Tentative Draft No. 3, approved 2001), authorizes an agent under a power of attorney to revoke or modify a revocable trust only to the extent the terms of the trust or power of attorney expressly so permit. An express provision is required because most settlors usually intend that the revocable trust, and not the power of attorney, to function as the settlor's principal property management device. The power of attorney is usually intended as a backup for assets not transferred to the revocable trust or to address specific topics, such as the power to sign tax returns or apply for government benefits, which may be beyond the authority of a trustee or are not customarily granted to a trustee.

Subsection (f) [72-38-602(6)] addresses the authority of a conservator or guardian to revoke or amend a revocable trust. Under the Uniform Trust Code, a "conservator" is appointed by the court to manage the ward's party, a "guardian" to make decisions with respect to the ward's personal affairs. *See* Section 103 [72-38-103]. Consequently, subsection (f) [72-38-602(6)] authorizes a guardian to exercise a settlor's power to revoke or amend a trust only if a conservator has not been appointed.

Many state conservatorship statutes authorize a conservator to exercise the settlor's power of revocation with the prior approval of the court supervising the conservatorship. *See, e.g.,* Uniform Probate Code § 411(a)(4). Subsection (f) [72-38-602(6)] ratifies this practice. Under the Code, a conservator may exercise a settlor's power of revocation, amendment, or right to withdraw trust property upon approval of the court supervising the conservatorship. Because a settlor often creates a revocable trust for the very purpose of avoiding conservatorship, this power should be exercised by the court reluctantly. Settlors concerned about revocation by a conservator may wish to deny a conservator a power to revoke. However, while such a provision in the terms of the trust is entitled to considerable weight, the court may override the restriction if it concludes that the action is necessary in the interests of justice. *See* Section 105(b)(13) [72-38-105(2)(k)].

Steps a conservator can take to stem possible abuse is not limited to petitioning to revoke the trust. The conservator could petition for removal of the trustee under Section 706 [72-38-706].

The conservator, acting on the settlor-beneficiary's behalf, could also bring an action to enforce the trust according to its terms. Pursuant to Section 303 [72-38-303], a conservator may act on behalf of the beneficiary whose estate the conservator controls whenever a consent or other action by the beneficiary is required or may be given under the Code.

If a conservator has not been appointed, subsection (f) [72-38-602(6)] authorizes a guardian to exercise a settlor's power to revoke or amend the trust upon approval of the court supervising the guardianship. The court supervising the guardianship will need to determine whether it can grant a guardian authority to revoke a revocable trust under local law or whether it will be necessary to appoint a conservator for that purpose.

2001 Amendment. By amendment in 2001, revocation by "executing a later will or codicil" in subsection (c)(2)(A) [not adopted] was changed to revocation by a "later will or codicil" to avoid an implication that the trust is revoked immediately upon execution of the will or codicil and not at the testator's death.

Compiler's Comments

Source: This section modifies section 602 of the Uniform Law Commission's Uniform Trust Code by adding the language referencing subsection (2)(a) in subsection (4).

The language in this section relates to the language in Title 72, chapter 33, part 4 (now repealed).

72-38-603. Settlor's powers — powers of withdrawal.

Official Comments

This section recognizes that the settlor of a revocable trust is in control of the trust and should have the right to enforce the trust. Pursuant to this section, the duty under Section 813 [72-38-813] to inform and report to beneficiaries is owed to the settlor of a revocable trust as long as the settlor has capacity.

If the settlor loses capacity, subsection (a) [72-38-603(1)] no longer applies, with the consequence that the rights of the beneficiaries are no longer subject to the settlor's control. The beneficiaries are then entitled to request information concerning the trust and the trustee must provide the beneficiaries with annual trustee reports and whatever other information may be required under Section 813 [72-38-813]. However, because this section may be freely overridden in the terms of the trust, a settlor is free to deny the beneficiaries these rights, even to the point of directing the trustee not to inform them of the existence of the trust. Also, should an incapacitated settlor later regain capacity, the beneficiaries' rights will again be subject to the settlor's control.

Typically, the settlor of a revocable trust will also be the sole or primary beneficiary of the trust, and the settlor has control over whether to take action against a trustee for breach of trust. Upon the settlor's incapacity, any right of action the settlor-trustee may have against the trustee for breach of trust occurring while the settlor had capacity will pass to the settlor's agent or conservator, who would succeed to the settlor's right to have property restored to the trust. Following the death or incapacity of the settlor, the beneficiaries would have a right to maintain an action against a trustee for breach of trust. However, with respect to actions occurring prior to the settlor's death or incapacity, an action by the beneficiaries could be barred by the settlor's consent or by other events such as approval of the action by a successor trustee. For the requirements of a consent, see Section 1009 [72-38-1009].

Subsection (b) [72-38-603(2)] makes clear that a holder of a power of withdrawal has the same powers over the trust as the settlor of a revocable trust. Equal treatment is warranted due to the holder's equivalent power to control the trust. For the definition of power of withdrawal, see Section 103(11) [72-38-103(13)].

2001 Amendment. By a 2001 amendment, former subsection (b) was deleted. Former subsection (b) provided: "While a trust is revocable and the settlor does not have capacity to revoke the trust, rights of the beneficiaries are held by the beneficiaries." No substantive change was intended by this amendment. Former subsection (b) was superfluous. Rights of the beneficiaries are always held by the beneficiaries unless taken away by some other provision. Subsection (a) [72-38-603(1)] grants these rights to the settlor of a revocable trust while the settlor has capacity. Upon a settlor's loss of capacity, these rights are held by the beneficiaries with or without former subsection (b).

2003 Amendment. The purpose of former subsection (b), which was deleted in 2003, was to make certain that upon revocation of amendment of a joint trust by fewer than all of its settlors, that the trustee would notify the nonparticipating settlor or settlors. The subsection, which provided that "If a revocable trust has more than one settlor, the duties of the trustee are owed to all of the settlors having capacity to revoke the trust," imposed additional duties upon a trustee and unnecessarily raised interpretative questions as to its scope. The drafter's original intent is restored, and in a much clearer form, by repealing former subsection (b), and by amending Section 602 to add a subsection (b)(3) [72-38-602(2)(c)] that states explicitly what former subsection (b) was trying to achieve.

2004 Amendment. The amendment places in brackets and makes optional the language in subsection (a) [not adopted] dealing with the settlor's capacity.

Section 603 [72-38-603] generally provides that while a trust is revocable, all rights that the trust's beneficiaries would otherwise possess are subject to the control of the settlor. This section, however, negates the settlor's control if the settlor is incapacitated. In such case, the beneficiaries are entitled to assert all rights provided to them under the Code, including the right to information concerning the trust.

Two issues have arisen concerning this incapacity limitation. First, because determining when a settlor is incapacitated is not always clear, concern has been expressed that it will often be difficult in a particular case to determine whether the settlor has become incapacitated and the settlor's control of the beneficiary's rights have ceased. Second, concern has been expressed that this section prescribes a different rule for revocable trusts than for wills and that the rules for both should instead be the same. In the case of a will, the devisees have no right to know of the dispositions made in their favor until the testator's death, whether or not the testator is incapacitated. Under Section 603 [72-38-603], however, the remainder beneficiary's right to know commences on the settlor's incapacity.

Concluding that uniformity among the states on this issue is not essential, the drafting committee has decided to place the reference to the settlor's incapacity in Section 603(a) [not adopted] in brackets. Enacting jurisdictions are free to strike the incapacity limitation or to provide a more precise definition of when a settlor is incapacitated, as has been done in the Missouri enactment (Mo. Stat. Ann. § 456.6-603).

Compiler's Comments

2021 Amendment: Chapter 325 in (1) substituted current language authorizing a trustee to follow a direction of a settlor or a settlor and other person holding a power to revoke even if the direction is contrary to the terms of a revocable trust for "Notwithstanding any other provision in this chapter, while a trust is revocable, all rights of the beneficiaries, including the right to consent to any action, are exercisable solely by the settlor, and all duties of the trustee, including the duty to provide notice, are owed exclusively to the settlor"; inserted (2) providing the rights of a beneficiary are subject to the control of a settlor and the trustee's duties are owed exclusively to a settlor for a revocable trust; and made minor changes in style. Amendment effective October 1, 2021.

Source: The language in this section relates to the language in 72-33-704 (now repealed).

72-38-604. Limitation on action contesting validity of revocable trust — distribution of trust property.

Official Comments

This section provides finality to the question of when a contest of a revocable trust may be brought. The section is designed to allow an adequate time in which to bring a contest while at the same time permitting the expeditious distribution of the trust property following the settlor's death.

A trust can be contested on a variety of grounds. For example, the contestant may allege that no trust was created due to lack of intent to create a trust or lack of capacity (*see* Section 402 [72-38-402]), that undue influence, duress, or fraud was involved in the trust's creation (*see* Section 406 [72-38-406]), or that the trust had been revoked or modified (*see* Section 602 [72-38-602]). A "contest" is an action to invalidate all or part of the terms of the trust or of property transfers to the trustee. An action against a beneficiary or other person for intentional interference with an inheritance or gift, not being a contest, is not subject to this section. For the law on intentional interference, see Restatement (Second) of Torts § 774B (1979). Nor does this section preclude an action to determine the validity of a trust that is brought during the settlor's lifetime, such as a petition for a declaratory judgment, if such action is authorized by other law. *See* Section 106 [72-38-106] (Uniform Trust Code supplemented by common law of trusts and principles of equity).

This section applies only to a revocable trust that becomes irrevocable by reason of the settlor's death. A trust that became irrevocable by reason of the settlor's lifetime release of the power to revoke is outside its scope. A revocable trust does not become irrevocable upon a settlor's loss of capacity. Pursuant to Section 602 [72-38-602], the power to revoke may be exercised by the settlor's agent, conservator, or guardian, or personally by the settlor if the settlor regains capacity.

Subsection (a) [72-38-602(1)] specifies a time limit on when a contest can be brought. A contest is barred upon the first to occur of two possible events. The maximum possible time for bringing a contest is three years from the settlor's death. This should provide potential contestants with ample time in which to determine whether they have an interest that will be affected by the trust, even if formal notice of the trust is lacking. The three-year period is derived from Section 3-108 of the Uniform Probate Code. Three years is the maximum limit under the UPC for contesting a nonprobated will. Enacting jurisdictions prescribing shorter or longer time limits for contest of a nonprobated will should substitute their own time limit. To facilitate this process, the "three-year" period has been placed in brackets.

A trustee who wishes to shorten the contest period may do so by giving notice. Drawing from California Probate Code § 16061.7, subsection (a)(2) [72-38-604(1)(b)] bars a contest by a potential contestant 120 days after the date the trustee sent that person a copy of the trust instrument and informed the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a contest. The reference to "120" days is placed in brackets to suggest to the enacting jurisdiction that it substitute its statutory time period for contesting a will following notice of probate. The 120 day period in subsection (a)(2) [72-38-604(1)(b)] is subordinate to the three-year bar in subsection (a)(1) [72-38-604(1)(a)]. A contest is automatically barred three years after the settlor's death even if notice is sent by the trustee less than 120 days prior to the end of that period.

Because only a small minority of trusts are actually contested, trustees should not be restrained from making distributions because of concern about possible liability should a contest later be filed. Absent a protective statute, a trustee is ordinarily absolutely liable for misdelivery of the trust assets, even if the trustee reasonably believed that the distribution was proper. *See* Restatement (Second) of Trusts § 226 (1959). Subsection (b) [72-38-604(2)] addresses liability concerns by allowing the trustee, upon the settlor's death, to proceed expeditiously to distribute the trust property. The trustee may distribute the trust property in accordance with the terms of the trust until and unless the trustee receives notice of a pending judicial proceeding contesting the validity of the trust, or until notified by a potential contestant of a possible contest, followed by its filing within 60 days.

Even though a distribution in compliance with subsection (b) [72-38-604(2)] discharges the trustee from potential liability, subsection (c) [72-38-604(3)] makes the beneficiaries of what later turns out to have been an invalid trust liable to return any distribution received. Issues as to whether the distribution must be returned with interest, or with income earned or profit made are not addressed in this section but are left to the law of restitution.

For purposes of notices under this section, the substitute representation principles of Article 3 are applicable. The notice by the trustee under subsection (a)(2) [72-38-604(1)(b)] or by a potential contestant under subsection (b)(2) [72-38-604(2)(b)] must be given in a manner reasonably suitable under the circumstances and likely to result in its receipt. *See* Section 109(a) [72-38-109(1)].

This section does not address possible liability for the debts of the deceased settlor or a trustee's possible liability to creditors for distributing trust assets. For possible liability of the trust, see Section 505(a)(3) [72-38-505(1)(c)] and Comment. Whether a trustee can be held personally liable for creditor claims following distribution of trust assets is addressed in Uniform Probate Code § 6-102, which was added to that Code in 1998.

Compiler's Comments

Source: The language in this section relates to the language in 72-34-511 (now repealed).

72-38-605. Fees and expenses — by whom paid.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in 72-34-428 (now repealed).

72-38-606. Separate writing identifying disposition of tangible personal property.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in 72-33-211 (now repealed).

Part 7
Office of Trustee

Part Official Comments

This article contains a series of default rules dealing with the office of trustee. Sections 701 [72-38-701] and 702 [72-38-702] address the process for getting a trustee into office, including the procedures for indicating an acceptance and whether bond will be required. Section 703 [72-38-703] addresses cotrustees, permitting the cotrustees to act by majority action and specifying the extent to which one trustee may delegate to another. Sections 704 [72-38-704] through 707 [72-38-707] address changes in the office of trustee, specifying the circumstances when a vacancy must be filled, the procedure for resignation, the grounds for removal, and the process for appointing a successor. Sections 708 [72-38-708] and 709 [72-38-709] prescribe the standards for determining trustee compensation and reimbursement for expenses advanced.

Except for the court's authority to order bond, all of the provisions of this article are subject to modification in the terms of the trust. *See* Section 105 [72-38-105].

Part Case Notes

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Common-Law Trust Deadlocked in Business Matters: In an action to quiet title to mining property owned by common-law trust of five trustees, the interest of one of whom had allegedly been transferred to cross complainant who had never received his stock, resulting in a hopeless deadlock of the remaining four in business matters by a vote of two to two, and the Court appointed a receiver at the request of cross complainant, the remedies provided by the trust agreement should have been exhausted first and, under 72-23-507 (now repealed), the Court could appoint a successor to fill the vacancy if the agreement does not provide a method. Remanded for revocation of order appointing receiver. Demos v. Doepker, 116 M 264, 149 P2d 544 (1944).

Vacancy — How Filled: Under 72-23-507 (now repealed), where a bank designated trustee of a sum of money for a specified purpose became insolvent and quit business, the District Court was required to appoint a successor. Conley v. Johnson, 101 M 376, 54 P2d 585 (1936).

Substitute Trustee: When a mother upon her deathbed delivered a quantity of jewelry to her daughter-in-law with instruction to turn it over to her surviving husband to be in turn delivered to their sons when old enough to appreciate the gift, the result of the transaction was the creation of a voluntary trust, which was not terminated by the death of the father before the trust was executed, the Court in such a case having power to appoint a trustee to carry it out. Stagg v. Stagg, 90 M 180, 300 P 539 (1931).

72-38-701. Accepting or declining trusteeship.

Official Comments

This section, which specifies the requirements for a valid acceptance of the trusteeship, implicates many of the same issues that arise in determining whether a trust has been revoked. Consequently, the two provisions track each other closely. *Compare* Section 701(a) [72-38-701(1)], *with* Section 602(c) [72-38-602(3)] (procedure for revoking or modifying trust). Procedures specified in the terms of the trust are recognized, but only substantial, not literal compliance is required. A failure to meet technical requirements, such as notarization of the trustee's signature, does not result in a failure to accept. Ordinarily, the trustee will indicate acceptance by signing the trust instrument or signing a separate written instrument. However, this section validates any other method demonstrating the necessary intent, such as by knowingly exercising trustee powers, unless the terms of the trust make the specified method exclusive. This section also does not preclude an acceptance by estoppel. For general background on issues relating to trustee acceptance and rejection, see Restatement (Third) of Trusts § 35 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 102 (1959). Consistent with Section 201(b) [not adopted], which emphasizes that continuing judicial supervision of a trust is the rare exception, not the rule, the Uniform Trust Code does not require that a trustee qualify in court.

To avoid the inaction that can result if the person designated as trustee fails to communicate a decision either to accept or to reject the trusteeship, subsection (b) [72-38-701(2)] provides that a failure to accept within a reasonable time constitutes a rejection of the trusteeship. What will constitute a reasonable time depends on the facts and circumstances of the particular case. A major consideration is possible harm that might occur if a vacancy in a trusteeship is not filled in a timely manner. A trustee's rejection normally precludes a later acceptance but does not cause the trust to fail. *See* Restatement (Third) of Trusts § 35 cmt. c (Tentative Draft No. 2, approved 1999). Regarding the filling of a vacancy in the event of a rejection, see Section 704 [72-38-704].

A person designated as trustee who decides not to accept the trusteeship need not provide a formal rejection, but a clear and early communication is recommended. The appropriate recipient of the rejection depends upon the circumstances. Ordinarily, it would be appropriate to communicate the rejection to the person who informed the designee of the proposed trusteeship. If judicial proceedings involving the trust are pending, the rejection could be filed with the court. In the case of a person named as trustee of a revocable trust, it would be appropriate to communicate the rejection to the settlor. In any event, it would be best to inform a beneficiary with a significant interest in the trust because that beneficiary might be more motivated than others to seek appointment of a new trustee.

Subsection (c)(1) [72-38-701(3)(a)] makes clear that a nominated trustee may act expeditiously to protect the trust property without being considered to have accepted the trusteeship. However, upon conclusion of the intervention, the nominated trustee must send a rejection of office to the settlor, if living and competent, otherwise to a qualified beneficiary.

Because of the potential liability that can inhere in trusteeship, subsection (c)(2) [72-38-701(3)(b)] allows a person designated as trustee to inspect the trust property without accepting the trusteeship. The condition of real property is a particular concern, including possible tort liability for the condition of the premises or liability for violation of state or federal environmental laws such as CERCLA, 42 U.S.C. § 9607. For a provision limiting a trustee's personal liability for obligations arising from ownership or control of trust property, see Section 1010(b) [72-38-1010(2)].

Compiler's Comments

Source: The language in this section relates to the language in 72-33-601 (now repealed) and 72-33-602 (now repealed).

Case Notes

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Acceptance of Trust: In order to bring about a trust relationship so as to bind the trustee thereby there must have been some act or declaration by the trustee indicating an acceptance of the trust. Wood v. Robbins, 67 M 409, 215 P 1101 (1923).

72-38-702. Trustee's bond.

Official Comments

This provision is consistent with the Restatement Third and with the bonding provisions of the Uniform Probate Code. *See* Restatement (Third) of Trusts § 34(3) and cmt. a (Tentative Draft No. 2, approved 1999); Uniform Probate Code §§ 3-604 (personal representatives), 5-415 (conservators), and 7-304 (trustees). Because a bond is required only if the terms of the trust require bond or a bond is found by the court to be necessary to protect the interests of beneficiaries, bond should rarely be required under this Code.

Despite the ability of the court pursuant to Section 105(b)(6) [72-38-105(2)(f)] to override a term of the trust waiving bond, the court should order bond in such cases only for good reasons. Similarly, the court should rarely dispense with bond if the settlor directed that the trustee give bond.

This section does not attempt to detail all of the technical bonding requirements that the court may impose. Typical requirements are listed in the Uniform Probate Code sections cited above. The amount of a bond otherwise required may be reduced by the value of trust property deposited in a manner that prevents its unauthorized disposition, and by the value of real property which the trustee, by express limitation of power, lacks power to convey without court authorization. Also, the court may excuse or otherwise modify a requirement of a bond, reduce or increase the amount of a bond, release a surety, or permit the substitution of another bond with the same or different sureties.

Subsection (c) [72-38-702(3)] clarifies that a regulated financial-service institution need not provide bond for individual trusts. Such institutions must meet detailed financial responsibility requirements in order to do trust business in the State, thereby obviating the need to post bonds in individual trusts. Subsection (c) [72-38-702(3)] is placed in brackets because the enacting jurisdiction may have already dealt with the subject in separate legislation, such as in its statutes on regulation of financial institutions. Instead of the phrase "regulated financial-service institution," enacting jurisdictions may wish to substitute their own term for institutions qualified to engage in trust business in the State.

Compiler's Comments

Source: The language in this section relates to the language in 72-33-603 (now repealed).

72-38-703. Cotrustees.

Official Comments

This section contains most but not all of the Code's provisions on cotrustees. Other provisions relevant to cotrustees include Sections 704 [72-38-704] (vacancy in trusteeship need not be filled if cotrustee remains in office), 705 [72-38-705] (notice of resignation must be given to cotrustee), 706 [72-38-706] (lack of cooperation among cotrustees as ground for removal), 707 [72-38-707] (obligations of resigning or removed trustee), 813 [72-38-813] (reporting requirements upon vacancy in trusteeship), and 1013 [72-38-1013] (authority of cotrustees to authenticate documents).

Cotrustees are appointed for a variety of reasons. Having multiple decision-makers serves as a safeguard against eccentricity or misconduct. Cotrustees are often appointed to gain the advantage of differing skills, perhaps a financial institution for its permanence and professional skills, and a family member to maintain a personal connection with the beneficiaries. On other occasions, cotrustees are appointed to make certain that all family lines are represented in the trust's management.

Cotrusteeship should not be called for without careful reflection. Division of responsibility among cotrustees is often confused, the accountability of any individual trustee is uncertain, obtaining consent of all trustees can be burdensome, and unless an odd number of trustees is named deadlocks requiring court resolution can occur. Potential problems can be reduced by addressing division of responsibilities in the terms of the trust. Like the other sections of this article, this section is freely subject to modification in the terms of the trust. *See* Section 105.

Much of this section is based on comparable provisions of the Restatement of Trusts, although with extensive modifications. Reference should also be made to ERISA § 405 (29 U.S.C. § 1105), which in recent years has been the statutory base for the most significant case law on the powers and duties of cotrustees.

Subsection (a) [72-38-703(1)] is in accord with Restatement (Third) of Trusts § 39 (Tentative Draft No. 2, approved 1999), which rejects the common law rule, followed in earlier Restatements, requiring unanimity among the trustees of a private trust. *See* Restatement (Second) of Trusts § 194 (1959). This section is consistent with the prior Restatement rule applicable to charitable trusts, which allowed for action by a majority of trustees. *See* Restatement (Second) of Trusts § 383 (1959).

Under subsection (b) [72-38-703(2)], a majority of the remaining trustees may act for the trust when a vacancy occurs in a cotrusteeship. Section 704 [72-38-704] provides that a vacancy in a cotrusteeship need be filled only if there is no trustee remaining in office.

Pursuant to subsection (c) [72-38-703(3)], a cotrustee must participate in the performance of a trustee function unless the cotrustee has properly delegated performance to another cotrustee, or the cotrustee is unable to participate due to temporary incapacity or disqualification under other law. Other laws under which a cotrustee might be disqualified include federal securities law and the ERISA prohibited transactions rules. Subsection (d) [72-38-703(4)] authorizes a cotrustee to assume some or all of the functions of another trustee who is unavailable to perform duties as provided in subsection (c) [72-38-703(3)].

Subsection (e) [72-38-703(5)] addresses the extent to which a trustee may delegate the performance of functions to a cotrustee. The standard differs from the standard for delegation to an agent as provided in Section 807 because the two situations are different. Section 807 [72-38-807], which is identical to Section 9 of the Uniform Prudent Investor Act, recognizes that many trustees are not professionals. Consequently, trustees should be encouraged to delegate functions they are not competent to perform. Subsection (e) [72-38-703(5)] is premised on the assumption that the settlor selected cotrustees for a specific reason and that this reason ought to control the scope of a permitted delegation to a cotrustee. Subsection (e) [72-38-703(5)] prohibits a trustee from delegating to another trustee functions the settlor reasonably expected the trustees to perform jointly. The exact extent to which a trustee may delegate functions to another trustee in a particular case will vary depending on the reasons the settlor decided to appoint cotrustees. The better practice is to address the division of functions in the terms of the trust, as allowed by Section 105 [72-38-105]. Subsection (e) [72-38-703(5)] is based on language derived from Restatement (Second) of Trusts § 171 (1959). This section of the Restatement Second, which applied to delegations to both agents and cotrustees, was superseded, as to delegation to agents, by Restatement (Third) of Trusts: Prudent Investor Rule § 171 (1992).

By permitting the trustees to act by a majority, this section contemplates that there may be a trustee or trustees who might dissent. Trustees who dissent from the acts of a cotrustee are in general protected from liability. Subsection (f) [72-38-703(6)] protects trustees who refused to join in the action. Subsection (h) [72-38-703(8)] protects a dissenting trustee who joined the action at the direction of the majority, such as to satisfy a demand of the other side to a transaction, if the trustee expressed the dissent to a cotrustee at or before the time of the action in question. However, the protections provided by subsections (f) [72-38-703(6)] and (h) [72-38-703(8)] no longer apply if the action constitutes a serious breach of trust. In that event, subsection (g) [72-38-703(7)] may impose liability against a dissenting trustee for failing to take reasonable steps to rectify the improper conduct. The responsibility to take action against a breaching cotrustee codifies the substance of Sections 184 and 224 of the Restatement (Second) of Trusts (1959).

Compiler's Comments

2021 Amendment: Chapter 325 in (3) and (7) at beginning inserted "Subject to 72-4-116"; and made minor changes in style. Amendment effective October 1, 2021.

Source: The language in this section relates to the language in 72-33-611 (now repealed).

Case Notes

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Trustees of Dissolved Corporation: One of five statutory trustees in charge of the affairs of a dissolved corporation may not prosecute an appeal to the Supreme Court from an order appointing a receiver for the corporation against the wishes of his cotrustees, irrespective of whether unit or majority rule of action controls under certain statutes. Union Bank & Trust Co. of Helena v. Penwell, 99 M 255, 42 P2d 457 (1935).

Action as Unit Required to Dispose of Business: The trustees are not merely agents who act independently one of another. They constitute a board and they can act only as a unit in the disposition of any business of the trust which requires the exercise of judgment or discretion. Gordon Campbell Petroleum Co. v. Gordon Campbell-Kevin Syndicate, 75 M 261, 242 P 540 (1926), distinguished in Bentall v. Koenig Bros., Inc., 140 M 339, 372 P2d 91 (1962). See also Williard v. Campbell Oil Co., 77 M 30, 248 P 219 (1926).

Business Trust: Since a trustee cannot take part in any transaction concerning the trust in which he is interested (72-20-204, now repealed), a contract entered into between a common-law trust at a meeting of its board of trustees attended by only two of its three members, and a company of which one of the two was the virtual owner was a nullity, and the fact that the third member in writing subsequently gave his approval did not render it valid for the reason that under 72-24-207 (now repealed), the board could act only as a board when assembled as such and not through the individuals composing it. Williard v. Campbell Oil Co., 77 M 30, 248 P 219 (1926).

72-38-704. Vacancy in trusteeship — appointment of successor.

Official Comments

This section lists the ways in which a trusteeship becomes vacant and the rules on filling the vacancy. *See also* Sections 701 [72-38-701] (accepting or declining trusteeship), 705 [72-38-705] (resignation), and 706 [72-38-706] (removal). Good drafting practice suggests that the terms of the trust deal expressly with the problem of vacancies, naming successors and specifying the procedure for filling vacancies. This section applies only if the terms of the trust fail to specify a procedure.

The disqualification of a trustee referred to in subsection (a)(4) [72-38-704(1)(d)] would include a financial institution whose right to engage in trust business has been revoked or removed. Such disqualification might also occur if the trust's principal place of administration is transferred to a jurisdiction in which the trustee, whether an individual or institution, is not qualified to act.

Subsection (b) [72-38-704(2)] provides that a vacancy in the cotrusteeship must be filled only if the trust has no remaining trustee. If a vacancy in the cotrusteeship is not filled, Section 703 [72-38-703] authorizes the remaining cotrustees to continue to administer the trust. However, as provided in subsection (e) [72-38-704(4)], the court, exercising its inherent equity authority, may always appoint additional trustees if the appointment would promote better administration of the trust. *See* Restatement (Third) of Trusts Section 34 cmt. e (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 108 cmt. e (1959).

Subsection (c) [72-38-704(3)] provides a procedure for filling a vacancy in the trusteeship of a noncharitable trust. Absent an effective provision in the terms of the trust, subsection (c)(2) [72-38-704(3)(b)] permits a vacancy in the trusteeship to be filled, without the need for court approval, by a person selected by unanimous agreement of the qualified beneficiaries. An effective provision in the terms of the trust for the designation of a successor trustee includes a procedure under which the successor trustee is selected by a person designated in those terms. Pursuant to Section 705(a)(1) [72-38-705(1)(a)], the qualified beneficiaries may also receive the trustee's resignation. If a trustee resigns following notice as provided in Section 705 [72-38-705], the trust may be transferred to a successor appointed pursuant to subsection (c)(2) [72-38-704(3)(b)] of this section, all without court involvement. A nonqualified beneficiary who is displeased with the choice of the qualified beneficiaries may petition the court for removal of the trustee under Section 706 [72-38-706].

If the qualified beneficiaries fail to make an appointment, subsection (c)(3) [72-38-704(3)(c)] authorizes the court to fill the vacancy. In making the appointment, the court should consider the objectives and probable intention of the settlor, the promotion of the proper administration of the trust, and the interests and wishes of the beneficiaries. *See* Restatement (Third) of Trusts Section 34 cmt. f (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 108 cmt. d (1959).

Subsection (d) [not adopted] specifies a procedure for filling a vacancy in the trusteeship of a charitable trust. Absent an effective designation in the terms of the trust, a successor trustee may be selected by the charitable organizations expressly designated to receive distributions in the terms of the trust but only if the attorney general concurs in the selection. If the attorney general does not concur in the selection, however, or if the trust does not designate a charitable organization to receive distributions, the vacancy may be filled only by the court. For the reason why the reference to the Attorney General is placed in brackets, see 2004 Amendment below.

In the case of a revocable trust, the appointment of a successor will normally be made directly by the settlor. As to the duties of a successor trustee with respect to the actions of a predecessor, see Section 812 [72-38-812].

2001 Amendment. Subsection (d) [not adopted], which creates a procedure for the filling of a vacancy in the trusteeship of a charitable trust, was added by a 2001 amendment.

2004 Amendment. The amendment to Section 704(d)(2) [not adopted] is a conforming amendment to the amendment to Section 110(d) [72-38-110(4)]. Section 110(d) [72-38-110(4)] provides that the attorney general has the rights of a qualified beneficiary with respect to charitable trusts having a principal place of administration in the state. If the enacting jurisdiction elects to delete or modify Section 110(d) [72-38-110(4)], then the enacting jurisdiction may wish to also modify subsection Section 704(d)(2) [not adopted] of this Section, which requires that the attorney general concur in the selection of a successor trustee nominated by a designated charitable organization.

Compiler's Comments

Source: This section modifies section 704 of the Uniform Law Commission's Uniform Trust Code by adding the commitment of a trustee in subsection (1)(g).

The language in this section relates to the language in 72-33-612 (now repealed) and 72-33-619 (now repealed).

72-38-705. Resignation of trustee.

Official Comments

This section rejects the common law rule that a trustee may resign only with permission of the court, and goes further than the Restatements, which allow a trustee to resign with the consent of the beneficiaries. *See* Restatement (Third) of Trusts § 36 (Tentative Draft No.2, approved 1999); Restatement (Second) of Trusts § 106 (1959). Concluding that the default rule ought to approximate standard drafting practice, the Drafting Committee provided in subsection (a) [72-38-705(1)] that a trustee may resign by giving notice to the qualified beneficiaries, a living settlor, and any cotrustee. A resigning trustee may also follow the traditional method and resign with approval of the court.

Restatement (Third) of Trusts § 36 cmt. d (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts § 106 cmt. b (1959), provide, similar to subsection (c) [72-38-705(3)], that a resignation does not release the resigning trustee from potential liabilities for acts or omissions while in office. The act of resignation can give rise to liability if the trustee resigns for the purpose of facilitating a breach of trust by a cotrustee. *See Ream v. Frey*, 107 F.3d 147 (3rd Cir. 1997).

Regarding the residual responsibilities of a resigning trustee until the trust property is delivered to a successor trustee, see Section 707 [72-38-707]. In the case of a revocable trust, because the rights of the qualified beneficiaries are subject to the settlor's control (*see* Section 603 [72-38-603]), resignation of the trustee is accomplished by giving notice to the settlor instead of the beneficiaries.

2001 Amendment. By a 2001 amendment, subsection (a)(1) [72-38-705(1)(a)] was amended to require that notice of a trustee's resignation be given to a living settlor. Previously, notice to a living settlor was required for a revocable but not irrevocable trust. Notice to the settlor of a revocable trust was required because the rights of the qualified beneficiaries, including the right to receive a trustee's resignation, are subject to the settlor's exclusive control. *See* Section 603 [72-38-603].

Compiler's Comments

Source: This section modifies section 705 of the Uniform Law Commission's Uniform Trust Code by adding the requirement to provide notice to a living settlor in subsection (1)(a).

The language in this section relates to the language in 72-33-616 (now repealed) and 72-33-617 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Material Purpose of Trust Frustrated — Modification of Trust for Appointment of Corporate Sole Trustee Proper: Eggebrecht died, leaving a wife and two young children. His wife was appointed personal representative of his intestate estate. Shortly after he died, Eggebrecht's parents filed several creditor's claims against the estate and sought to have a will, executed 10 years earlier, admitted to probate. The will left everything to Eggebrecht's brother and sisters and purported to disinherit any future spouse. Following lengthy litigation, the parties instead agreed to create an irrevocable trust, with the children as beneficiaries, the wife and mother as trustees, and the wife and both parents as trust advisers. About 3 years later, the wife sought funds from the trust to meet the children's needs, but her requests for disbursements were denied by the parents. The wife then petitioned to modify the trust, offering to resign as joint trustee and requesting substitution of a corporate trustee. One of the children gained majority during the pendency of the action and joined the suit with the wife, also expressing the belief that the solution was to have a corporate trustee administer the trust. The District Court found, and the Supreme Court agreed, that the true material purpose of the trust was to benefit the children by giving them support and maintenance and that that purpose was frustrated as a result of the joint trustees' inability to work together. Therefore, the reasons for modifying the trust to allow appointment of a corporate trustee outweighed the material purpose of having a trust adviser position, and the District Court properly exercised its discretion in eliminating the trust adviser position and appointing a corporate sole trustee. In re Eggebrecht Irrevocable Trust v. Eggebrecht, 2000 MT 189, 300 M 409, 4 P3d 1207, 57 St. Rep. 748 (2000).

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Term of Office: Unless discharged, a trustee is in office until he dies. Bradbury v. Nagelhus, 132 M 417, 319 P2d 503 (1957).

Termination of Trust: Neither malfeasance nor wrongful conversion will lapse or terminate a trust or discharge the trustee. Bradbury v. Nagelhus, 132 M 417, 319 P2d 503 (1957).

72-38-706. Removal of trustee.

Official Comments

Subsection (a) [72-38-706(1)], contrary to the common law, grants the settlor of an irrevocable trust the right to petition for removal of a trustee. The right to petition for removal does not give the settlor of an irrevocable trust any other rights, such as the right to an annual report or to receive other information concerning administration of the trust. The right of a beneficiary to petition for removal does not apply to a revocable trust while the settlor has capacity. Pursuant to Section 603(a) [72-38-603(1)], while a trust is revocable and the settlor has capacity, the rights of the beneficiaries are subject to the settlor's exclusive control.

Trustee removal may be regulated by the terms of the trust. *See* Section 105 [72-38-105]. In fashioning a removal provision for an irrevocable trust, the drafter should be cognizant of the danger that the trust may be included in the settlor's federal gross estate if the settlor retains the power to be appointed as trustee or to appoint someone who is not independent. *See* Rev. Rul. 95-58, 1995-2 C.B. 191.

Subsection (b) [72-38-706(2)] lists the grounds for removal of the trustee. The grounds for removal are similar to those found in Restatement (Third) of Trusts Section 37 cmt. e (Tentative Draft No. 2, approved 1999). A trustee may be removed for untoward action, such as for a serious breach of trust, but the section is not so limited. A trustee may also be removed under a variety of circumstances in which the court concludes that the trustee is not best serving the interests of the beneficiaries. The term "interests of the beneficiaries" means the beneficial interests as provided in the terms of the trust, not as defined by the beneficiaries. *See* Section 103(8) [73-38-103(9)]. Removal for conduct detrimental to the interests of the beneficiaries is a well-established standard for removal of a trustee. *See* Restatement (Third) of Trusts Section 37 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 107 cmt. a (1959).

Subsection (b)(1) [72-38-706(2)(a)], consistent with Restatement (Third) of Trusts Section 37 cmt. e and g (Tentative Draft No, 2, approved 1999), makes clear that not every breach of trust justifies removal of the trustee. The breach must be "serious." A serious breach of trust may consist of a single act that causes significant harm or involves flagrant misconduct. A serious breach of trust may also consist of a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together. A particularly appropriate circumstance justifying removal of the trustee is a serious breach of the trustee's duty to keep the beneficiaries reasonably informed of the administration of the trust or to comply with a beneficiary's request for information as required by Section 813 [72-38-813]. Failure to comply with this duty may make it impossible for the beneficiaries to protect their interests. It may also mask more serious violations by the trustee.

The lack of cooperation among trustees justifying removal under subsection (b)(2) [72-38-706(2)(b)] need not involve a breach of trust. The key factor is whether the administration of the trust is significantly impaired by the trustees' failure to agree. Removal is particularly appropriate if the naming of an even number of trustees, combined with their failure to agree, has resulted in deadlock requiring court resolution. The court may remove one or more or all of the trustees. If a cotrustee remains in office following the removal, under Section 704 appointment of a successor trustee is not required.

Subsection (b)(2) [72-38-706(2)(b)] deals only with lack of cooperation among cotrustees, not with friction between the trustee and beneficiaries. Friction between the trustee and beneficiaries is ordinarily not a basis for removal. However, removal might be justified if a communications breakdown is caused by the trustee or appears to be incurable. *See* Restatement (Third) of Trusts Section 37 cmt. e (Tentative Draft No. 2, approved 1999).

Subsection (b)(3) [72-38-706(2)(c)] authorizes removal for a variety of grounds, including unfitness, unwillingness, or persistent failure to administer the trust effectively. Removal in any of these cases is allowed only if it best serves the interests of the beneficiaries. For the definition of "interests of the beneficiaries," see Section 103(8) [72-38-103(9)]. "Unfitness" may include not only mental incapacity but also lack of basic ability to administer the trust. Before removing a trustee for unfitness the court should consider the extent to which the problem might be cured by a delegation of functions the trustee is personally incapable of performing. "Unwillingness" includes not only cases where the trustee refuses to act but also a pattern of indifference to some or all of the beneficiaries. *See* Restatement (Third) of Trusts Section 37 cmt. e (Tentative Draft No. 2, approved 1999). A "persistent failure to administer the trust effectively" might include a long-term pattern of mediocre performance, such as consistently poor investment results when compared to comparable trusts.

It has traditionally been more difficult to remove a trustee named by the settlor than a trustee named by the court, particularly if the settlor at the time of the appointment was aware of the trustee's failings. *See* Restatement (Third) of Trusts Section 37 cmt. f (Tentative Draft No.2, approved 1999); Restatement (Second) of Trusts Section 107 cmt. f-g (1959). Because of the discretion normally granted to a trustee, the settlor's confidence in the judgment of the particular person whom the settlor selected to act as trustee is entitled to considerable weight. This deference to the settlor's choice can weaken or dissolve if a substantial change in the trustee's circumstances occurs. To honor a settlor's reasonable expectations, subsection (b)(4) [72-38-706(2)(d)] lists a substantial change of circumstances as a possible basis for removal of the trustee. Changed circumstances justifying removal of a trustee might include a substantial change in the character of the service or location of the trustee. A corporate reorganization of an institutional trustee is not itself a change of circumstances if it does not affect the service provided the individual trust account. Before removing a trustee on account of changed circumstances, the court must also conclude that removal is not inconsistent with a material purpose of the trust, that it will best serve the interests of the beneficiaries, and that a suitable cotrustee or successor trustee is available.

Subsection (b)(4) [72-38-706(2)(d)] also contains a specific but more limited application of Section 411 [72-38-411]. Section 411 [72-38-411] allows the beneficiaries by unanimous agreement to compel modification of a trust if the court concludes that the particular modification is not inconsistent with a material purpose of the trust. Subsection (b)(4) [72-38-706(2)(d)] of this section similarly allows the qualified beneficiaries to request removal of the trustee if the designation of the trustee was not a material purpose of the trust. Before removing the trustee the court must also find that removal will best serve the interests of the beneficiaries and that a suitable cotrustee or successor trustee is available.

Subsection (c) [72-38-706(3)] authorizes the court to intervene pending a final decision on a request to remove a trustee. Among the relief that the court may order under Section 1001(b) [72-38-1001(2)] is an injunction prohibiting the trustee from performing certain acts and the appointment of a special fiduciary to perform some or all of the trustee's functions. Pursuant to Section 1004 [72-38-1004], the court may also award attorney's fees as justice and equity may require.

Compiler's Comments

Source: The language in this section relates to the language in 72-33-618 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

No Abuse of Discretion in Failure to Remove Trustee of Trust: The beneficiary of a trust contended that the District Court should have removed the trustee of the trust, primarily because the trustee failed to file an annual accounting for the trust. The Supreme Court found no abuse of the District Court's discretion in denying the removal, noting that although the law requires an annual accounting, in this case the trust had no income or disbursements, so there was nothing to account for. The trustee was directed to file an annual accounting in order to protect the rights of the parties. In re Baird Trust, 2009 MT 81, 349 M 501, 204 P3d 703 (2009). See also In re Gershcow's Will, 261 NW2d 335 (Minn. 1977).

Trustee Acting Properly in Carrying Out Testator's Intent Rather Than Acting in Best Interests of Beneficiaries: The beneficiaries of a trust petitioned the District Court to remove Norwest as trustee on the basis that Norwest was not operating the trust in a way to maximize income to the beneficiaries, but rather in a manner to maximize the fees charged by Norwest. The Supreme Court upheld the lower court's decision not to remove the trustee, stating that it is a basic principle of trust law that a trust is to be managed to carry out the testator's intent and that in the instant case, in examining the trust document, it is clear that the intent of the testator was to have the trust managed in the best interests of the trust estate. The Supreme Court went on to say that Norwest had greatly increased the value of the trust assets, which was in the best interest of the trust estate, even though that might not generate the most income for the beneficiaries. The Supreme Court's majority decision also included as dicta a detailed discussion countering points of the dissenting justices who argued in favor of removing the trustee. In re Estate of Berthot, 2002 MT 277, 312 M 366, 59 P3d 1080 (2002).

72-38-707. Delivery of property by former trustee.

Official Comments

This section addresses the continuing authority and duty of a resigning or removed trustee. Subject to the power of the court to make other arrangements or unless a cotrustee remains in office, a resigning or removed trustee has continuing authority until the trust property is delivered to a successor. If a cotrustee remains in office, there is no reason to grant a resigning or removed trustee any continuing authority, and none is granted under this section. In addition, if a cotrustee remains in office, the former trustee need not submit a final trustee's report. *See* Section 813(c) [72-38-813(3)].

There is ample authority in the Uniform Trust Code for the appointment of a special fiduciary, an appointment which can avoid the need for a resigning or removed trustee to exercise residual powers until a successor can take office. *See* Sections 704(e) [72-38-704(4)] (court may appoint additional trustee or special fiduciary whenever court considers appointment necessary for administration of trust), 705(b) [72-38-705(2)] (in approving resignation, court may impose conditions necessary for protection of trust property), 706(c) [72-38-706(3)] (pending decision on petition for removal, court may order appropriate relief), and 1001(b)(5) [72-38-1001(2)(e)] (to remedy breach of trust, court may appoint special fiduciary as necessary to protect trust property or interests of beneficiary).

If the former trustee has died, the Uniform Trust Code does not require that the trustee's personal representative windup the deceased trustee's administration. Nor is a trustee's conservator or guardian required to complete the former trustee's administration if the trustee's authority terminated due to an adjudication of incapacity. However, to limit the former trustee's liability, the personal representative, conservator or guardian may submit a trustee's report on the former trustee's behalf as authorized by Section 813(c) [72-38-813(3)]. Otherwise, the former trustee remains liable for actions taken during the trustee's term of office until liability is otherwise barred.

Compiler's Comments

Source: This section modifies section 707 of the Uniform Law Commission's Uniform Trust Code by adding the consequences of a trustee's failure to deliver trust property in subsections (2)(a) and (2)(b).

The language in this section relates to the language in 72-33-620 (now repealed).

72-38-708. Compensation of trustee.

Official Comments

Subsection (a) [72-38-708(1)] establishes a standard of reasonable compensation. Relevant factors in determining this compensation, as specified in the Restatement, include the custom of the community; the trustee's skill, experience, and facilities; the time devoted to trust duties; the amount and character of the trust property; the degree of difficulty, responsibility and risk assumed in administering the trust, including in making discretionary distributions; the nature and costs of services rendered by others; and the quality of the trustee's performance. *See* Restatement (Third) of Trusts Section 38 cmt. c (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. b (1959).

In setting compensation, the services actually performed and responsibilities assumed by the trustee should be closely examined. A downward adjustment of fees may be appropriate if a trustee has delegated significant duties to agents, such as the delegation of investment authority to outside managers. *See* Section 807 [72-38-807] (delegation by trustee). On the other hand, a trustee with special skills, such as those of a real estate agent, may be entitled to extra compensation for performing services that would ordinarily be delegated. *See* Restatement (Third) of Trusts Section 38 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. d (1959).

Because "trustee" as defined in Section 103(20) [72-38-103(23)] includes not only an individual trustee but also cotrustees, each trustee, including a cotrustee, is entitled to reasonable compensation under the circumstances. The fact that a trust has more than one trustee does not mean that the trustees together are entitled to more compensation than had either acted alone. Nor does the appointment of more than one trustee mean that the trustees are eligible to receive the compensation in equal shares. The total amount of the compensation to be paid and how it will be divided depend on the totality of the circumstances. Factors to be considered include the settlor's reasons for naming more than one trustee and the level of responsibility assumed and exact services performed by each trustee. Often the fees of cotrustees will be in the aggregate higher than the fees for a single trustee because of the duty of each trustee to participate in administration and not delegate to a cotrustee duties the settlor expected the trustees to perform jointly. *See* Restatement (Third) of Trusts Section 38 cmt. i (Tentative Draft No. 2, approved 1999). The trust may benefit in such cases from the enhanced quality of decision-making resulting from the collective deliberations of the trustees.

Financial institution trustees normally base their fees on published fee schedules. Published fee schedules are subject to the same standard of reasonableness under the Uniform Trust Code as are other methods for computing fees. The courts have generally upheld published fee schedules but this is not automatic. Among the more litigated topics is the issue of termination fees. Termination fees are charged upon termination of the trust and sometimes upon transfer of the trust to a successor trustee. Factors relevant to whether the fee is appropriate include the actual work performed; whether a termination fee was authorized in the terms of the trust; whether the fee schedule specified the circumstances in which a termination fee would be charged; whether the trustee's overall fees for administering the trust from the date of the trust's creation, including the termination fee, were reasonable; and the general practice in the community regarding termination fees. Because significantly less work is normally involved, termination fees are less appropriate upon transfer to a successor trustee than upon termination of the trust. For representative cases, see *Cleveland Trust Co. v. Wilmington Trust Co.*, 258 A.2d 58 (Del. 1969); *In re Trusts Under Will of Dwan*, 371 N.W. 2d 641 (Minn. Ct. App. 1985); *Mercer v. Merchants National Bank*, 298 A.2d 736 (N.H. 1972); *In re Estate of Payson*, 562 N.Y.S. 2d 329 (Surr. Ct. 1990); *In re Indenture Agreement of Lawson*, 607 A. 2d 803 (Pa. Super. Ct. 1992); *In re Estate of Ischy*, 415 A.2d 37 (Pa. 1980); *Memphis Memorial Park v. Planters National Bank*, 1986 Tenn. App. LEXIS 2978 (May 7, 1986); *In re Trust of Sensenbrenner*, 252 N.W. 2d 47 (Wis. 1977).

This Code does not take a specific position on whether dual fees may be charged when a trustee hires its own law firm to represent the trust. The trend is to authorize dual compensation as long as the overall fees are reasonable. For a discussion, see Ronald C. Link, *Developments Regarding the Professional Responsibility of the Estate Administration Lawyer: The Effect of the Model Rules of Professional Conduct*, 26 Real Prop. Prob. & Tr. J. 1, 22-38 (1991).

Subsection (b) [72-38-708(2)] permits the terms of the trust to override the reasonable compensation standard, subject to the court's inherent equity power to make adjustments downward or upward in appropriate circumstances. Compensation provisions should be drafted with care. Common questions include whether a provision in the terms of the trust setting the amount of the trustee's compensation is binding on a successor trustee, whether a dispositive provision for the trustee in the terms of the trust is in addition to or in lieu of the trustee's regular compensation, and whether a dispositive provision for the trustee is conditional on the person performing services as trustee. *See* Restatement (Third) of Trusts Section 38 cmt. e (Tentative Draft No.2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. f (1959).

Compensation may be set by agreement. A trustee may enter into an agreement with the beneficiaries for lesser or increased compensation, although an agreement increasing compensation is not binding on a nonconsenting beneficiary. *See* Section 111(d) [72-38-111(4)] (matters that may be the resolved by nonjudicial settlement). *See also* Restatement (Third) of Trusts Section 38 cmt. f (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. i (1959). A trustee may also agree to waive compensation and should do so prior to rendering significant services if concerned about possible gift and income taxation of the compensation accrued prior to the waiver. *See* Rev. Rul. 66-167, 1966-1 C.B. 20. *See also* Restatement (Third) of Trusts Section 38 cmt. g (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. j (1959).

Section 816(15) [72-38-816(15)] grants the trustee authority to fix and pay its compensation without the necessity of prior court review, subject to the right of a beneficiary to object to the compensation in a later judicial proceeding. Allowing the trustee to pay its compensation without prior court approval promotes efficient trust administration but does place a significant burden on a beneficiary who believes the compensation is unreasonable. To provide a beneficiary with time to take action, and because of the importance of trustee's fees to the beneficiaries' interests, Section 813(b)(4) [72-38-813(2)(d)] requires a trustee to provide the qualified beneficiaries with advance notice of any change in the method or rate of the trustee's compensation. Failure to provide such advance notice constitutes a breach of trust, which, if sufficiently serious, would justify the trustee's removal under Section 706 [72-38-706].

Under Sections 501-502 of the Uniform Principal and Income Act (1997), one-half of a trustee's regular compensation is charged to income and the other half to principal. Chargeable to principal are fees for acceptance, distribution, or termination of the trust, and fees charged on disbursements made to prepare property for sale.

Compiler's Comments

Source: The language in this section relates to the language in 72-33-626 through 72-33-630 (now repealed).

72-38-709. Reimbursement of expenses.

Official Comments

A trustee has the authority to expend trust funds as necessary in the administration of the trust, including expenses incurred in the hiring of agents. *See* Sections 807 [72-38-807] (delegation by trustee) and 816(15) [72-38-816(15)] (trustee to pay expenses of administration from trust).

Subsection (a)(1) [72-38-709(1)(a)] clarifies that a trustee is entitled to reimbursement from the trust for incurring expenses within the trustee's authority. The trustee may also withhold appropriate reimbursement for expenses before making distributions to the beneficiaries. *See* Restatement (Third) of Trusts § 38 cmt. b (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 244 cmt. b (1959). A trustee is ordinarily not entitled to reimbursement for incurring unauthorized expenses. Such expenses are normally the personal responsibility of the trustee.

As provided in subsection (a)(2) [72-38-709(1)(b)], a trustee is entitled to reimbursement for unauthorized expenses only if the unauthorized expenditures benefitted the trust The purpose of this provision, which is derived from Restatement (Second) of Trusts § 245 (1959), is not to ratify the unauthorized conduct of the trustee, but to prevent unjust enrichment of the trust. Given this purpose, a court, on appropriate grounds, may delay or even deny reimbursement for expenses which benefitted the trust. Appropriate grounds include: (1) whether the trustee acted in bad faith in incurring the expense; (2) whether the trustee knew that the expense was inappropriate; (3) whether the trustee reasonably believed the expense was necessary for the preservation of the trust estate; (4) whether the expense has resulted in a benefit; and (5) whether indemnity can be allowed without defeating or impairing the purposes of the trust. *See* Restatement (Second) of Trusts § 245 cmt. g (1959).

Subsection (b) [72-38-709(2)] implements Section 802(h)(5) [72-38-802(8)(e)], which creates an exception to the duty of loyalty for advances by the trustee for the protection of the trust if the transaction is fair to the beneficiaries.

Reimbursement under this section may include attorney's fees and expenses incurred by the trustee in defending an action. However, a trustee is not ordinarily entitled to attorney's fees and expenses if it is determined that the trustee breached the trust. *See* 3A Austin W. Scott & William F. Fratcher, The Law of Trusts § 245 (4th ed. 1988).

Compiler's Comments

Source: The language in this section relates to the language in 72-33-631 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Trustee Entitled to Attorney Fees Incurred in Defending Against Action to Remove Trustee: The beneficiaries of a trust petitioned the District Court to remove Norwest as trustee on the basis that Norwest was not operating the trust in a way to maximize income to the beneficiaries, but rather in a manner to maximize the fees charged by Norwest. The Supreme Court upheld the lower court's decision not to remove the trustee, stating that it is a basic principle of trust law that a trust is to be managed to carry out the testator's intent and that in the instant case, in examining the trust document, it is clear that the intent of the testator was to have the trust managed in the best interests of the trust estate. The District Court awarded Norwest $10,463 in costs in defending the action and further ordered that the amount be paid out of the trust. The Supreme Court affirmed the lower court's decision, holding that the trust document provided for reimbursement for reasonable expenses, including attorney fees, and that 72-33-631 (now repealed) provides for reimbursement for expenditures properly incurred in the administration of a trust. In re Estate of Berthot, 2002 MT 277, 312 M 366, 59 P3d 1080 (2002).

Upon Substantiation, Trustee Entitled to Reimbursement for Attorney Fees Incurred in Preparing Trust Accounting: In a case involving disputes between the trustee, Norwest, and the trust beneficiaries, the lower court approved Norwest's Twenty-Ninth Accounting, including the trustee fees, but denied Norwest its attorney fees and expenses incurred in the preparation of the accounting on the basis that the amount claimed was unsubstantiated. Norwest argued that the District Court should have given it the opportunity to provide supporting evidence, rather than denying its fees and expenses outright. The Supreme Court ruled that upon substantiation, 72-33-631 (now repealed) provides for the reimbursement of reasonable attorney fees and expenses incurred in administration of the trust and remanded the case to the lower court, directing it to determine the amount of attorney fees and expenses to which the trustee was entitled. In re Estate of Berthot, 2002 MT 277, 312 M 366, 59 P3d 1080 (2002).

Living Trust — Costs and Attorney Fees Awarded to Trustee From Trust — Judicial Construction of Trust Documents: Clifford Dern and his wife Mary established a living trust for the benefit of their family. Derril Dern, a cotrustee, refused to sign a quitclaim deed conveying various properties left to the trust beneficiaries, and Mary brought an action to determine the beneficiaries' rights. The District Court relied upon 25-10-103 for its determination that payment of costs was discretionary with the court. The Supreme Court held that 25-10-103 applies only in those situations in which costs are not otherwise provided for. In this case, article 3 of the trust documents states that the trustee may pay "expenses of administration" from the trust. In reliance on that language and on 72-33-631 (now repealed) the Supreme Court held that the fees were a necessary expense of the trust, given Derril's refusal to sign the deed. The Supreme Court also noted that 72-33-631 (now repealed) allows repayment of expenditures incurred by the trustee in administration of the trust, that that provision was patterned after a section of the California probate code, and that California decisions interpreting that section of the California probate code hold that reasonable attorney fees are considered necessary expenses of trust administration. The Supreme Court also pointed out that its decision to allow fees is further buttressed by decisions interpreting 72-12-206. Finally, because the trust documents provided that only expenses of the trust were to be paid from the "trust estate", without further delineation of what constitutes the "trust estate", the Supreme Court interpreted those words to mean the entire trust estate, and because the marital trust estate was the only remaining source of funding for the entire estate, the fees were to be paid from the marital trust estate. In re Estate of Dern, 279 M 138, 928 P2d 123, 53 St. Rep. 1087 (1996).

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Borrowing Money to Pay Taxes: The rule that an executor is entitled to legal interest on necessary advances made in good faith when beneficial to the estate applies where he borrows money for the purpose of paying taxes on estate property without previous court order. In re Kelly's Estate, 91 M 98, 5 P2d 559 (1931).

Part 8
Duties and Powers of Trustee

Part Official Comments

This article states the fundamental duties of a trustee and lists the trustee's powers. The duties listed are not new, but how the particular duties are formulated and applied has changed over the years. This article was drafted where possible to conform with the 1994 Uniform Prudent Investor Act, which has been enacted in approximately two thirds of the States. The Uniform Prudent Investor Act prescribes a trustee's responsibilities with respect to the management and investment of trust property. The Uniform Trust Code also addresses a trustee's duties with respect to distribution to beneficiaries.

Because of the widespread adoption of the Uniform Prudent Investor Act [Title 72, ch. 38, pt. 9], it was decided not to disassemble and fully integrate the Prudent Investor Act into the Uniform Trust Code. Instead, States enacting the Uniform Trust Code are encouraged to recodify their version of the Prudent Investor Act by reenacting it as Article 9 of this Code [Title 72, ch. 38, pt. 9] rather than leaving it elsewhere in their statutes. Where the Uniform Trust Code and Uniform Prudent Investor Act overlap, States should enact the provisions of this article and not enact the duplicative provisions of the Prudent Investor Act. Sections of this article which overlap with the Prudent Investor Act are Sections 802 [72-38-802] (duty of loyalty), 803 [72-38-803] (impartiality), 805 [72-38-805] (costs of administration), 806 [72-38-806] (trustee's skills), and 807 [72-38-807] (delegation). For more complete instructions on how to enact the Uniform Prudent Investor Act as part of this Code, see the General Comment to Article 9 [Title 72, ch. 38, pt. 9 Official Comments].

All of the provisions of this article may be overridden in the terms of the trust except for certain aspects of the trustee's duty to keep the beneficiaries informed of administration (*see* Section 105(b)(8)-(9)) [not adopted], and the trustee's fundamental obligation to act in good faith, in accordance with the purposes of the trust, and for the benefit of the beneficiaries (*see* Section 105(b)(2)-(3) [72-38-105(2)(b) and (2)(c)]).

Part Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Breach of Fiduciary Duty of Trust Board to Establish, Improve, and Maintain Museum From Trust Proceeds: Alberta Bair's will established a charitable trust and directed the board overseeing the trust proceeds to establish, improve, and maintain a museum to display the family's historical artifacts. The museum was to be funded from the principal and interest of the trust for philanthropic purposes. The trust agreement provided that the museum had first priority on income distributed from the trust, but also empowered the board to sell, transfer, or relocate the museum 5 years after Bair's death if the board determined that the museum no longer served its purposes. The board initially established a museum and contracted with another museum for operations, but subsequently determined that the necessity for additional resources, without the likelihood of any return in terms of greater attendance or educational possibilities, made continuing the museum unfeasible, so the board ordered that the museum be closed. Friends of the museum sued the board for breach of its trust duties. The District Court found no breach of the board's fiduciary duty, but on appeal, the Supreme Court disagreed. The museum constituted the trust's primary purpose, and the board was required to spend the amount of trust funds necessary to establish, improve, and maintain the museum and breached its fiduciary duty to administer the trust by failing to do so, although delegating management to another museum was not a breach given the board's inexperience in museum management. The board also breached its duty by distributing more trust money through charitable grants than it spent on the museum, despite the museum "first priority" spending requirement. The board's trust duty was also breached when the board failed to substantiate that the public and educational purposes of the museum were no longer met. The District Court's finding that the board did not breach its trust duties was reversed, and the trustee was directed to appoint a new board to follow the directives of the trust agreement and to give the museum a fair opportunity to succeed. In re Bair Family Trust, 2008 MT 144, 343 M 138, 183 P3d 61 (2008), followed in Lane v. Caler, 2013 MT 108, 370 Mont. 30, 299 P.3d 827.

Conservator's Exercise of Reasonable Judgment Regarding Lease of Estate Property — Remand for Audit of Leasing Arrangement: The District Court appointed Saylor's stepson, Tim, as temporary guardian. Saylor and her brother, Deane, both filed written objections to the appointment, and the District Court then approved an agreement that made Deane the limited guardian and conservator of Saylor's out-of-state property and Tim the conservator of Saylor's Montana property. Saylor and Deane subsequently moved to remove Tim as conservator based on his failure to disclose certain financial documents relating to his administration of the estate. Tim had entered a grazing lease on Saylor's property that Saylor contended provided no material benefit to the estate. The District Court found no good cause to remove Tim as conservator and dismissed the petition for removal. On appeal, the Supreme Court noted that conservators are under the same duties as trustees and held that Tim exercised reasonable judgment regarding the lease arrangement and did not breach his duty as conservator so as to require his removal. Saylor's proposed substitute model lease was unrealistic. However, as a matter of equity, the Supreme Court remanded with instructions that the District Court order an audit of the lease arrangement to ensure that the figures attached to the lease conform to actualities and to allow the District Court to revise its prior determinations should the audit reveal facts that would require revision. In re Guardianship & Conservatorship of Saylor, 2005 MT 236, 328 M 415, 121 P3d 532 (2005).

Inventory Requirement Mandatory — Verifiable Accountings Required — Audit: The 90-day inventory requirement in 72-5-424 is not discretionary for Montana courts and conservators as a matter of law, even when liabilities exceed assets. The requirement is mandatory because: (1) the overall purpose of a conservatorship is to preserve the property of the protected person, and a conservator will likely be appointed only when there are assets that should be managed; (2) the plain language of 72-5-424 requires that every conservator prepare and file with the appointing court a complete inventory of the estate; and (3) the purpose of the statutory inventory requirement is to furnish a means by which the conservator's management may be checked and accounts verified. In constructing the inventory, the conservator has discretion to decide what to include and how to value the items in the estate, but that discretion must be verifiable. Pursuant to the court's duty to ensure that a conservator is acting in the best interests of the protected person, verification must consist of a means by which a trial court can independently determine whether accountings are generally complete and accurate, and credibility is not sufficient as documentation of accountings. In the present case, the record did not contain a complete, accurate, and verifiable accounting to show that the conservator properly accounted for the estate, so the Supreme Court remanded for an audit pursuant to 72-5-438. Once the conservator meets the burden of showing proper management and accounting, such as the example in 72-34-128 (now repealed), the burden shifts to the protected person to show that the inventory is incorrect. Redies v. Cosner & Uerling, 2002 MT 86, 309 M 315, 48 P3d 697 (2002). See also In re Allard Guardianship, 49 M 219, 141 P 661 (1914), and In re Estate of Clark, 237 M 179, 772 P2d 299 (1989).

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

No Presumption of Competency in Transactions Between Conservator and Protected Persons: The lower court ruled that the protected persons, the elderly parents of the conservator, were competent. The Supreme Court reversed and remanded, stating that although the establishment of conservatorship is not an adjudication of incompetency and the protected person is presumed to have the capacity to contract with third persons, the presumption shifts with respect to transactions with the conservator. In such cases, the conservator has the burden of proving that the protected persons were at all times capable of understanding the nature of any transaction in which the conservator obtained a benefit. In re Estate of Clark, 237 M 179, 772 P2d 299, 46 St. Rep. 718 (1989), followed in Luke v. Gager, 2000 MT 377, 303 M 474, 16 P3d 377, 57 St. Rep. 1599 (2000).

Opportunity for Undue Influence Not Tantamount to Actual Undue Influence — Presumption Not Granted Absent Evidence of Misadministration: Where the older brother was named trustee and residuary devisee, younger brothers argued that 72-20-208 (now repealed) required the District Court to give them the benefit of the presumption against the trustee. They asserted that the statute places on the proponents of the will the burden of proving no undue influence. The

Supreme Court held that the mere opportunity to exercise undue influence was not tantamount to the actual exercise of undue influence and that the burden of proving undue influence under 72-3-310 lies with the contestant of a will. The mere naming of a party as both trustee and residuary devisee does not create a transaction between the trustee and grantor/beneficiary and thereby shift the burden of proof to the trustee. The presumption created by 72-20-208 (now repealed) is rebuttable, and substantial evidence showed the will was properly executed, the testator was competent, and there was no improper act in the administration of the trust. In re Estate of Watson, 227 M 212, 738 P2d 494, 44 St. Rep. 1020 (1987).

Fiduciary Relationship Between Insurer and Insured — Breach Constituting Constructive Fraud: Fiduciary duties are simply a statement of the kind of good faith duty owed by an insurer to an insured. An insurance company has to consider the interests of both itself and the insured, but failure to act in the highest good faith toward the insured may constitute constructive fraud. Tynes v. Bankers Life Co., 224 M 350, 730 P2d 1115, 43 St. Rep. 2243 (1986).

Burdens of Proof in Case Involving Claimed Breach of Fiduciary Duty by Union Officers: In a dispute between a union and its former business managers, the District Court gave a general instruction that the party who asserts the affirmative of an issue has the burden of proving that issue by a preponderance of the evidence. The court further instructed the jury that if a fiduciary profits personally from the use of union funds, the burden shifts to the fiduciary to show he acted reasonably. Finally, the court instructed that a person with the duty to keep proper accounts has the burden of proving that he is entitled to the credits he claims. These instructions were consistent, clear, and accurate. Local Union No. 400 v. Bosh, 220 M 304, 715 P2d 36, 43 St. Rep. 388 (1986).

Fiduciary Duty of Union Officers: It was proper to instruct the jury on the duty of fiduciary responsibility owed by union officers by comparing it to a trust relationship; stating that, as fiduciaries, the officers were required to act prudently; and allowing the jury to consider the duties, powers, and obligations in the union constitution and bylaws. Local Union No. 400 v. Bosh, 220 M 304, 715 P2d 36, 43 St. Rep. 388 (1986). See also Luke v. Gager, 2000 MT 377, 303 M 474, 16 P3d 377, 57 St. Rep. 1599 (2000).

Fiduciary Relationship Basis for Constructive Fraud Cause of Action: Dealings or transactions between parties who have a fiduciary relationship provide a sufficient contract to support an action for constructive fraud. Local Union No. 400 v. Bosh, 220 M 304, 715 P2d 36, 43 St. Rep. 388 (1986). See also Luke v. Gager, 2000 MT 377, 303 M 474, 16 P3d 377, 57 St. Rep. 1599 (2000).

Insurer's Concealment of Material Facts — Bad Faith: In an action against his insurance company for failure to settle a third-party claim within policy limits, plaintiff offered and the trial court gave an instruction stating that an insurer is liable for bad faith if it intentionally conceals material facts within its knowledge and not known by the insured. Defendant contended it was error to give the instruction. On appeal, the Supreme Court stated that the duty of a fiduciary to his beneficiary is no less than that of a trustee. The fiduciary, as a trustee, is bound to act in the highest good faith toward his beneficiary and may not obtain any advantage over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind. It was therefore not error to inform the jury that an insurance company which "intentionally" conceals material facts within its knowledge and not known to the insured may be found to be acting in bad faith. The concealed facts must be material to the subject of the trust or duty of the fiduciary as the instruction stated. The judgment was affirmed. Gibson v. W. Fire Ins. Co., 210 M 267, 682 P2d 725, 41 St. Rep. 1048 (1984).

Professional Misconduct — Lawyer Disbarred: The Supreme Court found substantial credible evidence supporting the findings of the Commission on Practice that the respondent violated 72-5-423, 72-20-201 (now repealed), 72-20-203 (now repealed), 72-20-204 (now repealed), 72-20-207 (now repealed), and various disciplinary rules and that he engaged in deceitful conduct for which he could be guilty of a misdemeanor in accordance with 37-61-406. The respondent was ordered disbarred and required to make restitution of $22,127.74. In re Reno, 187 M 262, 609 P2d 704, 37 St. Rep. 688 (1980).

Specific Finding on Existence of Confidential Relationship: There was no need for a specific finding on the issue of the existence of a confidential or fiduciary relationship because there was insufficient proof of wrongdoing on the part of defendant, even if he were considered to be a voluntary trustee. Boatman v. Berg, 176 M 208, 577 P2d 382 (1978).

Charitable Trust: A trustee of property dedicated to a charitable purpose is obligated to follow the directions of the trustor and to use ordinary care and diligence in the execution of the trust. Howard v. Sisters of Charity of Leavenworth, 193 F. Supp. 191 (D.C. Mont. 1961).

Vesting of Beneficiary's Interest in Stock: When the settlor of a revocable trust purchased a stock certificate in his name as trustee for a certain beneficiary and reserved the right to change the beneficiary and to receive the income and to vote the stock, upon the declaration of the trust, the named beneficiary became vested with an equitable interest in the stock, which consisted essentially in a right to have the trustee perform the duties imposed on him by law and eventually to succeed to complete ownership of the stock. Investors Stock Fund, Inc. v. Roberts, 179 F. Supp. 185 (D.C. Mont. 1959), affirmed in 286 F2d 647 (9th Cir. 1961).

Industrial Accident Board: The Industrial Accident Board (now the Division of Workers' Compensation of the Department of Labor and Industry) is under a legal and moral duty to deal fairly with workmen as beneficiaries and to disclose all matters affecting their interests, either beneficially or otherwise. Yurkovich v. Indus. Accident Bd., 132 M 77, 314 P2d 866 (1957).

Manager of Syndicate: By 72-20-201 and 72-20-207 (now repealed), it is made the duty of a trustee to act in the utmost good faith to those for whom he acts, and failure of the manager of a syndicate to inform those to whom sales of units were made through the use of the mails, that by contracts made by him approximately 50% of the proceeds of sales was paid as commissions and expenses to sales agents, was a breach of trust and a fraud upon them. Campbell v. U.S., 12 F2d 873 (1926).

Officer of Bank Dealing With It: While an officer or director of a bank stands in a fiduciary relation to it and will not be permitted to profit because of his position as such, he may engage in ordinary business transactions with it or through it, provided his dealings are fair and he takes no undue advantage of his fiduciary relationship. Duffy v. Hastings, 78 M 22, 252 P 316 (1926).

Director Dealing With Corporation: There is no presumption that a director dealing with his corporation does so in bad faith unless he gains an advantage thereby, and if the company is indebted to him on a bona fide claim he may enforce it by the same method open to any other of its creditors. Mayger v. St. Louis Min. & Mill. Co., 68 M 492, 219 P 1102 (1923).

Sale by Broker to Himself Voidable: A real estate broker entrusted with the privilege of selling the land of his principal cannot sell to himself, and where he does so, the sale made by him is voidable at the option of the owner. Crowley v. Rorvig, 61 M 245, 203 P 496 (1921), followed in Boyne, U.S.A., Inc. v. Mallas, 236 M 305, 769 P2d 1235, 46 St. Rep. 380 (1989).

Deposit in Bank for Benefit of Another: A bank which accepts a deposit of money in trust for the benefit of another, to be delivered to a third party upon the happening of a contingency, is bound to the highest good faith in executing the trust thus created; disposition of the deposit contrary to instruction renders the bank liable in damages either for a conversion or in assumpsit for money had and received. Glendenning v. Slayton, 55 M 586, 179 P 817 (1919).

All Conveyances Not Void — Burden of Proof: However 72-24-206 (now repealed) may be viewed, it is perfectly clear that not all conveyances by such trustees are prima facie void or voidable. They are void or voidable only if made in contravention of the trust, and as this presumably is not the character of any given conveyance, the burden is necessarily upon him who asserts to prove that such is its character. Horsky v. McKennan, 53 M 50, 162 P 376 (1916).

Guardian: It is fraud for a guardian to use the ward's funds entrusted to him for any purpose not connected with the trust. In re Allard Guardianship, 49 M 219, 141 P 661 (1914).

Accounting — Selling Price of Land: Good faith requires an agent employed to sell land to account to his principal for the entire selling price, less the agreed commission. Middlefork Cattle Co. v. Todd, 49 M 259, 141 P 641 (1914).

Real Estate Broker: If a broker is employed to sell land at a certain price on commission, and he finds a purchaser at that price, but induces his principal to sell at a lower figure, upon the representation that he cannot get any more, and the broker pockets the difference, it is a clear case of fraud upon his principal, and an action lies to compel him to disgorge the amount of profit so wrongfully realized. Middlefork Cattle Co. v. Todd, 49 M 259, 141 P 641 (1914).

Guardian as Trustee:

A guardian is a trustee and is held to the strict accountability attaching to a trustee. Smith v. Smith, 210 F 947 (D.C. Mont. 1914), affirmed in 224 F 1 (1915).

Where a guardian who had used his ward's money in payment of his debts concealed this fact from the Court in applying for authority to borrow his ward's money at a low rate of interest, the order so procured by fraud and imposition was voidable and afforded no protection to the guardian, and he was liable for legal interest both before and after the order granting such authority, there having been no such disclosure as is required by 72-20-204 (now repealed). Smith v. Smith, 210 F 947 (D.C. Mont. 1914), affirmed in 224 F 1 (1915).

Purchase of Property by Fiduciary — Director of Mining Corporation: The directors of a mining corporation are not allowed to profit by virtue of their position, and a breach of official duty on their part is fraud in law. A director who purchases the property of the corporation at a judicial sale must not be permitted to obtain a dishonest advantage over the corporation or its stockholders. Coombs v. Barker, 31 M 526, 79 P 1 (1905).

72-38-801. Duty to administer trust.

Official Comments

This section confirms that a primary duty of a trustee is to follow the terms and purposes of the trust and to do so in good faith. Only if the terms of a trust are silent or for some reason invalid on a particular issue does this Code govern the trustee's duties. This section also confirms that a trustee does not have a duty to act until the trustee has accepted the trusteeship. For the procedure for accepting a trusteeship, see Section 701 [72-38-701].

In administering the trust, the trustee must not only comply with this section but also with the other duties specified in this article, particularly the obligation not to place the interests of others above those of the beneficiaries (Section 802 [72-38-802]), the duty to act with prudence (Section 804 [72-38-804]), and the duty to keep the qualified beneficiaries reasonably informed about the administration of the trust (Section 813 [72-38-813]).

While a trustee generally must administer a trust in accordance with its terms and purposes, the purposes and particular terms of the trust can on occasion conflict. If such a conflict occurs because of circumstances not anticipated by the settlor, it may be appropriate for the trustee to petition under Section 412 [72-38-412] to modify or terminate the trust. Pursuant to Section 404 [72-38-404], the trustee is not required to perform a duty prescribed by the terms of the trust if performance would be impossible, illegal or contrary to public policy.

For background on the trustee's duty to administer the trust, see Restatement (Second) of Trusts §§ 164-169 (1959).

Compiler's Comments

Source: The language in this section relates to the language in 72-34-101 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Breach of Fiduciary Duty of Trust Board to Establish, Improve, and Maintain Museum From Trust Proceeds: Alberta Bair's will established a charitable trust and directed the board overseeing the trust proceeds to establish, improve, and maintain a museum to display the family's historical artifacts. The museum was to be funded from the principal and interest of the trust for philanthropic purposes. The trust agreement provided that the museum had first priority on income distributed from the trust, but also empowered the board to sell, transfer, or relocate the museum 5 years after Bair's death if the board determined that the museum no longer served its purposes. The board initially established a museum and contracted with another museum for operations, but subsequently determined that the necessity for additional resources, without the likelihood of any return in terms of greater attendance or educational possibilities, made continuing the museum unfeasible, so the board ordered that the museum be closed. Friends of the museum sued the board for breach of its trust duties. The District Court found no breach of the board's fiduciary duty, but on appeal, the Supreme Court disagreed. The museum constituted the trust's primary purpose, and the board was required to spend the amount of trust funds necessary to establish, improve, and maintain the museum and breached its fiduciary duty to administer the trust by failing to do so, although delegating management to another museum was not a breach given the board's inexperience in museum management. The board also breached its duty by distributing more trust money through charitable grants than it spent on the museum, despite the museum "first priority" spending requirement. The board's trust duty was also breached when the board failed to substantiate that the public and educational purposes of the museum were no longer met. The District Court's finding that the board did not breach its trust duties was reversed, and the trustee was directed to appoint a new board to follow the directives of the trust agreement and to give the museum a fair opportunity to succeed. In re Bair Family Trust, 2008 MT 144, 343 M 138, 183 P3d 61 (2008), followed in Lane v. Caler, 2013 MT 108, 370 Mont. 30, 299 P.3d 827.

Trust Necessary for Support — Necessity Construed: The trust that the decedent set up for his wife, an Alzheimer's sufferer, provided in part that "The purposes of this Trust are to provide for and assure, so far as possible, the generous care and support of my said wife ... and to provide for funeral ... and any other expenses attendant upon ... her death. ... The trustee shall ... pay ... as much ... as Trustee deems necessary for her support, care and health .... The discretion ... shall be exercised liberally in favor of my said wife, it being my intention that she shall have, in addition to the necessities, a reasonable number of the luxuries of life, if she desires them." It was improper for the trustee to deny every request of the wife's guardian and conservator for aid on the basis that no financial need was shown and that the wife must spend her whole personal estate before the trust could be used. The trustee and lower court improperly used the trust's use of the word "necessary" to support the trustee's interpretation. The trustee's intent and the trust's wording on the whole showed this interpretation to be erroneous. The trust was ordered to pay the wife's living, medical, funeral, and burial expenses and to repay the conservator for amounts that the conservator had paid for care since the trustee's death. In the absence of statutory or contractual authority and absent bad faith or malicious behavior, the conservator was denied attorney fees. In re Estate of Lindgren, 268 M 96, 885 P2d 1280, 51 St. Rep. 1182 (1994).

72-38-802. Duty of loyalty.

Official Comments

This section addresses the duty of loyalty, perhaps the most fundamental duty of the trustee. Subsection (a) [72-38-802(1)] states the general principle, which is copied from Restatement (Second) of Trusts Section 170(1) (1959). A trustee owes a duty of loyalty to the beneficiaries, a principle which is sometimes expressed as the obligation of the trustee not to place the trustee's own interests over those of the beneficiaries. Most but not all violations of the duty of loyalty concern transactions involving the trust property, but breaches of the duty can take other forms. For a discussion of the different types of violations, see George G. Bogert & George T. Bogert, The Law of Trusts and Trustees Section 543 (Rev. 2d ed. 1993); and 2A Austin W. Scott & William F. Fratcher, The Law of Trusts Sections 170-170.24 (4th ed. 1987). The "interests of the beneficiaries" to which the trustee must be loyal are the beneficial interests as provided in the terms of the trust. *See* Section 103(8) [72-38-103(9)].

The duty of loyalty applies to both charitable and noncharitable trusts, even though the beneficiaries of charitable trusts are indefinite. In the case of a charitable trust, the trustee must administer the trust solely in the interests of effectuating the trust's charitable purposes. *See* Restatement (Second) of Trusts Section 379 cmt. a (1959).

Duty of loyalty issues often arise in connection with the settlor's designation of the trustee. For example, it is not uncommon that the trustee will also be a beneficiary. Or the settlor will name a friend or family member who is an officer of a company in which the settlor owns stock. In such cases, settlors should be advised to consider addressing in the terms of the trust how such conflicts are to be handled. Section 105 [72-38-105] authorizes a settlor to override an otherwise applicable duty of loyalty in the terms of the trust. Sometimes the override is implied. The grant to a trustee of authority to make a discretionary distribution to a class of beneficiaries that includes the trustee implicitly authorizes the trustee to make distributions for the trustee's own benefit.

Subsection (b) [72-38-802(2)] states the general rule with respect to transactions involving trust property that are affected by a conflict of interest. A transaction affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary who is affected by the transaction. Subsection (b) [72-38-802(2)] carries out the "no further inquiry" rule by making transactions involving trust property entered into by a trustee for the trustee's own personal account voidable without further proof. Such transactions are irrebuttably presumed to be affected by a conflict between personal and fiduciary interests. It is immaterial whether the trustee acts in good faith or pays a fair consideration. *See* Restatement (Second) of Trusts Section 170 cmt. b (1959).

The rule is less severe with respect to transactions involving trust property entered into with persons who have close business or personal ties with the trustee. Under subsection (c) [72-38-802(3)], a transaction between a trustee and certain relatives and business associates is presumptively voidable, not void. Also presumptively voidable are transactions with corporations or other enterprises in which the trustee, or a person who owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment. The presumption is rebutted if the trustee establishes that the transaction was not affected by a conflict between personal and fiduciary interests. Among the factors tending to rebut the presumption are whether the consideration was fair and whether the other terms of the transaction are similar to those that would be transacted with an independent party.

Even where the presumption under subsection (c) [72-38-802(3)] does not apply, a transaction may still be voided by a beneficiary if the beneficiary proves that a conflict between personal and fiduciary interests existed and that the transaction was affected by the conflict. The right of a beneficiary to void a transaction affected by a conflict of interest is optional. If the transaction proves profitable to the trust and unprofitable to the trustee, the beneficiary will likely allow the transaction to stand. For a comparable provision regulating fiduciary investments by national banks, see 12 C.F.R. Section 9.12(a).

As provided in subsection (b) [72-38-802(2)], no breach of the duty of loyalty occurs if the transaction was authorized by the terms of the trust or approved by the court, or if the beneficiary failed to commence a judicial proceeding within the time allowed or chose to ratify the transaction, either prior to or subsequent to its occurrence. In determining whether a beneficiary has consented to a transaction, the principles of representation from Article 3 [Title 72, ch. 38, pt. 3] may be applied.

Subsection (b)(5) [72-38-802(2)(e)], which is derived from Section 3-713(1) of the Uniform Probate Code, allows a trustee to implement a contract or pursue a claim that the trustee entered into or acquired before the person became or contemplated becoming trustee. While this subsection allows the transaction to proceed without automatically being voidable by a beneficiary, the transaction is not necessarily free from scrutiny. In implementing the contract or pursuing the claim, the trustee must still complete the transaction in a way that avoids a conflict between the trustee's fiduciary and personal interests. Because avoiding such a conflict will frequently be difficult, the trustee should consider petitioning the court to appoint a special fiduciary, as authorized by subsection (i) [72-38-802(9)], to work out the details and complete the transaction.

Subsection (d) [72-38-802(4)] creates a presumption that a transaction between a trustee and a beneficiary not involving trust property is an abuse by the trustee of a confidential relationship with the beneficiary. This subsection has limited scope. If the trust has terminated, there must be proof that the trustee's influence with the beneficiary remained. Furthermore, whether or not the trust has terminated, there must be proof that the trustee obtained an advantage from the relationship. The fact the trustee profited is insufficient to show an abuse if a third party would have similarly profited in an arm's length transaction. Subsection (d) [72-38-802(4)] is based on Cal. Prob. Code Section16004(c). *See also* 2A Austin W. Scott & William F. Fratcher Section 170.25 (4th ed. 1987), which states the same principle in a slightly different form: "Where he deals directly with the beneficiaries, the transaction may stand, but only if the trustee makes full disclosure and takes no advantage of his position and the transaction is in all respects fair and reasonable."

Subsection (e) [72-38-802(5)], which allows a beneficiary to void a transaction entered into by the trustee that involved an opportunity belonging to the trust, is based on Restatement (Second) of Trusts Section 170 cmt. k (1959). While normally associated with corporations and with their directors and officers, what is usually referred to as the corporate opportunity doctrine also applies to other types of fiduciary. The doctrine prohibits the trustee's pursuit of certain business activities, such as entering into a business in direct competition with a business owned by the trust, or the purchasing of an investment that the facts suggest the trustee was expected to purchase for the trust. For discussion of the corporate opportunity doctrine, see Kenneth B. Davis, Jr., *Corporate Opportunity and Comparative Advantage,* 84 Iowa L. Rev. 211 (1999); and Richard A. Epstein, *Contract and Trust in Corporate Law: The Case of Corporate Opportunity,* 21 Del. J. Corp. L. 5 (1996). *See also* Principles of Corporate Governance: Analysis and Recommendations Section 5.05 (American Law Inst. 1994).

Subsection (f) [72-38-802(6)] creates an exception to the no further inquiry rule for trustee investment in mutual funds. This exception applies even though the mutual fund company pays the financial-service institution trustee a fee for providing investment advice and other services, such as custody, transfer agent, and distribution, that would otherwise be provided by agents of the fund. Mutual funds offer several advantages for fiduciary investing. By comparison with common trust funds, mutual fund shares may be distributed in-kind when trust interests terminate, avoiding liquidation and the associated recognition of gain for tax purposes. Mutual funds commonly offer daily pricing, which gives trustees and beneficiaries better information about performance. Because mutual funds can combine fiduciary and nonfiduciary accounts, they can achieve larger size, which can enhance diversification and produce economies of scale that can lower investment costs.

Mutual fund investment also has a number of potential disadvantages. It adds another layer of expense to the trust, and it causes the trustee to lose control over the nature and timing of transactions in the fund. Trustee investment in mutual funds sponsored by the trustee, its affiliate, or from which the trustee receives extra fees has given rise to litigation implicating the trustee's duty of loyalty, the duty to invest with prudence, and the right to receive only reasonable compensation. Because financial institution trustees ordinarily provide advisory services to and receive compensation from the very funds in which they invest trust assets, the contention is made that investing the assets of individual trusts in these funds is imprudent and motivated by the effort to generate additional fee income. Because the financial institution trustee often will also charge its regular fee for administering the trust, the contention is made that the financial institution trustee's total compensation, both direct and indirect, is excessive.

Subsection (f) [72-38-802(6)] attempts to retain the advantages of mutual funds while at the same time making clear that such investments are subject to traditional fiduciary responsibilities. Nearly all of the States have enacted statutes authorizing trustees to invest in funds from which the trustee might derive additional compensation. Portions of subsection (f) [72-38-802(6)] are based on these statutes. Subsection (f) [72-38-802(6)] makes clear that such dual investment-fee arrangements are not automatically presumed to involve a conflict between the trustee's personal and fiduciary interests, but subsection (f) [72-38-802(6)] does not otherwise waive or lessen a trustee's fiduciary obligations. The trustee, in deciding whether to invest in a mutual fund, must not place its own interests ahead of those of the beneficiaries. The investment decision must also comply with the enacting jurisdiction's prudent investor rule. To obtain the protection afforded by subsection (f) [72-38-802(6)], the trustee must disclose at least annually to the beneficiaries entitled to receive a copy of the trustee's annual report the rate and method by which the additional compensation was determined. Furthermore, the selection of a mutual fund, and the resulting delegation of certain of the trustee's functions, may be taken into account under Section 708 [72-38-708] in setting the trustee's regular compensation. *See also* Uniform Prudent Investor Act Sections 7 and 9 and Comments; Restatement (Third) of Trusts: Prudent Investor Rule Section 227 cmt. m (1992).

Subsection (f) [72-38-802(6)] applies whether the services to the fund are provided directly by the trustee or by an affiliate. While the term "affiliate" is not used in subsection (c) [72-38-802(3)], the individuals and entities listed there are examples of affiliates. The term is also used in the regulations under ERISA. An "affiliate" of a fiduciary includes (1) any person who directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the fiduciary; (2) any officer, director, partner, employee, or relative of the fiduciary, and any corporation or partnership of which the fiduciary is an officer, director or partner. *See* 29 C.F.R. Section 2510.3-21(e).

Subsection (g) [72-38-802(7)] addresses an overlap between trust and corporate law. It is based on Restatement of Trusts (Second) Section 193 cmt. a (1959), which provides that "[i]t is the duty of the trustee in voting shares of stock to use proper care to promote the interest of the beneficiary," and that the fiduciary responsibility of a trustee in voting a control block "is heavier than where he holds only a small fraction of the shares." Similarly, the Department of Labor construes ERISA's duty of loyalty to make share voting a fiduciary function. *See* 29 C.F.R. Section 2509.94-2. When the trust owns the entirety of the shares of a corporation, the corporate assets are in effect trust assets that the trustee determines to hold in corporate form. The trustee may not use the corporate form to escape the fiduciary duties of trust law. Thus, for example, a trustee whose duty of impartiality would require the trustee to make current distributions for the support of current beneficiaries may not evade that duty by holding assets in corporate form and pleading the discretion of corporate directors to determine dividend policy. Rather, the trustee must vote for corporate directors who will follow a dividend policy consistent with the trustee's trust-law duty of impartiality.

Subsection (h) [72-38-802(8)] contains several exceptions to the general duty of loyalty, which apply if the transaction was fair to the beneficiaries. Subsections (h)(1)-(2) [72-38-802(8)(a)-(8)(b)] clarify that a trustee is free to contract about the terms of appointment and rate of compensation. Consistent with Restatement (Second) of Trusts Section 170 cmt. r (1959), subsection (h)(3) [72-38-802(8)(c)] authorizes a trustee to engage in a transaction involving another trust of which the trustee is also trustee, a transaction with a decedent's estate or a conservatorship estate of which the trustee is personal representative or conservator, or a transaction with another trust or other fiduciary relationship in which a beneficiary of the trust has an interest. The authority of a trustee to deposit funds in a financial institution operated by the trustee, as provided in subsection (h)(4) [72-38-802(8)(d)], is recognized as an exception to the duty of loyalty in a number of state statutes although deemed to be a breach of trust in Restatement (Second) of Trusts Section 170 cmt. m (1959). The power to deposit funds in its own institution does not negate the trustee's responsibility to invest prudently, including the obligation to earn a reasonable rate of interest on deposits. Subsection (h)(5) [72-38-802(8)(e)] authorizes a trustee to advance money for the protection of the trust. Such advances usually are of small amounts and are made in emergencies or as a matter of convenience. Pursuant to Section 709(b) [72-38-709(2)], the trustee has a lien against the trust property for any advances made.

2003 Amendment. The amendment revises subsection (f) [72-38-802(6)] to clarify that compensation received from a mutual fund for providing services to the fund is in addition to the trustee's regular compensation. It also clarifies that the trustee obligation to notify certain of the beneficiaries of compensation received from the fund applies only to compensation received for providing investment management or advisory services. The amendment conforms subsection (f) [72-38-802(6)] to the drafters' original intent.

Subsection (f) formerly provided:

(f) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment complies with the prudent investor rule of [Article] 9. The trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust if the trustee at least annually notifies the persons entitled under Section 813 to receive a copy of the trustee's annual report of the rate and method by which the compensation was determined.

2004 Amendment. Section 802(f) [72-38-802(6)] creates an exception to the prohibition on self-dealing for certain investments in mutual funds in which the trustee, or its affiliate, provides services in a capacity other than that as trustee. As originally drafted, Section 802(f) [72-38-802(6)] provided that the exception applied only if the investment complied with the Uniform Prudent Investor Act and the trustee notified the qualified beneficiaries of the additional compensation received for providing the services. However, the Uniform Prudent Investor Act itself contains its own duty of loyalty provision (Section 5), thereby arguably limiting or undoing this exception to the UTC's loyalty provision. The amendment, by providing that the investment does not violate the duty of loyalty under the UTC if it "otherwise" complies with the Uniform Prudent Investor Act, is intended to negate the implication that the investment must also comply with the Uniform Prudent Investor Act's own duty of loyalty provision.

Compiler's Comments

2015 Amendments — Composite Section: Chapters 55 and 181 in (2) substituted "72-38-1012" for "72-38-1013". Amendments effective October 1, 2015.

Source: This section modifies section 802 of the Uniform Law Commission's Uniform Trust Code by adding the exception in subsection (2)(d) and adding the language regarding charities in subsection (4).

The language in this section relates to the language in 72-34-103 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Breach of Fiduciary Duty of Trust Board to Establish, Improve, and Maintain Museum From Trust Proceeds: Alberta Bair's will established a charitable trust and directed the board overseeing the trust proceeds to establish, improve, and maintain a museum to display the family's historical artifacts. The museum was to be funded from the principal and interest of the trust for philanthropic purposes. The trust agreement provided that the museum had first priority on income distributed from the trust, but also empowered the board to sell, transfer, or relocate the museum 5 years after Bair's death if the board determined that the museum no longer served its purposes. The board initially established a museum and contracted with another museum for operations, but subsequently determined that the necessity for additional resources, without the likelihood of any return in terms of greater attendance or educational possibilities, made continuing the museum unfeasible, so the board ordered that the museum be closed. Friends of the museum sued the board for breach of its trust duties. The District Court found no breach of the board's fiduciary duty, but on appeal, the Supreme Court disagreed. The museum constituted the trust's primary purpose, and the board was required to spend the amount of trust funds necessary to establish, improve, and maintain the museum and breached its fiduciary duty to administer the trust by failing to do so, although delegating management to another museum was not a breach given the board's inexperience in museum management. The board also breached its duty by distributing more trust money through charitable grants than it spent on the museum, despite the museum "first priority" spending requirement. The board's trust duty was also breached when the board failed to substantiate that the public and educational purposes of the museum were no longer met. The District Court's finding that the board did not breach its trust duties was reversed, and the trustee was directed to appoint a new board to follow the directives of the trust agreement and to give the museum a fair opportunity to succeed. In re Bair Family Trust, 2008 MT 144, 343 M 138, 183 P3d 61 (2008), followed in Lane v. Caler, 2013 MT 108, 370 Mont. 30, 299 P.3d 827.

Conservator's Exercise of Reasonable Judgment Regarding Lease of Estate Property — Remand for Audit of Leasing Arrangement: The District Court appointed Saylor's stepson, Tim, as temporary guardian. Saylor and her brother, Deane, both filed written objections to the appointment, and the District Court then approved an agreement that made Deane the limited guardian and conservator of Saylor's out-of-state property and Tim the conservator of Saylor's Montana property. Saylor and Deane subsequently moved to remove Tim as conservator based on his failure to disclose certain financial documents relating to his administration of the estate. Tim had entered a grazing lease on Saylor's property that Saylor contended provided no material benefit to the estate. The District Court found no good cause to remove Tim as conservator and dismissed the petition for removal. On appeal, the Supreme Court noted that conservators are under the same duties as trustees and held that Tim exercised reasonable judgment regarding the lease arrangement and did not breach his duty as conservator so as to require his removal. Saylor's proposed substitute model lease was unrealistic. However, as a matter of equity, the Supreme Court remanded with instructions that the District Court order an audit of the lease arrangement to ensure that the figures attached to the lease conform to actualities and to allow the District Court to revise its prior determinations should the audit reveal facts that would require revision. In re Guardianship & Conservatorship of Saylor, 2005 MT 236, 328 M 415, 121 P3d 532 (2005).

Findings That Constructive Trust Improperly Administered Not Erroneous: Bradshaw placed an annuity in his mother's name to hold in trust for the benefit of others. Bradshaw later died intestate, leaving two minor children and no surviving spouse. The District Court concluded that the trust should have been expended on behalf of the minor children and found that the mother violated her fiduciary obligation by originally taking the position that the annuity was to be distributed among various members of Bradshaw's family and only later deciding that each of the minor children was also entitled to a share. Bradshaw's children were properly the beneficiaries of the trust, and the District Court did not err in finding the mother in violation of her duty as trust administrator. In re Estate of Bradshaw, 2001 MT 92, 305 M 178, 24 P3d 211 (2001).

Self-Dealing During Agency Relationship — Proof of Undue Influence and Constructive Fraud — Shift of Burden of Proof — Agent Prohibited From Acting as Trustee Would Have Been Prohibited: Alice, a good friend of Maggie, lived near her and undertook to manage Maggie's financial affairs when Maggie's health began failing. As Maggie became more afflicted with dementia, Alice moved in with Maggie to care for her and began writing all of Maggie's checks for her. Alice also began selling Maggie's securities, depositing the proceeds into her own account, and writing checks to herself for purposes that sometimes involved Maggie. During this time, Maggie's physician found her mental capacity to be steadily diminishing and urged Alice to take Maggie to a nursing home. After Alice had depleted Maggie's financial resources from approximately $200,000 to approximately $20,000, Maggie's sister, Ida, discovered that Maggie had been moved to a nursing home and discovered that her money had been spent by Alice. Maggie died shortly thereafter, and the personal representative brought an action against Alice for an accounting of Maggie's funds. The Supreme Court held that all of the criteria for proof of undue influence established in Christensen v. Britton, 240 M 393, 784 P2d 908 (1989), had been satisfied and that the District Court therefore erred in not shifting the burden of proof to Alice to prove that the financial transactions involving Alice were fair and voluntary. Likewise, the Supreme Court also held, because of the agency or fiduciary relationship between Alice and Maggie, that the District Court erred in placing the burden on the estate to prove constructive fraud. The Supreme Court held that under statutory provisions of agency law, Alice was not authorized to do any act that a trustee would be prohibited by Title 72, ch. 34 (repealed in part and replaced by Title 72, ch. 38), from doing and found that such a prohibition still existed under 28-10-407(3), even though 72-20-208 had been repealed. The Supreme Court therefore remanded the case to the District Court for a new trial. Luke v. Gager, 2000 MT 377, 303 M 474, 16 P3d 377, 57 St. Rep. 1599 (2000).

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Conservator Who Benefits From Dealings Not Excused Due to Similar Actions Prior to Establishment of Trust: The lower court accepted the dealings of a son acting as conservator for his parents on the basis that, prior to the establishment of the trust, he had acted in the same self-serving manner and his parents had promised to give him the farm. The Supreme Court reversed, stating that once the trust had been set up, the conservator must perform his duties only in the best interests of the protected persons. In re Estate of Clark, 237 M 179, 772 P2d 299, 46 St. Rep. 718 (1989).

Obligations of Trustee to Beneficiary: A prejudgment Writ of Attachment brought by an auto dealer against a property division settlement in a marital dissolution was vacated by the Supreme Court upon finding that the attorney for the auto dealer was also the attorney for the husband making payments. The court held that when the attorney received money as trustee in satisfaction of the husband's contractual obligations to the wife, the attorney was bound to act in good faith toward the wife as beneficiary. The attorney was prohibited from dealing with the trust property for any purpose not connected with the trust. Pursuant to his duty under Rule 1.15 of the Rules of Professional Conduct, the attorney was required to promptly deliver the money to the wife, even though he had fully disclosed his relationship to both the husband and the auto dealer. The attorney was directed to pay over the full trust amount, plus interest, to the wife. Wild W. Motors, Inc. v. Lingle, 224 M 76, 728 P2d 412, 43 St. Rep. 2030 (1986).

Purchase of Mortgage:

Trustee did not violate his fiduciary duties in buying mortgage outstanding against trust property to protect trustor who had entrusted 5% royalty for sale by trustee to raise money needed by trustor, and when trustor thereafter elected to permit trustee to retain unsold royalty in satisfaction of mortgage, title to the royalty vested in the trustee. Iverson v. Rehal, 132 M 295, 317 P2d 869 (1957).

Where trustee purchased a mortgage against the property to protect the beneficiary and the royalty purchasers and held it for some 18 months, the effect was to continue the fiduciary relationship. Iverson v. Rehal, 132 M 295, 317 P2d 869 (1957).

Voidable Transfer: A sale or transfer of trust property to the trustee with full knowledge by the beneficiary at a fair price without influence is voidable only. Iverson v. Rehal, 132 M 295, 317 P2d 869 (1957).

Bank Trustee Purchasing Bonds: When a bank while acting as trustee of an estate had purchased bonds with its own funds and after holding them for about a month transferred them to the estate, retaining accrued interest for that month, the estate receiving the interest from the date the bonds were charged to it, claim of the cestui que trust that the bank profited from the use of estate funds, contrary to the provisions of 72-20-203 (now repealed), was held to be of no merit. In re Harper's Estate, 98 M 356, 40 P2d 51 (1934).

Director of Corporation: The rule declared by 72-20-205 (now repealed) that a trustee may not undertake a trust adverse in its nature to the interest of his beneficiary without the consent of the latter does not preclude a director of a corporation from becoming interested in another concern engaged in a business similar to, but not interfering with, that of his corporation. So long as he acts in good faith to the corporation and its shareholders and violates no legal or moral duty which he owes to it and them, he is free to engage in an independent competitive business. Greer v. Stannard, 85 M 78, 277 P 622, 64 ALR 772 (1929).

Business Trust:

Since a trustee cannot take part in any transaction concerning the trust in which he is interested (72-20-204, now repealed), a contract entered into between a common-law trust at a meeting of its board of trustees attended by only two of its three members, and a company of which one of the two was the virtual owner was a nullity, and the fact that the third member in writing subsequently gave his approval did not render it valid for the reason that under 72-24-207 (now repealed), the board could act only as a board when assembled as such and not through the individuals composing it. Williard v. Campbell Oil Co., 77 M 30, 248 P 219 (1926).

A trustee of a business trust cannot vote as such upon the approval of a claim of his own against the trust; hence where only two of the three trustees constituting the board were present at one of its meetings when the individual claim of one of the two was presented for allowance and an alleged account stated agreed upon, the action was void for want of competent representation of the trust. Gordon Campbell Petroleum Co. v. Gordon Campbell-Kevin Synd., 75 M 261, 242 P 540 (1926), distinguished in Bentall v. Koenig Bros., Inc., 140 M 339, 372 P2d 91 (1962).

Administrator Continuing Business of Decedent: Generally, an administrator is not permitted to engage the assets of the estate under his control in trade or business; where he does so without authority of Court beyond the time required in winding up its affairs and makes a profit, it inures to the estate, and if he meets with loss, he must bear it. In re Jennings' Estate, 74 M 449, 241 P 648 (1925), distinguished in Grauman v. Chambers, 122 M 31, 198 P2d 629 (1948).

Existence of Trust — Fiduciary Relation: The term "fiduciary or confidential relation" is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another and precludes the idea of profit or advantage resulting from the dealings of the parties and the person in whom the confidence is reposed. In such relation the party in whom the confidence is reposed, if he voluntarily accepts it, may take no advantage of the other party without the latter's knowledge or consent. Kerrigan v. O'Meara, 71 M 1, 227 P 819 (1924).

Misappropriation by Attorney of Funds of Client: When an attorney endorsed a check belonging to his client, deposited it in bank, and used the proceeds in the discharge of his private obligations, repaying it only after being called to account by the client some 4 months later, he was guilty of a fraud upon the latter under 72-20-203 (now repealed). In re Lunke, 56 M 226, 182 P 126 (1919).

Accounting — Accumulations From Use of Trust Funds: The Supreme Court has emphasized this statutory rule by declaring that the trustee must account for all accumulations from the use of trust funds and that under no circumstances will he be permitted to profit from their use. In re Allard Guardianship, 49 M 219, 141 P 661 (1914); Butte v. Goodwin, 47 M 155, 134 P 670 (1913); In re Davis' Estate, 35 M 273, 88 P 957 (1907).

Malversation of Trust Fund: It has been a recognized rule in equity for a century or more that a trustee shall not deal with the trust funds for any purpose not connected with the trust and shall not profit by malversation of the trust fund. In re Allard Guardianship, 49 M 219, 141 P 661 (1914).

72-38-803. Impartiality.

Official Comments

The duty of impartiality is an important aspect of the duty of loyalty. This section is identical to Section 6 of the Uniform Prudent Investor Act, except that this section also applies to all aspects of trust administration and to decisions by a trustee with respect to distributions. The Prudent Investor Act is limited to duties with respect to the investment and management of trust property. The differing beneficial interests for which the trustee must act impartially include those of the current beneficiaries versus those of beneficiaries holding interests in the remainder; and among those currently eligible to receive distributions. In fulfilling the duty to act impartially, the trustee should be particularly sensitive to allocation of receipts and disbursements between income and principal and should consider, in an appropriate case, a reallocation of income to the principal account and vice versa, if allowable under local law. For an example of such authority, see Uniform Principal and Income Act § 104 (1997).

The duty to act impartially does not mean that the trustee must treat the beneficiaries equally. Rather, the trustee must treat the beneficiaries equitably in light of the purposes and terms of the trust. A settlor who prefers that the trustee, when making decisions, generally favor the interests of one beneficiary over those of others should provide appropriate guidance in the terms of the trust. *See* Restatement (Second) of § 183 cmt. a (1959).

Compiler's Comments

Source: The language in this section relates to the language in 72-34-604 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Two Contested Wills and Trusts — Appointment of Neutral Representative — Undue Influence, Fraud, or Duress: The decedent executed a will and trust in 2010 leaving the majority of her estate to her niece, with whom she shared a close relationship. In 2012, the decedent executed a new will leaving a sizable portion of her estate to her housekeeper and handyman. The decedent died a year later. The housekeeper petitioned for probate of the 2012 will, and the niece objected and cross-petitioned for probate of the 2010 will. The District Court appointed a neutral personal representative to serve as a special fiduciary to the decedent's trust. A jury found that the 2012 will was procured by undue influence, fraud, or duress. However, the District Court rejected the niece's requests to receive fees and costs and to admit the 2010 will and trust because the special verdict form did not ask the jury to make any findings on the 2010 will or trust. On appeal by both parties, the Supreme Court affirmed in part, upholding the District Court's appointment of a neutral personal representative and special fiduciary, admission of settlement document evidence because one party opened the door to the line of questioning, and suppression of testimony by the decedent's attorneys relating to her dispositional intentions. The Supreme Court also found that while the District Court erred in precluding testimony because a party violated a sequestration order, numerous professional witnesses and friends of the decedent provided similar testimony. The Supreme Court held that the will contestants have the burden of establishing undue influence, fraud, or duress and that the jury properly found that the 2012 will was procured in this manner. However, the Supreme Court found that the District Court erred in refusing to admit the 2010 will to probate and in finding that the niece was statutorily barred from recovering attorney fees. In re Estate of Edwards, 2017 MT 93, 387 Mont. 274, 393 P.3d 639.

Repealed Statute Regarding Sale or Lease of School Trust Lands to School Districts — No Justiciable Controversy or Action Upon Which Relief Could Be Granted: Former 20-6-621(4) allowed the Board of Land Commissioners to sell, for appraised value, or to lease, for $1 a year, school trust lands to a school district. The Department of Natural Resources and Conservation stipulated that the provision was unconstitutional because it made state lands available for less than full market value. The District Court agreed, noting that leasing school trust lands to some school districts would favor only some of the beneficiaries and not the school trust as a whole. The Legislature concurred and repealed the subsection in 1999. Plaintiff subsequently sued the Department, the Board, and the state, contending that the Department unlawfully determined that the provision was unconstitutional and failed to defend the constitutionality of the provision. The state moved to dismiss the complaint on grounds that no justiciable controversy existed and that the complaint alleged no cause of action upon which relief could be granted. The District Court granted summary judgment for the state, and on appeal, the Supreme Court affirmed. Any determination that the Department exceeded its authority would have had no bearing on the existing rights or interests at issue, and a judgment granting the relief sought would not have effectively operated to resolve any issue in the case. Thus, there was no justiciable case or controversy, and the claim was properly dismissed. Advocates for Educ., Inc. v. Dept. of Natural Resources and Conservation, 2004 MT 230, 322 M 429, 97 P3d 553 (2004), following Mont.-Dak. Util. Co. v. Billings, 2003 MT 332, 318 M 862, 80 P3d 1247 (2003).

72-38-804. Prudent administration.

Official Comments

The duty to administer a trust with prudence is a fundamental duty of the trustee. This duty does not depend on whether the trustee receives compensation. The duty may be altered by the terms of the trust. *See* Section 105 [72-38-105]. This section is similar to Section 2(a) of the Uniform Prudent Investor Act and Restatement (Third) of Trusts: Prudent Investor Rule § 227 (1992).

The language of this section diverges from the language of the previous Restatement. The prior Restatement can be read as applying the same standard - "man of ordinary prudence would exercise in dealing with his own property" - regardless of the type or purposes of the trust. *See* Restatement (Second) of Trusts § 174 cmt. a (1959). This section appropriately bases the standard on the purposes and other circumstances of the particular trust.

A settlor who wishes to modify the standard of care specified in this section is free to do so, but there is a limit. Section 1008 [72-38-1008] prohibits a settlor from exculpating a trustee from liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or to the interests of the beneficiaries.

Compiler's Comments

Source: The language in this section relates to the language in 72-34-114 (now repealed) and 72-34-129 (now repealed).

72-38-805. Costs of administration.

Official Comments

This section is similar to Section 7 of the Uniform Prudent Investor Act and is consistent with the rules concerning costs in Restatement (Third) of Trusts: Prudent Investor Rule § 227(c)(3) (1992). For related rules concerning compensation and reimbursement of trustees, see Sections 708 [72-38-708] and 709 [72-38-709]. The duty not to incur unreasonable costs applies when a trustee decides whether and how to delegate to agents, as well as to other aspects of trust administration. In deciding whether and how to delegate, the trustee must be alert to balancing projected benefits against the likely costs. To protect the beneficiary against excessive costs, the trustee should also be alert to adjusting compensation for functions which the trustee has delegated to others. The obligation to incur only necessary or appropriate costs of administration has long been part of the law of trusts. *See* Restatement (Second) of Trusts § 188 (1959).

Compiler's Comments

Source: The language in this section relates to the language in 72-34-607 (now repealed).

72-38-806. Trustee's skills.

Official Comments

This section is similar to Section 7-302 of the Uniform Probate Code, Restatement (Second) of Trusts § 174 (1959), and Section 2(f) of the Uniform Prudent Investor Act.

Compiler's Comments

Source: The language in this section relates to the language in 72-34-115 (now repealed).

72-38-807. Delegation by trustee.

Official Comments

This section permits trustees to delegate various aspects of trust administration to agents, subject to the standards of the section. The language is derived from Section 9 of the Uniform Prudent Investor Act. *See also* John H. Langbein, *Reversing the Nondelegation Rule of Trust-Investment Law*, 59 Mo. L. Rev. 105 (1994) (discussing prior law).

This section encourages and protects the trustee in making delegations appropriate to the facts and circumstances of the particular trust. Whether a particular function is delegable is based on whether it is a function that a prudent trustee might delegate under similar circumstances. For example, delegating some administrative and reporting duties might be prudent for a family trustee but unnecessary for a corporate trustee.

This section applies only to delegation to agents, not to delegation to a cotrustee. For the provision regulating delegation to a cotrustee, see Section 703(e) [72-38-703(5)].

Compiler's Comments

Source: The language in this section relates to the language in 72-34-113 (now repealed) and 72-34-609 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Duties of Indenture Trustee Limited to Provisions of Small Tract Financing Act: Under the Small Tract Financing Act of Montana, an indenture trustee's duties are those related to properly conducting a foreclosure sale, including providing proper notice to affected parties, conducting the sale, and disposing of sale proceeds. In this case, plaintiff contended that broader duties of trustees, as set out in 72-34-113 (now repealed), also applied to indenture trustees. The Supreme Court disagreed. There is no indication that broader duties than those outlined in the Act were contemplated for indenture trustees, and the duties of indenture trustees are therefore limited to the statutory duties in the Act. Knucklehead Land Co., Inc. v. Accutitle, Inc., 2007 MT 301, 340 M 62, 172 P3d 116 (2007).

72-38-809. Control and protection of trust property.

Official Comments

This section codifies the substance of Sections 175 and 176 of the Restatement (Second) of Trusts (1959). The duty to take control of and safeguard trust property is an aspect of the trustee's duty of prudent administration as provided in Section 804 [72-38-804]. *See also* Sections 816(1) [72-38-816(1)] (power to collect trust property), 816(11) [72-38-816(11)] (power to insure trust property), and 816(12) [72-38-816(12)] (power to abandon trust property). The duty to take control normally means that the trustee must take physical possession of tangible personal property and securities belonging to the trust, and must secure payment of any choses in action. *See* Restatement (Second) of Trusts § 175 cmt. a, c and d (1959). This section, like the other sections in this article, is subject to alteration by the terms of the trust. *See* Section 105 [72-38-105]. For example, the settlor may provide that the spouse may occupy the settlor's former residence rent free, in which event the spouse's occupancy would prevent the trustee from taking possession.

Compiler's Comments

Source: The language in this section relates to the language in 72-34-107 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Conservator's Exercise of Reasonable Judgment Regarding Lease of Estate Property — Remand for Audit of Leasing Arrangement: The District Court appointed Saylor's stepson, Tim, as temporary guardian. Saylor and her brother, Deane, both filed written objections to the appointment, and the District Court then approved an agreement that made Deane the limited guardian and conservator of Saylor's out-of-state property and Tim the conservator of Saylor's Montana property. Saylor and Deane subsequently moved to remove Tim as conservator based on his failure to disclose certain financial documents relating to his administration of the estate. Tim had entered a grazing lease on Saylor's property that Saylor contended provided no material benefit to the estate. The District Court found no good cause to remove Tim as conservator and dismissed the petition for removal. On appeal, the Supreme Court noted that conservators are under the same duties as trustees and held that Tim exercised reasonable judgment regarding the lease arrangement and did not breach his duty as conservator so as to require his removal. Saylor's proposed substitute model lease was unrealistic. However, as a matter of equity, the Supreme Court remanded with instructions that the District Court order an audit of the lease arrangement to ensure that the figures attached to the lease conform to actualities and to allow the District Court to revise its prior determinations should the audit reveal facts that would require revision. In re Guardianship & Conservatorship of Saylor, 2005 MT 236, 328 M 415, 121 P3d 532 (2005).

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Trustee's Right to Appeal Court Order When Trustee Not a Party: Trustee-bank could appeal from court order directing trustee to pay all income due beneficiary to beneficiary's judgment creditors, even though the trustee was not a party to the action between the beneficiary and creditors. The trustee had a fiduciary duty to preserve and protect the trust assets. Lundgren v. Hoglund, 219 M 295, 711 P2d 809, 42 St. Rep. 2031 (1985).

Exchange of Trust Property: Courts hold that where the trust agreement gives the trustee authority to sell and dispose of property, as here, he may exchange it. Where all those interested in the trust property as beneficiaries consent thereto, there is no reason why a trustee may not exchange trust property for other property. Gray v. Corcoran, 127 M 572, 269 P2d 1091 (1954).

72-38-810. Recordkeeping and identification of trust property.

Official Comments

The duty to keep adequate records stated in subsection (a) [72-38-810(1)] is implicit in the duty to act with prudence (Section 804 [72-38-804]) and the duty to report to beneficiaries (Section 813 [72-38-813]). For an application, see *Green v. Lombard*, 343 A. 2d 905, 911 (Md. Ct. Spec. App. 1975). *See also* Restatement (Second) of Trusts §§ 172, 174 (1959).

The duty to earmark trust assets and the duty of a trustee not to mingle the assets of the trust with the trustee's own are closely related. Subsection (b) [72-38-810(2)], which addresses the duty not to mingle, is derived from Section 179 of the Restatement (Second) of Trusts (1959). Subsection (c) [72-38-810(3)] makes the requirement that assets be earmarked more precise than that articulated in Restatement (Second) § 179 by requiring that the interest of the trust must appear in the records of a third party, such as a bank, brokerage firm, or transfer agent. Because of the serious risk of mistake or misappropriation even if disclosure is made to the beneficiaries, showing the interest of the trust solely in the trustee's own internal records is insufficient. Section 816(7)(B) [72-38-816(7)(b)], which allows a trustee to hold securities in nominee form, is not inconsistent with this requirement. While securities held in nominee form are not specifically registered in the name of the trustee, they are properly earmarked because the trustee's holdings are indicated in the records maintained by an independent party, such as in an account at a brokerage firm.

Earmarking is not practical for all types of assets. With respect to assets not subject to registration, such as tangible personal property and bearer bonds, arranging for the trust's ownership interest to be reflected on the records of a third-party custodian would not be feasible. For this reason, subsection (c) [72-38-810(3)] waives separate recordkeeping for these types of assets. Under subsection (b) [72-38-810(2)], however, the duty of the trustee not to mingle these or any other trust assets with the trustee's own remains absolute.

Subsection (d) [72-38-810(4)], following the lead of a number of state statutes, allows a trustee to use the property of two or more trusts to make joint investments, even though under traditional principles a joint investment would violate the duty to earmark. A joint investment frequently is more economical than attempting to invest the funds of each trust separately. Also, the risk of misappropriation or mistake is less when the trust property is invested jointly with the property of another trust than when pooled with the property of the trustee or other person.

Compiler's Comments

Source: The language in this section relates to the language in 72-34-110 (now repealed).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

Misrepresentation of Value of Estate Constituting Breach of Fiduciary Duty — Incomplete Inventory: A conservator knew, but failed to mention, that an estate included annuities and jointly held property that was not included in the final estate inventory. The District Court concluded that the conservator breached the fiduciary duty by acting in the conservator's best interest by failing to disclose all financial information regarding the estate. The Supreme Court affirmed. The conservator was required to make a full disclosure in order to meet the statutory duties of conservatorship, and failure to do so constituted a breach of fiduciary duty to preserve the protected person's property and provide a means by which the conservator's work could be independently verified by a court. Further, the District Court's finding that the conservatorship accountings and inventories were incomplete was also affirmed in that the final inventory made no reference to annuities and jointly held property. The District Court's conclusion that the conservator misrepresented the value of the estate was supported by substantial evidence and was affirmed. In re Estate of Stukey, 2004 MT 279, 323 M 241, 100 P3d 114 (2004). See also In re Estate of Clark, 237 M 179, 772 P2d 299 (1989).

72-38-811. Enforcement and defense claims.

Official Comments

This section codifies the substance of Sections 177 and 178 of the Restatement (Second) of Trusts (1959). It may not be reasonable to enforce a claim depending upon the likelihood of recovery and the cost of suit and enforcement. It might also be reasonable to settle an action or suffer a default rather than to defend an action. *See also* Section 816(14) [72-38-816(14)] (power to pay, contest, settle, or release claims).

Compiler's Comments

Source: The language in this section relates to the language in 72-34-343 (now repealed).

72-38-812. Collecting trust property.

Official Comments

This section is a specific application of Section 811 [72-38-811] on the duty to enforce claims, which includes a claim for trust property held by a former trustee or others, and a claim against a predecessor trustee for breach of trust. The duty imposed by this section is not absolute. Pursuit of a claim is not required if the amount of the claim, costs of suit and enforcement, and likelihood of recovery, make such action uneconomic. Unlike Restatement (Second) of Trusts § 223 (1959), this section only requires a successor trustee to redress breaches of trust "known" to have been committed by the predecessor. For the definition of "know," see Section 104 [72-38-104]. Limiting the successor's obligation to known breaches is a common feature of state trust statutes. *See, e.g.*, Mo. Rev. Stat. § 456.187.2.

As authorized by Section 1009 [72-38-1009], the beneficiaries may relieve the trustee from potential liability for failing to pursue a claim against a predecessor trustee or other person holding trust property. The obligation to pursue a predecessor trustee can also be addressed in the terms of the trust. *See* Section 105 [72-38-105].

Compiler's Comments

Source: The language in this section relates to the language in 72-34-116 (now repealed).

72-38-813. Duty to inform and report.

Official Comments

The duty to keep the beneficiaries reasonably informed of the administration of the trust is a fundamental duty of a trustee. This duty, which is stated in subsection (a) [72-38-813(1)], is derived from Section 7-303(a) of the Uniform Probate Code, which was approved in 1969 and which has been enacted in about a third of the states. This provision of the UPC has also been enacted in states that have not otherwise enacted the Uniform Probate Code. *See, e.g.*, Cal. Prob. Code. Sections 16060-16061. Unlike the cited provision of the UPC, subsection (a) [72-38-813(1)] of this section limits the duty to keep the beneficiaries informed to the qualified beneficiaries. For the definition of qualified beneficiary, see Section 103(13) [72-38-103(16)]. The result of this limitation is that the information need not be furnished to beneficiaries with remote remainder interests unless they have made a request to the trustee.

For the extent to which a settlor may waive the requirements of this section in the terms of the trust, see Section 105(b)(8)-(9) [not adopted].

Subsection (a) [72-38-813(1)] requires that the trustee keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. This may include a duty to communicate to a qualified beneficiary information about the administration of the trust that is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights and to prevent or redress a breach of trust. *See* Restatement (Second) of Trusts Section 173 cmt. c (1959). With respect to the permissible distributees, the duty articulated in subsection (a) [72-38-813(1)] would ordinarily be satisfied by providing the beneficiary with a copy of the annual report mandated by subsection (c) [72-38-813(c)]. Otherwise, the trustee is not ordinarily under a duty to furnish information to a beneficiary in the absence of a specific request for the information. *See* Restatement (Second) of Trusts Section 173 cmt. d (1959). However, special circumstances may require that the trustee take affirmative steps to provide additional information. For example, if the trustee is dealing with the beneficiary on the trustee's own account, the trustee must communicate material facts relating to the transaction that the trustee knows or should know. *See* Restatement (Second) of Trusts Section 173 cmt. d (1959). Furthermore, to enable the beneficiaries to take action to protect their interests, the trustee may be required to provide advance notice of transactions involving real estate, closely-held business interests, and other assets that are difficult to value or to replace. *See In re Green Charitable Trust*, 431 N.W. 2d 492 (Mich. Ct. App. 1988); *Allard v. Pacific National Bank*, 663 P.2d 104 (Wash. 1983). The trustee is justified in not providing such advance disclosure if disclosure is forbidden by other law, as under federal securities laws, or if disclosure would be seriously detrimental to the interests of the beneficiaries, for example, when disclosure would cause the loss of the only serious buyer.

Subsection (a) [72-38-813(1), adopted as modified] also requires that the trustee promptly respond to the request of any beneficiary, whether qualified or not, for information related to the administration of the trust. Performance is excused only if compliance is unreasonable under the circumstances. Within the bounds of the reasonableness limit, this provision allows the beneficiary to determine what information is relevant to protect the beneficiary's interest. Should a beneficiary so request, subsection (b)(1) [72-38-813(2)(a)] also requires the trustee to furnish the beneficiary with a complete copy of the trust instrument and not merely with those portions the trustee deems relevant to the beneficiary's interest. For a case reaching the same result, see *Fletcher v. Fletcher*, 480 S.E. 2d 488 (Va. Ct. App. 1997). Subsection (b)(1) [72-38-813(2)(a)] is more expansive Section 7-303(b) of the Uniform Probate Code, which provides that "[u]pon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest. . . ."

The drafters of this Code decided to leave open for further consideration by the courts the extent to which a trustee may claim attorney-client privilege against a beneficiary seeking discovery of attorney-client communications between the trustee and the trustee's attorney. The courts are split because of the important values that are in tension on this question. "The [attorney-client] privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383 (1981). On the other hand, subsection (a) [72-38-813(1)] of this section requires that a trustee keep the qualified beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, which could include facts that the trustee has revealed only to the trustee's attorney. There is authority for the view that the trustee is estopped from pleading attorney-client privilege in such circumstances. In the leading case, *Riggs National Bank v. Zimmer*, 355 A.2d 709, 713 (Del. Ch. 1976), the court reasoned that the beneficiary, not the trustee, is the attorney's client: "As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client . . . ." This beneficiary-as-client theory has been criticized on the ground that it conflicts with the trustee's fiduciary duty to implement the intentions of the settlor, which are sometimes in tension with the wishes of one or more beneficiaries. *See* Louis H. Hamel, Jr., *Trustee's Privileged Counsel: A Rebuttal*, 21 ACTEC Notes 156 (1995); Charles F. Gibbs & Cindy D. Hanson, *The Fiduciary Exception to a Trustee's Attorney/Client Privilege*, 21 ACTEC Notes 236 (1995). Prominent decisions in California and Texas have refused to follow Delaware in recognizing an exception for the beneficiary against the trustee's attorney-client privilege. *Wells Fargo Bank v. Superior Court (Boltwood)*, 990 P.2d 591 (Cal. 2000); *Huie v. De Shazo*, 922 S.W. 2d 920 (Tex. 1996). The beneficiary-as-client theory continues to be applied to ERISA trusts. *See, e.g., United States v. Mett*, 178 F.3d 1058, 1062-64 (9th Cir. 1999). However, in a pension trust the beneficiaries are the settlors of their own trust because the trust is funded with their own earnings. Accordingly, in ERISA attorney-client cases "[t]here are no competing interests such as other stockholders or the intentions of the Settlor." Gibbs & Hanson, 21 ACTEC Notes at 238. For further discussion of the attorney-client privilege and whether there is a duty to disclose to the beneficiaries, see ACTEC Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.2 (3d ed. 1999); Rust E. Reid et al., *Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary*, 30 Real Prop. Prob. & Tr. J. 541 (1996).

To enable beneficiaries to protect their interests effectively, it is essential that they know the identity of the trustee. Subsection (b)(2) [72-38-813(2)(b)] requires that a trustee inform the qualified beneficiaries within 60 days of the trustee's acceptance of office and of the trustee's name, address and telephone number. Similar to the obligation imposed on a personal representative following admission of the will to probate, subsection (b)(3) [72-38-813(2)(c)] requires the trustee of a revocable trust to inform the qualified beneficiaries of the trust's existence within 60 days after the settlor's death. These two duties can overlap. If the death of the settlor happens also to be the occasion for the appointment of a successor trustee, the new trustee of the formerly revocable trust would need to inform the qualified beneficiaries both of the trustee's acceptance and of the trust's existence.

Subsection (b)(4) [72-38-813(2)(d)] deals with the sensitive issue of changes, usually increases, in trustee compensation. Changes can include changes in a periodic base fee, rate of percentage compensation, hourly rate, termination fee, or transaction charge. Regarding the standard for setting trustee compensation, see Section 708 [72-38-708] and Comment.

Subsection (c) [72-38-813(3)] requires the trustee to furnish the current beneficiaries and other beneficiaries who request it with a copy of a trustee's report at least annually and upon termination of the trust. Unless a cotrustee remains in office, the former trustee also must provide a report to all of the qualified beneficiaries upon the trustee's resignation or removal. If the vacancy occurred because of the former trustee's death or adjudication of incapacity, a report may, but need not be provided by the former trustee's personal representative, conservator, or guardian.

The Uniform Trust Code employs the term "report" instead of "accounting" in order to negate any inference that the report must be prepared in any particular format or with a high degree of formality. The reporting requirement might even be satisfied by providing the beneficiaries with copies of the trust's income tax returns and monthly brokerage account statements if the information on those returns and statements is complete and sufficiently clear. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests. For model account forms, together with practical advice on how to prepare reports, see Robert Whitman, Fiduciary Accounting Guide (2d ed. 1998).

Subsection (d) [72-38-813(4)] allows trustee reports and other required information to be waived by a beneficiary. A beneficiary may also withdraw a consent. However, a waiver of a trustee's report or other information does not relieve the trustee from accountability and potential liability for matters that the report or other information would have disclosed.

Subsection (e) [72-38-813(5)], which was added to the Code in 2004, is discussed in 2004 Amendment below.

2004 Amendment. Subsection (b)(2) [72-38-813(2)(b)] and (b)(3) [72-38-813(2)(c)] require that certain notices be sent by the trustee to the qualified beneficiaries within 60 days of the trustee's acceptance of office, or within 60 days after the creation of an irrevocable trust or the date a revocable trust becomes irrevocable. Subsection (e) [72-38-813(5)] is added to make clear the drafting committee's intent that these requirements are not to be retroactively applied to trustee acceptances of office occurring prior to the effective date of the Code and to trusts which have become irrevocable prior to the effective date.

Compiler's Comments

Source: This section modifies section 813 of the Uniform Law Commission's Uniform Trust Code by adding language at the beginning of the section allowing a limitation or waiver of the requirements by the trust instrument, by adding language regarding a reasonably necessary request in subsection (1), by limiting the requirement to furnish a copy of only portions of the trust instrument rather than the whole instrument in subsection (2)(a), and by modifying the requirements of the annual report in subsection (3).

Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

No Abuse of Discretion in Failure to Remove Trustee of Trust: The beneficiary of a trust contended that the District Court should have removed the trustee of the trust, primarily because the trustee failed to file an annual accounting for the trust. The Supreme Court found no abuse of the District Court's discretion in denying the removal, noting that although the law requires an annual accounting, in this case the trust had no income or disbursements, so there was nothing to account for. The trustee was directed to file an annual accounting in order to protect the rights of the parties. In re Baird Trust, 2009 MT 81, 349 M 501, 204 P3d 703 (2009). See also In re Gershcow's Will, 261 NW2d 335 (Minn. 1977).

Conservator's Exercise of Reasonable Judgment Regarding Lease of Estate Property — Remand for Audit of Leasing Arrangement: The District Court appointed Saylor's stepson, Tim, as temporary guardian. Saylor and her brother, Deane, both filed written objections to the appointment, and the District Court then approved an agreement that made Deane the limited guardian and conservator of Saylor's out-of-state property and Tim the conservator of Saylor's Montana property. Saylor and Deane subsequently moved to remove Tim as conservator based on his failure to disclose certain financial documents relating to his administration of the estate. Tim had entered a grazing lease on Saylor's property that Saylor contended provided no material benefit to the estate. The District Court found no good cause to remove Tim as conservator and dismissed the petition for removal. On appeal, the Supreme Court noted that conservators are under the same duties as trustees and held that Tim exercised reasonable judgment regarding the lease arrangement and did not breach his duty as conservator so as to require his removal. Saylor's proposed substitute model lease was unrealistic. However, as a matter of equity, the Supreme Court remanded with instructions that the District Court order an audit of the lease arrangement to ensure that the figures attached to the lease conform to actualities and to allow the District Court to revise its prior determinations should the audit reveal facts that would require revision. In re Guardianship & Conservatorship of Saylor, 2005 MT 236, 328 M 415, 121 P3d 532 (2005).

Inventory Requirement Mandatory — Verifiable Accountings Required — Audit: The 90-day inventory requirement in 72-5-424 is not discretionary for Montana courts and conservators as a matter of law, even when liabilities exceed assets. The requirement is mandatory because: (1) the overall purpose of a conservatorship is to preserve the property of the protected person, and a conservator will likely be appointed only when there are assets that should be managed; (2) the plain language of 72-5-424 requires that every conservator prepare and file with the appointing court a complete inventory of the estate; and (3) the purpose of the statutory inventory requirement is to furnish a means by which the conservator's management may be checked and accounts verified. In constructing the inventory, the conservator has discretion to decide what to include and how to value the items in the estate, but that discretion must be verifiable. Pursuant to the court's duty to ensure that a conservator is acting in the best interests of the protected person, verification must consist of a means by which a trial court can independently determine whether accountings are generally complete and accurate, and credibility is not sufficient as documentation of accountings. In the present case, the record did not contain a complete, accurate, and verifiable accounting to show that the conservator properly accounted for the estate, so the Supreme Court remanded for an audit pursuant to 72-5-438. Once the conservator meets the burden of showing proper management and accounting, such as the example in 72-34-128 (now repealed), the burden shifts to the protected person to show that the inventory is incorrect. Redies v. Cosner & Uerling, 2002 MT 86, 309 M 315, 48 P3d 697 (2002). See also In re Allard Guardianship, 49 M 219, 141 P 661 (1914), and In re Estate of Clark, 237 M 179, 772 P2d 299 (1989).

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Union Management Dispute — No Specific Form Required for Accounting Request: Generally the demand for accounting need not be in any particular form, so long as it is sufficiently explicit to leave no room for doubt in a defendant's mind that the plaintiff intended to demand an accounting. Local Union No. 400 v. Bosh, 220 M 304, 715 P2d 36, 43 St. Rep. 388 (1986).

Accounting by Trustee: Trustee may be compelled to make an accounting upon the application of any beneficiary under the trust. Attix v. Robinson, 155 F. Supp. 592 (D.C. Mont. 1957).

72-38-814. Discretionary powers — tax savings.

Official Comments

Despite the breadth of discretion purportedly granted by the wording of a trust, no grant of discretion to a trustee, whether with respect to management or distribution, is ever absolute. A grant of discretion establishes a range within which the trustee may act. The greater the grant of discretion, the broader the range. Pursuant to subsection (a) [72-38-814(1)], a trustee's exercise of discretion must be in good faith. Consistent with the trustee's duty to administer the trust (*see* Section 801 [72-38-801]), the trustee's exercise must also be in accordance with the terms and purposes of the trust and the interests of the beneficiaries. "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust. *See* Section 103(8) [72-38-103(9)]. Subsection (a) [72-38-814(1)] does not otherwise address the obligations of a trustee to make distributions, leaving that issue to the caselaw. Regarding the standards for exercising discretion and construing particular language of discretion, with numerous case citations, see Restatement (Third) of Trusts Section 50 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 187 (1959). *See also* Edward C. Halbach, Jr., *Problems of Discretion in Discretionary Trusts*, 61 Colum. L. Rev. 1425 (1961). Under these standards, whether the trustee has a duty in a given situation to make a distribution depends on the exact language used, whether the standard grants discretion and its breadth, whether this discretion is coupled with a standard, whether the beneficiary has other available resources, and, more broadly, the overriding purposes of the trust. For example, distilling the results of scores of cases, the Restatement (Third) of Trusts concludes that there is a presumption that the "trustee's discretion should be exercised in a manner that will avoid either disqualifying the beneficiary for other benefits or expending trust funds for purposes for which public funds would otherwise be available." Restatement (Third) of Trusts Section 50 cmt. e & Reporter's Notes (Tentative Draft No. 2, 1999).

Subsection (a) [72-38-814(1)] requires a trustee exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. Similar to Restatement (Second) of Trusts Section 187 (1959), subsection (a) [72-38-814(1)] does not impose an obligation that a trustee's decision be within the bounds of a reasonable judgment, although such an interpretive standard may be imposed by the courts if the document adds a standard whereby the reasonableness of the trustee's judgment can be tested. Restatement (Second) of Trusts Section 187 cmt. f (1959).

The obligation of a trustee to act in good faith is a fundamental concept of fiduciary law although there are different ways that it can be expressed. Sometimes different formulations appear in the same source. Scott, in his treatise on trusts, states that the court *will not* interfere with the trustee's exercise of discretion if the trustee "acts in good faith and does not act capriciously," but Scott then states that the trustee *will* interfere if the trustee "acts dishonestly or in good faith, or where he acts from an improper motive." 3 Austin W. Scott & William F. Fratcher, The Law of Trusts Section 187.2 (4th ed. 1988).

Sometimes different formulations are used in the same case: [If] the "sole discretion" vested in and exercised by the trustees in this case . . . were exercised fraudulently, in bad faith or in an abuse of discretion, it is subject to . . . review. Whether good faith has been exercised, or whether fraud, bad faith or an abuse of discretion has been committed is always subject to consideration by the court upon appropriate allegations and proof. *In re* Ferrall's Estate, 258 P.2d 1009 (Cal. 1953).

An abuse by the trustee of the discretion granted in the terms of the trust is a breach of trust that can result in surcharge. *See* Section 1001(b) [72-38-1001(2)] (remedies for breach of trust). The standard stated in subsection (a) [72-38-810(1)] applies only to powers which are to be exercised in a fiduciary as opposed to a nonfiduciary capacity.

Subsections (b) [72-38-814(2)] through (d) [72-38-814(4)] rewrite the terms of a trust that might otherwise result in adverse estate and gift tax consequences to a beneficiary-trustee. This Code does not generally address the subject of tax curative provisions. These are provisions that automatically rewrite the terms of trusts that might otherwise fail to qualify for probable intended tax benefits. Such provisions, because they apply to all trusts using or failing to use specified language, are often overbroad, applying not only to trusts intended to qualify for tax benefits but also to smaller trust situations where taxes are not a concern. Enacting tax-curative provisions also requires special diligence by state legislatures to make certain that these provisions are periodically amended to account for the frequent changes in federal tax law. Furthermore, many failures to draft with sufficient care may be correctable by including a tax savings clause in the terms of the trust or by seeking modification of the trust using one or more of the methods authorized by Sections 411-417 [72-38-411 through 72-38-417]. Notwithstanding these reasons, the unintended inclusion of the trust in the beneficiary-trustee's gross estate is a frequent enough occurrence that the drafters concluded that it is a topic that this Code should address. It is also a topic on which numerous States have enacted corrective statutes.

A tax curative provision differs from a statute such as Section 416 [72-38-416] of this Code, which allows a court to modify a trust to achieve an intended tax benefit. Absent Congressional or regulatory authority authorizing the specific modification, a lower court decree in state court modifying a trust is controlling for federal estate tax purposes only if the decree was issued before the taxing event, which in the case of the estate tax would be the decedent's death. *See* Rev. Rul. 73-142, 1973-1 C.B. 405. There is specific federal authority authorizing modification of trusts for a number of reasons (*see* Comment to Section 416 [72-38-416]) but not on the specific issues addressed in this section. Subsections (b) [72-38-814(2)] through (d) [72-38-814(4)], by interpreting the original language of the trust instrument in a way that qualifies for intended tax benefits, obviates the need to seek a later modification of the trust.

Subsection (b)(1) [72-38-814(2)(a)] states the main rule. Unless the terms of the trust expressly indicate that the rule in this subsection is not to apply, the power to make discretionary distributions to a beneficiary-trustee is automatically limited by the requisite ascertainable standard necessary to avoid inclusion of the trust in the trustee's gross estate or result in a taxable gift upon the trustee's release or exercise of the power. Trusts of which the trustee-beneficiary is also a settlor are not subject to this subsection. In such a case, limiting the discretion of a settlor-trustee to an ascertainable standard would not be sufficient to avoid inclusion of the trust in the settlor's gross estate. *See generally* John J. Regan, Rebecca C. Morgan & David M. English, Tax, Estate and Financial Planning for the Elderly Section 17.07[2][h]. Furthermore, the inadvertent inclusion of a trust in a settlor-trustee's gross estate is a far less frequent and better understood occurrence than is the inadvertent inclusion of the trust in the estate of a nonsettlor trustee-beneficiary.

Subsection (b)(2) [72-38-814(2)(b)] addresses a common trap, the trustee who is not a beneficiary but who has power to make discretionary distributions to those to whom the trustee owes a legal obligation of support. Discretion to make distributions to those to whom the trustee owes a legal obligation of support, such as to the trustee's minor children, results in inclusion of the trust in the trustee's gross estate even if the power is limited by an ascertainable standard. The applicable regulation provides that the ascertainable standard exception applies only to distributions for the benefit of the decedent, not to distributions to those to whom the decedent owes a legal obligation of support. *See* Treas. Reg. Section 20.2041-1(c)(2).

Subsection (c) [72-38-814(3)] deals with cotrustees and adopts the common planning technique of granting the broader discretion only to the independent trustee. Cotrustees who are beneficiaries of the trust or who have a legal obligation to support a beneficiary may exercise the power only as limited by subsection (b) [72-38-814(2)]. If all trustees are so limited, the court may appoint a special fiduciary to make a decision as to whether a broader exercise is appropriate.

Subsection (d) [72-38-814(4)] excludes certain trusts from the operation of this section. Trusts qualifying for the marital deduction will be includable in the surviving spouse's gross estate regardless of whether this section applies. Consequently, if the spouse is acting as trustee, there is no need to limit the power of the spouse-trustee to make discretionary distributions for the spouse's benefit. Similar reasoning applies to the revocable trust, which, because of the settlor's power to revoke, is automatically includable in the settlor's gross estate even if the settlor is not named as a beneficiary.

QTIP marital trusts are subject to this section, however. QTIP trusts qualify for the marital deduction only if so elected on the federal estate tax return. Excluding a QTIP for which an election has been made from the operation of this section would allow the terms of the trust to be modified after the settlor's death. By not making the QTIP election, an otherwise unascertainable standard would be limited. By making the QTIP election, the trustee's discretion would not be curtailed. This ability to modify a trust depending on elections made on the federal estate tax return could itself constitute a taxable power of appointment resulting in inclusion of the trust in the surviving spouse's gross estate.

The exclusion of the Section 2503(c) minors trust is necessary to avoid loss of gift tax benefits. While preventing a trustee from distributing trust funds in discharge of a legal obligation of support would keep the trust out of the trustee's gross estate, such a restriction might result in loss of the gift tax annual exclusion for contributions to the trust, even if the trustee were otherwise granted unlimited discretion. *See* Rev. Rul. 69-345, 1969-1 C.B. 226.

2004 Amendment. The amendment substitutes "ascertainable standard" which is now a defined term in Section 103(2) [72-38-103(2)], for the former and identical definition in this section. No substantive change is intended.

Compiler's Comments

Source: The language in this section relates to the language in 72-34-124 through 72-34-126 (now repealed).

72-38-815. General powers of trustee.

Official Comments

This section is intended to grant trustees the broadest possible powers, but to be exercised always in accordance with the duties of the trustee and any limitations stated in the terms of the trust. This broad authority is denoted by granting the trustee the powers of an unmarried competent owner of individually owned property, unlimited by restrictions that might be placed on it by marriage, disability, or cotenancy.

The powers conferred elsewhere in this Code that are subsumed under this section include all of the specific powers listed in Section 816 [72-38-816] as well as other powers described elsewhere in this Code. *See* Sections 108(c) [72-38-108(3)] (transfer of principal place of administration), 414(a) [72-38-414(1), adopted as modified] (termination of uneconomic trust with value less than $50,000), 417 [72-38-417] (combination and division of trusts), 703(e) [72-38-703(5)] (delegation to cotrustee), 802(h) [72-38-802(8)] (exception to duty of loyalty), 807 [72-38-807] (delegation to agent of powers and duties), 810(d) [72-38-810(4)] (joint investments), and Article 9 [Title 72, ch. 38, pt. 9] (Uniform Prudent Investor Act). The powers conferred by this Code may be exercised without court approval. If court approval of the exercise of a power is desired, a petition for court approval should be filed.

A power differs from a duty. A duty imposes an obligation or a mandatory prohibition. A power, on the other hand, is a discretion, the exercise of which is not obligatory. The existence of a power, however created or granted, does not speak to the question of whether it is prudent under the circumstances to exercise the power.

2003 Amendment. The amendment, which changes an "or" to an "and" between subsections (a)(1) [72-38-815(1)(a)] and (a)(2) [72-38-815(1)(b)], corrects an inadvertent style glitch. As the comments to Section 815 [72-38-815] make clear, the drafters intended that the trustee have both the powers stated in the terms of the trust and the powers specified in this Act, not that they be alternatives.

Compiler's Comments

Source: The language in this section relates to the language in 72-34-301 (now repealed).

72-38-816. Specific powers of trustee.

Official Comments

This section enumerates specific powers commonly included in trust instruments and in trustee powers legislation. All the powers listed are subject to alteration in the terms of the trust. *See* Section 105 [72-38-105]. The powers listed are also subsumed under the general authority granted in Section 815(a)(2) [72-38-815(1)(b)] to exercise all powers over the trust property which an unmarried competent owner has over individually owned property, and any other powers appropriate to achieve the proper management, investment, and distribution of the trust property. The powers listed add little of substance not already granted by Section 815 [72-38-815] and powers conferred elsewhere in the Code, which are listed in the Comment to Section 815 [72-38-815]. While the Committee drafting this Code discussed dropping the list of specific powers, it concluded that the demand of third parties to see language expressly authorizing specific transactions justified retention of a detailed list.

As provided in Section 815(b) [72-38-815(2)], the exercise of a power is subject to fiduciary duties except as modified in the terms of the trust. The fact that the trustee has a power does not imply a duty that the power must be exercised.

Many of the powers listed in this section are similar to the powers listed in Section 3 of the Uniform Trustees' Powers Act (1964). Several are new, however, and other powers drawn from that Act have been updated. The powers enumerated in this section may be divided into categories. Certain powers, such as the powers to acquire or sell property, borrow money, and deal with real estate, securities, and business interests, are powers that any individual can exercise. Other powers, such as the power to collect trust property, are by their very nature only applicable to trustees. Other specific powers, particularly those listed in other sections of the Uniform Trust Code, modify a trustee duty that would otherwise apply. *See, e.g.,* Sections 802(h) [72-38-802(8)] (exceptions to duty of loyalty) and 810(d) [72-38-810(4)] (joint investments as exception to earmarking requirement).

Paragraph (1) [72-38-816(1)] authorizes a trustee to collect trust property and collect or decline additions to the trust property. The power to collect trust property is an incident of the trustee's duty to administer the trust as provided in Section 801 [72-38-801]. The trustee has a duty to enforce claims as provided in Section 811 [72-38-811], the successful prosecution of which can result in collection of trust property. Pursuant to Section 812 [72-38-812], the trustee also has a duty to collect trust property from a former trustee or other person holding trust property. For an application of the power to reject additions to the trust property, see Section 816(13) [72-38-816(13)] (power to decline property with possible environmental liability).

Paragraph (2) [72-38-816(2)] authorizes a trustee to sell trust property, for cash or on credit, at public or private sale. Under the Restatement, a power of sale is implied unless limited in the terms of the trust. Restatement (Third) of Trusts: Prudent Investor Rule Section 190 (1992). In arranging a sale, a trustee must comply with the duty to act prudently as provided in Section 804 [72-38-804]. This duty may dictate that the sale be made with security.

Paragraph (4) [72-38-816(4)] authorizes a trustee to deposit funds in an account in a regulated financial-service institution. This includes the right of a financial institution trustee to deposit funds in its own banking department as authorized by Section 802(h)(4) [72-38-802(8)(d)].

Paragraph (5) [72-38-816(5)] authorizes a trustee to borrow money. Under the Restatement, the sole limitation on such borrowing is the general obligation to invest prudently. *See* Restatement (Third) of Trusts: Prudent Investor Rule Section 191 (1992). Language clarifying that the loan may extend beyond the duration of the trust was added to negate an older view that the trustee only had power to encumber the trust property for the period that the trust was in existence.

Paragraph (6) [72-38-816(6)] authorizes the trustee to continue, contribute additional capital to, or change the form of a business. Any such decision by the trustee must be made in light of the standards of prudent investment stated in Article 9.

Paragraph (7) [72-38-816(7)], regarding powers with respect to securities, codifies and amplifies the principles of Restatement (Second) of Trusts Section 193 (1959).

Paragraph (9) [72-38-816(9)], authorizing the leasing of property, negates the older view, reflected in Restatement (Second) of Trusts Section 189 cmt. c (1959), that a trustee could not lease property beyond the duration of the trust. Whether a longer term lease is appropriate is judged by the standards of prudence applicable to all investments.

Paragraph (10) [72-38-816(10), authorizing a trustee to grant options with respect to sales, leases or other dispositions of property, negates the older view, reflected in Restatement (Second) of Trusts Section 190 cmt. k (1959), that a trustee could not grant another person an option to purchase trust property. Like any other investment decision, whether the granting of an option is appropriate is a question of prudence under the standards of Article 9 [Title 72, ch. 38, pt. 9].

Paragraph (11) [72-38-816(11)], authorizing a trustee to purchase insurance, empowers a trustee to implement the duty to protect trust property. *See* Section 809 [72-38-809]. The trustee may also insure beneficiaries, agents, and the trustee against liability, including liability for breach of trust.

Paragraph (13) [72-38-816(13)] is one of several provisions in the Uniform Trust Code designed to address trustee concerns about possible liability for violations of environmental law. This paragraph collects all the powers relating to environmental concerns in one place even though some of the powers, such as the powers to pay expenses, compromise claims, and decline property, overlap with other paragraphs of this section (decline property, paragraph (1) [72-38-816(1)]; compromise claims, paragraph (14) [72-38-816(14)]; pay expenses, paragraph (15) [72-38-816(15)]). Numerous States have legislated on the subject of environmental liability of fiduciaries. For a representative state statute, see Tex. Prop. Code Ann. Section 113.025. *See also* Sections 701(c)(2) [72-38-701(3)(b)] (designated trustee may inspect property to determine potential violation of environmental or other law or for any purpose) and 1010(b) [72-38-1010(2)] (trustee not personally liable for violation of environmental law arising from ownership or control of trust property).

Paragraph (14) [72-38-816(14)] authorizes a trustee to pay, contest, settle, or release claims. Section 811 [72-38-811] requires that a trustee need take only "reasonable" steps to enforce claims, meaning that a trustee may release a claim not only when it is uncollectible, but also when collection would be uneconomic. *See* Restatement (Second) of Trusts Section 192 (1959) (power to compromise, arbitrate and abandon claims).

Paragraph (15) [72-38-816(15)], among other things, authorizes a trustee to pay compensation to the trustee and agents without prior approval of court. Regarding the standard for setting trustee compensation, see Section 708. *See also* Section 709 [72-38-709] (repayment of trustee expenditures). While prior court approval is not required, Section 813(b)(4) [72-38-813(2)(d)] requires the trustee to inform the qualified beneficiaries in advance of a change in the method or rate of compensation.

Paragraph (16) [72-38-816(16)] authorizes a trustee to make elections with respect to taxes. The Uniform Trust Code leaves to other law the issue of whether the trustee, in making such elections, must make compensating adjustments in the beneficiaries' interests.

Paragraph (17) [72-38-816(17)] authorizes a trustee to take action with respect to employee benefit or retirement plans, or annuities or life insurance payable to the trustee. Typically, these will be beneficiary designations which the settlor has made payable to the trustee, but this Code also allows the trustee to acquire ownership of annuities or life insurance.

Paragraphs (18) [72-38-816(18)] and (19) [72-38-816(19)] allow a trustee to make loans to a beneficiary or to guarantee loans of a beneficiary upon such terms and conditions as the trustee considers fair and reasonable. The determination of what is fair and reasonable must be made in light of the fiduciary duties of the trustee and the purposes of the trust. Frequently, a trustee will make loans to a beneficiary which might be considered less than prudent in an ordinary commercial sense although of great benefit to the beneficiary and which help carry out the trust purposes. If the trustee requires security for the loan to the beneficiary, adequate security under this paragraph may consist of a charge on the beneficiary's interest in the trust. *See* Restatement (Second) of Trusts Section 255 (1959). However, the interest of a beneficiary subject to a spendthrift restraint may not be pledged as security for a loan. *See* Section 502 [72-38-502].

Paragraph (20) [72-38-816(20)] authorizes the appointment of ancillary trustees in jurisdictions in which the regularly appointed trustee is unable or unwilling to act. Normally, an ancillary trustee will be appointed only when there is a need to manage real estate located in another jurisdiction. This paragraph allows the regularly appointed trustee to select the ancillary trustee and to confer on the ancillary trustee such powers and duties as may be necessary. The appointment of ancillary trustees is a topic which a settlor may wish to address in the terms of the trust.

Paragraph (21) [72-38-816(21)] authorizes a trustee to make payments to another person for the use or benefit of a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated. Although an adult relative or other person receiving funds is required to spend it on the beneficiary's behalf, it is preferable that the trustee make the distribution to a person having more formal fiduciary responsibilities. For this reason, payment may be made to an adult relative only if the trustee does not know of a conservator, guardian, custodian, or custodial trustee capable of acting for the beneficiary.

Paragraph (22) [72-38-816(22)] authorizes a trustee to make non-pro-rata distributions and allocate particular assets in proportionate or disproportionate shares. This power provides needed flexibility and lessens the risk that a non-pro-rata distribution will be treated as a taxable sale.

Paragraph (23) [72-38-816(23)] authorizes a trustee to resolve disputes through mediation, arbitration or other methods of alternate dispute resolution. The drafters of this Code encourage the use of such alternate methods for resolving disputes. Arbitration is a form of nonjudicial settlement agreement authorized by Section 111. In representing beneficiaries and others in connection with arbitration or in approving settlements obtained through mediation or other methods of ADR, the representation principles of Article 3 may be applied. Settlors wishing to encourage use of alternate dispute resolution may draft to provide it. For sample language, see American Arbitration Association, Arbitration Rules for Wills and Trusts (1995).

Paragraph (24) [72-38-816(24)] authorizes a trustee to prosecute or defend an action. As to the propriety of reimbursement for attorney's fees and other expenses of an action or judicial proceeding, see Section 709 [72-38-709] and Comment. *See also* Section 811 [72-38-811] (duty to defend actions).

Paragraph (26) [72-38-816(26)], which is similar to Section 344 of the Restatement (Second) of Trusts (1959), clarifies that even though the trust has terminated, the trustee retains the powers needed to wind up the administration of the trust and distribute the remaining trust property.

Compiler's Comments

Source: The language in this section relates to the language in Title 72, chapter 34, part 3 (now repealed).

Case Notes

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Exchange of Trust Property: Courts hold that where the trust agreement gives the trustee authority to sell and dispose of property, as here, he may exchange it. Where all those interested in the trust property as beneficiaries consent thereto, there is no reason why a trustee may not exchange trust property for other property. Gray v. Corcoran, 127 M 572, 269 P2d 1091 (1954).

72-38-817. Distribution upon termination.

Official Comments

This section contains several independent provisions governing distribution upon termination. Other provisions of the Uniform Trust Code relevant to distribution upon termination include Section 816(26) [72-38-816(26)] (powers upon termination to windup administration and distribution), and 1005 [72-38-1005] (limitation of action against trustee).

Subsection (a) [72-38-817(1)] is based on Section 3-906(b) of the Uniform Probate Code. It addresses the dilemma that sometimes arises when the trustee is reluctant to make distribution until the beneficiary approves but the beneficiary is reluctant to approve until the assets are in hand. The procedure made available under subsection (a) [72-38-817(1)] facilitates the making of non-pro-rata distributions. However, whenever practicable it is normally better practice to obtain the advance written consent of the beneficiaries to a proposed plan of distribution. Similar to other notices under the Code, the right of a beneficiary to object may be barred by delivery of the proposal to another person if that other person may represent and bind the beneficiary as provided in Article 3 [Title 72, ch. 38, pt. 3].

The failure of a beneficiary to object to a plan of distribution pursuant to subsection (a) [72-38-817(1)] is not a release as provided in subsection (c) [72-38-817(3)] or Section 1009 [72-38-1009]. A release requires an affirmative act by a beneficiary and is not accomplished upon a mere failure to object. Furthermore, a failure of a beneficiary to object does not preclude the beneficiary from bringing an action with respect to matters not disclosed in the proposal for distribution.

Subsection (b) [72-38-817(2)] recognizes that upon an event terminating or partially terminating a trust, expeditious distribution should be encouraged to the extent reasonable under the circumstances. However, a trustee is entitled to retain a reasonable reserve for payment of debts, expenses, and taxes. Sometimes these reserves must be quite large, for example, upon the death of the beneficiary of a QTIP trust that is subject to federal estate tax in the beneficiary's estate. Not infrequently, a substantial reserve must be retained until the estate tax audit is concluded several years after the beneficiary's death.

Subsection (c) [72-38-817(3)] is an application of Section 1009 [72-38-1009]. Section 1009 [72-38-1009] addresses the validity of any type of release that a beneficiary might give. Subsection (c) [72-38-817(3)] is more limited, dealing only with releases given upon termination of the trust. Factors affecting the validity of a release include adequacy of disclosure, whether the beneficiary had a legal incapacity and was not represented under Article 3 [Title 72, ch. 38, pt. 3], and whether the trustee engaged in any improper conduct. *See* Restatement (Second) of Trusts Section 216 (1959).

Comment Amended in 2005.

Compiler's Comments

Source: The language in this section relates to the language in 72-33-411(now repealed) and 72-33-414 (now repealed).

72-38-820. Definitions.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.
The language in this section relates to the language in 72-34-201 (now repealed).

72-38-821. Distribution under charitable trust or private foundation.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.
The language in this section relates to the language in 72-34-202 (now repealed).

72-38-822. Restrictions on trustees under charitable trust, private foundations, or split-interest trust.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.
The language in this section relates to the language in 72-34-203 (now repealed).

72-38-823. Exceptions applicable to split-interest trusts.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.
The language in this section relates to the language in 72-34-204 (now repealed).

72-38-824. Incorporation in trust instruments.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in 72-34-205 (now repealed).

72-38-825. Proceedings.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in 72-34-206 (now repealed).

72-38-826. Disposition of property upon termination of a charitable trust, private foundation, or split-interest trust.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in 72-34-207 (now repealed).

Part 9
Uniform Prudent Investor Act

Part Official Comments

Because of the widespread adoption of the Uniform Prudent Investor Act, no effort has been made to disassemble and integrate the Uniform Prudent Investor Act into the Uniform Trust Code. States adopting the Uniform Trust Code that have previously enacted the Prudent Investor Act are encouraged to reenact their version of the Prudent Investor Act as Article 9 [Title 72, ch. 38, pt. 9] of the Uniform Trust Code. Reenacting the Uniform Prudent Investor Act as a unit will preserve uniformity with States that have enacted the Uniform Prudent Investor Act in free-standing form.

The Uniform Prudent Investor Act prescribes a series of duties relevant to the *investment* and *management* of trust property. The Uniform Trust Code, Article 8 [Title 72, ch. 38, pt. 8] contains duties and powers of a trustee relevant to the *investment, administration,* and *distribution* of trust property. There is therefore significant overlap between Article 8 [Title 72, ch. 38, pt. 8] and the Prudent Investor Act. Where the Uniform Prudent Investor Act and Uniform Trust Code are duplicative, enacting jurisdictions are encouraged to enact the Uniform Prudent Investor Act in this article but *without* the provisions already addressed in Article 8 [Title 72, ch. 38, pt. 8] of the Uniform Trust Code. The duplicative provisions of the Uniform Prudent Investor Act and Article 8 [Title 72, ch. 38, pt. 8] of this Code are as follows:

	Prudent Investor Act	**Article 8**
Special Skills	2(f)	806
Loyalty	5	802
Impartiality	6	803
Investment costs	7	805
Delegation	9	807

Deleting these duplicative provisions leaves the following sections of the Uniform Prudent Investor Act for enactment in this article:

Section 1	Prudent Investor Rule
Section 2(a)-(e)	Standard of Care; Portfolio Strategy; Risk and Return Objectives
Section 3	Diversification
Section 4	Duties at Inception of Trusteeship
Section 8	Reviewing Compliance
Section 10	Language Invoking Standard of [Act]

72-38-901. Prudent investor rule.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code.

The language in this section relates to the language in 72-34-602 (now repealed).

72-38-902. Standard of care — investments and management — considerations.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code. The language in this section relates to the language in 72-34-603 (now repealed).

72-38-903. Diversification — duty of trustee — exception.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code. The language in this section relates to the language in 72-34-605 (now repealed).

72-38-904. Review of assets — time for compliance.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code. The language in this section relates to the language in 72-34-606 (now repealed).

72-38-905. Compliance determinations — standards.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code. The language in this section relates to the language in 72-34-608 (now repealed).

72-38-906. Interpretation of trust terms construing legal investments.

Compiler's Comments

Source: This section is not part of the Uniform Law Commission's Uniform Trust Code. The language in this section relates to the language in 72-34-610 (now repealed).

Part 10
Liability of Trustees and Rights of Persons Dealing with Trustee

Part Official Comments

Sections 1001 [72-38-1001] through 1009 [72-38-1009] identify the remedies for breach of trust, describe how money damages are to be determined, and specify potential defenses. Section 1001 [72-38-1001] lists the remedies for breach of trust and specifies when a breach of trust occurs. A breach of trust occurs when the trustee breaches one of the duties contained in Article 8 [Title 72, ch. 38, pt. 8] or elsewhere in the Code. The remedies for breach of trust in Section 1001 [72-38-1001] are broad and flexible. Section 1002 [72-38-1002] provides how money damages for breach of trust are to be determined. The standard for determining money damages rests on two principles: (1) the trust should be restored to the position it would have been in had the harm not occurred; and (2) the trustee should not be permitted to profit from the trustee's own wrong. Section 1003 [72-38-1003] holds a trustee accountable for profits made from the trust even in the absence of a breach of trust. Section 1004 [72-38-1004] reaffirms the court's power in equity to award costs and attorney's fees as justice requires.

Sections 1005 [72-38-1005] through 1009 [72-38-1009] deal with potential defenses. Section 1005 [72-38-1005] provides a statute of limitations on actions against a trustee. Section 1006 [72-38-1006] protects a trustee who acts in reasonable reliance on the terms of a written trust instrument. Section 1007 [72-38-1007] protects a trustee who has exercised reasonable care to ascertain the happening of events that might affect distribution, such as a beneficiary's marriage or death. Section 1008 [72-38-1008] describes the effect and limits on the use of an exculpatory clause. Section 1009 [72-38-1009] deals with the standards for recognizing beneficiary approval of acts of the trustee that might otherwise constitute a breach of trust.

Sections 1010 [72-38-1010] through 1013 [72-38-1013] address trustee relations with persons other than beneficiaries. The emphasis is on encouraging third parties to engage in commercial transactions to the same extent as if the property were not held in trust. Section 1010 [72-38-1010] negates personal liability on contracts entered into by the trustee if the fiduciary capacity was properly disclosed. The trustee is also relieved from liability for torts committed in the course of administration unless the trustee was personally at fault. Section 1011 [72-38-1011] negates personal liability for contracts entered into by partnerships in which the trustee is a general partner as long as the fiduciary capacity was disclosed in the contract or partnership certificate. Section 1012 [72-38-1012] protects persons other than beneficiaries who deal with a trustee in good faith and without knowledge that the trustee is exceeding or improperly exercising a power. Section 1013 [72-38-1013] permits a third party to rely on a certification of trust, thereby reducing the need for a third party to request a copy of the complete trust instrument.

Much of this article is not subject to override in the terms of the trust. The settlor may not limit the rights of persons other than beneficiaries as provided in Sections 1010 [72-38-1010] through 1013 [72-38-1013], nor interfere with the court's ability to take such action to remedy a breach of trust as [may] be necessary in the interests of justice. *See* Section 105 [72-38-105].

Part Case Notes

CASES DECIDED AFTER ADOPTION OF 1989 TRUST CODE

No Fiduciary Duty of Trustee Owed to Beneficiary When Person With Power to Revoke Competent: A possible beneficiary of a trust contended that the trustee bank breached its fiduciary duty to the beneficiary. The Supreme Court disagreed. Under 72-33-701 (now repealed), the trustee of a revocable trust owes a fiduciary duty only to the person holding the power to revoke during the time that the person is competent, not to the beneficiary. The person with the power to revoke was competent during the time in question, so the trustee owed no fiduciary duty to the beneficiary. Stanton v. Wells Fargo Bank Mont., N.A., 2007 MT 22, 335 M 384, 152 P3d 115 (2007).

Trust Necessary for Support — Necessity Construed: The trust that the decedent set up for his wife, an Alzheimer's sufferer, provided in part that "The purposes of this Trust are to provide for and assure, so far as possible, the generous care and support of my said wife ... and to provide for funeral ... and any other expenses attendant upon ... her death. ... The trustee shall ... pay ... as much ... as Trustee deems necessary for her support, care and health .... The discretion ... shall be exercised liberally in favor of my said wife, it being my intention that she shall have, in addition to the necessities, a reasonable number of the luxuries of life, if she desires them." It was improper for the trustee to deny every request of the wife's guardian and conservator for aid on the basis that no financial need was shown and that the wife must spend her whole personal estate before the trust could be used. The trustee and lower court improperly used the trust's use of the word "necessary" to support the trustee's interpretation. The trustee's intent and the trust's wording on the whole showed this interpretation to be erroneous. The trust was ordered to pay the wife's living, medical, funeral, and burial expenses and to repay the conservator for amounts that the conservator had paid for care since the trustee's death. In the absence of statutory or contractual authority and absent bad faith or malicious behavior, the conservator was denied attorney fees. In re Estate of Lindgren, 268 M 96, 885 P2d 1280, 51 St. Rep. 1182 (1994).

CASES DECIDED PRIOR TO ADOPTION OF 1989 TRUST CODE

Vesting of Beneficiary's Interest in Stock: When the settlor of a revocable trust purchased a stock certificate in his name as trustee for a certain beneficiary and reserved the right to change the beneficiary and to receive the income and to vote the stock, upon the declaration of the trust, the named beneficiary became vested with an equitable interest in the stock, which consisted essentially in a right to have the trustee perform the duties imposed on him by law and eventually to succeed to complete ownership of the stock. Investors Stock Fund, Inc. v. Roberts, 179 F. Supp. 185 (D.C. Mont. 1959), affirmed in 286 F2d 647 (9th Cir. 1961).

72-38-1001. Remedies for breach of trust.

Official Comments

This section codifies the remedies available to rectify or to prevent a breach of trust for violation of a duty owed to a beneficiary. The duties that a trust might breach include those contained in Article 8 [Title 72, ch. 38, pt. 8] in addition to those specified elsewhere in the Code.

This section identifies the available remedies but does not attempt to cover the refinements and exceptions developed in case law. The availability of a remedy in a particular circumstance will be determined not only by this Code but also by the common law of trusts and principles of equity. *See* Section 106 [72-38-106].

Beneficiaries and cotrustees have standing to bring a petition to remedy a breach of trust. Following a successor trustee's acceptance of office, a successor trustee has standing to sue a predecessor for breach of trust. *See* Restatement (Second) of Trusts § 200 (1959). A person who may represent a beneficiary's interest under Article 3 [Title 72, ch. 38, pt. 3] would have standing to bring a petition on behalf of the person represented. In the case of a charitable trust, those with standing include the state attorney general, a charitable organization designated entitled to receive distributions under the terms of the trust, and other persons with a special interest. *See* Section 110 & Restatement (Second) of Trusts § 391 (1959). A person appointed to enforce a trust for an animal or a trust for a noncharitable purpose would have standing to sue for a breach of trust. *See* Sections 110(b) [72-38-110(2)], 408 [72-38-408], 409 [72-38-409].

Traditionally, remedies for breach of trust at law were limited to suits to enforce unconditional obligations to pay money or deliver chattels. *See* Restatement (Second) of Trusts § 198 (1959). Otherwise, remedies for breach of trust were exclusively equitable, and as such, punitive damages were not available and findings of fact were made by the judge and not a jury. *See* Restatement (Second) of Trusts § 197 (1959). The Uniform Trust Code does not preclude the possibility that a particular enacting jurisdiction might not follow these norms.

The remedies identified in this section are derived from Restatement (Second) of Trusts § 199 (1959). The reference to payment of money in subsection (b)(3) [72-38-1001(2)(c)] includes liability that might be characterized as damages, restitution, or surcharge. For the measure of liability, see Section 1002 [72-38-1002]. Subsection (b)(5) [72-38-1001(2)(e)] makes explicit the court's authority to appoint a special fiduciary, also sometimes referred to as a receiver. *See* Restatement (Second) of Trusts § 199(d) (1959). The authority of the court to appoint a special fiduciary is not limited to actions alleging breach of trust but is available whenever the court, exercising its equitable jurisdiction, concludes that an appointment would promote administration of the trust. *See* Section 704(d) [72-38-704(4)] (special fiduciary may be appointed whenever court considers such appointment necessary for administration).

Subsection (b)(8) [72-38-1001(2)(h)], which allows the court to reduce or deny compensation, is in accord with Restatement (Second) of Trusts § 243 (1959). For the factors to consider in setting a trustee's compensation absent breach of trust, see Section 708 [72-38-708] and Comment. In deciding whether to reduce or deny a trustee compensation, the court may wish to consider (1) whether the trustee acted in good faith; (2) whether the breach of trust was intentional; (3) the nature of the breach and the extent of the loss; (4) whether the trustee has restored the loss; and (5) the value of the trustee's services to the trust. *See* Restatement (Second) of Trusts § 243 cmt. c (1959).

The authority under subsection (b)(9) [72-38-1001(2)(i)] to set aside wrongful acts of the trustee is a corollary of the power to enjoin a threatened breach as provided in subsection (b)(2) [72-38-1001(2)(b)]. However, in setting aside the wrongful acts of the trustee the court may not impair the rights of bona fide purchasers protected under Section 1012 [72-38-1012]. *See* Restatement (Second) of Trusts § 284 (1959).

Compiler's Comments

Source: The language in this section relates to the language in 72-34-506 (now repealed).

Case Notes

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Cestui Que Trust's Remedies at Law Not Limited: While 72-20-203 (now repealed) would seem to provide only equitable remedies against the trustee in his fiduciary capacity, it does not limit the cestui que trust's remedies at law, as evidenced by 72-20-210 (now repealed). Word v. Union Bank & Trust Co., 111 M 279, 107 P2d 1083 (1940).

72-38-1002. Damages for breach of trust.

Official Comments

Subsection (a) [72-38-1002(1), adopted as modified] is based on Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992). If a trustee commits a breach of trust, the beneficiaries may either affirm the transaction or, if a loss has occurred, hold the trustee liable for the amount necessary to compensate fully for the consequences of the breach. This may include recovery of lost income, capital gain, or appreciation that would have resulted from proper administration. Even if a loss has not occurred, the trustee may not benefit from the improper action and is accountable for any profit the trustee made by reason of the breach.

For extensive commentary on the determination of damages, traditionally known as trustee surcharge, with numerous specific applications, see Restatement (Third) of Trusts: Prudent Investor Rule §§ 205-213 (1992). For the use of benchmark portfolios to determine damages, see Restatement (Third) of Trusts: Prudent Investor Rule Reporter's Notes to §§ 205 and 208-211 (1992). On the authority of a court of equity to reduce or excuse damages for breach of trust, see Restatement (Second) of Trusts § 205 cmt. g (1959).

For purposes of this section and Section 1003 [72-38-1003], "profit" does not include the trustee's compensation. A trustee who has committed a breach of trust is entitled to reasonable compensation for administering the trust unless the court reduces or denies the trustee compensation pursuant to Section 1001(b)(8) [72-38-1001(2)(h)].

Subsection (b) [72-38-1002(2)] is based on Restatement (Second) of Trusts § 258 (1959). Cotrustees are jointly and severally liable for a breach of trust if there was joint participation in the breach. Joint and several liability also is imposed on a nonparticipating cotrustee who, as provided in Section 703(g) [72-38-703(7)], failed to exercise reasonable care (1) to prevent a cotrustee from committing a serious breach of trust, or (2) to compel a cotrustee to redress a serious breach of trust. Joint and several liability normally carries with it a right in any trustee to seek contribution from a cotrustee to the extent the trustee has paid more than the trustee's proportionate share of the liability. Subsection (b) [72-38-1002(2)], consistent with Restatement (Second) of Trusts § 258 (1959), creates an exception. A trustee who was substantially more at fault or committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries is not entitled to contribution from the other trustees.

Determining degrees of comparative fault is a question of fact. The fact that one trustee was more culpable or more active than another does not necessarily establish that this trustee was substantially more at fault. Nor is a trustee substantially less at fault because the trustee did not actively participate in the breach. *See* Restatement (Second) of Trusts § 258 cmt. e (195). Among the factors to consider: (1) Did the trustee fraudulently induce the other trustee to join in the breach? (2) Did the trustee commit the breach intentionally while the other trustee was at most negligent? (3) Did the trustee, because of greater experience or expertise, control the actions of the other trustee? (4) Did the trustee alone commit the breach with liability imposed on the other trustee only because of an improper delegation or failure to properly monitor the actions of the cotrustee? *See* Restatement (Second) of Trusts § 258 cmt. d (1959).

Compiler's Comments

Source: This section modifies section 1002 of the Uniform Law Commission's Uniform Trust Code by modifying the amount for which a trustee may be liable under subsection (1) and by adding the amount of interest for which a trustee may be liable under subsection (3).

The language in this section relates to the language in 72-34-508 (now repealed) and 72-34-509 (now repealed).

72-38-1003. Damages in absence of breach.

Official Comments

The principle on which a trustee's duty of loyalty is premised is that a trustee should not be allowed to use the trust as a means for personal profit other than for routine compensation earned. While most instances of personal profit involve situations where the trustee has breached the duty of loyalty, not all cases of personal profit involve a breach of trust. Subsection (a) [72-38-1003(1)], which holds a trustee accountable for any profit made, even absent a breach of trust, is based on Restatement (Second) of Trusts § 203 (1959). A typical example of a profit is receipt by the trustee of a commission or bonus from a third party for actions relating to the trust's administration. *See* Restatement (Second) of Trusts § 203 cmt. a (1959).

A trustee is not an insurer. Similar to Restatement (Second) of Trusts § 204 (1959), subsection (b) [72-38-1003(2)] provides that absent a breach of trust a trustee is not liable for a loss or depreciation in the value of the trust property or for failure to make a profit.

72-38-1004. Attorney fees and costs.

Official Comments

This section, which is based on Massachusetts General Laws chapter 215, § 45, codifies the court's historic authority to award costs and fees, including reasonable attorney's fees, in judicial proceedings grounded in equity. The court may award a party its own fees and costs from the trust. The court may also charge a party's costs and fees against another party to the litigation. Generally, litigation expenses were at common law chargeable against another party only in the case of egregious conduct such as bad faith or fraud. With respect to a party's own fees, Section 709 [72-38-709] authorizes a trustee to recover expenditures properly incurred in the administration of the trust. The court may award a beneficiary litigation costs if the litigation is deemed beneficial to the trust. Sometimes, litigation brought by a beneficiary involves an allegation that the trustee has committed a breach of trust. On other occasions, the suit by the beneficiary is brought because of the trustee's failure to take action against a third party, such as to recover property properly belonging to the trust. For the authority of a beneficiary to bring an action when the trustee fails to take action against a third party, see Restatement (Second) of Trusts §§ 281-282 (1959). For the case law on the award of attorney's fees and other litigation costs, see 3 Austin W. Scott & William F. Fratcher, The Law of Trusts §§ 188.4 (4th ed. 1988).

Compiler's Comments

Source: The language in this section relates to the language in 72-34-428 (now repealed).

Case Notes

Relief Sought in Appeal Rendered Moot — Costs and Expenses Awarded: The sale of a piece of real estate by a trust following a District Court's dissolution of a temporary injunction preventing that sale rendered an appeal to reinstate the temporary injunction moot. Equity demanded that the Supreme Court grant the trustee selling the real estate costs and expenses in the appeal because the relief sought on appeal had been rendered moot, regardless of whether the plaintiff had legitimate grounds. In re Osorio Irrevocable Trust, 2014 MT 286, 376 Mont. 524, 337 P.3d 87.

72-38-1005. Limitation of action against trustee.

Official Comments

The one-year and five-year limitations periods under this section are not the only means for barring an action by a beneficiary. A beneficiary may be foreclosed by consent, release, or ratification as provided in Section 1009 [72-38-1009]. Claims may also be barred by principles such as estoppel and laches arising in equity under the common law of trusts. *See* Section 106 [72-38-106].

The representative referred to in subsection (a) [72-38-1005(1)] is the person who may represent and bind a beneficiary as provided in Article 3 [Title 72, ch. 38, pt. 3]. During the time that a trust is revocable and the settlor has capacity, the person holding the power to revoke is the one who must receive the report. *See* Section 603(a) [72-38-603(1)] (rights of settlor of revocable trust).

This section addresses only the issue of when the clock will start to run for purposes of the statute of limitations. If the trustee wishes to foreclose possible claims immediately, a consent to the report or other information may be obtained pursuant to Section 1009 [72-38-1009]. For the provisions relating to the duty to report to beneficiaries, see Section 813 [72-38-813].

Subsection (a) [72-38-1005(1)] applies only if the trustee has furnished a report. The one-year statute of limitations does not begin to run against a beneficiary who has waived the furnishing of a report as provided in Section 813(d) [72-38-813(4)].

Subsection (c) [72-38-1005(3)] is intended to provide some ultimate repose for actions against a trustee. It applies to cases in which the trustee has failed to report to the beneficiaries or the report did not meet the disclosure requirements of subsection (b) [72-38-1005(2)]. It also applies to beneficiaries who did not receive notice of the report, whether personally or through representation. While the five-year limitations period will normally begin to run on termination of the trust, it can also begin earlier. If a trustee leaves office prior to the termination of the trust, the limitations period for actions against that particular trustee begins to run on the date the trustee leaves office. If a beneficiary receives a final distribution prior to the date the trust terminates, the limitations period for actions by that particular beneficiary begins to run on the date of final distribution.

If a trusteeship terminates by reason of death, a claim against the trustee's estate for breach of fiduciary duty would, like other claims against the trustee's estate, be barred by a probate creditor's claim statute even though the statutory period prescribed by this section has not yet expired.

This section does not specifically provide that the statutes of limitations under this section are tolled for fraud or other misdeeds, the drafters preferring to leave the resolution of this question to other law of the State.

Compiler's Comments

Source: This section modifies section 1005 of the Uniform Law Commission's Uniform Trust Code by extending the deadline for commencing a proceeding from 1 year to 3 years in subsection (1).

The language in this section relates to the language in 72-34-511 (now repealed).

Case Notes

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Statute of Limitations Runs From Date Plaintiffs Could Have Discovered Existence of Claim Against Trustee: Family members filed suit against the trustee of their parents' estate. The trustee argued that the 3-year statute of limitations under 72-34-511 (repealed in 2013) had expired. The plaintiffs argued that the statute of limitations did not begin to run until after they received a letter regarding the trustee's possible breach of duties, which they received after the trustee had already been terminated. The District Court agreed with the trustee that the plaintiffs should have known of the existence of any claims at the time of his termination and the claims were time-barred. On appeal, the Supreme Court affirmed. Gibbs v. Altenhofen, 2014 MT 200, 376 Mont. 61, 330 P.3d 458.

Statute of Limitations Applicable to Workers' Compensation Subrogation Right Created by Statute — Subrogation Agreement Not Created by Correspondence Between Attorneys for Claimant and Insurer: Roadarmel suffered an industrial injury and filed a workers' compensation claim against his employer, and the claim was defended by Royal Insurance Company (Royal). Roadarmel received a judgment and then filed a third-party action against two companies that had supplied the chemicals that injured him. Roadarmel's attorney, White, properly notified Royal that the third-party action was being commenced. Pursuant to 39-71-414, Roadarmel requested that Royal pay a portion of the costs, and Royal agreed to participate in the costs rather than waive its subrogation rights, tendering a check for $5,000 toward the costs. Roadarmel was successful in the third-party action, and White advised Royal that the third parties would appeal. The appeal was upheld, and White notified Royal of that fact, attaching copies of the settlement check and jury verdict forms, a breakdown of the actual costs of the third-party action, and a request that Royal determine its subrogation interest in a portion of the third-party proceeds. Royal independently computed the amount that it contended that it was owed and advised Roadarmel in letters that an action would be filed to determine Royal's subrogation interests. White did not respond to the letters, and 3 ½ years passed before Royal filed a petition to determine its subrogation rights. Royal later learned through discovery that White had disbursed the third-party proceeds on the same day that Royal had been requested to determine its subrogation interest, allegedly instructing Roadarmel to hold the funds pending a subrogation determination. Royal then also filed a separate count against White for an alleged breach of the duty of trust owed Royal as a third-party beneficiary of the trust imposed on the third-party proceeds. The Workers' Compensation Court determined that a subrogation agreement had been formed in the exchange of letters between White and Royal's counsel, that the statute of limitations on the contract had not expired, and that Roadarmel and White were jointly and severally liable for $63,864.79 for breaching the subrogation contract and failing to honor Royal's first lien of the third-party judgment. Roadarmel and White appealed, contending that Royal's subrogation action was based on a statutory liability that was time-barred by the 2-year statute of limitations in 27-2-211 and that the 3-year statute of limitations in 72-34-511 (now repealed), which governs actions based on an alleged breach of trust, also barred Royal's action against White. Royal argued that the correspondence between the parties formed an enforceable contract that was subject to the longer statute of limitations in 27-2-202. The Supreme Court agreed with Roadarmel and White. The correspondence only confirmed in writing that which was required by and took place entirely in the context of the mandatory statutory procedures and did not create an enforceable contract. Although the court recognized the rights of equitable subrogation at common law, those rights were conceptually distinguished from an insurer's first lien against third-party proceeds recovered by an injured employee, which constitutes a statutory liability amounting to an unqualified right of reimbursement not found at common law. As set out in St. Paul Fire & Marine Ins. Co. v. Glassing, 269 M 76, 887 P2d 218 (1994), the concept of subrogation merely gives the insurer the right to prosecute the cause of action that the insurer possessed, so the insurer's claim by subrogation, being purely derivative, is subject to the same statute of limitations as though the cause of action were sued upon by the insured. The statutory right to reimbursement or recoupment is distinguishable from the insurer's right of subrogation proper. Thus, Royal's claim against Roadarmel, being based on a liability created by statute, was time-barred under 27-2-211(1)(c). Further, Royal's breach of trust claim against White was time-barred by 72-34-511 (now repealed). Because Royal's statutory lien was extinguished as a matter of law 2 years after Royal received notice that the third-party action was settled, by the time that the statute of limitations on White's actions began to run, even if that time was determined to be the date on which he disbursed the third-party funds, he could no longer be characterized as a trustee, constructive or otherwise, of the third-party proceeds. The case was reversed and remanded for summary judgment in favor of Roadarmel and White. Royal Ins. Co. v. Roadarmel, 2000 MT 259, 301 M 508, 11 P3d 105, 57 St. Rep. 1080 (2000).

72-38-1006. Reliance on trust instrument.

Official Comments

It sometimes happens that the intended terms of the trust differ from the apparent meaning of the trust instrument. This can occur because the court, in determining the terms of the trust, is allowed to consider evidence extrinsic to the trust instrument. *See* Section 103(18) [72-38-103(21)] (definition of "terms of a trust"). Furthermore, if a trust is reformed on account of mistake of fact or law, as authorized by Section 415 [72-38-415], provisions of a trust instrument can be deleted or contradicted and provisions not in the trust instrument may be added. The concept of the "terms of a trust," both as defined in this Code and as used in the doctrine of reformation, is intended to effectuate the principle that a trust should be administered and distributed in accordance with the settlor's intent. However, a trustee should also be able to administer a trust with some dispatch and without concern that a reasonable reliance on the terms of the trust instrument is misplaced. This section protects a trustee who so relies on a trust instrument but only to the extent the breach of trust resulted from such reliance. This section is similar to Section 1(b) of the Uniform Prudent Investor Act, which protects a trustee from liability to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

This section protects a trustee only if the trustee's reliance is reasonable. For example, a trustee's reliance on the trust instrument would not be justified if the trustee is aware of a prior court decree or binding nonjudicial settlement agreement clarifying or changing the terms of the trust.

This section protects a trustee only if the trustee's reliance is reasonable. For example, a trustee's reliance on the trust instrument would not be justified if the trustee is aware of a prior court decree or binding nonjudicial settlement agreement clarifying or changing the terms of the trust.

Compiler's Comments

Source: The language in this section relates to the language in Title 72, chapter 34, part 5 (now repealed).

72-38-1007. Event affecting administration or distribution.

Official Comments

This section, which is based on Washington Revised Code § 11.98.100, is designed to encourage trustees to administer trusts expeditiously and without undue concern about liability for failure to ascertain external facts, often of a personal nature, that might affect administration or distribution of the trust. The common law, contrary to this section, imposed absolute liability against a trustee for misdelivery regardless of the trustee's level of care. *See* Restatement (Second) of Trusts § 226 (1959). The events listed in this section are not exclusive. A trustee who has exercised reasonable care to ascertain the occurrence of other events, such as the attainment by a beneficiary of a certain age, is also protected from liability.

72-38-1008. Exculpation of trustee.

Official Comments

Even if the terms of the trust attempt to completely exculpate a trustee for the trustee's acts, the trustee must always comply with a certain minimum standard. As provided in subsection (a) [72-38-1008(1)], a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. Subsection (a) [72-38-1008(1)] is consistent with the standards expressed in Sections 105 [72-38-105] and 814(a) [72-38-814(1)], which, similar to this section, place limits on the power of a settlor to negate trustee duties. This section is also similar to Section 222 of the Restatement (Second) of Trusts (1959), except that this Code, unlike the Restatement, allows a settlor to exculpate a trustee for a profit that the trustee made from the trust.

Subsection (b) [72-38-1008(2)] disapproves of cases such as *Marsman v. Nasca,* 573 N.E.2d 1025 (Mass. App. Ct. 1991), which held that an exculpatory clause in a trust instrument drafted by the trustee was valid because the beneficiary could not prove that the clause was inserted as a result of an abuse of a fiduciary relationship. For a later case where sufficient proof of abuse was present, see *Rutanan v. Ballard,* 678 N.E.2d 133 (Mass. 1997). Subsection (b) [72-38-1008(2)] responds to the danger that the insertion of such a clause by the fiduciary or its agent may have been undisclosed or inadequately understood by the settlor. To overcome the presumption of abuse in subsection (b) [72-38-1008(2)], the trustee must establish that the clause was fair and that its existence and contents were adequately communicated to the settlor. In determining whether the clause was fair, the court may wish to examine: (1) the extent of the prior relationship between the settlor and trustee; (2) whether the settlor received independent advice; (3) the sophistication of the settlor with respect to business and fiduciary matters; (4) the trustee's reasons for inserting the clause; and (5) the scope of the particular provision inserted. *See* Restatement (Second) of Trusts § 222 cmt. d (1959).

The requirements of subsection (b) [72-38-1008(2)] are satisfied if the settlor was represented by independent counsel. If the settlor was represented by independent counsel, the settlor's attorney is considered the drafter of the instrument even if the attorney used the trustee's form. Because the settlor's attorney is an agent of the settlor, disclosure of an exculpatory term to the settlor's attorney is disclosure to the settlor.

Compiler's Comments

2015 Amendment: Chapter 181 in (2) at end deleted "and that the settlor was represented by independent legal counsel before adopting the exculpatory term"; and made minor changes in style. Amendment effective October 1, 2015.

Source: This section modifies section 1008 of the Uniform Law Commission's Uniform Trust Code by adding language regarding profits derived from a breach of trust in subsection (1)(c) and by adding the requirement that the settlor was represented by independent legal counsel in subsection (2).

The language in this section relates to the language in 72-34-512 (now repealed).

72-38-1009. Beneficiary's consent, release, or ratification.

Official Comments

This section is based on Sections 216 through 218 of the Restatement (Second) of Trusts (1959). A consent, release, or affirmance under this section may occur either before or after the approved conduct. This section requires an affirmative act by the beneficiary. A failure to object is not sufficient. *See* Restatement (Second) of Trusts § 216 cmt. a (1959). A consent is binding on a consenting beneficiary although other beneficiaries have not consented. *See* Restatement (Second) of Trusts § 216 cmt. g (1959). To constitute a valid consent, the beneficiary must know of the beneficiary's rights and of the material facts relating to the breach. *See* Restatement (Second) of Trusts § 216 cmt. k (1959). If the beneficiary's approval involves a self-dealing transaction, the approval is binding only if the transaction was fair and reasonable. *See* Restatement (Second) of Trusts §§ 170(2), 216(3) and cmt. n (1959).

An approval by the settlor of a revocable trust or by the holder of a presently exercisable power of withdrawal binds all the beneficiaries. *See* Section 603 [72-38-603]. A beneficiary is also bound to the extent an approval is given by a person authorized to represent the beneficiary as provided in Article 3 [Title 72, ch. 38, pt.3].

2001 Amendment. By a 2001 amendment, the limitation of this section to beneficiaries "having capacity" was deleted. This limitation was included by mistake. As indicated in the second paragraph of the comment, the drafting committee did not intend to prohibit the use of the representation provisions of Article 3 [Title 72, ch. 38, pt. 3], several of which address representation of and the giving of a binding consent on behalf of an incapacitated beneficiary.

Compiler's Comments

Source: The language in this section relates to the language in 72-34-514 (now repealed).

72-38-1010. Limitation on personal liability of trustee.

Official Comments

This section is based on Section 7-306 of the Uniform Probate Code. However, unlike the Uniform Probate Code, which requires that the contract both disclose the representative capacity and identify the trust, subsection (a) [72-38-1010(1)] protects a trustee who reveals the fiduciary relationship either by indicating a signature as trustee or by simply referring to the trust. The protection afforded the trustee by this section applies only to contracts that are properly entered into in the trustee's fiduciary capacity, meaning that the trustee is exercising an available power and is not violating a duty. This section does not excuse any liability the trustee may have for breach of trust.

Subsection (b) [72-38-1010(2)] addresses trustee liability arising from ownership or control of trust property and for torts occurring incident to the administration of the trust. Liability in such situations is imposed on the trustee personally only if the trustee was personally at fault, either intentionally or negligently. This is contrary to Restatement (Second) of Trusts § 264 (1959), which imposes liability on a trustee regardless of fault, including liability for acts of agents under respondeat superior. Responding to a particular concern of trustees, subsection (b) [72-38-1010(2)] specifically protects a trustee from personal liability for violations of environmental law such as CERCLA (42 U.S.C. § 9607) or its state law counterparts, unless the trustee was personally at fault. *See also* Sections 701(c)(2) [72-38-701(3)(b)] (nominated trustee may investigate trust property to determine potential violation of environmental law without having accepted trusteeship) and 816(13) [72-38-816(13)] (trustee powers with respect to possible liability for violation of environmental law).

Subsection (c) [72-38-1010(3)] alters the common law rule that a trustee could not be sued in a representative capacity if the trust estate was not liable.

Compiler's Comments

Source: The language in this section relates to the language in 72-36-101 through 72-36-103 (now repealed).

Case Notes

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Responsibility to Third Persons: The effect of 72-23-307 (now repealed), viewed in connection with 28-10-702, stating when the agent is responsible to third persons as a principal for his acts in the course of his agency, is either that the trust estate is to be considered an entity chargeable as a principal for the acts of the trustee, its agent, or that the legal incidents of the trustee's authorized acts, so far as the parties are concerned, are the same as those which would attach to an agent's authorized transactions for his principal. Tuttle v. Union Bank & Trust Co., 112 M 568, 119 P2d 884, 139 ALR 127 (1941).

Suits Against Trustee in Representative Capacity to Enforce Claim Against Trust Property: A testator left residue of estate to bank in trust for support and maintenance of his daughter who became an invalid. Plaintiff's assignor furnished the requisite care and medical attention and, upon trustee bank's refusal to pay, brought suit at law on the theory of its personal liability, as distinguished from its liability as trustee. The District Court properly sustained a general demurrer (demurrer abolished, former Rule 7(c), now superseded, the remedy being against the trustee bank in its representative capacity to obtain a judgment enforceable against the trust property. Tuttle v. Union Bank & Trust Co., 112 M 568, 119 P2d 884, 139 ALR 127 (1941).

72-38-1011. Interest as general partner.

Official Comments

Section 1010 [72-38-1010] protects a trustee from personal liability on contracts that the trustee enters into on behalf of the trust. Section 1010 [72-38-1010] also absolves a trustee from liability for torts committed in administering the trust unless the trustee was personally at fault. It does not protect a trustee from personal liability for contracts entered into or torts committed by a general or limited partnership of which the trustee was a general partner. That is the purpose of this section, which is modeled after Ohio Revised Code § 1339.65. Subsection (a) [72-38-1011(1)] protects the trustee from personal liability for such partnership obligations whether the trustee signed the contract or it was signed by another general partner. Subsection (b) [72-38-1011(2)] protects a trustee from personal liability for torts committed by the partnership unless the trustee was personally at fault. Protection from the partnership's contractual obligations is available under subsection (a) [72-38-1011(1)] only if the other party is on notice of the fiduciary relationship, either in the contract itself or in the partnership certificate on file.

Special protection is not needed for other business interests that the trustee may own, such as an interest as a limited partner, a membership interest in an LLC, or an interest as a corporate shareholder. In these cases the nature of the entity or the interest owned by the trustee carries with it its own limitation on liability.

Certain exceptions apply. The section is not intended to be used as a device for individuals or their families to shield assets from creditor claims. Consequently, subsection (c) [not adopted] excludes from the protections provided by this section trustees who own an interest in the partnership in another capacity or if an interest is owned by the trustee's spouse or the trustee's descendants, siblings, parents, or the spouse of any of them.

Nor can a revocable trust be used as a device for avoiding claims against the partnership. Subsection (d) [72-38-1011(3)] imposes personal liability on the settlor for partnership contracts and other obligations of the partnership the same as if the settlor were a general partner.

This section has been placed in brackets to alert enacting jurisdictions to consider modifying the section to conform it to the State's specific laws on partnerships and other forms of unincorporated businesses.

Compiler's Comments

Source: This section modifies section 1011 of the Uniform Law Commission's Uniform Trust Code by adding language that using "trustee" or "as trustee" is a satisfactory disclosure of the fiduciary capacity in subsection (1) and by removing an exception that provides that immunity is not applicable if an interest in the partnership is held by the trustee in a capacity other than that of trustee or is held by one of the trustee's relatives.

72-38-1012. Protection of person dealing with trustee.

Official Comments

This section is derived from Section 7 of the Uniform Trustee Powers Act.

Subsection (a) [72-38-1012(1)] protects two different classes; persons other than beneficiaries who assist a trustee with a transaction, and persons other than beneficiaries who deal with the trustee for value. As long as the assistance was provided or the transaction was entered into in good faith and without knowledge, third persons in either category are protected in the transaction even if the trustee was exceeding or improperly exercising the power. For the definition of "know," see Section 104 [72-38-104]. This Code does not define "good faith" for purposes of this and the next section. Defining good faith with reference to the definition used in the State's commercial statutes would be consistent with the purpose of this section, which is to treat commercial transactions with trustees similar to other commercial transactions.

Subsection (b) [72-38-1012(2)] confirms that a third party who is acting in good faith is not charged with a duty to inquire into the extent of a trustee's powers or the propriety of their exercise. The third party may assume that the trustee has the necessary power. Consequently, there is no need to request or examine a copy of the trust instrument. A third party who wishes assurance that the trustee has the necessary authority instead should request a certification of trust as provided in Section 1013 [72-38-1013]. Subsection (b) [72-38-1012(2)], and the comparable provisions enacted in numerous States, are intended to negate the rule, followed by some courts, that a third party is charged with constructive notice of the trust instrument and its contents. The cases are collected in George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 897 (Rev. 2d ed. 1995); and 4 Austin W. Scott & William F. Fratcher, The Law of Trusts § 297 (4th ed. 1989).

Subsection (c) [72-38-1012(3)] protects any person, including a beneficiary, who in good faith delivers property to a trustee. The standard of protection in the Restatement is phrased differently although the result is similar. Under Restatement (Second) of Trusts § 321 (1959), the person delivering property to a trustee is liable if at the time of the delivery the person had notice that the trustee was misapplying or intending to misapply the property.

Subsection (d) [72-38-1012(4)] extends the protections afforded by the section to assistance provided to or dealings for value with a former trustee. The third party is protected the same as if the former trustee still held the office.

Subsection (e) [72-38-1012(5)] clarifies that a statute relating to commercial transactions controls whenever both it and this section could apply to a transaction. Consequently, the protections provided by this section are superseded by comparable protective provisions of these other laws. The principal statutes in question are the various articles of the Uniform Commercial Code, including Article 8 on the transfer of securities, as well as the Uniform Simplification of Fiduciary Securities Transfer Act.

Compiler's Comments

Source: The language in this section relates to the language in 72-36-201 (now repealed).

72-38-1013. Certification of trust.

Official Comments

This section, derived from California Probate Code § 18100.5, is designed to protect the privacy of a trust instrument by discouraging requests from persons other than beneficiaries for complete copies of the instrument in order to verify a trustee's authority. Even absent this section, such requests are usually unnecessary. Pursuant to Section 1012(b) [72-38-1012(2)], a third person proceeding in good faith is not required to inquire into the extent of the trustee's powers or the propriety of their exercise. This section adds another layer of protection.

Third persons frequently insist on receiving a copy of the complete trust instrument solely to verify a specific and narrow authority of the trustee to engage in a particular transaction. While a testamentary trust, because it is created under a will, is a matter of public record, an inter vivos trust instrument is private. Such privacy is compromised, however, if the trust instrument must be distributed to third persons. A certification of trust is a document signed by a currently acting trustee that may include excerpts from the trust instrument necessary to facilitate the particular transaction. A certification provides the third party with an assurance of authority without having to disclose the trust's dispositive provisions. Nor is there a need for third persons who may already have a copy of the instrument to pry into its provisions. Persons acting in reliance on a certification may assume the truth of the certification even if they have a complete copy of the trust instrument in their possession.

Subsections (a) [72-38-1013(1)] through (c) [72-38-1013(3)] specify the required contents of a certification. Subsection (d) [72-38-1013(4)] clarifies that the certification need not include the trust's dispositive terms. A certification, however, normally will contain the administrative terms of the trust relevant to the transaction. Subsection (e) [72-38-1013(5)] provides that the third party may make this a condition of acceptance. Subsections (f) [72-38-1013(6)] and (g) [72-38-1013(7)] protect a third party who relies on the certification. The third party may assume that the certification is true, and is not charged with constructive knowledge of the terms of the trust instrument even if the third party has a copy.

To encourage compliance with this section, a person demanding a trust instrument after already being offered a certification may be liable under subsection (h) [72-38-1013(8)] for damages if the refusal to accept the certification is determined not to have been in good faith. A person acting in good faith would include a person required to examine a complete copy of the trust instrument pursuant to due diligence standards or as required by other law. Examples of such due diligence and legal requirements include (1) in connection with transactions to be executed in the capital markets where documentary standards have been established in connection with underwriting concerns; (2) to satisfy documentary requirements established by state or local government or regulatory agency; (3) to satisfy documentary requirements established by a state or local government or regulatory agency; and (4) where the insurance rates or premiums or other expenses of the party would be higher absent the availability of the documentation.

The Uniform Trust Code leaves to other law the issue of how damages for a bad faith refusal are to be computed and whether attorney's fees might be recoverable. For a discussion of the meaning of "good faith," see Section 1012 [72-38-1012] Comment.

Compiler's Comments

2015 Amendment: Chapter 181 inserted (1)(g) concerning the state whose laws govern the trust; inserted (10) concerning consent to jurisdiction; and made minor changes in style. Amendment effective October 1, 2015.

Source: This section modifies section 1013 of the Uniform Law Commission's Uniform Trust Code by removing requirements to furnish the trust's taxpayer identification number and the manner of taking title to trust property in subsection (1) and by adding the requirement of a trustee's acknowledgment in subsection (2).

Part 11
Miscellaneous Provisions

Part Official Comments

Comment Section 1105 of the Uniform Trust Code was not adopted and the Official Comment to Section 1105 is included here:

For the reasons why the above Uniform Acts should be repealed upon enactment of the Uniform Trust Code, see the Prefatory Note. Enacting jurisdictions that have not enacted one or more of the specified Uniform Acts should repeal their comparable legislation. Because of the comprehensive scope of the Uniform Trust Code, many States will have trust provisions not based on any Uniform Act that will need to be repealed upon enactment of this Code. This section does not attempt to list the types of conforming amendments, whether in the enacting State's probate code or elsewhere, that need to be made upon enactment of this Code.

Comment Section 1106 of the Uniform Trust Code was not adopted and the Official Comment to Section 1106 is included here:

The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen.

This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code's enactment.

The Uniform Trust Code contains an additional effective date provision. Pursuant to Section 602(a) [72-38-602(1)], prior law will determine whether a trust executed prior to the effective date of the Code is presumed to be revocable or irrevocable.

For a comparable uniform law effective date provision, see Uniform Probate Code § 8-101.

72-38-1102. Electronic records and signatures.

Official Comments

This section, which is being inserted in all Uniform Acts approved in 2000 or later, preempts the federal Electronic Signatures in Global and National Commerce Act. Section 102(a)(2)(B) of that Act provides that the federal law can be preempted by a later statute of the State that specifically refers to the federal law. The effect of this section, when enacted as part of this Code, is to leave to state law the procedures for obtaining and validating an electronic signature. The Uniform Trust Code does not require that any document be in paper form, allowing all documents under this Code to be transmitted in electronic form. A properly directed electronic message is a valid method of notice under the Code as long as it is reasonably suitable under the circumstances and likely to result in receipt of the notice or document. *See* Section 109(a) [72-38-109(1)].

72-38-1103. Limit on charitable trust requirement.

Compiler's Comments

Effective Date: This section is effective October 1, 2023.

72-38-1111. Effects on real property transactions.

Official Comments

This section is new [in 1989], but to a great extent codifies existing law and practice, including former M.C.A. sections 72-24-201 and 72-24-209 (1987). It also makes clear that the protection of a bona fide purchaser in the conveyance of real property has no direct effect upon the existence of a trust or the rights and remedies of those interested in the trust, as among themselves. It also makes clear that the simple designation of a grantee in a conveyance, as a trustee, with nothing more, is sufficient for conveyancing purposes and title standards, but may not be sufficient alone to create a valid trust under Title 72, Chapter 33, Part 2 [now repealed] (particularly section 16 [72-33-208, now repealed, see 72-38-407]) of this code [T. 72, chapter 38].

Compiler's Comments

2013 Amendment: Chapter 264 in (1) and (2) in two places substituted "Title 72, chapter 38" for references to Title 72, chapters 33 through 36. Amendment effective October 1, 2013.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1993 Amendment: Chapter 494 at end of (1) deleted "This section does not affect conveyances recorded prior to October 1, 1989"; and made minor changes in style.

Retroactive Applicability: Section 135, Ch. 494, L. 1993, provided: "The amendment to 72-36-206(1) applies retroactively, within the meaning of 1-2-109, to conveyances recorded on or before October 1, 1989. The amendment also applies to conveyances recorded after October 1, 1989."

Saving Clause: Section 136, Ch. 494, L. 1993, was a saving clause.

1991 Amendment: Inserted (8) clarifying that the designation of a trust in a conveyance vests the estate in the trustee. Amendment effective April 27, 1991.

Case Notes

Sale of Real Property — Appeal Moot: A plaintiff appealed the District Court's order to dissolve a temporary injunction that prevented a trustee from selling a piece of real property. After the injunction was dissolved, the trustee sold the real property. Because the property was subsequently sold, the plaintiff's requested relief was rendered moot. In re Osorio Irrevocable Trust, 2014 MT 286, 376 Mont. 524, 337 P.3d 87.

No Legal Interest or Equitable Estate in Trust Property by Beneficiaries of Express Trust: Four siblings were to receive their father's trust property upon their mother's death. One daughter predeceased the mother, and her husband entered into an agreement with the remaining siblings that he would receive the share of the daughter. The husband then established a trust, conveying his future share by grant deed to a third party. The husband then predeceased the mother, and the third party claimed his portion. The District Court held that only the three remaining siblings had an interest in the trust property, and the third party appealed. The Supreme Court affirmed, holding that under the plain and unambiguous language of this section, the beneficiaries of the express trust did not have either a legal or an equitable estate of interest in the trust property; instead, they would only be allowed to enforce the performance of the trust. Because the remainder beneficiaries, including the husband, did not have an estate or interest in the trust property, there was no interest that could be transferred to another trust and then to a third party. Further, the siblings' claim that the third party did not acquire an interest was not barred by judicial admissions, collateral estoppel, res judicata, or judicial estoppel. (Case decided under 72-24-201, now repealed and replaced by this section.) In re George Trust, 1999 MT 223, 296 M 56, 986 P2d 427, 56 St. Rep. 879 (1999), distinguishing Cascade v. Cascade County, 75 M 304, 243 P 806 (1926), Stagg v. Stagg, 90 M 180, 300 P 539 (1931), In re Strode's Estate, 118 M 540, 167 P2d 579 (1946), and Hames v. Polson, 123 M 469, 215 P2d 950 (1950).

CHAPTER 39
UNIFORM TRUST DECANTING ACT

Chapter Compiler's Comments

Effective Date: This chapter is effective October 1, 2021.

Severability: Section 31, Ch. 177, L. 2021, was a severability clause.

CHAPTER 40
UNIFORM DIRECTED TRUST ACT

Part 1
General Provisions

Part Compiler's Comments

Effective Date: This part is effective October 1, 2021.

TITLES 73 AND 74

RESERVED

barred by judicial admissions, collateral estoppel, res judicata, or judicial estoppel. (Case decided under 72-24-201, now repealed and replaced by this section.) In re George Trust, 1999 MT 223, 296 M 56, 986 P2d 427, 56 St. Rep. 879 (1999), distinguishing Cascade v. Cascade County, 75 M 304, 243 P 806 (1926), Stagg v. Stagg, 90 M 180, 300 P 539 (1931), In re Strode's Estate, 118 M 540, 167 P2d 579 (1946), and Hames v. Polson, 123 M 469, 215 P2d 950 (1950).

CHAPTER 39
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CHAPTER 40
UNIFORM DIRECTED TRUST ACT

Part 1
General Provisions

Part Compiler's Comments

Effective Date: This part is effective October 1, 2021.

TITLE 75
ENVIRONMENTAL PROTECTION

Title Law Review Articles

Murky Waters: Private Action and the Right to a Clean and Healthful Environment — An Examination of Cape-France Enterprises v. Estate of Peed, Naber, 64 Mont. L. Rev. 357 (2003).

Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions, Thompson, 64 Mont. L. Rev. 157 (2003).

MEIC v. DEQ: An Inadequate Effort to Address the Meaning of Montana's Constitutional Environmental Provisions, Horwich, 62 Mont. L. Rev. 269 (2001).

An Essay on "Takings", Clifford & Huff, 59 Mont. L. Rev. 9 (1998).

Montana's Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion?, Horwich, 57 Mont. L. Rev. 323 (1996).

The Public Participation Requirement in Environmental and Public Land Decision-Making: Politics or Practice?, Harten, 11 Pub. Land L. Rev. 153 (1990).

Title Collateral References

Montana Index of Environmental Permits, Montana Environmental Quality Council.

CHAPTER 1
ENVIRONMENTAL POLICY AND PROTECTION GENERALLY

Chapter Administrative Rules

Title 17, chapter 4, subchapter 6, ARM Montana Environmental Policy Act.

Title 17, chapter 4, subchapter 7, ARM Environmental impact statement — fees.

Chapter Case Notes

No Requirement for Agency to Consider Impacts of Full-Scale Mining Operation When Analyzing Exploratory License: In 2017, the Department of Environmental Quality approved a license for a mining company to conduct exploratory activities in Emigrant Gulch after issuing an environmental assessment concluding that the proposal posed no significant environmental impact. Environmental groups sued the Department, alleging failures to comply with the Montana Environmental Policy Act (MEPA). The District Court voided the exploration license on several grounds, including a conclusion that the Department had failed to adequately evaluate potential secondary impacts of the exploratory activities leading to full-scale mining operations in the future. The Supreme Court upheld the voiding of the exploration license but reversed the District Court's finding that the Department should have considered the secondary impacts of a potential future full-scale mining operation. The Supreme Court concluded that the Department's granting of the exploration license did not set in motion a chain of events that would inevitably and irreversibly lead to a full-scale mining operation; the mining company would be required to obtain another operating permit under 82-4-335 in order to conduct full-scale mining operations, and that permit review process would also be subject to MEPA. Park County Envtl. Council v. Dept. of Environmental Quality, 2020 MT 303, 402 Mont. 168, 477 P.3d 288.

Initiative Banning Cyanide Mining — Reverse Condemnation Against State Not Justiciable in Federal Court: Initiative Measure No. 137, codified as 82-4-390, which banned the use of open-pit mining using cyanide leaching except as to mines operating with existing permits, could not be the basis of a reverse condemnation action in federal court because such an action is jurisdictionally barred by the 11th amendment to the U.S. Constitution. Eleventh amendment immunity cannot be avoided by the application of Ex parte Young, 209 US 123 (1908), since a reverse condemnation action is a form of retroactive relief and not a claim for prospective relief. Seven Up Pete Venture v. Schweitzer, 523 F3d 948 (9th Cir. 2008).

Eleventh Amendment Immunity as Preventing Federal Court Enforcement of MEPA and NEPA Against State or State Agency: The Fund for Animals, Inc., sued the state and the Department of Fish, Wildlife, and Parks, alleging violations of the National Environmental Policy Act of 1969 and the Montana Environmental Policy Act in the failure of the Department to prepare an environmental impact statement before adopting a plan to kill bison leaving Yellowstone

National Park to wander into the state. The Ninth Circuit Court of Appeals held that the 11th amendment bars the U.S. courts from entertaining challenges against state officials brought under state law and also bars the same courts from hearing suits brought directly against the state or one of its agencies for violation of a federal law unless the state has consented to suit. The court held that nothing in the record showed that Montana had waived its 11th amendment immunity by consenting to be sued in federal court. Fund for Animals, Inc. v. Lujan, 962 F2d 1391 (9th Cir. 1992).

Federal Law Applied to Road Building and Logging in National Forest: The U.S. District Court discussed the applicability of federal law to road building and logging activities in certain portions of Beaverhead National Forest. The case examined long-range management guidance, environmental assessments, environmental impact statements, the effects of a finding of no significant impact, and regeneration of timber sale areas as affected by the 1978 Beaverhead National Forest Land Management Plan, the Roadless Area Review Evaluation (RARE II), the Montana Wilderness Study Act of 1977, the National Environmental Policy Act, the National Forest Management Act of 1976, and the Multiple-Use Sustained-Yield Act of 1960. Big Hole Ranchers Ass'n, Inc. v. U.S. Forest Serv., 686 F. Supp. 256, 45 St. Rep. 908 (D.C. Mont. 1988).

Preliminary Environmental Review — No Hearing Requirement: Neither the Montana Environmental Policy Act (MEPA) nor the Montana Administrative Procedure Act (MAPA) requires a hearing in a preliminary environmental review. Titeca v. St., 194 M 209, 634 P2d 1156, 38 St. Rep. 1533 (1981).

MEPA Mandate Superseded: In an action for declaratory and injunctive relief against a proposed subdivision development in which plaintiffs alleged that the Environmental Impact Statement (EIS) issued by the Department of Health and Environmental Sciences (now Department of Environmental Quality) pursuant to the Montana Environmental Policy Act (MEPA) was defective, the Supreme Court held that the legislative intent of the Sanitation in Subdivisions Act was to place control of the decisionmaking process with local governments. This was held to preclude any state level attempt to exercise authority over subdivisions except where explicitly required under the Sanitation in Subdivisions Act. Mont. Wilderness Ass'n v. Bd. of Health & Environmental Sciences, 171 M 477, 559 P2d 1157 (1976). (Mr. Chief Justice Haswell dissenting, MEPA imposes a supplementary responsibility to consider environmental factors not explicitly enumerated in existing permit granting statutes.)

Chapter Law Review Articles

Constitutional Teeth: Sharpening Montana's Clean and Healthful Environment Provision, Kansman, 81 Mont. L. Rev. 247 (2020).

Of Crabbed Interpretations and Frustrated Mandates: The Effect of Environmental Policy Acts on Pre-Existing Agency Authority, Tobias & McLean, 41 Mont. L. Rev. 177 (1980).

A Retrospective: The Golden Years, Meloy, 43 Pub. Land. & Resources L. Rev. 193 (2020).

The Coming of Age of State Environmental Policy Acts, Renz, 5 Pub. Land L. Rev. 31 (1984).

Chapter Collateral References

Montana Index of Environmental Permits, Montana Environmental Quality Council.

Part 1
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Part Law Review Articles

The Coming of Age of State Environmental Policy Acts, Renz, 5 Pub. Land L. Rev. 31 (1984).

Part Collateral References

National Environmental Policy Act of 1969, 42 U.S.C. § 4321, et seq.

A Guide to the Montana Environmental Policy Act, Montana Environmental Quality Council.

75-1-102. Intent — purpose.

Compiler's Comments

2015 Amendment: Chapter 55 in (3)(b) substituted "75-1-201(4)(b)" for "75-1-201(6)(b)". Amendment effective October 1, 2015.

2011 Amendment: Chapter 396 in (1)(a) after "considered" inserted remainder of subsection; inserted (1)(b) concerning informed public; in (2) near middle inserted "mitigate"; inserted (3) regarding purpose of requiring environmental assessment and environmental impact statement; and made minor changes in style. Amendment effective May 12, 2011.

Severability: Section 8, Ch. 396, L. 2011, was a severability clause.

Applicability: Section 10, Ch. 396, L. 2011, provided: "[This act] applies to an environmental assessment and an environmental impact statement begun on or after [the effective date of this act]." Effective May 12, 2011.

2003 Amendment: Chapter 361 inserted (1) relating to constitutional obligations and legislative intent; and made minor changes in style. Amendment effective April 16, 2003.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Severability: Section 39, Ch. 361, L. 2003, was a severability clause.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

1995 Amendment: Chapter 352 near beginning, after "environment", inserted "to protect the right to use and enjoy private property free of undue government regulation"; and made minor changes in style.

1995 Statement of Intent: The statement of intent attached to Ch. 352, L. 1995, provided: "Whenever Montana Environmental Policy Act analysis is required, it is the intent of the legislature that actions that regulate the use of private property are evaluated to ensure that alternatives that reduce, minimize, or eliminate regulatory restrictions are considered. It is not the intent of the legislature to affect in any manner other economic or social considerations or any other analysis conducted under the Montana Environmental Policy Act."

Case Notes

DEQ Not Required by MEPA to Consider Environmental Impacts Not Related to Water Quality — Effect Preventable by Agency Only Through Lawful Exercise of Independent Authority: The Montana Environmental Policy Act (MEPA) did not require the Department of Environmental

Quality (DEQ) to consider non-water quality related environmental impacts of the construction and operation of a retail store facility as secondary impacts of the issuance of a Montana Water Quality Act permit to discharge facility wastewater into the ground from an onsite wastewater treatment system. The Supreme Court held that MEPA, like the National Environmental Policy Act, requires a reasonably close causal relationship between the triggering state action and the subject environmental effect. The court rejected the unyielding "but for" causation standard asserted by the plaintiffs to the effect that a state action is a cause of an environmental impact regardless of whether the agency, in the lawful exercise of its independent authority, can avoid or mitigate the effect. The Supreme Court further held that, for purposes of MEPA, an agency action is a legal cause of an environmental effect only if the agency can prevent the effect through the lawful exercise of its independent authority. Requiring a state agency to consider environmental impacts it has no authority to lawfully prevent would not serve MEPA's purposes of ensuring that agencies and the interested public have sufficient information regarding relevant environmental impacts to inform the lawful exercise of agency authority. Consequently, the Supreme Court reversed the District Court's summary judgment that DEQ violated MEPA in contravention of an administrative rule by failing to further consider the environmental impacts of the construction and operation of the facility other than water quality impacts and impacts of the related construction of the required wastewater treatment system. Bitterrooters for Planning, Inc. v. Dept. of Environmental Quality, 2017 MT 222, 388 Mont. 453, 401 P.3d 712.

Allowance of Change in Grazing Permit Not Ministerial Act — EIS Required: Shoberg transferred his grazing permit to Madden, and Madden changed from grazing cattle to grazing sheep. The Department of State Lands (now Department of Natural Resources and Conservation) allowed the grazing of sheep to continue, notwithstanding that the Department had information indicating that the grazing of sheep would adversely impact upon bighorn sheep reintroduced into the area. The plaintiffs brought an action to require the completion of an environmental impact statement (EIS). The Supreme Court held that an EIS was required because the Department was allowing an action, grazing of sheep, to go forward that could have a significant effect upon the quality of the human environment, notwithstanding statutes requiring the Department to protect the best interests of the state, including consideration of consequences to environment and wildlife. Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

Maximization of Income From School Trust Lands Not to Preclude Nonagricultural Uses: Shoberg transferred his grazing permit to Madden, and Madden changed from grazing cattle to grazing sheep. The Department of State Lands (now Department of Natural Resources and Conservation) allowed the grazing of sheep to continue, notwithstanding that the Department had information indicating that the grazing of sheep would adversely impact upon bighorn sheep reintroduced into the area. The plaintiffs brought an action to require the completion of an environmental impact statement (EIS). The Supreme Court held that an EIS was required and that the Department's duty to maximize income from school trust lands did not exempt the Department from its obligation to comply with state environmental statutes. The Supreme Court also held that maximizing income is "a" consideration but not "the" consideration regarding school trust lands and is not paramount to the exclusion of wildlife or environmental considerations. Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

Law Review Articles

Of Crabbed Interpretations and Frustrated Mandates: The Effect of Environmental Policy Acts on Pre-Existing Agency Authority, Tobias & McLean, 41 Mont. L. Rev. 177, 234 (1980).

75-1-103. Policy.

Compiler's Comments

2003 Amendment: Chapter 361 in (3) in first sentence inserted reference to right to pursue life's basic necessities and inserted last sentence relating to implementation of rights; and made minor changes in style. Amendment effective April 16, 2003.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Severability: Section 39, Ch. 361, L. 2003, was a severability clause.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

1995 Amendment: Chapter 352 in (1), near middle after "development", inserted "and further recognizing that governmental regulation may unnecessarily restrict the use and enjoyment of private property" and near end, after "harmony", inserted "to recognize the right to use and enjoy private property free of undue government regulation"; inserted (2)(d) regarding the right to use and enjoy private property free of undue government regulation; in (3), near middle after "healthful environment", inserted "that each person is entitled to use and enjoy that person's private property free of undue government regulation"; and made minor changes in style.

1995 Statement of Intent: The statement of intent attached to Ch. 352, L. 1995, provided: "Whenever Montana Environmental Policy Act analysis is required, it is the intent of the legislature that actions that regulate the use of private property are evaluated to ensure that alternatives that reduce, minimize, or eliminate regulatory restrictions are considered. It is not the intent of the legislature to affect in any manner other economic or social considerations or any other analysis conducted under the Montana Environmental Policy Act."

Case Notes

DEQ Not Required by MEPA to Consider Environmental Impacts Not Related to Water Quality — Effect Preventable by Agency Only Through Lawful Exercise of Independent Authority: The Montana Environmental Policy Act (MEPA) did not require the Department of Environmental Quality (DEQ) to consider non-water quality related environmental impacts of the construction and operation of a retail store facility as secondary impacts of the issuance of a Montana Water Quality Act permit to discharge facility wastewater into the ground from an onsite wastewater treatment system. The Supreme Court held that MEPA, like the National Environmental Policy Act, requires a reasonably close causal relationship between the triggering state action and the subject environmental effect. The court rejected the unyielding "but for" causation standard asserted by the plaintiffs to the effect that a state action is a cause of an environmental impact regardless of whether the agency, in the lawful exercise of its independent authority, can avoid or mitigate the effect. The Supreme Court further held that, for purposes of MEPA, an agency action is a legal cause of an environmental effect only if the agency can prevent the effect through the lawful exercise of its independent authority. Requiring a state agency to consider environmental impacts it has no authority to lawfully prevent would not serve MEPA's purposes of ensuring that agencies and the interested public have sufficient information regarding relevant environmental impacts to inform the lawful exercise of agency authority. Consequently, the Supreme Court reversed the District Court's summary judgment that DEQ violated MEPA in contravention of an administrative rule by failing to further consider the environmental impacts of the construction and operation of the facility other than water quality impacts and impacts of the related construction of the required wastewater treatment system. Bitterrooters for Planning, Inc. v. Dept. of Environmental Quality, 2017 MT 222, 388 Mont. 453, 401 P.3d 712.

Maximization of Income From School Trust Lands Not to Preclude Nonagricultural Uses: Shoberg transferred his grazing permit to Madden, and Madden changed from grazing cattle to grazing sheep. The Department of State Lands (now Department of Natural Resources and Conservation) allowed the grazing of sheep to continue, notwithstanding that the Department had information indicating that the grazing of sheep would adversely impact upon bighorn sheep reintroduced into the area. The plaintiffs brought an action to require the completion of an environmental impact statement (EIS). The Supreme Court held that an EIS was required and that the Department's duty to maximize income from school trust lands did not exempt the Department from its obligation to comply with state environmental statutes. The Supreme Court also held that maximizing income is "a" consideration but not "the" consideration regarding school trust lands and is not paramount to the exclusion of wildlife or environmental considerations. Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

Law Review Articles

Montana's Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion?, Horwich, 57 Mont. L. Rev. 323 (1996).

The Battle for the Environmental Provisions in Montana's 1972 Constitution, Cross, 51 Mont. L. Rev. 449 (1990).

The Montana Constitution and the Right to a Clean and Healthful Environment, Schmidt & Thompson, 51 Mont. L. Rev. 411 (1990).

Symposium — The Montana Constitution: Taking New Rights Seriously, Part I, Environmental Rights, 39 Mont. L. Rev. 221 (1978).

The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: "They Mean Something", Wyatt-Shaw, 15 Pub. Land L. Rev. 219 (1994).

75-1-104. Specific statutory obligations unimpaired.

Compiler's Comments

2003 Amendment: Chapter 131 in (2) after "any" inserted "local government"; and made minor changes in style. Amendment effective March 26, 2003.

Applicability: Section 4, Ch. 131, L. 2003, provided: "[This act] applies to environmental impact statements commenced on or after [the effective date of this act]." Effective March 26, 2003.

Case Notes

DEQ Not Required by MEPA to Consider Environmental Impacts Not Related to Water Quality — Effect Preventable by Agency Only Through Lawful Exercise of Independent Authority: The Montana Environmental Policy Act (MEPA) did not require the Department of Environmental Quality (DEQ) to consider non-water quality related environmental impacts of the construction and operation of a retail store facility as secondary impacts of the issuance of a Montana Water Quality Act permit to discharge facility wastewater into the ground from an onsite wastewater treatment system. The Supreme Court held that MEPA, like the National Environmental Policy Act, requires a reasonably close causal relationship between the triggering state action and the subject environmental effect. The court rejected the unyielding "but for" causation standard asserted by the plaintiffs to the effect that a state action is a cause of an environmental impact regardless of whether the agency, in the lawful exercise of its independent authority, can avoid or mitigate the effect. The Supreme Court further held that, for purposes of MEPA, an agency action is a legal cause of an environmental effect only if the agency can prevent the effect through the lawful exercise of its independent authority. Requiring a state agency to consider environmental impacts it has no authority to lawfully prevent would not serve MEPA's purposes of ensuring that agencies and the interested public have sufficient information regarding relevant environmental impacts to inform the lawful exercise of agency authority. Consequently, the Supreme Court reversed the District Court's summary judgment that DEQ violated MEPA in contravention of an administrative rule by failing to further consider the environmental impacts of the construction and operation of the facility other than water quality impacts and impacts of the related construction of the required wastewater treatment system. Bitterrooters for Planning, Inc. v. Dept. of Environmental Quality, 2017 MT 222, 388 Mont. 453, 401 P.3d 712.

No Violation of Clear Legal Duty to Consult With County Under MEPA — Writ of Mandamus and Injunction Improper — Action Against DEQ Dismissed: After an exchange of information between the Department of Environmental Quality (DEQ) and Jefferson County about the Mountain States Transmission Intertie (MSTI), a proposed electric transmission line that would transect Jefferson County, the county filed a petition for a writ of mandamus and injunctive relief seeking to compel DEQ to satisfy its legal duty under the Montana Environmental Protection Act (MEPA) to consult with local government prior to issuing a draft Environmental Impact Statement (EIS) and to enjoin DEQ from issuing the draft EIS until after it had complied with its duty to consult. After a series of evidentiary hearings, the District Court concluded that DEQ had not satisfied its duty to consult with the county under MEPA and enjoined it from issuing a draft EIS on the MSTI project until DEQ had more thoroughly consulted with the county, and DEQ appealed. The Supreme Court concluded that the District Court had erred in issuing a writ of mandamus to compel DEQ to more thoroughly consult with the county because MEPA does not establish a clear legal duty for DEQ to consult with a local government to any specified degree. It also ruled that the writ of mandamus was improper because the county had other remedies available to it once DEQ rendered a final decision on the project. Because neither MEPA nor related regulations define the word "consult," DEQ is afforded some discretion in determining the extent to which it consults with a local government under 75-1-104. Because MEPA allows for some discretion on the part of DEQ on how to consult with local government, the Supreme Court held the requirement to consult was not ministerial and therefore did not establish a clear legal duty under MEPA. Accordingly, the Supreme Court remanded the matter to the District Court with instructions to dismiss without prejudice. Jefferson County v. Dept. of Environmental Quality, 2011 MT 265, 362 Mont. 311, 264 P.3d 715.

75-1-105. Policies and goals supplementary.

Case Notes

Maximization of Income From School Trust Lands Not to Preclude Nonagricultural Uses: Shoberg transferred his grazing permit to Madden, and Madden changed from grazing cattle to grazing sheep. The Department of State Lands (now Department of Natural Resources and Conservation) allowed the grazing of sheep to continue, notwithstanding that the Department had information indicating that the grazing of sheep would adversely impact upon bighorn sheep reintroduced into the area. The plaintiffs brought an action to require the completion of an environmental impact statement (EIS). The Supreme Court held that an EIS was required and that the Department's duty to maximize income from school trust lands did not exempt the Department from its obligation to comply with state environmental statutes. The Supreme Court also held that maximizing income is "a" consideration but not "the" consideration regarding school trust lands and is not paramount to the exclusion of wildlife or environmental considerations. Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

MEPA Mandate Superseded: In an action for declaratory and injunctive relief against a proposed subdivision development in which plaintiffs alleged that the Environmental Impact Statement (EIS) issued by the Department of Health and Environmental Sciences (now Department of Environmental Quality) pursuant to the Montana Environmental Policy Act (MEPA) was defective, the Supreme Court held that the legislative intent of the Sanitation in Subdivisions Act was to place control of the decisionmaking process with local governments. This was held to preclude any state level attempt to exercise authority over subdivisions except where explicitly required under the Sanitation in Subdivisions Act. Mont. Wilderness Ass'n v. Bd. of Health & Environmental Sciences, 171 M 477, 559 P2d 1157 (1976). (Mr. Chief Justice Haswell dissenting, MEPA imposes a supplementary responsibility to consider environmental factors not explicitly enumerated in existing permit-granting statutes.)

Law Review Articles

Montana Land Use Law: Application of MEPA, Goetz, 38 Mont. L. Rev. 109 (1977).

75-1-106. Private property protection — ongoing programs of state government.

Compiler's Comments

1995 Statement of Intent: The statement of intent attached to Ch. 352, L. 1995, provided: "Whenever Montana Environmental Policy Act analysis is required, it is the intent of the legislature that actions that regulate the use of private property are evaluated to ensure that alternatives that reduce, minimize, or eliminate regulatory restrictions are considered. It is not the intent of the legislature to affect in any manner other economic or social considerations or any other analysis conducted under the Montana Environmental Policy Act."

75-1-107. Determination of constitutionality.

Compiler's Comments

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Severability: Section 39, Ch. 361, L. 2003, was a severability clause.

Effective Date: Section 40, Ch. 361, L. 2003, provided that this section is effective on passage and approval. Approved April 16, 2003.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

75-1-108. Venue.

Compiler's Comments

2021 Amendment: Chapter 535 in (1) in first sentence inserted references to parts 10 and 11. Amendment effective October 1, 2021.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Severability: Section 39, Ch. 361, L. 2003, was a severability clause.

Effective Date: Section 40, Ch. 361, L. 2003, provided that this section is effective on passage and approval. Approved April 16, 2003.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

75-1-110. Environmental rehabilitation and response account.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 2 in (2)(c) at end after "82-4-424" deleted "and 82-4-426"; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 107 in (3)(c) after "wastes" substituted "as defined in 75-10-403, hazardous or deleterious substances as defined in 75-10-701, or solid waste as defined in 75-10-203" for "or hazardous substances for which the department may not recover costs from a legally responsible party"; and made minor changes in style. Amendment effective July 1, 2009.

Chapter 200 inserted (2)(b) regarding reimbursements; and made minor changes in style. Amendment effective April 9, 2009.

Saving Clause: Section 10, Ch. 200, L. 2009, was a saving clause.

Severability: Section 8, Ch. 338, L. 2001, was a severability clause.

Effective Date: Section 9, Ch. 338, L. 2001, provided that this act is effective July 1, 2001.

Part 2
Environmental Impact Statements

Part Collateral References

National Environmental Policy Act of 1969, 42 U.S.C. § 4332.

A Guide to the Montana Environmental Policy Act, Montana Environmental Quality Council.

75-1-201. General directions — environmental impact statements.

Compiler's Comments

2023 Amendments — Composite Section — Coordination: Section 1, Ch. 450, L. 2023, in (2)(a) at end substituted "an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders" for "a review of actual or potential impacts beyond Montana's borders. It may not include actual or potential impacts that are regional, national, or global in nature"; in (2)(b) at end of introductory clause substituted "an evaluation if" for "a review of actual or potential impacts beyond Montana's borders if it is conducted by"; substituted current (2)(b)(i) concerning environmental review conducted jointly and current (2)(b)(ii) concerning amendment of the federal Clean Air Act for former (2)(b)(i), (2)(b)(ii), and (2)(b)(iii) (see sec. 1, Ch. 450, L. 2023, for former text); and made minor changes in style. Amendment effective May 8, 2023.

Section 1, Ch. 703, L. 2023, in (5)(a)(i) near beginning of first sentence substituted "agency's environmental review" for "agency action", near middle of first sentence after "final agency action" inserted "decision", and inserted last sentence regarding limits to challenges; in (6)(a)(i) inserted second sentence regarding assessing and collecting fee; inserted (6)(a)(ii) regarding actions alleging noncompliance or inadequate compliance with parts 1 through 3 of MEPA; in (6)(a)(iv) at end after "capricious" deleted "or was otherwise not in accordance with law"; in (6)(d) at end of first sentence after "in the case" inserted "including but not limited to lost wages of employees and lost project revenues for 1 year" and inserted last sentence regarding seeking an injunction; inserted (6)(d)(i), (6)(d)(ii), and (6)(d)(iii) regarding criteria for issuing an injunction; and made minor changes in style. Amendment effective May 19, 2023.

The amendment to this section made by sec. 1, Ch. 632, L. 2023, was rendered void by sec. 4, Ch. 450, L. 2023, a coordination section.

Preamble: The preamble attached to Ch. 703, L. 2023, provided: "WHEREAS, in accordance with Article IX, section 1(2), of the Montana constitution, the Legislature is constitutionally delegated the authority to implement the right to a clean and healthful environment; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the United States Supreme Court's decision in West Virginia v. EPA realigns the separation of powers to restrict the administrative state; and

WHEREAS, Congress has neither explicitly passed legislation that regulates greenhouse gases as pollutants under the federal Clean Air Act nor explicitly directed the Environmental Protection Agency to regulate carbon dioxide."

Severability: Section 3, Ch. 450, L. 2023, was a severability clause.

Section 2, Ch. 703, L. 2023, was a severability clause.

Contingent Effective Date: Section 9(2), Ch. 396, L. 2011, provided: "The amendments to 75-1-201 contained in [section 7] are effective on the date that the contingency provided for in [section 11] occurs." The contingency occurred December 8, 2020.

Contingent Termination: Section 11, Ch. 396, L. 2011, provided: "If either subsection (6)(c) or (6)(d) of 75-1-201, as included in [section 6], is invalidated or found to be unconstitutional by the Montana supreme court, then the amendments to 75-1-201 contained in [section 6] terminate on the date of the invalidation or the finding of unconstitutionality." The contingency occurred December 8, 2020, pursuant to Park County Envtl. Council v. Dept. of Environmental Quality, 2020 MT 303, 402 Mont. 168, 477 P.3d 288, in which the Montana Supreme Court found 75-1-201(6)(c) and (6)(d), as included in section 6, Ch. 396, L. 2011, to be unconstitutional under the Montana Constitution.

2011 Amendment: Chapter 396 in (1)(b) inserted reference to (3); in (1)(b)(i)(A) inserted "for a state-sponsored project", "Montana", and "by projects in Montana"; in (1)(b)(ii) inserted "for state-sponsored projects"; in (1)(b)(iii) and (1)(b)(iv) inserted "in Montana"; in (1)(b)(iv)(B) substituted "effects on Montana's environment" for "environmental effects"; deleted former (1)(b)(iv)(C)(III) that read: "if the project sponsor believes that an alternative is not reasonable as provided in subsection (1)(b)(iv)(C)(I), the project sponsor may request a review by the appropriate board, if any, of the agency's determination regarding the reasonableness of the alternative. The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the issue. The agency may not charge the project sponsor for any of its activities associated with any review under this section. The period of time between the request for a review and completion of a review under this subsection may not be included for the purposes of determining compliance with the time limits established for environmental review in 75-1-208"; in (1)(b)(v) inserted second and third sentences regarding alternatives analysis; in (1)(b)(vi) substituted "potential" for "national and", substituted "impacts in Montana" for "problems", after "maximize" deleted "national", and substituted "Montana's" for "the world"; in (1)(b)(vii) substituted "Montana's environment" for "the environment"; in (1)(b)(ix) inserted "legislature and the"; in (1)(c) in three places inserted reference to Montana; inserted (2) regarding environmental review; deleted former (3) and (4) that read: "(3) (a) In any action challenging or seeking review of an agency's decision that a statement pursuant to subsection (1)(b)(iv) is not required or that the statement is inadequate, the burden of proof is on the person challenging the decision. Except as provided in subsection (3)(b), in a challenge to the adequacy of a statement, a court may not consider any issue relating to the adequacy or content of the agency's environmental review document or evidence that was not first presented to the agency for the agency's consideration prior to the agency's decision. A court may not set aside the agency's decision unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law. A customer fiscal impact analysis pursuant to 69-2-216 or an allegation that the customer fiscal impact analysis is inadequate may not be used as the basis of any action challenging or seeking review of the agency's decision.

(b) When new, material, and significant evidence or issues relating to the adequacy or content of the agency's environmental review document are presented to the district court that had not previously been presented to the agency for its consideration, the district court shall remand the new evidence or issue relating to the adequacy or content of the agency's environmental review document back to the agency for the agency's consideration and an opportunity to modify its findings of fact and administrative decision before the district court considers the evidence or issue relating to the adequacy or content of the agency's environmental review document within the administrative record under review. Immaterial or insignificant evidence or issues relating to the adequacy or content of the agency's environmental review document may not be remanded to the agency. The district court shall review the agency's findings and decision to determine whether they are supported by substantial, credible evidence within the administrative record under review.

(4) To the extent that the requirements of subsections (1)(b)(iv)(C)(I) and (1)(b)(iv)(C)(III) are inconsistent with federal requirements, the requirements of subsections (1)(b)(iv)(C)(I) and (1)(b)(iv)(C)(III) do not apply to an environmental review that is being prepared by a state agency pursuant to this part and a federal agency pursuant to the National Environmental Policy Act or to an environmental review that is being prepared by a state agency to comply with the requirements of the National Environmental Policy Act"; inserted (6) regarding judicial remedies in legal action alleging noncompliance; inserted (7) regarding inconsistency with National Environmental Policy Act; and made minor changes in style. Amendment to temporary version effective May 12, 2011, and amendment to contingent version effective on occurrence of contingency.

The amendments to this section made by sec. 2, Ch. 396, L. 2011, were rendered void by sec. 6, Ch. 396, L. 2011, a coordination instruction.

Severability: Section 8, Ch. 396, L. 2011, was a severability clause.

Applicability: Section 10, Ch. 396, L. 2011, provided: "[This act] applies to an environmental assessment and an environmental impact statement begun on or after [the effective date of this act]." Effective May 12, 2011.

2009 Amendment: Chapter 416 inserted (6)(c) requiring that a district court action involving an equine slaughter or processing facility must comply with 81-9-240 and 81-9-241. Amendment effective October 1, 2009.

2007 Amendment: Chapter 469 inserted (1)(b)(iv)(G) referring to the customer fiscal impact analysis; in (3)(a) inserted fourth sentence providing that the agency's decision may not be challenged or reviewed based on customer fiscal impact analysis; and made minor changes in style. Amendment effective May 8, 2007.

Applicability: Section 10, Ch. 469, L. 2007, provided: "[This act] applies to applications received by the department of environmental quality on or after [the effective date of this act]." Effective May 8, 2007.

2003 Amendments — Composite Section: Chapter 125 inserted (6)(a)(iii) defining final agency action for action taken by board or department under Title 77; and made minor changes in style. Amendment effective March 26, 2003.

Chapter 131 in (1)(c) at end of first sentence inserted "and with any local government, as defined in 7-12-1103, that may be directly impacted by the project". Amendment effective March 26, 2003.

Applicability: Section 4, Ch. 131, L. 2003, provided: "[This act] applies to environmental impact statements commenced on or after [the effective date of this act]." Effective March 26, 2003.

2001 Amendments — Composite Section: Chapter 186 in (3)(a) in second sentence near middle after "may not consider any issue" inserted "relating to the adequacy or content of the agency's environment review document"; in (3)(b) in four places inserted references to issues relating to the adequacy or content of the agency's environmental review document; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 267 inserted (1)(b)(i)(B) providing that all state agencies, with exceptions, must to the fullest extent possible use a systematic, interdisciplinary approach that ensures that an environmental review that is not subject to subsection (1)(b)(iv) for which an agency considers alternatives has an alternative analysis in compliance with subsections (1)(b)(iv)(C)(I) through (1)(b)(iv)(C)(III) and, if requested by the project sponsor or if determined by the agency to be necessary, subsection (1)(b)(iv)(C)(IV); in (1)(b)(iv)(C) inserted "An analysis of any alternative included in the environmental review must comply with the following criteria:

(I) any alternative proposed must be reasonable, in that the alternative must be achievable under current technology and the alternative must be economically feasible as determined solely by the economic viability for similar projects having similar conditions and physical locations and determined without regard to the economic strength of the specific project sponsor;

(II) the agency proposing the alternative shall consult with the project sponsor regarding any proposed alternative, and the agency shall give due weight and consideration to the project sponsor's comments regarding the proposed alternative;

(III) if the project sponsor believes that an alternative is not reasonable as provided in subsection (1)(b)(iv)(C)(I), the project sponsor may request a review by the appropriate board, if any, of the agency's determination regarding the reasonableness of the alternative. The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the issue. The agency may not charge the project sponsor for any of its activities associated with any review under this section. The period of time between the request for a review and completion of a review under this subsection may not be included for the purposes of determining compliance with the time limits established for environmental review in 75-1-208.

(IV) the agency shall complete a meaningful no-action alternative analysis. The no-action alternative analysis must include the projected beneficial and adverse environmental, social, and economic impact of the project's noncompletion"; inserted (1)(b)(iv)(G) relating to "the details of the beneficial aspects of the proposed project, both short-term and long-term, and the economic advantages and disadvantages of the proposal"; at beginning of (1)(b)(v) inserted "in accordance with the criteria set forth in subsection (1)(b)(iv)(C)"; inserted (4) providing: "To the extent that the requirements of subsections (1)(b)(iv)(C)(I) and (1)(b)(iv)(C)(III) are inconsistent with federal requirements, the requirements of subsections (1)(b)(iv)(C)(I) and (1)(b)(iv)(C)(III) do not apply to an environmental review that is being prepared by a state agency pursuant to this part and a federal agency pursuant to the National Environmental Policy Act or to an environmental review that is being prepared by a state agency to comply with the requirements of the National Environmental Policy Act"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 268 inserted (5) providing that the agency may not withhold, deny, or impose conditions on a permit or other authority to act based on parts 1 through 3 of this chapter, that subsection (5) does not prevent a project sponsor and an agency from mutually developing measures that may, at the request of the project sponsor, be incorporated into a permit or other authority to act, and that parts 1 through 3 of this chapter do not confer authority to an agency that is a project sponsor to modify a proposed project or action. Amendment effective April 20, 2001.

Chapter 299 in (1)(b) at beginning inserted "under this part"; inserted (6) providing that challenge to agency action may be brought only against final agency action in district or federal court, requiring action alleging failure to comply with part 2 to be brought within 60 days, and requiring action or proceeding to take precedence over other cases in district court; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 300 inserted (7) requiring responsible agency directors to endorse determination or recommendation for determination of significance; and inserted (8) authorizing a project sponsor to request a review of a significance determination, allowing a board to submit an advisory recommendation, and establishing that time for the review may not be included in determining compliance with time limits for environmental reviews. Amendment effective April 20, 2001.

Applicability: Section 16, Ch. 299, L. 2001, provided: "[This act] applies to environmental reviews that are begun after [the effective date of this act]." Effective October 1, 2001.

1999 Amendment: Chapter 223 inserted (1)(d) exempting transfer of ownership interest from review if no material change in terms or conditions; in (3)(a) near middle of first sentence inserted "or that the statement is inadequate" and inserted second sentence limiting court's review to issues or evidence presented to agency; inserted (3)(b) requiring new, material, and significant evidence to be remanded by court for agency consideration; and made minor changes in style. Amendment effective April 1, 1999.

Retroactive Applicability: Section 5, Ch. 223, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all matters pending before an agency on [the effective date of this act]." Effective April 1, 1999.

1995 Amendments: Chapters 331, 352, 418, and 545 deleted former (3) that read: "(3) (a) Until the board of oil and gas conservation adopts a programmatic environmental statement, but no later than December 31, 1989, the issuance of a permit to drill a well for oil or gas is not a major action of state government as that term is used in subsection (1)(b)(iii).

(b) The board of oil and gas conservation shall adopt a programmatic statement by December 31, 1989, that must include but not be limited to:

(i) such environmental impacts as may be found to be associated with the drilling for and production of oil and gas in the major producing basins and ecosystems in Montana;

(ii) such methods of accomplishing drilling and production of oil and gas as may be found to be necessary to avoid permanent impairment of the environment or to mitigate long-term impacts so that the environment and renewable resources of the ecosystem may be returned to either conditions similar to those existing before drilling or production occurs or conditions that reflect a natural progression of environmental change;

(iii) the process that will be employed by the board of oil and gas conservation to evaluate such environmental impacts of individual drilling proposals as may be found to exist;

(iv) an appropriate method for incorporating such environmental review as may be found to be necessary into the board's rules and drill permitting process and for accomplishing the review in an expedient manner;

(v) the maximum time periods that will be required to complete the drill permitting process, including any environmental review; and

(vi) a record of information and analysis for the board of oil and gas conservation to rely upon in responding to public and private concerns about drilling and production.

(c) The governor shall direct and have management responsibility for the preparation of the programmatic statement, including responsibility on behalf of the board of oil and gas conservation for the disbursement and expenditure of funds necessary to complete the statement. The facilities and personnel of appropriate state agencies must be used to the extent the governor deems necessary to complete the statement. The governor shall forward the completed draft programmatic statement to the board of oil and gas conservation for hearing pursuant to the provisions of the Montana Administrative Procedure Act, Title 2, chapter 4. Following completion of a final programmatic statement, the governor shall forward the statement to the board for adoption and use in the issuance of permits to drill for oil and gas.

(d) Until the programmatic environmental statement is adopted, the board of oil and gas conservation shall prepare a written progress report after each regular meeting of the board and after any special board meeting that addresses the adoption or implementation of the programmatic environmental statement. A copy of each report must be sent to the environmental quality council."

Chapter 331 in (1)(b), after "except", inserted "the legislature and except"; in (1)(b)(iv), after "programs", deleted "legislation"; inserted (3) establishing burden of proof in action challenging agency decision that environmental impact statement is not required; and made minor changes in style.

Chapter 352 inserted (1)(b)(iii) requiring the identification and development of methods to ensure that state government actions that may impact the human environment are evaluated for regulatory restrictions on private property; inserted (1)(b)(iv)(D) requiring that regulatory impacts on property rights be included in every recommendation or report on proposals for major actions of state government involving regulation of private property; in (1)(c) inserted second sentence requiring consultation with regard to the regulation of private property; adjusted subsection references; and made minor changes in style.

Chapter 418 made minor changes in style. Amendment effective July 1, 1995.

Chapter 545 made minor changes in style. Amendment effective July 1, 1995.

1995 Statement of Intent: The statement of intent attached to Ch. 352, L. 1995, provided: "Whenever Montana Environmental Policy Act analysis is required, it is the intent of the legislature that actions that regulate the use of private property are evaluated to ensure that alternatives that reduce, minimize, or eliminate regulatory restrictions are considered. It is not the intent of the legislature to affect in any manner other economic or social considerations or any other analysis conducted under the Montana Environmental Policy Act."

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

1989 Amendment: In (3)(a) and (3)(b) substituted "December 31, 1989" for "June 30, 1989"; and inserted (3)(d) relating to reporting requirements concerning programmatic environmental statements not yet adopted.

1987 Amendment: Inserted (3) providing that until June 30, 1989, the issuance of a permit to drill for oil and gas is not a major action requiring an environmental impact review until the Board adopts a programmatic environmental statement.

Case Notes

Deference Owed to Agency Not Overcome by Potential Deficiencies — District Court Erred by Departing From Framework and Vacating Permit. Water for Flathead's Future, Inc. v. Dept. of Environmental Quality, 2023 MT 86, 412 Mont. 258, 530 P.3d 790.

Environmental Assessment Used Reasoned Analysis to Determine That Environmental Impact Statement Not Required — Development and Management Plan Did Not Pose Significant Adverse Effect Warranting Environmental Impact Statement — Summary Judgment Upheld. Hillcrest Natural Area Foundation, Inc. v. Dept. of Environmental Quality, 2022 MT 240, 411 Mont. 30, 521 P.3d 766.

Outstanding Resource Waters — Department Failure to Supplement Environmental Impact Statement Alleged — Abandoned Proposal Removed Obligation to Supplement. Mont. Rivers v. Dept. of Environmental Quality, 2022 MT 132, 409 Mont. 204, 512 P.3d 1193.

Environmental Assessment of Stone Quarry's Impact Reasoned — Summary Judgment in Favor of DEQ Affirmed. Belk v. Dept. of Environmental Quality, 2022 MT 38, 408 Mont. 1, 504 P.3d 1090.

2011 Amendments Facially Unconstitutional — Violations of Right to Clean and Healthful Environment: During the 2011 legislative session, the Montana Legislature amended 75-1-201 to

(1) limit the remedy for a violation of the Montana Environmental Policy Act (MEPA) to remand to the agency to correct any deficiencies in the environmental review and (2) prohibit equitable relief during the completion of any review ordered to be conducted on remand (2011 amendments). In 2017, the Department of Environmental Quality approved a license for a mining company to conduct exploratory activities in Emigrant Gulch after issuing an environmental assessment concluding that the proposal posed no significant environmental impact. Environmental groups sued the Department, alleging failures to comply with MEPA. The District Court voided the exploration license and found that the 2011 amendments violated certain provisions of the Montana Constitution. The Supreme Court reviewed the constitutionality issue de novo. It concluded that the 2011 amendments implicated constitutional rights and failed to meet the state's constitutional environmental obligations. The court further found that the rights provided in Art. II, sec. 3, and Art. IX, sec. 1, Mont. Const., are fundamental rights subject to strict scrutiny review. The court determined that the 2011 amendments were not narrowly tailored to further a compelling government interest. By removing the possibility of injunction or retraction of an improperly issued license or permit, they amounted to a complete deprivation of adequate remedies for a violation of the right to a clean and healthful environment as guaranteed by Art. II, sec. 3, and Art. IX, sec. 1. Park County Envtl. Council v. Dept. of Environmental Quality, 2020 MT 303, 402 Mont. 168, 477 P.3d 288.

Improper Substitution of District Court Judgment for Agency Technical Expertise: In 2017, the Department of Environmental Quality approved a license for a mining company to conduct exploratory activities in Emigrant Gulch after issuing an environmental assessment concluding that the proposal posed no significant environmental impact. The applicant provided water quality data from multiple locations, and the Department concluded that the water chemistry observed in several boreholes with good water quality was more representative of the overall area to be explored than the water chemistry in a localized formation with worse water quality. Environmental groups sued the Department, alleging failures to comply with the Montana Environmental Policy Act (MEPA). The District Court voided the exploration license on several grounds, including a determination that the Department had improperly over-relied on the more favorable water quality data in the environmental assessment and therefore failed to take the requisite "hard look" under MEPA. The Supreme Court upheld the District Court's voiding of the exploration license but found that on the matter of finding the Department's "hard look" insufficient the District Court had erred and should have deferred to the agency's technical expertise instead of substituting its own judgment. Park County Envtl. Council v. Dept. of Environmental Quality, 2020 MT 303, 402 Mont. 168, 477 P.3d 288.

No Requirement for Agency to Consider Impacts of Full-Scale Mining Operation When Analyzing Exploratory License: In 2017, the Department of Environmental Quality approved a license for a mining company to conduct exploratory activities in Emigrant Gulch after issuing an environmental assessment concluding that the proposal posed no significant environmental impact. Environmental groups sued the Department, alleging failures to comply with the Montana Environmental Policy Act (MEPA). The District Court voided the exploration license on several grounds, including a conclusion that the Department had failed to adequately evaluate potential secondary impacts of the exploratory activities leading to full-scale mining operations in the future. The Supreme Court upheld the voiding of the exploration license but reversed the District Court's finding that the Department should have considered the secondary impacts of a potential future full-scale mining operation. The Supreme Court concluded that the Department's granting of the exploration license did not set in motion a chain of events that would inevitably and irreversibly lead to a full-scale mining operation; the mining company would be required to obtain another operating permit under 82-4-335 in order to conduct full-scale mining operations, and that permit review process would also be subject to MEPA. Park County Envtl. Council v. Dept. of Environmental Quality, 2020 MT 303, 402 Mont. 168, 477 P.3d 288.

DEQ Not Required by MEPA to Consider Environmental Impacts Not Related to Water Quality — Effect Preventable by Agency Only Through Lawful Exercise of Independent Authority: The Montana Environmental Policy Act (MEPA) did not require the Department of Environmental Quality (DEQ) to consider non-water quality related environmental impacts of the construction and operation of a retail store facility as secondary impacts of the issuance of a Montana Water Quality Act permit to discharge facility wastewater into the ground from an onsite wastewater treatment system. The Supreme Court held that MEPA, like the National Environmental Policy Act, requires a reasonably close causal relationship between the triggering state action and the subject environmental effect. The court rejected the unyielding "but for" causation standard asserted by the plaintiffs to the effect that a state action is a cause of an environmental impact regardless of whether the agency, in the lawful exercise of its independent authority, can avoid or mitigate the effect. The Supreme Court further held that, for purposes of MEPA, an agency action is a legal cause of an environmental effect only if the agency can prevent the effect through the lawful exercise of its independent authority. Requiring a state agency to consider environmental impacts it has no authority to lawfully prevent would not serve MEPA's purposes of ensuring that agencies and the interested public have sufficient information regarding relevant environmental impacts to inform the lawful exercise of agency authority. Consequently, the Supreme Court reversed the District Court's summary judgment that DEQ violated MEPA in contravention of an administrative rule by failing to further consider the environmental impacts of the construction and operation of the facility other than water quality impacts and impacts of the related construction of the required wastewater treatment system. Bitterrooters for Planning, Inc. v. Dept. of Environmental Quality, 2017 MT 222, 388 Mont. 453, 401 P.3d 712.

Leasing State Land Mineral Interests Without Environmental Review — No Violation of Right to Clean and Healthful Environment: Plaintiffs sought declaratory rulings that the State Land Board wrongfully failed to conduct environmental studies required by the Montana Constitution prior to entering leases with the coal company. Section 77-1-121(2) expressly exempts the State Land Board from conducting any environmental review under the Montana Environmental Policy Act (MEPA) prior to issuing a lease as long as the lease is subject to further state permitting regulations. The Supreme Court held that because the leases did not remove any action by the coal company from environmental review or regulation provided by Montana law, such environmental review was only deferred from the leasing stage to the permitting stage. The terms of the leases required the coal company to comply with all applicable state and federal laws and specifically with Montana laws regarding mine siting and reclamation as well as with the provisions of MEPA. Because the leases themselves did not allow for any degradation of the environment, the act of issuing the leases without environmental review under 77-1-121(2), did not violate Article II, section 3, or Article IX, section 1, 2, or 3, of the Montana Constitution. N. Plains Resource Council v. Mont. Bd. of Land Comm'rs, 2012 MT 234, 366 Mont. 399, 288 P.3d 169.

Environmental Assessment Adequate — Environmental Impact Statement Not Required: Plaintiffs appealed the Board of Oil and Gas Conservation's issuance of 23 gas well permits, arguing that the environmental assessments (EAs) prepared by the Board were inadequate because the Board failed to take a "hard look" at the environmental impacts and to "tier" or explicitly reference previous analyses relied upon in the EAs and that the Board was required to prepare an environmental impact statement. The Supreme Court affirmed, concluding that because the Board implicitly tiered the EAs to older analyses and considered cumulative impacts, the EAs were adequate and that the drilling of the wells in an existing field of over 1,000, with most infrastructure in place and minimum anticipated impacts, did not constitute a major state action necessitating an environmental impact statement. Mont. Wildlife Fed'n v. Bd. of Oil & Gas Conserv., 2012 MT 128, 365 Mont. 232, 280 P.3d 877.

Review of MEPA Case Proper: Plaintiffs appealed the District Court's application of 82-11-144 to a review, for compliance with the Montana Environmental Policy Act (MEPA), of the Board of Oil and Gas Conservation's issuance of gas well permits, arguing that 82-11-144 does not apply to a MEPA claim and that, in accordance with 75-1-201, the court should not have considered evidence outside of the administrative record. The Supreme Court affirmed, concluding that 82-11-144 applies to any act of the Board within its regulatory jurisdiction. Mont. Wildlife Fed'n v. Bd. of Oil & Gas Conserv., 2012 MT 128, 365 Mont. 232, 280 P.3d 877.

No Violation of Clear Legal Duty to Consult With County Under MEPA — Writ of Mandamus and Injunction Improper — Action Against DEQ Dismissed: After an exchange of information between the Department of Environmental Quality (DEQ) and Jefferson County about the Mountain States Transmission Intertie (MSTI), a proposed electric transmission line that would transect Jefferson County, the county filed a petition for a writ of mandamus and injunctive relief seeking to compel DEQ to satisfy its legal duty under the Montana Environmental Protection Act (MEPA) to consult with local government prior to issuing a draft Environmental Impact Statement (EIS) and to enjoin DEQ from issuing the draft EIS until after it had complied with its duty to consult. After a series of evidentiary hearings, the District Court concluded that DEQ had not satisfied its duty to consult with the county under MEPA and enjoined it from issuing a draft EIS on the MSTI project until DEQ had more thoroughly consulted with the county, and DEQ appealed. The Supreme Court concluded that the District Court had erred in issuing a writ of mandamus to compel DEQ to more thoroughly consult with the county because MEPA does not establish a clear legal duty for DEQ to consult with a local government to any specified degree.

It also ruled that the writ of mandamus was improper because the county had other remedies available to it once DEQ rendered a final decision on the project. Because neither MEPA nor related regulations define the word "consult," DEQ is afforded some discretion in determining the extent to which it consults with a local government under 75-1-104. Because MEPA allows for some discretion on the part of DEQ on how to consult with local government, the Supreme Court held the requirement to consult was not ministerial and therefore did not establish a clear legal duty under MEPA. Accordingly, the Supreme Court remanded the matter to the District Court with instructions to dismiss without prejudice. Jefferson County v. Dept. of Environmental Quality, 2011 MT 265, 362 Mont. 311, 264 P.3d 715.

Challenge of Environmental Assessment — No Jurisdiction for Administrative Review: A grain company sought a permit to build a high-speed grain loading terminal near Pompeys Pillar national monument. The permit was granted and plaintiff, a nonprofit association supporting the monument's preservation, began administrative proceedings in an effort to overturn the permit issuance on grounds that the Department of Environmental Quality erred in its preparation of the environmental assessment related to the permit. An administrative law judge concluded that the Department acted arbitrarily and capriciously by issuing a permit without preparing an environmental impact statement. The Department filed exceptions to the administrative law judge's conclusions with the Board of Environmental Review. The Board ultimately affirmed the Department's decision to issue the permit, and plaintiff appealed to District Court. The Department contended that because the challenge to the administrative decisions did not contain any air quality issues, but only addressed environmental assessment issues governed by the Montana Environmental Policy Act (MEPA), and that because MEPA does not provide for administrative review of challenges to MEPA compliance, the administrative law judge and the Board did not have jurisdiction to preside over the appeal, nor did the District Court have jurisdiction to review the administrative proceedings. The District Court agreed and dismissed plaintiff's petition for lack of subject matter jurisdiction. Plaintiff appealed, but the Supreme Court affirmed. Had plaintiff challenged air quality issues, it would have been entitled to administrative proceedings. However, plaintiff's challenge pertained only to issues related to the environmental assessment, which is governed by MEPA. MEPA requires that a compliance challenge be brought in District Court, rather than through administrative proceedings. Thus, the administrative law judge and the Board did not have jurisdiction to preside over the appeal, nor did the District Court have jurisdiction to review the administrative proceedings. Plaintiff's petition was properly dismissed. Pompeys Pillar Historical Ass'n v. Dept. of Environmental Quality, 2002 MT 352, 313 M 401, 61 P3d 148 (2002).

Failure to Include Adequate Cumulative Impacts Analysis — Insufficient Environmental Impact Statement: The District Court held that the environmental impact statement (EIS) prepared for the Middle Soup Creek logging project was insufficient because it did not adequately analyze and discuss the cumulative impacts of the project in accordance with the definitions of cumulative impact and human environment in ARM 36.2.522 or include discussion of reconciliation of the proposed project with the state forest land management plan (SFLMP). The Department of Natural Resources and Conservation (DNRC) argued on appeal that the court failed to comprehend that a new course filter ecological analysis took into account all of the prevailing conditions of the affected lands and therefore incorporated a cumulative effects analysis into the EIS. The DNRC also contended that even though ARM 36.2.529 requires a cumulative impacts analysis, the rule does not dictate a particular methodology. The Supreme Court disagreed. ARM 36.2.529 clearly states that the EIS must contain a description of the cumulative impacts and does not allow a mere analysis implicit within the EIS. The public is not benefited by reviewing an EIS that does not explicitly set forth the actual cumulative impacts analysis and the facts that form the basis for the analysis. Further, ARM 36.2.524 requires consideration of potential conflicts with formal plans, such as the SFLMP. Here, the EIS discussed old growth and fragmentation as concerns, but did not discuss the SFLMP objective to preserve old growth, reduce fragmentation, and protect unique habitat. The District Court did not err when it held that the DNRC violated MEPA as a result of its failure to include an adequate cumulative impacts analysis in the EIS. Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, 2000 MT 209, 301 M 1, 6 P3d 972, 57 St. Rep. 816 (2000).

Substantial Economic Change as Basis for Supplemental EIS: The District Court held that a supplemental environmental impact statement (EIS) was required for the Middle Soup Creek logging project in light of changed economic circumstances of the sale. The sale was originally proposed as a revenue source for the school trust, before revenue reestimation revealed that the sale would actually cost the state about $150,000. The state contended that a supplemental EIS was not required absent proof that a reduction in the total timber sale revenue would result in physical impact to the environment, arguing that ARM 36.2.522 does not compel preparation of a supplemental EIS based on economic impacts alone. The Supreme Court disagreed, noting that nothing in ARM 36.2.533 requires that a substantial change must result in additional environmental impact before a supplemental EIS is required, nor is there a limitation on what may be considered a substantial change. Thus, a substantial economic change in a project can serve as the basis for requiring a supplemental EIS. Here, a timber sale that would ultimately cost the state money rather than raise revenue as originally anticipated was considered a substantial change sufficient to warrant a supplemental EIS, and the state erred in not preparing one. Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, 2000 MT 209, 301 M 1, 6 P3d 972, 57 St. Rep. 816 (2000).

New Circumstances Requiring Supplemental Environmental Impact Statement — Arbitrary Agency Decision to Not Prepare Supplemental Constituting Reversible Error: Under ARM 18.2.247, an agency is required to prepare a supplemental EIS when there are significant new circumstances that change the basis for the agency's decision and the supplement is required to describe any impacts, alternatives, or other items that were not covered in the original statement or that must be revised based on the new information or circumstances concerning the proposed agency action. When an agency action is challenged for failure to prepare a supplemental EIS, the reviewing court must consider whether the agency made a reasoned decision based on its evaluation of the significance or lack of significance of the new information, whether the decision was based on a consideration of the relevant factors, and whether there has been a clear error of judgment. Here, the decision of the Department of Transportation to build the Forestvale interchange in the Helena Valley was challenged on grounds that the Department did not comply with the supplemental EIS requirements of ARM 18.2.247. The Department conducted an in-house review and determined in 1999 that a supplemental EIS to the original 1991 draft EIS was not necessary because the changes in the proposed project's scope of work and the new information did not result in any significant environmental impacts. The Supreme Court disagreed. The change in traffic patterns, the development around the Capitol interchange, the patterns of development in Helena, and the proposed alternatives to the Forestvale interchange were all significant new circumstances that required a supplemental EIS, and the Department's decision not to prepare one was arbitrary, constituting reversible error. Mont. Envtl. Information Center, Inc. v. Dept. of Transportation, 2000 MT 5, 298 M 1, 994 P2d 676, 57 St. Rep. 18 (2000), following N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862, 46 St. Rep. 1409 (1989), and Marsh v. Oreg. Natural Resources Council, 490 US 360 (1989).

Standard of Review Applicable to Noncontested Cases — Approval of Plan for Drilling Exploratory Well: The District Court incorrectly applied the "clearly erroneous" standard set out in 2-4-704 when reviewing whether the Department of State Lands (functions now transferred to Department of Natural Resources and Conservation) properly approved a plan proposing drilling of an exploratory well on a leased tract near Glacier Park. The court found that shortcomings in the approval procedure, coupled with the fact that information gathered by the Department indicating that the well would generate a significant environmental impact, necessitated preparation of an environmental impact statement. However, 2-4-704 was inapplicable because the case was not truly contested. No hearing was requested or held before the Department, there was no action initiated until after the Department had approved the operating plan, and there was no evidentiary record against which to measure the Department's decision and determine whether it was clearly erroneous. Rather, the proper standard of review was whether the record established that the Department acted arbitrarily, capriciously, or unlawfully. The fact that the Department conducted two preliminary environmental reviews, conditioned approval on 42 protective stipulations, and considered the concerns raised in the approval process and took significant steps to address them indicated that the decision to forego preparation of an environmental impact statement was not arbitrary, capricious, or illegal. N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862, 46 St. Rep. 1409 (1989), distinguishing Conner v. Burford, 605 F. Supp. 107 (D.C. Mont. 1985), and followed in Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995), Mont. Envtl. Information Center, Inc. v. Dept. of Transportation, 2000 MT 5, 298 M 1, 994 P2d 676, 57 St. Rep. 18 (2000), and Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, 2000 MT 209, 301 M 1, 6 P3d 972, 57 St. Rep. 816 (2000), in which omission of a cumulative impact analysis was directly related to the "unlawful" portion of the MEPA standard of review. See also Madison River R.V. Ltd. v. Ennis, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000).

Environmental Impact Statements — Scope of Appellate Review of Findings of Sufficiency of Statement: Following the completion of an environmental impact statement under the Montana Environmental Policy Act, the Board of Natural Resources and Conservation (now Board of Environmental Review) issued a certificate of environmental compatibility and public need under the Montana Utility Siting Act of 1973 (now the Montana Major Facility Siting Act of 1975) for the construction of several powerlines. The Supreme Court refused to apply a de novo standard of review of the District Court's finding that the impact statement was sufficient. The court held that the correct scope of appellate review of agency decisions was stated in N. Plains Resources Council v. Bd. of Natural Resources and Conserv., 181 M 500, 594 P2d 297 (1979), to be whether the agency's decision was clearly erroneous in light of substantial evidence on the whole record. Mont. Wilderness Ass'n v. Bd. of Natural Resources and Conserv., 200 M 11, 648 P2d 734, 39 St. Rep. 1238 (1982).

Sufficiency of Environmental Impact Statement — Failure to Consider Alternatives — Failure to Prepare Cost Benefit Analysis: Following the completion of an environmental impact statement under the provisions of the Montana Environmental Policy Act (MEPA), the Board of Natural Resources and Conservation (now Board of Environmental Review) issued a certificate of environmental compatibility and public need under the Montana Utility Siting Act of 1973 (now the Montana Major Facility Siting Act of 1975) for the construction of a powerline. The Supreme Court affirmed the holding of the District Court that the impact statement sufficiently considered the alternative of "no action" and that neither the siting act nor MEPA explicitly requires a formal, mathematically expressed cost/benefit analysis. The language of the impact statement makes clear that the "no action" alternative was considered and rejected and that the relative costs and benefits of the proposed powerline were considered in the impact statement. (See 2001 amendment.) Mont. Wilderness Ass'n v. Bd. of Natural Resources and Conserv., 200 M 11, 648 P2d 734, 39 St. Rep. 1238 (1982).

Laches: An objection that various state and federal agencies failed to follow the requirements of the National Environmental Policy Act (NEPA) and the Montana Environmental Policy Act (MEPA) in initiating construction of a four-lane highway was not barred by laches on the grounds that the four-lane proposal had been before the public for 10 years. Here, respondents failed to consider secondary impacts and the alternative of constructing an improved two-lane road. Regarding the issue of laches, NEPA and MEPA by their very nature contemplate delay in implementing plans for construction of a highway. The expenditure of $1 million is not alone sufficient prejudice to warrant a finding of laches; a finding of prejudice depends on what Congress defines as prejudicial. Coalition for Canyon Preservation v. Bowers, 632 F2d 774 (9th Cir. 1980), overruling 479 F. Supp. 815 (D.C. Mont. 1979).

Federal Authority Interpreting MEPA: Federal case law is an appropriate guide in interpreting the Montana Environmental Policy Act (MEPA). Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147, 36 St. Rep. 1820 (1979), followed in Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

Necessity for Statement — Conflict With MEPA Time Limit: Where Hard Rock Mining Act (HRMA) provision requires that the state Board of Land Commissioners (functions now transferred to Department of Environmental Quality) act within 60 days of receipt of complete application and reclamation plan and it would have been impossible to complete preparation of an Environmental Impact Statement (EIS) before taking action on HRMA application, the Montana Environmental Policy Act (MEPA) requirement is inapplicable. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147, 36 St. Rep. 1820 (1979), following Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma, 426 US 776 (1976), and distinguished in Hillcrest Natural Area Foundation, Inc. v. Dept. of Environmental Quality, 2022 MT 240, 411 Mont. 30, 521 P.3d 766, holding that Kadillak does not apply when there is no conflict between applicable statutes.

Statutory Requirement Not Constitutionally Mandated: The requirement that an agency prepare an environmental impact statement was not constitutionally mandated because of a subsequent adoption of a constitutional provision in 1972 (Art. II, sec. 3, Mont. Const.), guaranteeing a clean and healthful environment. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147, 36 St. Rep. 1820 (1979).

Attorney General's Opinions

When Environmental Impact Statement Required in Conjunction With Loan Participation Agreement: A determination by the Montana Board of Investments to enter into a loan participation agreement constitutes a major action of state government under the Montana Environmental Policy Act (MEPA). Therefore, the Board must comply with the environmental impact statement requirements of MEPA when considering whether to enter into a loan participation agreement when the underlying project benefiting from the agreement may significantly affect the quality of the human environment. 43 A.G. Op. 62 (1990).

Emergency Exception Inapplicable to Foreseeable Situations — Environmental Policy Act Applicable: The Department of Agriculture did not follow the directive of ARM 4.2.308 (repealed in 1988) in dealing with an emergency infestation of grasshoppers when it failed to file a report with the Governor and the Environmental Quality Council. While an emergency situation is a legitimate exception to the requirements of the Montana Environmental Policy Act (MEPA), the Department should comply with MEPA before participating in a grasshopper spraying program if the need for such a program is reasonably foreseeable. 42 A.G. Op. 62 (1988).

State Participation in Spraying Program — Environmental Policy Act Triggered: State participation in a grasshopper spraying program in which the state paid up to one-third of the costs and provided financial management and technical expertise was a major state action in which compliance with the Montana Environmental Policy Act was required. 42 A.G. Op. 62 (1988).

Law Review Articles

Application of NEPA to Leasing of Property for Strip Mining on Reservation Lands, Anderson, 35 Mont. L. Rev. 209, 220 (1974).

Collateral References

National Environmental Policy Act of 1969, 42 U.S.C. § 4332.

A Guide to the Montana Environmental Policy Act, Montana Environmental Quality Council.

75-1-202. Agency rules to prescribe fees.

Compiler's Comments

2005 Amendment: Chapter 337 at end of first sentence inserted reference to lack of agency finding under 75-1-205(1)(a); in second sentence near beginning after "determine" deleted "within 30 days after a completed application is filed" and at end substituted "this section" for "this part" and inserted references to statutory timeframes and 90-day timeframe; in third sentence at beginning inserted exception clause and substituted "under this section may be used" for "under this part shall be used"; and made minor changes in style. Amendment effective April 21, 2005.

Applicability: Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

75-1-203. Fee schedule — maximums.

Compiler's Comments

2011 Amendment: Chapter 396 in (1) in second sentence near end substituted "$2,501" for "$2,500". Amendment effective May 12, 2011.

Severability: Section 8, Ch. 396, L. 2011, was a severability clause.

Applicability: Section 10, Ch. 396, L. 2011, provided: "[This act] applies to an environmental assessment and an environmental impact statement begun on or after [the effective date of this act]." Effective May 12, 2011.

2001 Amendment: Chapter 251 inserted (5) relating to calculating fees based on the estimated project cost and acquisition of information; and made minor changes in style. Amendment effective April 16, 2001.

1993 Amendment: Chapter 349 deleted second sentence of (4) that read: "Furthermore, each agency shall, pursuant to 5-11-210, provide the legislature with a complete report on the fees collected prior to the time that a request for an appropriation is made to the legislature"; and made minor changes in style.

1991 Amendment: In second sentence of (4) inserted reference to 5-11-210. Amendment effective March 20, 1991.

Law Review Articles

Mont. Code Ann. § 75-1-203(2)—What Is It Good For? Absolutely Nothing!, Vachowski, 60 Mont. L. Rev. 139 (1999).

75-1-205. Collection and use of fees and costs.

Compiler's Comments

2007 Amendment: Chapter 469 in (1)(a) inserted second sentence providing that an applicant pay the consumer counsel's cost in preparing customer fiscal impact analysis; and made minor changes in style. Amendment effective May 8, 2007.

Applicability: Section 10, Ch. 469, L. 2007, provided: "[This act] applies to applications received by the department of environmental quality on or after [the effective date of this act]." Effective May 8, 2007.

2005 Amendment: Chapter 337 inserted (1) requiring applicants to pay costs or fees for application requiring preparation of environmental impact statement; inserted (2) including certain costs of compiling information, attending meetings, and preparing, printing, and distributing draft statements in costs to be paid under subsection (1); inserted (3) including certain personnel costs, payments, salaries, and expenses in costs to be paid under subsection (1); inserted (4) relating to scoping process, third-party contractors, agreement negotiation for preparation of statement, and informal review process; in (5) in two places after "fees" inserted "and costs"; and made minor changes in style. Amendment effective April 21, 2005.

Applicability: Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

75-1-207. Major facility siting applications excepted.

Compiler's Comments

2021 Amendment: Chapter 409 in (2) at end after "files a petition under" substituted "75-20-201(4)" for "75-20-201(5)". Amendment effective May 7, 2021.

2011 Amendment: Chapter 19 in (2) after "department" inserted "of environmental quality". Amendment effective October 1, 2011.

2005 Amendment: Chapter 337 at beginning of (1) inserted exception clause; inserted (2) authorizing department to require applicants to pay costs or fees for application requiring preparation of environmental impact statement; and made minor changes in style. Amendment effective April 21, 2005.

Applicability: Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

Administrative Rules

ARM 36.2.608 Exceptions.

75-1-208. Environmental review procedure.

Compiler's Comments

2019 Amendment: Chapter 80 in (4)(b) removed brackets around reference to 76-4-111. Amendment effective July 1, 2019.

Termination Provision Repealed: Section 18, Ch. 80, L. 2019, repealed sec. 13, Ch. 344, L. 2017, which terminated the 2017 amendments to this section September 30, 2019. Effective July 1, 2019.

2017 Amendment: Chapter 344 in (4)(b) substituted "76-4-114" for "76-4-125". Amendment effective October 1, 2017, and terminates September 30, 2019.

Applicability: Section 12, Ch. 344, L. 2017, provided: "[This act] applies to subdivision applications submitted on or after October 1, 2017."

2015 Amendment: Chapter 122 in (2) at beginning inserted exception clause; inserted (2)(b) concerning the environmental review of a project involving issues of water quality or quantity; and made minor changes in style. Amendment effective March 25, 2015.

2011 Amendment: Chapter 396 in (4)(b) in first sentence substituted "75-1-201(9)" for "75-1-201(1)(b)(iv)(C)(III) or (8)"; and in (11) near beginning substituted "evaluate" for "consider". Amendment effective May 12, 2011.

Severability: Section 8, Ch. 396, L. 2011, was a severability clause.

Applicability: Section 10, Ch. 396, L. 2011, provided: "[This act] applies to an environmental assessment and an environmental impact statement begun on or after [the effective date of this act]." Effective May 12, 2011.

2009 Amendment: Chapter 366 in (4)(b) near end after "75-2-218" deleted "75-10-922"; and made minor changes in style. Amendment effective April 27, 2009.

2005 Amendment: Chapter 337 near beginning of (1)(a) in exception clause inserted reference to 75-1-205(4); near end of (4)(a)(ii) inserted "or 75-1-205(4)"; and made minor changes in style. Amendment effective April 21, 2005.

Applicability: Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

Effective Date: This section is effective October 1, 2001.

Applicability: Section 16, Ch. 299, L. 2001, provided: "[This act] applies to environmental reviews that are begun after [the effective date of this act]." Effective October 1, 2001.

75-1-220. Definitions.

Compiler's Comments

2013 Amendment: Chapter 235 in (2)(b) substituted "fish and wildlife commission" for "fish, wildlife, and parks commission" and at end inserted "and the state parks and recreation board, as provided for in 2-15-3406". Amendment effective July 1, 2013.

Saving Clause: Section 40, Ch. 235, L. 2013, was a saving clause.

2011 Amendment: Chapter 396 inserted definitions of alternatives analysis and state-sponsored project; in definitions of cumulative impacts and environmental review inserted "within the borders of Montana"; and made minor changes in style. Amendment effective May 12, 2011.

Severability: Section 8, Ch. 396, L. 2011, was a severability clause.

Applicability: Section 10, Ch. 396, L. 2011, provided: "[This act] applies to an environmental assessment and an environmental impact statement begun on or after [the effective date of this act]." Effective May 12, 2011.

2009 Amendment: Chapter 2 in definition of project sponsor at end of second sentence after "through" substituted "329" for "328". Amendment effective October 1, 2009.

Effective Dates: Section 2, Ch. 267, and sec. 2, Ch. 299, L. 2001, are effective October 1, 2001. Section 4, Ch. 268, and sec. 5, Ch. 300, L. 2001, provided: "[This act] is effective on passage and approval." (definitions of appropriate board and environmental review) Approved April 20, 2001.

Applicability: Section 16, Ch. 299, L. 2001, provided: "[This act] applies to environmental reviews that are begun after [the effective date of this act]." Effective October 1, 2001.

Case Notes

License Approval Conditioned on Obtaining Permit Under Section 404 of Federal Clean Water Act Satisfied Department Rules — Analysis of Alternative Project or Facility Not Required — No Conflict Between Statutes and Rules — Summary Judgment Upheld. Hillcrest Natural Area Foundation, Inc. v. Dept. of Environmental Quality, 2022 MT 240, 411 Mont. 30, 521 P.3d 766.

Identification of Actual Owner or Operator Required in Permit Application Based on Administrative Rules: The Montana Environmental Policy Act requires the Department of Environmental Quality (DEQ) to identify the actual owner or operator of a proposed retail facility prior to issuing a Montana Water Quality Act groundwater discharge permit. The Supreme Court reasoned that Board of Environmental Review administrative rules expressly provide that the owner or operator of any proposed source that may discharge pollutants into state ground waters is required to file a completed Montana groundwater pollution control system permit application. Moreover, pursuant to 75-5-402, the Supreme Court held that DEQ must issue, suspend, revoke, modify, or deny permits to discharge sewage into state waters consistently with Board rules. Bitterrooters for Planning, Inc. v. Dept. of Environmental Quality, 2017 MT 222, 388 Mont. 453, 401 P.3d 712.

Part 3
Environmental Quality Council

Part Collateral References

A Council Member's Guide to the Environmental Quality Council, Montana Environmental Quality Council.

75-1-312. Hearings — council subpoena power — contempt proceedings.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

75-1-314. Reporting requirements.

Compiler's Comments

2021 Amendment: See 2021 Session Law for amendment made by sec. 98, Ch. 261, L. 2021. Amendment effective April 20, 2021.

Effective Date: Section 3, Ch. 38, L. 1997, provided: "[This act] is effective July 1, 1997."

75-1-323. Staff for environmental quality council.

Compiler's Comments

1995 Amendment: Chapter 545 substituted language outlining duties of the staff of the Environmental Quality Council for former language that read: "The executive director, subject to the approval of the council, may appoint whatever employees are necessary to carry out the provisions of parts 1 through 3, within the limitations of legislative appropriations." Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

75-1-324. Duties of environmental quality council.

Compiler's Comments

2015 Amendment: Chapter 122 in (10) at beginning inserted exception clause; and made minor changes in style. Amendment effective March 25, 2015.

Interim Study of Hunting and Fishing License Statutes and Fees: Chapter 395, L. 2013, required the environmental quality council to conduct a study of Montana's hunting and fishing license statutes and fees, prepare a final report, and prepare draft legislation. Chapter 395 was effective May 6, 2013, and terminates December 31, 2014.

Preamble: The preamble attached to Ch. 395, L. 2013, provided: "WHEREAS, the Montana Legislature establishes hunting and fishing license fees; and

WHEREAS, hunting and fishing license fees provide approximately $34 million annually to fund most of the operations of the department of fish, wildlife, and parks; and

WHEREAS, hunting and fishing license fees are historically set at a stable level for 8 to 10 years, when revenue exceeds expenses and creates a surplus in the general license account; and

WHEREAS, revenue from hunting and fishing licenses no longer matches expenses, and the general license account has declined since fiscal year 2010; and

WHEREAS, the last major adjustment to hunting and fishing license fees was in 2005; and

WHEREAS, reduced cost hunting and fishing licenses for certain population groups result in approximately $4 million less in general license account revenue; and

WHEREAS, the sale of hunting and fishing licenses has declined in recent years, most notably in 2011; and

WHEREAS, the general license account may be close to a critical point, and hunting and fishing license fee increases may be necessary to fund current operations."

2003 Amendment: Chapter 33 in (10) at end of introductory clause after "committee for the" inserted "following executive branch agencies and the entities attached to the agencies for administrative purposes". Amendment effective February 18, 2003.

2001 Amendment: Chapter 210 in (10) inserted "draft legislation review". Amendment effective April 6, 2001.

1999 Amendment: Chapter 19 inserted (10) requiring the environmental quality council to act as an interim committee with respect to certain state agencies; and made minor changes in style. Amendment effective February 17, 1999.

1995 Amendment: Chapter 545 in introductory clause substituted "The environmental quality council shall" for "It shall be the duty and function of the executive director and the staff to"; and made minor changes in style. Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

1993 Amendment: Chapter 349 deleted (10) that read: "(10) annually, beginning July 1, 1972, transmit to the governor and the legislature and make available to the general public an environmental quality report concerning the state of the environment, which shall contain:

(a) the status and condition of the major natural, manmade, or altered environmental classes of the state, including but not limited to the air, the aquatic (including surface water and ground water) and the terrestrial environments, including but not limited to the forest, dryland, wetland, range, urban, suburban, and rural environments;

(b) the adequacy of available natural resources for fulfilling human and economic requirements of the state in the light of expected population pressures;

(c) current and foreseeable trends in the quality, management, and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the state in the light of expected population pressures;

(d) a review of the programs and activities (including regulatory activities) of the state and local governments and nongovernmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development, and utilization of natural resources; and

(e) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation"; and made minor changes in style.

Law Review Articles

Of Crabbed Interpretations and Frustrated Mandates: The Effect of Environmental Policy Acts on Pre-Existing Agency Authority, Tobias & McLean, 41 Mont. L. Rev. 177, 237 (1980).

Part 10

Penalties, Fees, and Interest

Part Compiler's Comments

Saving Clause: Section 29, Ch. 487, L. 2005, was a saving clause.

Effective Date: Section 31, Ch. 487, L. 2005, provided that this part is effective January 1, 2006.

75-1-1001. Penalty factors.

Compiler's Comments

2021 Amendment: Chapter 324 in (5) substituted current text delegating rulemaking authority to the department of environmental quality for former text that read: "The board of environmental review and the department of environmental quality may, for the statutes listed in subsection (4) for which each has rulemaking authority, adopt rules to implement this section." Amendment effective July 1, 2021.

2017 Amendment: Chapter 320 in (4) inserted reference to Title 75, chapter 8. Amendment effective May 4, 2017.

Retroactive Applicability: Section 18, Ch. 320, L. 2017, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to a coal-fired generating unit retired on or after January 1, 2017."

Saving Clause: Section 15, Ch. 320, L. 2017, was a saving clause.

Severability: Section 16, Ch. 320, L. 2017, was a severability clause.

Part 11
Environmental Contingency Grant Program

75-1-1101. Environmental contingency account objectives.

Compiler's Comments

2021 Amendment: See 2021 Session Law for amendment made by sec. 99, Ch. 261, L. 2021. Amendment effective April 20, 2021.

2013 Amendment: Chapter 120 in (5) after "submit" inserted "to the legislative fiscal analyst" and inserted last sentence requiring report to be provided in electronic format. Amendment effective July 1, 2013.

2007 Amendment: Chapter 432 in (2) near beginning substituted "each fiscal year" for "each biennium" and at end after "fund" deleted "with the following exceptions:

(a) if at the beginning of any biennium the unobligated cash balance in the environmental contingency account equals or exceeds $750,000, allocation may not be made; and

(b) if at the beginning of any biennium the unobligated cash balance in the environmental contingency account is less than $750,000, then an amount less than or equal to the difference between the unobligated cash balance and $750,000, but not to exceed $175,000, must be allocated to the environmental contingency account from the interest income of the resource indemnity trust fund"; inserted (3)(b) relating to imminent natural resource restoration and remediation needs; in (3)(c)(ii) after "fire" inserted "suppression"; in (4) after "Interest" inserted "earned" and after "account" substituted "remains in the account" for "accrues to the general fund"; in (5) after "submit" substituted "to the legislative finance committee a complete annual financial report by September 15 following the end of the fiscal year" for "as a part of the information required by 17-7-111, a complete financial report"; and made minor changes in style. Amendment effective July 1, 2007, and terminates June 30, 2009.

1997 Amendments: Chapter 42 in (4) substituted "general fund" for "resource indemnity trust interest account"; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 444 at end of (4) substituted "general fund" for "resource indemnity trust interest account"; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 270 inserted (3)(d) regarding responses to emergencies caused by hazardous materials. Amendment effective March 28, 1995.

Code Commissioner Correction: The Code Commissioner substituted reference to renewable resource for reference to water development. Chapter 478, L. 1993, combined the water development and renewable resource development programs. The Code Commissioner has made the change to reflect changes made by Ch. 478. Authority for the change is found in sec. 84, Ch. 10, L. 1993.

1993 Amendment: Chapter 349 in (5), after "shall", substituted "submit, as a part of the information required by 17-7-111" for "as provided in 5-11-210, submit to the legislature"; and made minor changes in style.

1991 Amendment: Near beginning of (5) inserted reference to 5-11-210 and after "legislature" deleted "at the beginning of each regular session". Amendment effective March 20, 1991.

1987 Amendments: Chapter 370 near beginning of former (2) (now deleted) changed "subsection (5)" to "subsection (4)".

Chapter 418 substituted (2) relating to environmental contingency account exceptions for former (2) that read: "Except as provided in subsection (5), at the beginning of each fiscal year, 5% of the funds appropriated to the department of natural resources and conservation from the resource indemnity trust interest account, not to exceed $175,000 in fiscal year 1987, must be allocated to the environmental contingency account"; and deleted former (4) that read: "(4) The environmental contingency account may receive no additional allocation for any fiscal year in which the balance in the account exceeds $1,000,000 at the beginning of that fiscal year."

Severability: Section 19, Ch. 418, L. 1987, was a severability section.

Saving Clause: Section 20, Ch. 418, L. 1987, was a saving clause.

1986 Amendment: In (2) following "indemnity trust interest account" inserted "not to exceed $175,000 in fiscal year 1987".

CHAPTER 2
AIR QUALITY

Chapter Administrative Rules

Title 17, chapter 8, ARM Air quality.

Chapter Law Review Articles

The Effect of Federal Legislation on Historical State Powers of Pollution Control: Has Congress Muddied State Waters?, Renz, 43 Mont. L. Rev. 197 (1982).

Part 1
General Provisions and Administration

Part Compiler's Comments

Preamble: The preamble attached to Ch. 502, L. 1993, provided: "WHEREAS, pursuant to Subchapter V of the federal Clean Air Act, 42 U.S.C. 7661, et seq., the State of Montana may be authorized by the U.S. Environmental Protection Agency to administer an operating permit program applicable to certain sources of air pollutants; and

WHEREAS, if the state fails to obtain authorization for an operating permit program from the federal government under the federal Clean Air Act, the program will be administered within the state by the U.S. Environmental Protection Agency and the state will be subjected to sanctions, including the loss of federal air program funding or highway funding; and

WHEREAS, the Legislature believes that it is in the best interests of both the citizens and businesses of this state for the Department of Health and Environmental Sciences [now Department of Environmental Quality] to seek and obtain authorization from the federal government to administer an operating permit program pursuant to Subchapter V of the federal Clean Air Act; and

WHEREAS, to provide the Department of Health and Environmental Sciences [now Department of Environmental Quality] with the statutory authority necessary to obtain authorization under Subchapter V, numerous amendments and additions to the Clean Air Act of Montana are necessary and appropriate, including significant amendments to existing permitting, fee, and enforcement authority and the adoption of new provisions governing the operating permit program and relating to assistance for small businesses."

1993 Statement of Intent: The statement of intent attached to Ch. 502, L. 1993, provided: "A statement of intent is provided for this bill because it extends current rulemaking authority of the board of health and environmental sciences [now board of environmental review] to adopt rules implementing a program for the issuance and renewal of air quality operating permits by the department of health and environmental sciences [now department of environmental quality] and amends several sections of the Clean Air Act of Montana for which the board currently has rulemaking authority, including the authority to adopt air quality permit fees to be collected by the department of health and environmental sciences [now department of environmental quality].

Section 75-2-204 and [section 9] [75-2-217] provide the authority to the board and department to create and administer an operating permit program for those sources subject to Subchapter V of the federal Clean Air Act. It is the desire of the legislature that the program be applied only to those sources covered by the statutory requirements of Subchapter V and that the department allow for operational flexibility at those sources, including provisions for minor permit modifications and off-permit changes. The legislature does not intend the operating permit program administered by the department to serve as a basis for imposition of any additional emission limitations, monitoring or reporting requirements, or other substantive requirements upon sources within the state, except as required by Subchapter V and implementing regulations. It is also the intent of the legislature that the operating permit program administered by the department for those sources subject to Subchapter V of the federal Clean Air Act be consistent with the operating permit framework and guidelines outlined in Subchapter V and implementing federal regulations. The legislature further intends that the operating permit program authorized by this bill, when viewed as a whole, should not invariably be limited to the minimum federal requirements but also should not invariably impose the strictest optional alternatives allowable under Subchapter V and implementing federal regulations. These sections and the amendments contained in 75-2-103(2) are also intended to clarify the department's existing authority to implement the provisions of the federal Clean Air Act relating to hazardous air pollutants, 42 U.S.C. 7412, as those provisions relate to the requirements of Subchapter V.

Section 75-2-211 contains amendments that clarify the authority of the department to continue to administer the air quality permitting program relating to the construction, installation, alteration, or use of air pollutant sources. It is the desire of the legislature that the department continue this permitting program in conjunction with the operating permit program under [sections 9 through 11] [75-2-217 through 75-2-219]. The clarifying amendments contained in this bill are not intended to expand the current authority of the department to administer an air quality permitting program relating to construction, installation, alteration, or use. This authority is currently used for conducting various state air quality permitting programs, as well as for operating federal permitting programs relating to prevention of significant deterioration and nonattainment, all of which are part of the state implementation plan for protecting air quality. In addition to these programs, the legislature intends that 75-2-211 serve as the authority needed to meet the requirements of the federal Clean Air Act relating to the construction, reconstruction, and modification of sources of hazardous air pollutants, 42 U.S.C. 7412.

[Section 12] [75-2-220] contains the department's existing authority to assess application and annual fees for permits issued under the Clean Air Act of Montana, Title 75, chapter 2. The placement of this authority in a separate section of the code emphasizes its general applicability to all permitting activities under that chapter. [Section 12(1), (2), and (3)] [75-2-220(1), (2), and (3)] contain amendments to the existing fee authority to ensure that the department will be able to collect fees sufficient to meet the requirements of Subchapter V of the federal Clean Air Act. [Section 12(5)] [75-2-220(5)] is intended to provide the department with an alternative to civil enforcement in addressing the delinquent payment of fees."

Severability: Section 22, Ch. 502, L. 1993, was a severability clause.

Part Administrative Rules

ARM 17.8.101 Definitions.

75-2-101. Short title.

Compiler's Comments

1997 Amendment: Chapter 42 at beginning substituted "Parts 1 through 4 of this chapter" for "This chapter"; and made minor changes in style. Amendment effective March 12, 1997.

75-2-102. Intent — policy and purpose.

Compiler's Comments

2003 Amendment: Chapter 361 inserted (1) relating to constitutional obligations and legislative intent; in (2) inserted last sentence relating to the balance of policies; and made minor changes in style. Amendment effective April 16, 2003.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75,

chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Severability: Section 39, Ch. 361, L. 2003, was a severability clause.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

Law Review Articles

Symposium—The Montana Constitution: Taking New Rights Seriously, Part I, Environmental Rights, 39 Mont. L. Rev. 221 (1978).

75-2-103. Definitions.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 142, L. 2023. Amendment effective April 18, 2023.

Saving Clause: Section 4, Ch. 142, L. 2023, was a saving clause.

2021 Amendments — Composite Section: Chapter 409 in definition of energy development project deleted former (b) that read: "(b) The term does not include a nuclear facility as defined in 75-20-1202"; and made minor changes in style. Amendment effective May 7, 2021.

Chapter 503 in definition of energy development project deleted former (a)(vi) that read: "(vi) producing biodiesel and that are eligible for a tax incentive for the production of biodiesel pursuant to 15-32-701"; and made minor changes in style. Amendment effective January 1, 2022.

Effective Date — Applicability: Section 69, Ch. 503, L. 2021, provided: "(1) Except as provided in subsection (2), [this act] is effective January 1, 2024, and applies to income tax years beginning after December 31, 2023.

(2) [Sections 14, 31, 32, 54, 59 through 64, 66, 68, and 69] [15-30-2303, 15-32-104, 15-32-106, 50-51-114, 70-9-803, 75-2-103, 75-5-103, 87-2-102, and 87-2-105] and this section are effective January 1, 2022, and apply to income tax years beginning after December 31, 2021."

Severability: Section 68, Ch. 503, L. 2021, was a severability clause.

2019 Amendment: Chapter 3 in definition of oil or gas well facility in (b) substituted "subsection (14)(a)" for "subsection (15)(a)". Amendment effective October 1, 2019.

2013 Amendment: Chapter 417 deleted definition that read ""Advisory council" means the air pollution control advisory council provided for in 2-15-2106"; and made minor changes in style. Amendment effective May 6, 2013.

2009 Amendment: Chapter 445 inserted definitions of associated supporting infrastructure and energy development project; and made minor changes in style. Amendment effective May 5, 2009.

Severability: Section 10, Ch. 445, L. 2009, was a severability clause.

Applicability: Section 12, Ch. 445, L. 2009, provided: "[This act] applies to judicial and board of environmental review hearing and appeal proceedings initiated on or after [the effective date of this act]." Effective May 5, 2009.

2005 Amendment: Chapter 236 inserted definition of oil or gas well facility; and made minor changes in style. Amendment effective January 1, 2006.

1995 Amendments — Composite Section: Chapter 418 in definition of Board substituted "board of environmental review provided for in 2-15-3502" for "board of health and environmental sciences provided for in 2-15-2104"; in definition of Department substituted "department of environmental quality provided for in 2-15-3501" for "department of health and environmental sciences provided for in Title 2, chapter 15, part 21"; in definition of solid waste, in (b), substituted "department of environmental quality" for "department of state lands", with regard to reclamation, and substituted "department of natural resources and conservation" for "department of state lands", with regard to forest debris; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 deleted definition of Board that read: ""Board" means the board of health and environmental sciences provided for in 2-15-2104"; pursuant to sec. 568, Ch. 546, L. 1995, a coordination section, in definition of Department the Code Commissioner substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Because Ch. 418 inserted a reference to the Board of Environmental Review and Ch. 546 deleted a reference to the Board of Health and Environmental Sciences, the codifier has reflected both the insertion and the deletion.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendments — Composite Section: Chapter 129 inserted definitions of hazardous waste, incinerator, and solid waste; and made minor changes in style. Amendment effective March 19, 1993.

Chapter 502 inserted definition of air pollutants; in definition of air pollution, after "presence", substituted "of air pollutants" for "in the outdoor atmosphere of one or more air contaminants"; in definition of person, before "subdivision", inserted "the state or a" and after "estate" inserted "an interstate body, the federal government or an agency of the federal government"; inserted definition of small business stationary source; and made minor changes in style. Amendment effective April 24, 1993.

Chapter 639 inserted definitions of commercial hazardous waste incinerator, environmental protection law, hazardous waste, incinerator, medical waste, and principal. Amendment effective May 13, 1993.

The definition of hazardous waste contained in Ch. 129 differed from the definition contained in Ch. 639. The definition in Ch. 639 was broader, so the codifier codified the broader definition. The definition of incinerator in Ch. 129 was identical to the definition in Ch. 639.

1993 Statement of Intent: The statement of intent attached to Ch. 129, L. 1993, provided: "It is the intent of the legislature that the statutory size cutoff for incinerators that burn 200 pounds or less per hour, as provided for in 75-2-215, be eliminated and that the requirements of 75-2-215 be extended to boilers and industrial furnaces. As a result, the requirements of 75-2-215 would apply to all incinerators and all boilers and industrial furnaces subject to 75-10-406, regardless of size. In order to lessen the burden on the department of health and environmental sciences [now department of environmental quality], the board of health and environmental sciences [now board of environmental review] may provide by rule for general permits that apply to classes or categories of sources subject to the requirements of 75-2-215. The board shall use this authority to the greatest extent possible, consistent with its obligation to protect public health and the environment.

It is also the intent of the legislature to clarify the provisions of 75-2-215 by amending the definitions in 75-2-103. The definition of incinerator contains no reference to end use or economic value of the feed, but rather focuses on the process employed. The definition of solid waste is intended to be more encompassing than the use of that definition elsewhere in Title 75, and the reference to "marketable byproducts" contained in other definitions is intentionally omitted. The overriding purpose of this bill is to protect air quality, public health, and the physical environment, and the legislature does not believe it appropriate to draw distinctions in applicability based upon whether or not the incineration activity is, for example, associated with waste disposal or volume reduction in conjunction with recycling."

Severability: Section 3, Ch. 129, L. 1993, was a severability clause.

Section 8, Ch. 639, L. 1993, was a severability clause.

Retroactive Applicability: Section 9, Ch. 639, L. 1993, provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to all commercial medical waste incinerators that have applied for but have not received by [the effective date of this act] [effective May 13, 1993] a permit under Title 75, chapter 2, and a license under 75-10-221.

(2) [This act] applies retroactively, within the meaning of 1-2-109, to all commercial hazardous waste incinerators that have applied for but not received by [the effective date of this act] [effective May 13, 1993] a permit under Title 75, chapter 2, and a permit under 75-10-406."

Case Notes

Failure to Allow Amendment of Affidavit Contesting Air Quality Permit — Prejudice to Substantial Rights Warranting Reversal: Plaintiffs moved to amend an affidavit contesting the issuance of an air quality permit. The Board of Environmental Review denied the motion and the District Court affirmed the Board's decision. On appeal, the Supreme Court reversed. Former Rule 15(c), M.R.Civ.P. (now superseded), did not prevent plaintiffs from amending the affidavit, and the error prevented plaintiffs from raising potentially meritorious claims, which prejudiced plaintiffs' substantial rights and warranted reversal under the Montana Administrative Procedure Act. Additionally, 75-2-211(10) did not bar amendment of the original affidavit. The Supreme Court noted that it would make little sense and would not foster resolution of contested cases on the merits to foreclose the possibility of amendments before significant discovery occurred. Citizens Awareness Network v. Bd. of Envtl. Review, 2010 MT 10, 355 Mont. 60, 227 P.3d 583.

75-2-104. Limitations — personal cause of action unabridged — venue.

Compiler's Comments

2009 Amendment: Chapter 416 inserted (4) requiring that a judicial action for an equine slaughter or processing facility must comply with 81-9-240 and 81-9-241. Amendment effective October 1, 2009.

2005 Amendment: Chapter 337 in (2) near middle of second sentence after "determined" substituted "by the court" for "under 75-1-203". Amendment effective April 21, 2005.

Applicability: Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

2003 Amendment: Chapter 361 inserted (2) relating to a judicial challenge; inserted (3) relating to venue; and made minor changes in style. Amendment effective April 16, 2003.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Severability: Section 39, Ch. 361, L. 2003, was a severability clause.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

Case Notes

Common-Law Rights of United States Not Preempted: The United States is not precluded by the state and federal clean air acts from maintaining an action for damages and for injunctive relief to protect its property from pollutants. There is no intent in the federal Clean Air Act to abolish common-law rights of the United States. U.S. v. Atlantic-Richfield Co., 478 F. Supp. 1215, 36 St. Rep. 1983 (D.C. Mont. 1979). (But see contrary decision on similar issue with respect to regulation of water quality in City of Milwaukee v. Illinois, 451 US 304 (1981), and 61 ALR Fed. 859.)

Federal Clean Air Act — Preconstruction Review: In an action to enjoin the Environmental Protection Agency (EPA) from mandating preconstruction review of electrical power facility, the U.S. District Court discussed many of the major issues involved in this type of case and found that the power companies (plaintiffs) were exempt from such review. Mont. Power Co. v. Environmental Protection Agency, 429 F. Supp. 683, 34 St. Rep. 30 (D.C. Mont 1977).

Law Review Articles

Attorney Fees: Slipping From the American Rule Strait Jacket, 40 Mont. L. Rev. 308 (1979).

75-2-105. Confidentiality of records.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) in middle of first and fifth sentences and in (2) near beginning before "department" deleted "board or". Amendment effective July 1, 2021.

1993 Amendment: Chapter 502 in two places in (1), after "air", substituted "pollutant" for "contaminant" and in last sentence, after "data", inserted "and operating permits issued by the department pursuant to 75-2-217 through 75-2-219"; and made minor changes in style.

Effective Dates: Section 24(2), Ch. 502, L. 1993, provided that 75-2-105, 75-2-204, 75-2-211, 75-2-217 through 75-2-220, subsections (1) and (3) of 75-2-221, 75-2-301, 75-2-401, 75-2-412, 75-2-413, and 75-2-421 are effective October 1, 1993, but that the Board and Department may adopt rules under these sections upon passage and approval. Approved April 24, 1993. Rules adopted to implement these sections may not be effective before October 1, 1993.

75-2-106. Small business compliance assistance advisory council — duties — secretary — meetings.

Compiler's Comments

Effective Date: Section 24(1), Ch. 502, L. 1993, provided that this section is effective on passage and approval. Approved April 24, 1993.

75-2-107. Small business stationary source technical and environmental compliance assistance program — duties.

Compiler's Comments

Effective Date: Section 24(1), Ch. 502, L. 1993, provided that this section is effective on passage and approval. Approved April 24, 1993.

75-2-108. Small business stationary sources — exceptions — waivers.

Compiler's Comments

Effective Date: Section 24(1), Ch. 502, L. 1993, provided that this section is effective on passage and approval. Approved April 24, 1993.

75-2-109. Small business stationary source representative — duties.

Compiler's Comments

2001 Amendment: Chapter 491 in (1) near middle after "is not located in" substituted "a regulatory program of the department and not subject to direct supervision by a regulatory program of the department" for "the department or subject to the direct supervision of the department"; and inserted (3) regarding use of information obtained from small business stationary source representative. Amendment effective May 1, 2001.

Effective Date: Section 24(1), Ch. 502, L. 1993, provided that this section is effective on passage and approval. Approved April 24, 1993.

75-2-111. Powers of board.

Compiler's Comments

2021 Amendment: Chapter 324 deleted former (1) (see 2021 Session Law for former text); deleted former (4) that read: "(4) by rule require access to records relating to emissions"; deleted former (5) that read: "(5) by rule adopt a schedule of fees required for permits, permit applications, and registrations consistent with this chapter"; and made minor changes in style. Amendment effective July 1, 2021.

2011 Amendment: Chapter 94 inserted (1)(c) regarding forestry equipment; and made minor changes in style. Amendment effective March 30, 2011.

2009 Amendment: Chapter 2 in (1)(a) at end and in (1)(b) at end substituted "7661a" for "7661". Amendment effective October 1, 2009.

2007 Amendment: Chapter 256 in (1) at end inserted exception clause; inserted (1)(a) relating to agricultural activity or equipment; and inserted (1)(b) concerning commercial operations. Amendment effective April 26, 2007.

2003 Amendment: Chapter 231 in (5) after "applications" inserted "and registrations"; and made minor changes in style. Amendment effective April 4, 2003.

Severability: Section 9, Ch. 231, L. 2003, was a severability clause.

1995 Amendment: Chapter 471 in introductory clause inserted "subject to the provisions of 75-2-207"; and made minor changes in style. Amendment effective April 14, 1995.

Applicability: Section 22(3), Ch. 471, L. 1995, provided: "(3) [This act] does not apply to the establishment of fees or public participation requirements."

1991 Amendment: In (5) inserted "and permit applications, consistent with"; and made minor change in style.

1991 Statement of Intent: The statement of intent attached to Ch. 652, L. 1991, provided: "A statement of intent is required for this bill because [section 1] [75-2-111] requires the board of health and environmental sciences [now board of environmental review] to adopt by rule fees for air quality permit applications. The purpose of this bill is to allow the collection of an ongoing annual fee to cover the costs associated with the development and administration, including implementation and enforcement, of an air quality permitting program. While there is a need for a fee system to cover these costs, it is not the legislature's intent that these fees be used to recover other costs not delineated in this bill. The legislature recognizes that the identification of actual costs associated with specific permits and permitting activities may be difficult and envisions that a fee schedule may be established with generic applicability. This may result in fees for classes of sources according to the type or amount of emissions or the type of source. For example, it may be determined that the costs associated with the development and administration of a permitting program vary directly with the amount or type of regulated pollutants emitted. In such a case, a fee based upon the tons of a regulated pollutant emitted may be appropriate. The board's rules defining the fee structure to be used by the department shall ensure that the fees charged will not collect, in the aggregate, more than is authorized and appropriated by the legislature to the department for the development and administration of the permitting program.

This bill also clarifies the authority of the department of health and environmental sciences [now department of environmental quality] to issue an operating permit for air contaminant sources. It is the legislature's intent that all air contaminant sources operating within the state obtain an operating permit, including those sources that are "grandfathered" under current air quality regulations. Reasonable exemptions from this requirement may be approved by the board and implemented based upon the size or nature of the source or its emissions.

For sources of air contaminants that are subject to Title V of the federal Clean Air Act, 42 U.S.C. 7401, et seq., as amended, the board may provide for the expiration and renewal of permits issued to those sources, as necessary to meet the requirements of Title V. To provide for the orderly transition to Title V permits for both current permitholders and grandfathered sources, the board shall establish a transition schedule. The transition schedule may not specify dates for obtaining Title V permits that are earlier than the times contained in the Act.

This bill also allows for the assessment of those fees necessary to fund activities of the department that are intended to address specific air quality problems in the state if the legislature authorizes the activities and appropriates the funds for the activities. For example, it may be necessary to conduct additional ambient monitoring in a particular geographic area in order to determine the compliance status of that area with applicable ambient air quality standards. The legislature intends that this provision be used only to fund those activities that examine specific problems in particular geographic areas. The assessments for funding should be levied in an equitable fashion and only upon those sources whose emissions are both of the type being focused upon and thought to impact the geographic area."

Effective Date — Rulemaking Authority: Section 4(1), Ch. 652, L. 1991, provided: "(1) [Section 1 [75-2-111], subsections (1) and (3) through (16) of section 2 [75-2-211], section 3, and this section] are effective October 1, 1991, but the department may proceed with the rulemaking process under Title 2, chapter 4, prior to that date. The effective date of any rule adopted to implement those parts of [this act] may be effective no earlier than October 1, 1991."

Statement of Intent: The statement of intent attached to HB 716 (Ch. 560, L. 1979) provided: "The Legislature intends to grant to the Board of Health and Environmental Sciences [now Board of Environmental Review] rulemaking authority to adopt a permit fee schedule, and to adopt a schedule of penalty assessments for noncompliance with respect to any source under sections 7 through 15 of this act."

Administrative Rules

Title 17, chapter 4, subchapter 5, ARM Major Facility Siting Act.

Title 17, chapter 8, ARM Air quality.

Case Notes

Failure to Allow Amendment of Affidavit Contesting Air Quality Permit — Prejudice to Substantial Rights Warranting Reversal: Plaintiffs moved to amend an affidavit contesting the issuance of an air quality permit. The Board of Environmental Review denied the motion and the District Court affirmed the Board's decision. On appeal, the Supreme Court reversed. Former Rule 15(c), M.R.Civ.P. (now superseded), did not prevent plaintiffs from amending the affidavit, and the error prevented plaintiffs from raising potentially meritorious claims, which prejudiced plaintiffs' substantial rights and warranted reversal under the Montana Administrative Procedure Act. Additionally, 75-2-211(10) did not bar amendment of the original affidavit. The Supreme Court noted that it would make little sense and would not foster resolution of contested cases on the merits to foreclose the possibility of amendments before significant discovery occurred. Citizens Awareness Network v. Bd. of Envtl. Review, 2010 MT 10, 355 Mont. 60, 227 P.3d 583.

Challenge of Environmental Assessment — No Jurisdiction for Administrative Review: A grain company sought a permit to build a high-speed grain loading terminal near Pompeys Pillar national monument. The permit was granted and plaintiff, a nonprofit association supporting the monument's preservation, began administrative proceedings in an effort to overturn the permit issuance on grounds that the Department of Environmental Quality erred in its preparation of the environmental assessment related to the permit. An administrative law judge concluded that the Department acted arbitrarily and capriciously by issuing a permit without preparing an environmental impact statement. The Department filed exceptions to the administrative law judge's conclusions with the Board of Environmental Review. The Board ultimately affirmed the Department's decision to issue the permit, and plaintiff appealed to District Court. The Department contended that because the challenge to the administrative decisions did not contain any air quality issues, but only addressed environmental assessment issues governed by the Montana Environmental Policy Act (MEPA), and that because MEPA does not provide for administrative review of challenges to MEPA compliance, the administrative law judge and the Board did not have jurisdiction to preside over the appeal, nor did the District Court have jurisdiction to review the administrative proceedings. The District Court agreed and dismissed plaintiff's petition for lack of subject matter jurisdiction. Plaintiff appealed, but the Supreme Court affirmed. Had plaintiff challenged air quality issues, it would have been entitled to administrative proceedings. However, plaintiff's challenge pertained only to issues related to the environmental assessment, which is governed by MEPA. MEPA requires that a compliance challenge be brought in District Court, rather than through administrative proceedings. Thus, the administrative law judge and the Board did not have jurisdiction to preside over the appeal, nor did the District Court have jurisdiction to review the administrative proceedings. Plaintiff's petition was properly dismissed. Pompeys Pillar Historical Ass'n v. Dept. of Environmental Quality, 2002 MT 352, 313 M 401, 61 P3d 148 (2002).

Standing of Local Air Pollution Control Board to Challenge Validity of State Administrative Rules: A local pollution control board is a person within the statutory definition in 2-4-102, and in the same way as a citizen of a local area is more particularly affected by actions of the state Board of Environmental Review than is a citizen of another area, the interest of a local board is distinguishable from and greater than the interest of the public generally. Because of threatened injury to a local board in the form of potential economic harm from additional expenses necessary to implement state administrative rules, a local board has standing to challenge the validity of administrative rules concerning air pollution applicable within its area of jurisdiction. Missoula City-County Air Pollution Control Bd. v. Bd. of Envtl. Review, 282 M 255, 937 P2d 463, 54 St. Rep. 338 (1997), followed in Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236, 56 St. Rep. 964 (1999).

Rulemaking Authority as to Open Burning: The authority granted in this section includes rulemaking authority to regulate and require permits for open burning. State ex rel. Dept. of Health & Environmental Sciences v. Lincoln County, 178 M 410, 584 P2d 1293, 35 St. Rep. 1402 (1978).

Attorney General's Opinions

Garbage Removal — Burning — Constitutional Law: A city may provide tax-supported garbage-hauling services. The service in Kalispell came under the Department of Health and Environmental Sciences (now Department of Environmental Quality) rules which also provide that the geographical area covered by a private hauler or tax-supported service is within the area where open burning is prohibited. Neither due process nor equal protection is violated by a prohibition of open burning in some areas when the object and tendency of the prohibiting legislation or a rule adopted thereunder is promotion of public health. 38 A.G. Op. 30 (1979).

75-2-112. Powers and responsibilities of department.

Compiler's Comments

2021 Amendment: Chapter 324 inserted (2) providing department duties involving rulemaking and issuance of orders; in (3)(a) near end before "the board" inserted "the department or"; and made minor changes in style. Amendment effective July 1, 2021.

Part 2
Standards, Permits, and Variances

Part Compiler's Comments

1997 Repeal of "Hannah Amendment" — 1987 Ambient Air Quality Standards for Sulfur Dioxide Repealed: In sec. 1, Ch. 504, L. 1987, the 1987 Legislature amended ARM 16.8.820 (renumbered ARM 17.8.210) by adopting the federal annual average and 24-hour average standards for ambient air quality for sulfur dioxide in Yellowstone County. The 1987 act, known as the "Hannah Amendment", was repealed by sec. 1, Ch. 33, L. 1997. The effect of the 1997 repeal was to return sulfur dioxide ambient air quality standards to the pre-1987 state annual average and 24-hour average standards.

Preamble: The preamble attached to Ch. 502, L. 1993, provided: "WHEREAS, pursuant to Subchapter V of the federal Clean Air Act, 42 U.S.C. 7661, et seq., the State of Montana may be authorized by the U.S. Environmental Protection Agency to administer an operating permit program applicable to certain sources of air pollutants; and

WHEREAS, if the state fails to obtain authorization for an operating permit program from the federal government under the federal Clean Air Act, the program will be administered within the state by the U.S. Environmental Protection Agency and the state will be subjected to sanctions, including the loss of federal air program funding or highway funding; and

WHEREAS, the Legislature believes that it is in the best interests of both the citizens and businesses of this state for the Department of Health and Environmental Sciences [now Department of Environmental Quality] to seek and obtain authorization from the federal government to administer an operating permit program pursuant to Subchapter V of the federal Clean Air Act; and

WHEREAS, to provide the Department of Health and Environmental Sciences [now Department of Environmental Quality] with the statutory authority necessary to obtain authorization under Subchapter V, numerous amendments and additions to the Clean Air Act of Montana are necessary and appropriate, including significant amendments to existing permitting, fee, and enforcement authority and the adoption of new provisions governing the operating permit program and relating to assistance for small businesses."

1993 Statement of Intent: The statement of intent attached to Ch. 502, L. 1993, provided: "A statement of intent is provided for this bill because it extends current rulemaking authority of the board of health and environmental sciences [now board of environmental review] to adopt rules implementing a program for the issuance and renewal of air quality operating permits by the department of health and environmental sciences [now department of environmental quality] and amends several sections of the Clean Air Act of Montana for which the board currently has rulemaking authority, including the authority to adopt air quality permit fees to be collected by the department of health and environmental sciences [now department of environmental quality].

Section 75-2-204 and [section 9] [75-2-217] provide the authority to the board and department to create and administer an operating permit program for those sources subject to Subchapter V of the federal Clean Air Act. It is the desire of the legislature that the program be applied only to those sources covered by the statutory requirements of Subchapter V and that the department allow for operational flexibility at those sources, including provisions for minor permit modifications and off-permit changes. The legislature does not intend the operating permit program administered by the department to serve as a basis for imposition of any additional emission limitations, monitoring or reporting requirements, or other substantive requirements upon sources within the state, except as required by Subchapter V and implementing regulations. It is also the intent of the legislature that the operating permit program administered by the department for those sources subject to Subchapter V of the federal Clean Air Act be consistent with the operating permit framework and guidelines outlined in Subchapter V and implementing federal regulations. The legislature further intends that the operating permit program authorized by this bill, when viewed as a whole, should not invariably be limited to the minimum federal requirements but also should not invariably impose the strictest optional alternatives allowable under Subchapter V and implementing federal regulations. These sections and the amendments contained in 75-2-103(2) are also intended to clarify the department's existing authority to implement the provisions of the federal Clean Air Act relating to hazardous air pollutants, 42 U.S.C. 7412, as those provisions relate to the requirements of Subchapter V.

Section 75-2-211 contains amendments that clarify the authority of the department to continue to administer the air quality permitting program relating to the construction, installation, alteration, or use of air pollutant sources. It is the desire of the legislature that the department continue this permitting program in conjunction with the operating permit program under [sections 9 through 11] [75-2-217 through 75-2-219]. The clarifying amendments contained in this bill are not intended to expand the current authority of the department to administer an air quality permitting program relating to construction, installation, alteration, or use. This authority is currently used for conducting various state air quality permitting programs, as well as for operating federal permitting programs relating to prevention of significant deterioration and nonattainment, all of which are part of the state implementation plan for protecting air quality. In addition to these programs, the legislature intends that 75-2-211 serve as the authority needed to meet the requirements of the federal Clean Air Act relating to the construction, reconstruction, and modification of sources of hazardous air pollutants, 42 U.S.C. 7412.

[Section 12] [75-2-220] contains the department's existing authority to assess application and annual fees for permits issued under the Clean Air Act of Montana, Title 75, chapter 2. The placement of this authority in a separate section of the code emphasizes its general applicability to all permitting activities under that chapter. [Section 12(1), (2), and (3)] [75-2-220(1), (2), and (3)] contain amendments to the existing fee authority to ensure that the department will be able to collect fees sufficient to meet the requirements of Subchapter V of the federal Clean Air Act. [Section 12(5)] [75-2-220(5)] is intended to provide the department with an alternative to civil enforcement in addressing the delinquent payment of fees."

Severability: Section 22, Ch. 502, L. 1993, was a severability clause.

Part Administrative Rules

Title 17, chapter 8, ARM Air quality.

ARM 17.8.132 Credible evidence.

Part Collateral References

Permitting in Montana, Department of Environmental Quality, Montana Environmental Quality Council (2012).

75-2-201. Classifying and reporting air contaminant sources.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) near beginning of first sentence and in (2) near middle after "rules of the" substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 2021.

75-2-202. Department to set ambient air quality standards.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 2021.

1981 Amendment: Added (2) requiring the establishment of ambient air quality standards for fluorides.

Statement of Intent: The statement of intent attached to HB 642 (Ch. 565, L. 1981) provided: "The intent of HB 642 is to amend Section 75-2-202 of the Montana Clean Air Act in order to limit the authority of the Board of Health and Environmental Sciences [now Board of Environmental Review] to set standards regulating fluoride pollution.

HB 642 requires that an air quality standard be established for fluoride but that any such standard shall be established only in terms of concentrations of fluorides in forage grasses, hay, and silage.

By confining the fluoride standard to concentration in forage grasses, hay, and silage, the bill prevents the Board of Health and Environmental Sciences [now Board of Environmental Review] from adopting an air quality standard governing fluoride in its gaseous state (HF)."

Administrative Rules

Title 17, chapter 8, subchapter 2, ARM Ambient air quality.

Title 17, chapter 8, subchapter 8, ARM Prevention of significant deterioration of air quality.

75-2-203. Department to set emission levels.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) at beginning of first sentence, in (2) in middle, in (3) at beginning, and in (4) in middle substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 2021.

Legislative Repeal of Administrative Rule: In 1981, prior to the amendment of 2-4-412 (Ch. 164, L. 1983) the Legislature, in HJR 22, repealed Rule 16.8.1420 ARM, a rule promulgated pursuant to this section. HJR 22 read as follows: "WHEREAS, subsection (4) of section 75-2-203, MCA, allows the Board of Health and Environmental Sciences [now Board of Environmental Review] to adopt emission standards more stringent than federal emission standards only if the stricter state standards are "necessary in some localities in this state"; and

WHEREAS, in 1970 the Board of Health and Environmental Sciences [now Board of Environmental Review] adopted emission standards limiting fluoride and particulate emissions from existing primary aluminum reduction plants, which standards are designated as Rule 16.8.1420 of the Administrative Rules of Montana; and

WHEREAS, in 1976 the Board of Health and Environmental Sciences [now Board of Environmental Review] adopted as state standards the federal new source performance standards limiting fluoride and particulate emissions from new primary aluminum reduction plants, which standards are designated as Rule 16.8.1423 of the Administrative Rules of Montana; and

WHEREAS, the state standards adopted prior to the state's adoption of the federal standards are more restrictive than the federal standards adopted by the state; and

WHEREAS, the more stringent state standards tend to limit the expansion and economic growth of the affected industry by requiring additional expenditures for control equipment that are unnecessary in that the federal standards are designed to protect human health and welfare; and

WHEREAS, because both standards are state standards, the state has now adopted two different emission standards for particulate and fluoride emissions for new and existing primary aluminum reduction plants.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That the state standards limiting the fluoride and particulate emissions from existing primary aluminum reduction plants and designated as Rule 16.8.1420 of the Administrative Rules of Montana are repealed.

BE IT FURTHER RESOLVED, that the Board of Health and Environmental Sciences [now Board of Environmental Review] is directed to proceed within 30 days to promulgate new standards. The Board shall adopt the terms and provisions of the federal new source performance standards for fluoride and particulate emissions from primary existing aluminum reduction plants as its standard for all primary aluminum reduction plants in this state." House Joint Resolution 22 was approved March 25, 1981.

Administrative Rules

ARM 17.8.105 Testing requirements.

ARM 17.8.106 Source testing protocol.

ARM 17.8.110 Malfunctions.

ARM 17.8.111 Circumvention.

Title 17, chapter 8, subchapter 3, ARM Emission standards.

ARM 17.8.330 through 17.8.333 Emission standards for existing aluminum plants.

Title 17, chapter 8, subchapter 4, ARM Stack heights and dispersion techniques.

Title 17, chapter 8, subchapter 6, ARM Open burning.

Title 17, chapter 8, subchapter 8, ARM Prevention of significant deterioration of air quality.

Title 17, chapter 8, subchapter 9, ARM Permit requirements for major stationary sources or major modifications locating within nonattainment areas.

Title 17, chapter 8, subchapter 10, ARM Preconstruction permit requirements for major stationary sources or major modifications locating within attainment or unclassified areas.

Title 17, chapter 8, subchapter 11, ARM Visibility impact assessment.

Title 17, chapter 8, subchapter 12, ARM Operating permit program.

Case Notes

Delegation of Authority — Constitutional: Although 75-2-203 and 75-2-211 grant broad powers to the Board of Health and Environmental Sciences (now Board of Environmental Review), this delegation is not unconstitutional. Air pollution control is an emerging field for which detailed and precise standards have not been fully developed, and the authority granted must necessarily be phrased broadly. State ex rel. Dept. of Health & Environmental Sciences v. Lincoln County, 178 M 410, 584 P2d 1293, 35 St. Rep. 1402 (1978).

75-2-204. Rules relating to construction, installation, alteration, operation, or use.

Compiler's Comments

2021 Amendment: Chapter 324 near beginning substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 2021.

2003 Amendment: Chapter 231 at end after "part" inserted "or has registered the source of air contaminants with the department if the source is in a category for which only registration is required by the rules adopted to implement this part"; and made minor changes in style. Amendment effective April 4, 2003.

Severability: Section 9, Ch. 231, L. 2003, was a severability clause.

1993 Amendment: Chapter 502 near beginning, after "alteration", inserted "operation" and at end inserted "under this part"; and made minor changes in style.

Effective Dates: Section 24(2), Ch. 502, L. 1993, provided that 75-2-105, 75-2-204, 75-2-211, 75-2-217 through 75-2-220, subsections (1) and (3) of 75-2-221, 75-2-301, 75-2-401, 75-2-412, 75-2-413, and 75-2-421 are effective October 1, 1993, but that the Board and Department may adopt rules under these sections upon passage and approval. Approved April 24, 1993. Rules adopted to implement these sections may not be effective before October 1, 1993.

Administrative Rules

Title 17, chapter 8, subchapter 7, ARM Permit, construction, and operation of air contaminant sources.

Title 17, chapter 8, subchapter 8, ARM Prevention of significant deterioration of air quality.

Title 17, chapter 8, subchapter 9, ARM Permit requirements for major stationary sources or major modifications locating within nonattainment areas.

Title 17, chapter 8, subchapter 10, ARM Preconstruction permit requirements for major stationary sources or major modifications located within attainment or unclassified areas.

Title 17, chapter 8, subchapter 11, ARM Visibility impact assessment.

Case Notes

Writ of Mandate Improper: Since the Legislature gave the Department of Health and Environmental Sciences (now Department of Environmental Quality) a discretionary duty under this section to control air pollution rather than a ministerial duty, a Writ of Mandate cannot properly be issued against the Department under this section. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147, 36 St. Rep. 1820 (1979).

75-2-206. Study of effects of sulfur dioxide on health and environment.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) in middle of first sentence and in (2) in middle substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 2021.

75-2-207. State regulations no more stringent than federal regulations or guidelines — exceptions — procedure.

Compiler's Comments

2021 Amendment: Chapter 324 throughout section in 13 places substituted references to department for references to board or department; and made minor changes in style. Amendment effective July 1, 2021.

2001 Amendment: Chapter 536 in (2)(a) near beginning after "only if" substituted remainder of (2)(a) through (2)(c) prohibiting the board of environmental review from approving or adopting rules that are more stringent than those imposed by the federal government unless certain requirements are met and providing for review of rules that may be more stringent than federal requirements for remainder of former (2) through (4) that read: "the board or department makes a written finding after a public hearing and public comment and based on evidence in the record that:

(a) the proposed state standard or requirement protects public health or the environment of the state; and

(b) the state standard or requirement to be imposed can mitigate harm to the public health or environment and is achievable under current technology.

(3) The written finding must reference information and peer-reviewed scientific studies contained in the record that forms the basis for the board's or department's conclusion. The written finding must also include information from the hearing record regarding the costs to the regulated community that are directly attributable to the proposed state standard or requirement.

(4) (a) A person affected by a rule of the board or department adopted after January 1, 1990, and before April 14, 1995, that that person believes to be more stringent than comparable federal regulations or guidelines may petition the board or department to review the rule. If the board or department determines that the rule is more stringent than comparable federal regulations or guidelines, the board or department shall comply with this section by either revising the rule to conform to the federal regulations or guidelines or by making the written finding, as provided under subsection (2), within a reasonable period of time, not to exceed 12 months after receiving the petition. A petition under this section does not relieve the petitioner of the duty to comply with the challenged rule. The board or department may charge a petition filing fee in an amount not to exceed $250.

(b) A person may also petition the board or department for a rule review under subsection (4)(a) if the board or department adopts a rule after January 1, 1990, in an area in which no federal regulations or guidelines existed and the federal government subsequently establishes comparable regulations or guidelines that are less stringent than the previously adopted board or department rule"; and made minor changes in style. Amendment effective May 1, 2001.

Preamble: The preamble attached to Ch. 471, L. 1995, provided: "WHEREAS, the federal government frequently regulates areas that are also subject to state regulation; and

WHEREAS, differing state and federal policy goals and unique state prerogatives frequently result in different levels of regulation, different standards, and different requirements being imposed by state and federal programs covering the same subject matter; and

WHEREAS, Montana must simultaneously move toward reducing redundant and unnecessary regulation that dulls the state's competitive advantage while being ever vigilant in the protection of the public's health, safety, and welfare; and

WHEREAS, Montana's administrative agencies should consider applicable federal standards when adopting, readopting, or amending rules with analogous federal counterparts; and

WHEREAS, Montana's administrative agencies should analyze whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana's citizens; and

WHEREAS, as part of the formal rulemaking process, the public should be advised of the agencies' conclusions about whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana citizens."

1995 Statement of Intent: The statement of intent attached to Ch. 471, L. 1995, provided: "A statement of intent is required for this bill in order to provide guidance to the board of health and environmental sciences [now board of environmental review], the department of health and environmental sciences [now department of environmental quality], and local units of government in complying with [this act].

The legislature intends that in addition to all requirements imposed by existing law and rules, the board or the department include as part of the initial publication and all subsequent publications of a rule a written finding if the rule in question contains any standards or requirements that exceed the standards or requirements imposed by comparable federal law.

If the rules are more stringent than comparable federal law, the written finding must include but is not limited to a discussion of the policy reasons and an analysis that supports the board's or department's decision that the proposed state standards or requirements protect public health or the environment of the state and that the state standards or requirements to be imposed can mitigate harm to the public health or the environment and are achievable under current technology. The department is not required to show that the federal regulation is inadequate to protect public health. The written finding must also include information from the hearing record regarding the costs to the regulated community directly attributable to the proposed state standard or requirement."

Effective Date: Section 23, Ch. 471, L. 1995, provided that this section is effective on passage and approval. Approved April 14, 1995.

Applicability: Section 22(1) and (3), Ch. 471, L. 1995, provided: "(1) [Sections 1 through 3] are intended to apply to any rule that is in effect, adopted, or amended, and that regulates those resources or activities for which the state has been given primary authority to regulate by federal authority pursuant to Title 75, chapter 2; Title 75, chapter 3 [renumbered, except for part 6, as Title 50, chapter 79]; Title 75, chapter 5; Title 75, chapter 6; or Title 75, chapter 10, as of [the effective date of this act] [April 14, 1995].

(3) [This act] does not apply to the establishment of fees or public participation requirements."

75-2-211. Permits for construction, installation, alteration, or use.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) at beginning, in (2)(a) in middle, in (2)(d) near beginning, in (4) in middle, in (12) near beginning of introductory clause, and in (13), (14), and (15)(a) near beginning substituted references to department for references to board. Amendment effective July 1, 2021.

2009 Amendments — Composite Section: Chapter 2 in (9)(b) near middle, in (9)(c) near middle, and in (12)(a) at end substituted "7661a" for "7661". Amendment effective October 1, 2009.

Chapter 445 in (10) in first sentence at beginning inserted exception clause, and substituted "directly and adversely affected" for "jointly or severally adversely affected"; in (11) inserted exception clause; and made minor changes in style. Amendment effective May 5, 2009.

Severability: Section 10, Ch. 445, L. 2009, was a severability clause.

Applicability: Section 12, Ch. 445, L. 2009, provided: "[This act] applies to judicial and board of environmental review hearing and appeal proceedings initiated on or after [the effective date of this act]." Effective May 5, 2009.

2005 Amendments — Composite Section: Chapter 188 in (9)(b) at end after "application" inserted exception clause; in (10) in third sentence at end after "request" inserted "must be filed within 30 days after the department renders its decision"; inserted (13) requiring a rule to provide for a 15-day public comment period; inserted (14) providing for rules to allow extensions of comment and notification periods; and made minor changes in style. Amendment effective July 1, 2005.

Chapter 236 in (2)(a) near beginning after "75-2-234" inserted "and subsections (2)(b) and (2)(c) of this section"; inserted (2)(b) through (2)(e) delaying the requirement to apply for an air quality permit for an oil or gas well facility to January 3, 2006, or 60 days after the initial well completions date, whichever is later, and requiring adoption of rules to regulate facilities until a permit is issued; and made minor changes in style. Amendment effective January 1, 2006.

Chapter 337 near beginning of (9)(a) in exception clause inserted "75-1-205(4) and"; and made minor changes in style. Amendment effective April 21, 2005.

Applicability: Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

2003 Amendments — Composite Section: Chapter 99 in (9)(b) in first sentence near middle after "impact statement" inserted "is not subject to the provisions of 75-2-215, and is not subject to the federal air quality permitting provisions of 42 U.S.C. 7475, 7503, or 7661" and deleted former second, third, and fourth sentences that read: "The time for notification may be extended for 30 days by written agreement of the department and the applicant. Additional 30-day extensions may be granted by the department on request of the applicant. Notification of approval or denial may be served personally or by certified mail on the applicant or the applicant's agent"; inserted (9)(c) requiring the department to notify applicants subject to the provisions of 42 U.S.C. 7475, 7503, or 7661 of its approval or denial of the application within 75 days of receipt of the application; inserted (9)(d) requiring the department to notify applicants subject to the provisions of 75-2-215 of its approval or denial of the application within 75 days of receipt of the application; in (9)(e) near middle after "department shall" inserted requirement that the department prepare a single environment review document for licenses and permits and near end after "act on the" substituted "applications" for "permit application"; inserted (9)(f) providing for 30-day extensions of the time for notification and providing for service of the notification of approval or denial; in temporary version inserted (13) and in version effective July 1, 2005, inserted (12) requiring the board to provide by rule a 30-day period for the public to submit comments on draft air quality permits for applications that are subject to certain federal provisions or state provisions or that require an environmental impact statement; and made minor changes in style. Amendment effective March 24, 2003.

Chapter 231 in exception clause in (2) inserted reference to 75-2-234; at end of (11)(a) after "decision" deleted "and there is no request for a hearing under this section" and deleted former second sentence that read: "The filing of a request for a hearing postpones the effective date of the department's decision until the conclusion of the hearing and issuance of a final decision by the board"; inserted (11)(b) providing that filing of hearing request does not stay department's decision and authorizing board to order stay upon receipt of petition and finding that person is entitled to relief or that continuing permit during appeal would cause great or irreparable injury to person requesting stay; inserted (11)(c) allowing board when granting stay to require undertaking by requestor to pay for costs and damages incurred and requiring board to use same procedures and limitations used for injunctions; inserted (14) in temporary version and (13) in version effective July 1, 2005, allowing board to adopt rules for issuance, modification, suspension, revocation, renewal, or creation of general and other permits and authorizing adoption of rules for construction and operation; and made minor changes in style. Amendment effective April 4, 2003.

Severability: Section 9, Ch. 231, L. 2003, was a severability clause.

Retroactive Applicability: Section 11, Ch. 231, L. 2003, provided: "[Sections 3 and 4] [75-2-211 and 75-2-218] apply retroactively, within the meaning of 1-2-109, to a request for a hearing or an appeal filed on or after January 1, 2003."

2001 Amendments — Composite Section: Chapter 299 at beginning of (2) and (9)(a) inserted exception clause; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 588 in (2) at end after "department" inserted exception clause; and inserted (12) regarding permits for temporary power generation units. Amendment effective May 5, 2001, and terminates July 1, 2005.

Preamble: The preamble attached to Ch. 588, L. 2001, provided: "WHEREAS, the Legislature finds that it is necessary to meet Montana's constitutional mandate of a clean and healthful environment; and

WHEREAS, the Legislature finds it necessary to allow, in certain limited and controlled circumstances, temporary emergency operation of power generation units pending the completion of the state's air quality permitting process, as long as ambient air quality standards are not violated."

Applicability: Section 16, Ch. 299, L. 2001, provided: "[This act] applies to environmental reviews that are begun after [the effective date of this act]." Effective October 1, 2001.

Retroactive Applicability: Section 3, Ch. 588, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to applications filed on or after January 1, 2001."

1999 Amendment: Chapter 221 inserted (5) exempting transfer of permits for portable emission sources from Montana Environmental Policy Act review process; and made minor changes in style. Amendment effective March 31, 1999.

1997 Amendment: Chapter 273 inserted (8)(a)(iii) requiring notice within 30 days of issuance of the final environmental impact statement if the application is for a machine, equipment, a device, or a facility at an operation that requires a permit under Title 82, chapter 4, part 1, 2, or 3; and made minor changes in style. Amendment effective April 16, 1997.

Saving Clause: Section 6, Ch. 273, L. 1997, was a saving clause.

1995 Amendment: Chapter 85 in (8)(b) inserted second and third sentences providing for extensions of time for notification and additional 30-day extensions; and made minor changes in style.

1993 Amendments: Chapter 502 in (1) substituted "board" for "department", after "shall" inserted "by rule", and after "issuance" inserted "modification"; deleted former (2) that read: "(2) For all sources of air contaminants that are subject to the provisions of Title V of the federal Clean Air Act, 42 U.S.C. 7401, et seq., as amended, the provisions of this section apply in addition to the other applicable provisions of this chapter.

(a) The board shall by rule require that permits issued to sources described in subsection (2) be of limited duration, but it may not limit the duration of the permits beyond that required by the federal Clean Air Act, 42 U.S.C. 7401, et seq., as amended.

(b) The board shall by rule provide for the renewal of permits issued to the sources.

(c) The board shall by rule establish a transition schedule for air quality permits held by sources of air contaminants subject to the provisions of subsection (2). The transition schedule must specify dates for the expiration of the permits, absent an application for renewal by the source. The transition schedule may not specify expiration dates that are earlier in time than those required by Title V of the federal Clean Air Act, 42 U.S.C. 7401, et seq., as amended. The transition schedule established by the board also applies to existing sources of air contaminants that are subject to the provisions of Title V of the federal Clean Air Act, 42 U.S.C. 7401, et seq., as amended, and that do not hold an air quality permit from the department as of November 2, 1992"; deleted former (4) through (9) that read: "(4) Concurrent with the submittal of a permit application required by subsection (3) and annually for the duration of the permit, the applicant shall submit to the department a fee sufficient to cover the reasonable costs, both direct and indirect, of developing and administering the permitting requirements in this chapter, including the reasonable costs of:

(a) reviewing and acting upon the application;

(b) implementing and enforcing the terms and conditions of the permit if the permit is issued. However, this amount does not include any court costs or other costs associated with any enforcement action. If the permit is not issued, the department shall return this portion of the fee to the applicant.

(c) emissions and ambient monitoring;

(d) preparing generally applicable regulations or guidance;

(e) modeling, analysis, and demonstrations; and

(f) preparing inventories and tracking emissions.

(5) In addition to the fee required under subsection (4), the board may order the assessment of additional fees required to fund specific activities of the department that are directed at a particular geographic area if the legislature authorizes the activities and appropriates the funds for the activities, including emissions or ambient monitoring, modeling analysis or demonstrations, or emissions inventories or tracking. Additional assessments may be levied only on those sources that are within or are believed by the department to be impacting the geographic area. Before the board may require the assessments, it shall first determine, after opportunity for hearing, that the activities to be funded are necessary for the administration or implementation of this chapter, that the assessments apportion the required funding in an equitable manner, and that the department has obtained legislative authorization for the expenditure and the necessary appropriation.

(6) As a condition of the continuing validity of permits issued by the department under this part prior to October 1, 1991, the department may require the permitholder to pay an annual fee sufficient to cover the costs identified in subsection (4).

(7) For any existing source of air contaminants that is subject to Title V of the federal Clean Air Act, 42 U.S.C. 7401, et seq., as amended, and that is not required to hold an air quality permit from the department as of October 1, 1991, the board may, as a condition of continued operation, require by rule that the owner or operator of the source pay the annual fee provided for in subsection (4). Nothing in this subsection may be construed as allowing the department to charge any source of air contaminants more than one annual fee that is designed to cover the costs identified in subsection (4).

(8) The fees collected by the department pursuant to this section must be deposited in the state special revenue fund to be appropriated by the legislature to the department for the development and administration of the permitting requirements in this chapter.

(9) (a) The department shall give written notice of the amount of the fee to be assessed and the basis for the department's fee assessment under this section to the owner or operator of the air contaminant source. The owner or operator may appeal the department's fee assessment to the board within 20 days after receipt of the written notice.

(b) An appeal must be based upon the allegation that the fee assessment is erroneous or excessive. An appeal may not be based only on the amount of the fee schedule adopted by the board.

(c) If any part of the fee assessment is not appealed, it must be paid to the department upon receipt of the notice in subsection (9)(a).

(d) The contested case provisions of the Montana Administrative Procedure Act provided for in Title 2, chapter 4, apply to any hearing before the board under this subsection (9)"; inserted (3) relating to permit program requirements; in (7), after "fees", inserted "required under 75-2-220", after "subsections" inserted "(2)", and after "(3)" substituted "and (6)" for "through (7) and (12)"; in (8)(a) and (8)(b), near beginning, substituted "preparation" for "compilation"; in (8)(a), after "Act", inserted "Title 75, chapter 1, parts 1 through 3"; in (8)(a)(i), before "receipt", inserted "department's"; in (8)(a)(i) and (8)(b) substituted "provided in subsection (7)" for "defined in subsection (13)"; in (8)(b), before "certified mail", deleted "registered or"; inserted (8)(d) relating to Department failure to act and judicial remedies; in (9), in first sentence after "request", inserted "a hearing before the board. The request for hearing must be filed", in second sentence, after "decision", substituted "and must include an" for "upon" and after "grounds" substituted "for the request" for "therefor, a hearing before the board", and substituted third sentence relating to contested case hearing for former third sentence that read: "A hearing shall be held under the provisions of the Montana Administrative Procedure Act"; in (10), after "elapsed", inserted "from the date of the decision"; and made minor changes in style.

Chapter 639 in (8)(b), near beginning, substituted "preparation" for "compilation" and near end, before "certified mail", deleted "registered or"; inserted (8)(c) providing that a permit application for construction, installation, alteration, or use of a source required to obtain a license under 75-10-221 or a permit under 75-10-406 must be acted on within the time stated in 75-2-215(2)(e); and made minor changes in style. Amendment effective May 13, 1993.

Style changes in (8) were slightly different in the two chapters. The codifier chose the more appropriate of the two.

Retroactive Applicability: Section 23(1), Ch. 502, L. 1993, provided that 75-2-220(7) applies retroactively to all permits issued by the Department of Health and Environmental Sciences (now Department of Environmental Quality) pursuant to Title 75, chapter 2, prior to October 1, 1993. Section 23(2) provided that subsection (2) of 75-2-211, subsections (2) and (3) of 75-2-217, and subsection (8) of 75-2-220 apply retroactively to all activities identified in those subsections that are not subject to a permit issued by the Department of Health and Environmental Sciences (now Department of Environmental Quality) pursuant to Title 75, chapter 2, as of October 1, 1993.

Section 9, Ch. 639, L. 1993, provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to all commercial medical waste incinerators that have applied for but have not received by [the effective date of this act] [effective May 13, 1993] a permit under Title 75, chapter 2, and a license under 75-10-221.

(2) [This act] applies retroactively, within the meaning of 1-2-109, to all commercial hazardous waste incinerators that have applied for but not received by [the effective date of this act] [effective May 13, 1993] a permit under Title 75, chapter 2, and a permit under 75-10-406."

Effective Dates: Section 24(2), Ch. 502, L. 1993, provided that 75-2-105, 75-2-204, 75-2-211, 75-2-217 through 75-2-220, subsections (1) and (3) of 75-2-221, 75-2-301, 75-2-401, 75-2-412, 75-2-413, and 75-2-421 are effective October 1, 1993, but that the Board and Department may adopt rules under these sections upon passage and approval. Approved April 24, 1993. Rules adopted to implement these sections may not be effective before October 1, 1993.

Severability: Section 8, Ch. 639, L. 1993, was a severability clause.

1991 Amendment: (Temporary version) At end of (1) substituted "part" for "section"; in (2), after "construction", substituted "installation, or alteration begins or as a condition of use" for "begins", after "air pollutants" deleted "and not later than 120 days before installation, alteration, or use begins", and at end deleted "and pay to the department a fee sufficient to cover:

(a) the reasonable costs of reviewing and acting upon the application for such permit; and

(b) the reasonable costs of implementing and enforcing the terms and conditions of such permit if the permit is granted (not including any court costs or other costs associated with any enforcement action). The fee shall be deposited in the state special revenue fund to be used by the department for administration of this section"; inserted (3) concerning annual fee to cover permitting requirements; inserted (4) concerning assessment of additional fees to fund specific activities; inserted (5) concerning validity of permits issued before October 1, 1991; inserted (6) concerning fee for certain air contaminant sources not required to obtain a permit; inserted (7) providing for deposit and appropriation of fees; inserted (8) providing for notice and appeal of fee assessment; in (12), after "submitted all", inserted "fees and" and after "subsections" extended reference to subsections (4), (5), (6), and (11); and in (13)(a)(i) and (b) changed subsection reference.

(Version effective November 1, 1992) At end of (1) substituted "part" for "section"; inserted (2) providing for limited duration air quality permits for sources of air contaminants subject to the federal Clean Air Act; in (3), after "construction", substituted "installation, or alteration begins or as a condition of use" for "begins", after "air pollutants" deleted "and not later than 120 days before installation, alteration, or use begins", and at end deleted "and pay to the department a fee sufficient to cover:

(a) the reasonable costs of reviewing and acting upon the application for such permit; and

(b) the reasonable costs of implementing and enforcing the terms and conditions of such permit if the permit is granted (not including any court costs or other costs associated with any enforcement action). The fee shall be deposited in the state special revenue fund to be used by the department for administration of this section"; inserted (4) concerning annual fee to cover permitting requirements; inserted (5) concerning assessment of additional fees to fund specific activities; inserted (6) concerning validity of permits issued before October 1, 1991; inserted (7) concerning fee for certain air contaminant sources not required to obtain a permit; inserted (8) providing for deposit and appropriation of fees; inserted (9) providing for notice and appeal of fee assessment; in (13), after "submitted all", inserted "fees and" and after "subsections" deleted reference to subsection (2) and extended reference to subsections (4), (6), (7), and (12); and in (14)(a)(i) and (14)(b) changed subsection reference.

1991 Statement of Intent: The statement of intent attached to Ch. 652, L. 1991, provided: "A statement of intent is required for this bill because [section 1] [75-2-111] requires the board of health and environmental sciences [now board of environmental review] to adopt by rule fees for air quality permit applications. The purpose of this bill is to allow the collection of an ongoing annual fee to cover the costs associated with the development and administration, including implementation and enforcement, of an air quality permitting program. While there is a need for a fee system to cover these costs, it is not the legislature's intent that these fees be used to recover other costs not delineated in this bill. The legislature recognizes that the identification of actual costs associated with specific permits and permitting activities may be difficult and envisions that a fee schedule may be established with generic applicability. This may result in fees for classes of sources according to the type or amount of emissions or the type of source. For example, it may be determined that the costs associated with the development and administration of a permitting program vary directly with the amount or type of regulated pollutants emitted. In such a case, a fee based upon the tons of a regulated pollutant emitted may be appropriate. The board's rules defining the fee structure to be used by the department shall ensure that the fees charged will not collect, in the aggregate, more than is authorized and appropriated by the legislature to the department for the development and administration of the permitting program.

This bill also clarifies the authority of the department of health and environmental sciences [now department of environmental quality] to issue an operating permit for air contaminant sources. It is the legislature's intent that all air contaminant sources operating within the state obtain an operating permit, including those sources that are "grandfathered" under current air quality regulations. Reasonable exemptions from this requirement may be approved by the board and implemented based upon the size or nature of the source or its emissions.

For sources of air contaminants that are subject to Title V of the federal Clean Air Act, 42 U.S.C. 7401, et seq., as amended, the board may provide for the expiration and renewal of permits issued to those sources, as necessary to meet the requirements of Title V. To provide for the orderly transition to Title V permits for both current permitholders and grandfathered sources, the board shall establish a transition schedule. The transition schedule may not specify dates for obtaining Title V permits that are earlier than the times contained in the Act.

This bill also allows for the assessment of those fees necessary to fund activities of the department that are intended to address specific air quality problems in the state if the legislature authorizes the activities and appropriates the funds for the activities. For example, it may be necessary to conduct additional ambient monitoring in a particular geographic area in order to determine the compliance status of that area with applicable ambient air quality standards. The legislature intends that this provision be used only to fund those activities that examine specific problems in particular geographic areas. The assessments for funding should be levied in an equitable fashion and only upon those sources whose emissions are both of the type being focused upon and thought to impact the geographic area."

Retroactive Applicability: Section 3, Ch. 652, L. 1991, provided: "(1) [Subsections (2) and (6) [subsection (5) of temporary version] of section 2] [75-2-211] apply retroactively, within the meaning of 1-2-109, to all permits issued by the department of health and environmental sciences [now department of environmental quality] pursuant to Title 75, chapter 2, and prior to [the effective date of those subsections [November 1, 1992, for subsection (2) and October 1, 1991, for subsection (6) (which is subsection (5) of temporary version)]].

(2) [Subsections (2), (3), and (7) [subsections (2) and (6) of temporary version] of section 2] [75-2-211] apply retroactively, within the meaning of 1-2-109, to all uses identified in those subsections that are not subject to a permit issued by the department of health and environmental sciences [now department of environmental quality] pursuant to Title 75, chapter 2, as of [the effective dates of those subsections]." Subsection (2) of 75-2-211 effective November 1, 1992, and subsections (3), (6), and (7) [subsections (2), (5), and (6) of temporary version] of 75-2-211 effective October 1, 1991.

Effective Date — Rulemaking Authority: Section 4, Ch. 652, L. 1991, provided: "(1) [Section 1 [75-2-111], subsections (1) and (3) through (16) [subsections (1) through (15) of temporary version] of section 2 [75-2-211], section 3, and this section] are effective October 1, 1991, but the department may proceed with the rulemaking process under Title 2, chapter 4, prior to that date. The effective date of any rule adopted to implement those parts of [this act] may be effective no earlier than October 1, 1991.

(2) [Subsection (2) of section 2] [75-2-211] is effective November 1, 1992, but the department may proceed with the rulemaking process under Title 2, chapter 4, prior to that date. The effective date of any rule adopted to implement those parts of [this act] may be effective no earlier than November 1, 1992."

1983 Amendments: Chapter 196, in (6), after "(3), and" substituted "(5)" for "(4)"; in (7)(a)(i) and (7)(b), after "subsection" substituted "(6)" for "(5)"; in (7)(a)(i), inserted "if the department prepares the environmental impact statement; or"; inserted (7)(a)(ii) requiring the Department to notify an applicant in writing of approval or denial of permit within 30 days after a final environmental impact statement has been issued by a nondepartment agency designated by the Governor; and rearranged phrases.

Chapter 277, in (2)(b), substituted reference to state special revenue fund for reference to earmarked revenue fund.

Administrative Rules

Title 17, chapter 8, subchapter 4, ARM Stack heights and dispersion techniques.

Title 17, chapter 8, subchapter 5, ARM Air quality permit application, operation, and open burning fees.

Title 17, chapter 8, subchapter 6, ARM Open burning.

Title 17, chapter 8, subchapter 7, ARM Permit, construction, and operation of air contaminant sources.

Title 17, chapter 8, subchapter 11, ARM Visibility impact assessment.

Title 17, chapter 8, subchapter 16, ARM Emission control requirements for oil and gas well facilities operating prior to issuance of a Montana air quality permit.

Case Notes

Burden of Proof on Party Asserting Claim in Contested Case Hearing to Present Evidence That Department Decision Violated Law: Plaintiffs requested a hearing before the Board of Environmental Review, contending that an air quality permit issued by the Department of Environmental Quality for a coal-fired power plant and the application for the permit suffered from various procedural and substantive deficiencies. The Board held a contested case hearing and, after establishing that plaintiffs had the burden of proof, approved the Department's decision to grant the permit. On appeal, the Supreme Court affirmed that, as the party asserting the claim in the contested case, plaintiffs had the burden of presenting evidence necessary to establish the fact that the Department's decision violated the law. Mont. Envtl. Information Center v. Dept. of Environmental Quality, 2005 MT 96, 326 M 502, 112 P3d 964 (2005).

Department Analysis of Visibility Impacts Required in Issuance of Air Quality Permit — Deference to Federal Land Manager Information Error: Although federal land managers (FLMs) have responsibility to protect visibility in Class I areas, the Department of Environmental Quality may not simply defer to the conclusions of FLMs regarding visibility impacts in Class I areas. The Department's own administrative rules preclude the issuance of an air quality permit unless the applicant affirmatively demonstrates to the Department that a proposed project will not contribute to an adverse visibility impact in Class I areas. Therefore, the Department must make its own independent determination of the visibility issue based on the information presented, including comments from the FLMs. Mont. Envtl. Information Center v. Dept. of Environmental Quality, 2005 MT 96, 326 M 502, 112 P3d 964 (2005).

Improper Standard of Review Applied by Board of Environmental Review in Contested Case Hearing — Remand: Plaintiffs requested a hearing before the Board of Environmental Review, contending that an air quality permit issued by the Department of Environmental Quality for a coal-fired power plant and the application for the permit suffered from various procedural and substantive deficiencies. The Board held a contested case hearing, addressed plaintiffs' contentions whether the Department's decision was erroneous, arbitrary, capricious, or an abuse of discretion, and approved the Department's decision to grant the permit. Plaintiffs petitioned for judicial review of the Board's order, and the District Court affirmed the Board's findings, conclusions, and order. On appeal, the Supreme Court noted that hearings related to the issuance of an air quality permit must be conducted under the contested case provisions of Title 2, ch. 4, part 6, rather than part 7, which sets out the standard of judicial review. The role of the Board was to receive evidence from the parties, enter findings of fact based on a preponderance of the evidence, and then enter conclusions of law based on the findings. The determination of whether an agency decision is erroneous, arbitrary, capricious, or an abuse of discretion is the role of the District Court. Thus, the Board applied a standard of review not legally available to it as the finder of fact in a contested case hearing. The District Court erred in determining that the Board applied the correct standard, so the case was remanded with instructions that the Board enter new findings of fact and conclusions of law in conformity with Title 2, ch. 4, part 6. Mont. Envtl. Information Center v. Dept. of Environmental Quality, 2005 MT 96, 326 M 502, 112 P3d 964 (2005).

Challenge of Environmental Assessment — No Jurisdiction for Administrative Review: A grain company sought a permit to build a high-speed grain loading terminal near Pompeys Pillar national monument. The permit was granted and plaintiff, a nonprofit association supporting the monument's preservation, began administrative proceedings in an effort to overturn the permit issuance on grounds that the Department of Environmental Quality erred in its preparation of the environmental assessment related to the permit. An administrative law judge concluded that the Department acted arbitrarily and capriciously by issuing a permit without preparing an environmental impact statement. The Department filed exceptions to the administrative law judge's conclusions with the Board of Environmental Review. The Board ultimately affirmed the Department's decision to issue the permit, and plaintiff appealed to District Court. The Department contended that because the challenge to the administrative decisions did not contain any air quality issues, but only addressed environmental assessment issues governed by the Montana Environmental Policy Act (MEPA), and that because MEPA does not provide for administrative review of challenges to MEPA compliance, the administrative law judge and the Board did not have jurisdiction to preside over the appeal, nor did the District Court have jurisdiction to review the administrative proceedings. The District Court agreed and dismissed plaintiff's petition for lack of subject matter jurisdiction. Plaintiff appealed, but the Supreme Court affirmed. Had plaintiff challenged air quality issues, it would have been entitled to administrative proceedings. However, plaintiff's challenge pertained only to issues related to the environmental assessment, which is governed by MEPA. MEPA requires that a compliance challenge be brought in District Court, rather than through administrative proceedings. Thus, the administrative law judge and the Board did not have jurisdiction to preside over the appeal, nor did the District Court have jurisdiction to review the administrative proceedings. Plaintiff's petition was properly dismissed. Pompeys Pillar Historical Ass'n v. Dept. of Environmental Quality, 2002 MT 352, 313 M 401, 61 P3d 148 (2002).

Delegation of Authority — Constitutional: Although 75-2-203 and 75-2-211 grant broad powers to the Board of Health and Environmental Sciences (now Board of Environmental Review), this delegation is not unconstitutional. Air pollution control is an emerging field for which detailed and precise standards have not been fully developed, and the authority granted must necessarily be phrased broadly. State ex rel. Dept. of Health and Environmental Sciences v. Lincoln County, 178 M 410, 584 P2d 1293, 35 St. Rep. 1402 (1978).

75-2-212. Variances — renewals — filing fees.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) in three places in introductory paragraph, in (2), in (3) in four places, in (4) in two places, and in (6) near beginning of first sentence substituted references to department for references to board. Amendment effective July 1, 2021.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1983 Amendments: Chapter 265, at beginning of (3), deleted "No exemption or partial exemption may be granted pursuant to this section for a period to exceed 1 year, but"; and deleted "for like periods" following "may be renewed".

Chapter 277, in (6), substituted reference to state special revenue fund for reference to earmarked revenue fund.

Administrative Rules

ARM 17.8.120 Variance procedures — initial application.
ARM 17.8.121 Variance procedures — renewal application.

75-2-213. Energy development project — hearing and procedures.

Compiler's Comments

Severability: Section 10, Ch. 445, L. 2009, was a severability clause.

Effective Date: Section 11, Ch. 445, L. 2009, provided that this section is effective on passage and approval. Approved May 5, 2009.

Applicability: Section 12, Ch. 445, L. 2009, provided: "[This act] applies to judicial and board of environmental review hearing and appeal proceedings initiated on or after [the effective date of this act]." Effective May 5, 2009.

75-2-215. Solid or hazardous waste incineration — additional permit or registration requirements.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 142, L. 2023. Amendment effective April 18, 2023.

Saving Clause: Section 4, Ch. 142, L. 2023, was a saving clause.

2021 Amendment: Chapter 324 in (5) near beginning of first sentence substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 2021.

2001 Amendment: Chapter 354 in (3)(b) substituted "7-1-4127" for "7-1-4127(2) and 7-1-4128(2)". Amendment effective October 1, 2001.

1993 Amendments: Chapter 129 in (1), at beginning, inserted "Until the department has issued an air quality permit pursuant to 75-2-211 that includes the conditions required by this section", after "construct" substituted "install, alter, or use" for "modify, or operate", and after "incinerator" substituted "or a boiler or industrial furnace subject to the provisions of 75-10-406, except as provided in subsection (2)" for part of (1) and former (1)(a) and (1)(b) that read: "of any of the following categories until the department has issued an air quality permit pursuant to this chapter, including the conditions provided in this section:

(a) a new solid or hazardous waste incinerator that is designed to burn more than 200 pounds an hour of solid or hazardous waste; or

(b) an existing or permitted solid or hazardous waste incinerator that is designed to burn more than 200 pounds an hour of solid or hazardous waste and that incinerates or would incinerate solid or hazardous waste in an amount, form, kind, or content different from its designed or permitted operation or that incinerates or would incinerate any solid or hazardous waste that changes the nature, character, or composition of its emissions"; inserted (2) subjecting an existing or permitted incinerator or boiler or furnace to air quality permitting only under certain conditions; in (3)(a)(i), after "existing", substituted "emission source" for "incineration"; in (3)(a)(ii), after "solid or hazardous waste", inserted "or the use of hazardous waste as fuel for a boiler or industrial furnace"; inserted (5) allowing the Board to provide for general air quality permits by rule; in (6), after "incinerator", inserted "or a boiler or industrial furnace"; and made minor changes in style. Amendment effective March 19, 1993.

Chapter 639 inserted (3)(b) and (3)(c) stating that the Department may not issue a permit to a facility described in subsection (1) if a license is required under 75-10-221 or a permit is required under 75-10-406 until the applicant has published at least three notices and the Department has held a public hearing; and inserted (3)(e) providing that the Department may not issue a permit to a facility described in subsection (1) until the Department has issued a license under 75-10-221 or a permit under 75-10-406 if a license or permit is required and stating that the license issuance decision must be within 30 days of issuance of a 75-10-221 license or a 75-10-406 permit or within 90 days after receipt of a complete application for a permit or permit alteration under 75-2-211 and this section, whichever is later. Amendment effective May 13, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 129, L. 1993, provided: "It is the intent of the legislature that the statutory size cutoff for incinerators that burn 200 pounds or less per hour, as provided for in 75-2-215, be eliminated and that the requirements of 75-2-215 be extended to boilers and industrial furnaces. As a result, the requirements of 75-2-215 would apply to all incinerators and all boilers and industrial furnaces subject to 75-10-406, regardless of size. In order to lessen the burden on the department of health and environmental sciences [now department of environmental quality], the board of health and environmental sciences [now board of environmental review] may provide by rule for general permits that apply to classes or categories of sources subject to the requirements of 75-2-215. The board shall use this authority to the greatest extent possible, consistent with its obligation to protect public health and the environment.

It is also the intent of the legislature to clarify the provisions of 75-2-215 by amending the definitions in 75-2-103. The definition of incinerator contains no reference to end use or economic value of the feed, but rather focuses on the process employed. The definition of solid waste is intended to be more encompassing than the use of that definition elsewhere in Title 75, and the reference to "marketable byproducts" contained in other definitions is intentionally omitted. The overriding purpose of this bill is to protect air quality, public health, and the physical environment, and the legislature does not believe it appropriate to draw distinctions in applicability based upon whether or not the incineration activity is, for example, associated with waste disposal or volume reduction in conjunction with recycling."

Severability: Section 3, Ch. 129, L. 1993, was a severability clause.

Section 8, Ch. 639, L. 1993, was a severability clause.

Retroactive Applicability: Section 9, Ch. 639, L. 1993, provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to all commercial medical waste incinerators that have applied for but have not received by [the effective date of this act] [effective May 13, 1993] a permit under Title 75, chapter 2, and a license under 75-10-221.

(2) [This act] applies retroactively, within the meaning of 1-2-109, to all commercial hazardous waste incinerators that have applied for but not received by [the effective date of this act] [effective May 13, 1993] a permit under Title 75, chapter 2, and a permit under 75-10-406."

1991 Amendment: Throughout section, after "solid", inserted "or hazardous"; in (1), near beginning before "operate", inserted "construct, modify, or"; in (1)(a), after "new", deleted "commercial" and after "incinerator" inserted "that is designed to burn more than 200 pounds an hour of solid or hazardous waste"; in (1)(b), at beginning before "permitted", inserted "an existing or", after "incinerator" inserted "that is designed to burn more than 200 pounds an hour of solid or hazardous waste", in two places, before "would", inserted "incinerates or", near middle, before "permitted", inserted "designed or", and after "any" substituted "solid or hazardous waste" for "material"; in (3), near beginning before "procedures", inserted "other operating", after "necessary to" deleted "satisfy the determination required under subsection (2)(c). The equipment, engineering, or procedures must", after "provide" deleted "particulate and gaseous emission", after "reductions" inserted "of air pollutants, including hazardous air pollutants", and after "technology" deleted "in addition to any other controls necessary to satisfy the determination required under subsection (2)(c)"; and made minor changes in style. Amendment effective April 24, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 605, L. 1991, provided: "It is the intent of the legislature that the department of health and environmental sciences [now department of environmental quality] not issue an air quality permit for any new solid waste incinerator that is designed to burn more than 200 pounds an hour of solid waste and not authorize any existing or permitted solid waste incinerator that is designed to burn more than 200 pounds an hour of solid waste to change the amount, form, or content of the solid waste it incinerates or to incinerate any solid waste that would change the nature, character, or composition of its emissions until the department and the public have the necessary information to understand the composition and concentrations of emissions. It is also the intent of the legislature that the department apply the concept of best available control technology to all air pollutants, including hazardous air pollutants, when considering a permit application or modification for a solid waste incinerator. The legislature intends that these additional permit requirements be extended to hazardous waste incinerators as well. It is also the intent of the legislature that the department develop a reasonable and practical health risk assessment-based definition of the term "negligible risk" as used in 75-2-215(2)(c)."

1989 Statement of Intent: The statement of intent attached to Ch. 696, L. 1989, provided: "It is the intent of the legislature that the department of health and environmental sciences [now department of environmental quality] adopt rules establishing procedures for the determination and collection of the solid waste management fee provided for in [section 1] [75-10-115] and for the waiver of the fee when consistent with the criteria provided in [section 1(2)] [75-10-115(2)]. It is the intent of the legislature that the department be able to use this fee to bolster its solid waste management program in a manner, including the hiring of adequate staff, that will:

(1) protect the public health, welfare, and safety and the environment of Montana;

(2) provide assistance to local governments in meeting the pending federal solid waste management requirements;

(3) develop an effective and coordinated regional approach to solid waste management in Montana; and

(4) ensure a state and local capability to effectively manage the importation of solid waste into Montana for disposal purposes.

It is the intent of the legislature that the department of health and environmental sciences [now department of environmental quality] waive the fee for interregional solid waste incineration or disposal in situations where the incineration or disposal is consistent with state solid waste management goals and results in equivalent or improved protection of Montana's public health, safety, welfare, and environment when compared to the alternative of intraregional incineration or disposal. The incineration or disposal of solid waste at a licensed facility in the manner and quantity incinerated or disposed of before [the effective date of this act] [May 22, 1989] is exempt from the solid waste management fee and from the requirement for local government approval under [section 6] [75-10-218, now repealed].

It is the intent of the legislature that the department of health and environmental sciences [now department of environmental quality] not issue an air quality permit for any new commercial incinerator of solid waste and not authorize any existing incinerator to change the amount, form, kind, or content of the material it incinerates or to incinerate any material that would change the nature, character, or composition of the emissions until the department and the public have necessary information to understand the composition and concentrations of the emissions and until the emissions and projected ambient concentrations are known to constitute a negligible risk to the public health, safety, and welfare and to the environment. For a permitted solid waste incinerator, the department shall consider an increase in the amount of medical waste incinerated as sufficient to trigger the additional permit and review requirements provided in [section 5] [75-2-215], including consideration of emissions of hydrochloric acid, compounds deriving from plastic incineration, and other hazardous air pollutants."

Severability: Section 15, Ch. 696, L. 1989, was a severability clause.

Effective Date: Section 16, Ch. 696, L. 1989, provided that this section is effective May 22, 1989.

Administrative Rules

Title 17, chapter 8, subchapter 7, ARM Permit, construction, and operation of air contaminant sources.

75-2-216. Adoption of rules for solid or hazardous waste incinerator permits.

Compiler's Comments

1997 Amendment: Chapter 112 deleted (1) that read: "(1) Except for remedial actions pursuant to Title 75, chapter 10, part 7, or corrective actions pursuant to 75-10-405(2)(c) or 75-10-416, until October 1, 1993, the department may not issue a permit to a solid or hazardous waste incinerator subject to the requirements of 75-2-215"; at beginning deleted "Notwithstanding the provisions of (1)"; and at end deleted "and in processing air quality permit applications required under 75-2-211 for solid or hazardous waste incinerators".

Saving Clause: Section 38(1), Ch. 112, L. 1997, was a saving clause.

Preamble: The preamble attached to Ch. 16, Sp. L. July 1992, provided: "WHEREAS, efforts are underway to locate facilities in Montana that would incinerate solid wastes or hazardous wastes and to locate other facilities that burn hazardous waste-derived fuels; and

WHEREAS, the Legislature is concerned that current state law does not provide adequate protection for the human and physical environment, including impacts to public health, safety, and welfare and property values, from the impacts of solid waste or hazardous waste incinerator facilities or other facilities that burn hazardous waste-derived fuels; and

WHEREAS, the Legislature desires to fully consider the impacts of solid waste and hazardous waste incinerators or other facilities that burn hazardous waste-derived fuels during the 53rd Regular Session."

Severability: Section 5, Ch. 16, Sp. L. July 1992, was a severability clause.

Effective Date: Section 6, Ch. 16, Sp. L. July 1992, provided that this act is effective on passage and approval. The act became effective pursuant to Article VI, sec. 10, of the Montana Constitution due to the passage of 25 days after delivery without gubernatorial action on the bill. Effective August 14, 1992.

75-2-217. Operating permit program — exemptions — general requirements — duration.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) near beginning of first and last sentences, in (4) in three places, and in (5) near beginning substituted "department" for "board". Amendment effective July 1, 2021.

Retroactive Applicability: Section 23(1), Ch. 502, L. 1993, provided that 75-2-220(7) applies retroactively to all permits issued by the Department of Health and Environmental Sciences (now Department of Environmental Quality) pursuant to Title 75, chapter 2, prior to October 1, 1993. Section 23(2) provided that subsection (2) of 75-2-211, subsections (2) and (3) of 75-2-217, and subsection (8) of 75-2-220 apply retroactively to all activities identified in those subsections that are not subject to a permit issued by the Department of Health and Environmental Sciences (now Department of Environmental Quality) pursuant to Title 75, chapter 2, as of October 1, 1993.

Effective Dates: Section 24(2), Ch. 502, L. 1993, provided that 75-2-105, 75-2-204, 75-2-211, 75-2-217 through 75-2-220, subsections (1) and (3) of 75-2-221, 75-2-301, 75-2-401, 75-2-412, 75-2-413, and 75-2-421 are effective October 1, 1993, but that the Board and Department may adopt rules under these sections upon passage and approval. Approved April 24, 1993. Rules adopted to implement these sections may not be effective before October 1, 1993.

Administrative Rules

Title 17, chapter 8, subchapter 12, ARM Operating permit program.

75-2-218. Permits for operation — application completeness — action by department — application shield — review by board.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) at beginning of last sentence and in (3) at beginning of first and last sentences substituted "department" for "board"; in (5) near end of last sentence after "hearing" deleted "before the board"; and made minor changes in style. Amendment effective July 1, 2021.

2005 Amendment: Chapter 236 in (1) at beginning of sixth sentence substituted "board" for "department". Amendment effective January 1, 2006.

2003 Amendment: Chapter 231 at end of (6)(a) after "decision" deleted "and there is no request for a hearing under this section" and deleted former second sentence that read: "The filing of a request for a hearing postpones the effective date of the department's decision until the conclusion of the hearing and issuance of a final decision by the board"; inserted (6)(b) providing that filing of hearing request does not stay department's decision and authorizing board to order stay upon receipt of petition and finding that person is entitled to relief or that continuing permit during appeal would cause great or irreparable injury to person requesting hearing; inserted (6)(c) allowing board when granting stay to require undertaking by requestor to pay for costs and damages incurred and requiring board to use same procedures and limitations used for injunctions; in (7) after "(6)" inserted "also"; and made minor changes in style. Amendment effective April 4, 2003.

Severability: Section 9, Ch. 231, L. 2003, was a severability clause.

Retroactive Applicability: Section 11, Ch. 231, L. 2003, provided: "[Sections 3 and 4] [75-2-211 and 75-2-218] apply retroactively, within the meaning of 1-2-109, to a request for a hearing or an appeal filed on or after January 1, 2003."

2001 Amendments — Composite Section: Chapter 299 in (2) at beginning in exception clause inserted "75-1-208(4)(b)"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 491 in (3) deleted former last sentence that read: "Any transition schedule for action by the department must ensure that all permit applications required under 75-2-217 and this subsection for existing sources will be acted upon by the department before November 15, 1997." Amendment effective May 1, 2001.

Applicability: Section 16, Ch. 299, L. 2001, provided: "[This act] applies to environmental reviews that are begun after [the effective date of this act]." Effective October 1, 2001.

Effective Dates: Section 24(2), Ch. 502, L. 1993, provided that 75-2-105, 75-2-204, 75-2-211, 75-2-217 through 75-2-220, subsections (1) and (3) of 75-2-221, 75-2-301, 75-2-401, 75-2-412, 75-2-413, and 75-2-421 are effective October 1, 1993, but that the Board and Department may adopt rules under these sections upon passage and approval. Approved April 24, 1993. Rules adopted to implement these sections may not be effective before October 1, 1993.

Administrative Rules

Title 17, chapter 8, subchapter 12, ARM Operating permit program.

75-2-219. Permits for operation — limitations.

Compiler's Comments

2021 Amendment: Chapter 324 in (2) substituted "department's" for "board's". Amendment effective July 1, 2021.

Effective Dates: Section 24(2), Ch. 502, L. 1993, provided that 75-2-105, 75-2-204, 75-2-211, 75-2-217 through 75-2-220, subsections (1) and (3) of 75-2-221, 75-2-301, 75-2-401, 75-2-412, 75-2-413, and 75-2-421 are effective October 1, 1993, but that the Board and Department may adopt rules under these sections upon passage and approval. Approved April 24, 1993. Rules adopted to implement these sections may not be effective before October 1, 1993.

75-2-220. Fees — special assessments — late payment assessments — credit.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) in middle of introductory clause after "fees" substituted "set pursuant to 75-2-112" for "set by the board pursuant to 75-2-111"; and in (3) near beginning, in (4) near beginning of first and third sentences and near end of last sentence, in (5)(c), in (6), in (7) and (8) in middle after "1993, the", and in (9)(b) substituted "department" for "board". Amendment effective July 1, 2021.

2015 Amendment: Chapter 339 in (1) at beginning substituted "A person required to obtain a permit or to register a facility pursuant to this chapter" for "Concurrent with the submittal of a permit application required under this chapter and annually for the duration of the permit, the applicant", substituted "fees set by the board pursuant to 75-2-111 that are" for "a fee", and after "permitting" inserted "or registration"; in (1)(a) substituted "a permit application or a registration or modifying, amending, or updating a permit or registration" for "the application"; in (1)(b) substituted "a permit issued pursuant to this chapter or an administrative rule or other regulatory requirement adopted pursuant to this chapter" for "the permit" and in second sentence after "This" deleted "amount"; in (1)(d) substituted "rules" for "regulations"; in (2) substituted "For a permit or registration fee based on emissions, the fee must be based on emissions" for "In recovering the costs described in subsection (1), the department may assess an application fee based on estimated actual emissions or an annual fee based on actual emissions"; in (3) substituted "annual review of all fees assessed for persons holding an operating permit issued under 75-2-217 and 75-2-218 to ensure the collection of revenue sufficient to cover the costs of administering the operating permit requirements of this chapter" for "annual adjustment of all fees assessed for operating permit applications under 75-2-217 and 75-2-218 to account for changes to the consumer price index"; in (4) near beginning after "In addition to" substituted "fees" for "fee"; in (5)(a) substituted "permitholder or registrant" for "applicant or permitholder"; in (5)(a)(ii) inserted "or registration"; in (5)(b) in first sentence after "revoked permit" inserted "or registration" and substituted "permitholder or registrant" for "applicant or permitholder"; deleted former (10) that read: "(10) The department may not charge more than one fee annually to a source of air pollutants for the costs identified in subsection (1)"; in (10) at end after "the permitting" inserted "and registration"; and made minor changes in style. Amendment effective October 1, 2015.

Termination Provision Repealed: Section 3, Ch. 159, L. 2009, repealed sec. 9, Ch. 712, L. 1991, secs. 4 and 5, Ch. 542, L. 1995, sec. 1, Ch. 411, L. 1997, secs. 4, 5, 6, and 7, Ch. 398, L. 2001, sec. 8, Ch. 516, L. 2001, secs. 3 and 5, Ch. 129, L. 2005, and secs. 1, 2, 3, 4, 5, 6, 7, and 8, Ch. 569, Laws of 2005, which terminated amendments to this section December 31, 2011. Effective July 1, 2009.

Extension of Termination Date: Section 3, Ch. 129, L. 2005, amended sec. 8, Ch. 516, L. 2001, by extending the termination date imposed by Ch. 516 to December 31, 2009. Effective March 30, 2005.

2001 Amendment: Chapter 516 inserted (11) requiring that fees charged to an applicant be reduced by the amount of credit accrued for using postconsumer glass in recycled material. Amendment effective May 1, 2001, and terminates December 31, 2005.

1999 Amendment: Chapter 427 in (5)(a)(i) at end substituted "as provided in 15-1-216" for "at the rate contained in 15-31-510". Amendment effective January 1, 2000.

Applicability: Section 57, Ch. 427, L. 1999, provided that this section applies to all tax periods beginning after December 31, 1999.

1997 Amendment: Chapter 51 in (5)(a)(i) substituted "15-31-510" for "15-31-510(3)". Amendment effective March 13, 1997.

Retroactive Applicability: Section 23(1), Ch. 502, L. 1993, provided that 75-2-220(7) applies retroactively to all permits issued by the Department of Health and Environmental Sciences (now Department of Environmental Quality) pursuant to Title 75, chapter 2, prior to October 1, 1993. Section 23(2) provided that subsection (2) of 75-2-211, subsections (2) and (3) of 75-2-217, and subsection (8) of 75-2-220 apply retroactively to all activities identified in those subsections that are not subject to a permit issued by the Department of Health and Environmental Sciences (now Department of Environmental Quality) pursuant to Title 75, chapter 2, as of October 1, 1993.

Effective Dates: Section 24(2), Ch. 502, L. 1993, provided that 75-2-105, 75-2-204, 75-2-211, 75-2-217 through 75-2-220, subsections (1) and (3) of 75-2-221, 75-2-301, 75-2-401, 75-2-412, 75-2-413, and 75-2-421 are effective October 1, 1993, but that the Board and Department may adopt rules under these sections upon passage and approval. Approved April 24, 1993. Rules adopted to implement these sections may not be effective before October 1, 1993.

Administrative Rules

Title 17, chapter 8, subchapter 5, ARM Air quality permit application, operation, and open burning fees.

75-2-221. Deposit of air quality permitting and registration fees.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) near beginning substituted "75-2-112" for "75-2-111". Amendment effective July 1, 2021.

2015 Amendment: Chapter 339 in (1) near end after "the permitting" inserted "and registration". Amendment effective October 1, 2015.

2003 Amendment: Chapter 231 near beginning in (1) before "75-2-220" inserted "75-2-111 and". Amendment effective April 4, 2003.

Severability: Section 9, Ch. 231, L. 2003, was a severability clause.

1999 Amendment: Chapter 221 deleted former (2) that read: "(2) The operating permit fees and the construction permit fees must be maintained in separate accounts within the state special revenue fund"; and made minor changes in style. Amendment effective July 1, 1999.

Effective Dates: Section 24(2), Ch. 502, L. 1993, provided that 75-2-105, 75-2-204, 75-2-211, 75-2-217 through 75-2-220, subsections (1) and (3) of 75-2-221, 75-2-301, 75-2-401, 75-2-412, 75-2-413, and 75-2-421 are effective October 1, 1993, but that the Board and Department may adopt rules under these sections upon passage and approval. Approved April 24, 1993. Rules adopted to implement these sections may not be effective before October 1, 1993.

Section 24(3) provided that subsection (2) of 75-2-221 is effective July 1, 1994.

75-2-224. Definitions.

Compiler's Comments

Termination Provision Repealed: Section 3, Ch. 159, L. 2009, repealed sec. 9, Ch. 712, L. 1991, secs. 4 and 5, Ch. 542, L. 1995, sec. 1, Ch. 411, L. 1997, secs. 4, 5, 6, and 7, Ch. 398, L. 2001, sec. 8, Ch. 516, L. 2001, secs. 3 and 5, Ch. 129, L. 2005, and secs. 1, 2, 3, 4, 5, 6, 7, and 8, Ch. 569, Laws of 2005, which terminated this section December 31, 2011. Effective July 1, 2009.

Extension of Termination Date: Section 3, Ch. 129, L. 2005, amended sec. 8, Ch. 516, L. 2001, by extending the termination date imposed by Ch. 516 to December 31, 2009. Effective March 30, 2005.

Effective Date: Section 7, Ch. 516, L. 2001, provided: "[This act] is effective on passage and approval." Approved May 1, 2001.

Termination: Section 8, Ch. 516, L. 2001, provided: "[This act] terminates December 31, 2005."

75-2-225. Amount and duration of credit — how claimed.

Compiler's Comments

2009 Amendment: Chapter 159 in (2) at beginning deleted "Subject to 75-2-226(2)"; and made minor changes in style. Amendment effective July 1, 2009.

Termination Provision Repealed: Section 3, Ch. 159, L. 2009, repealed sec. 9, Ch. 712, L. 1991, secs. 4 and 5, Ch. 542, L. 1995, sec. 1, Ch. 411, L. 1997, secs. 4, 5, 6, and 7, Ch. 398, L. 2001, sec. 8, Ch. 516, L. 2001, secs. 3 and 5, Ch. 129, L. 2005, and secs. 1, 2, 3, 4, 5, 6, 7, and 8, Ch. 569, Laws of 2005, which terminated this section December 31, 2011. Effective July 1, 2009.

2005 Amendment: Chapter 129 in (2) deleted former second sentence that read: "If postconsumer glass was used in recycled material prior to January 1, 2002, but on or after January 1, 2001, an applicant is entitled to a credit for calendar year 2002"; in (3)(a) increased amount of credit that may be claimed from $7 to $8 for each ton of postconsumer glass; and in (3)(b) increased maximum credit allowable in any calendar year from $1,500 to $2,000. Amendment effective March 30, 2005, and terminates December 31, 2009.

Extension of Termination Date: Section 3, Ch. 129, L. 2005, amended sec. 8, Ch. 516, L. 2001, by extending the termination date imposed by Ch. 516 to December 31, 2009. Effective March 30, 2005.

Effective Date: Section 7, Ch. 516, L. 2001, provided: "[This act] is effective on passage and approval." Approved May 1, 2001.

Termination: Section 8, Ch. 516, L. 2001, provided: "[This act] terminates December 31, 2005."

75-2-226. Credit for use of postconsumer glass.

Compiler's Comments

2009 Amendment: Chapter 159 deleted former (2) that read: "(2) A credit under this section may be claimed by an applicant for a business only if the qualifying postconsumer glass was used in recycled material before January 1, 2010"; and made minor changes in style. Amendment effective July 1, 2009.

Termination Provision Repealed: Section 3, Ch. 159, L. 2009, repealed sec. 9, Ch. 712, L. 1991, secs. 4 and 5, Ch. 542, L. 1995, sec. 1, Ch. 411, L. 1997, secs. 4, 5, 6, and 7, Ch. 398, L. 2001, sec. 8, Ch. 516, L. 2001, secs. 3 and 5, Ch. 129, L. 2005, and secs. 1, 2, 3, 4, 5, 6, 7, and 8, Ch. 569, Laws of 2005, which terminated this section December 31, 2011. Effective July 1, 2009.

2005 Amendment: Chapter 129 in (2) at end extended time for claiming credit, if qualifying postconsumer glass was recycled, from January 1, 2006, to January 1, 2010. Amendment effective March 30, 2005, and terminates December 31, 2009.

Extension of Termination Date: Section 3, Ch. 129, L. 2005, amended sec. 8, Ch. 516, L. 2001, by extending the termination date imposed by Ch. 516 to December 31, 2009. Effective March 30, 2005.

Effective Date: Section 7, Ch. 516, L. 2001, provided: "[This act] is effective on passage and approval." Approved May 1, 2001.

Termination: Section 8, Ch. 516, L. 2001, provided: "[This act] terminates December 31, 2005."

Administrative Rules

ARM 17.8.506 Credit against air permitting fees for certain use of postconsumer glass.

75-2-227. Postconsumer glass qualifying for credit — rulemaking.

Compiler's Comments

Termination Provision Repealed: Section 3, Ch. 159, L. 2009, repealed sec. 9, Ch. 712, L. 1991, secs. 4 and 5, Ch. 542, L. 1995, sec. 1, Ch. 411, L. 1997, secs. 4, 5, 6, and 7, Ch. 398, L. 2001, sec. 8, Ch. 516, L. 2001, secs. 3 and 5, Ch. 129, L. 2005, and secs. 1, 2, 3, 4, 5, 6, 7, and 8, Ch. 569, Laws of 2005, which terminated this section December 31, 2011. Effective July 1, 2009.

Extension of Termination Date: Section 3, Ch. 129, L. 2005, amended sec. 8, Ch. 516, L. 2001, by extending the termination date imposed by Ch. 516 to December 31, 2009. Effective March 30, 2005.

Effective Date: Section 7, Ch. 516, L. 2001, provided: "[This act] is effective on passage and approval." Approved May 1, 2001.

Termination: Section 8, Ch. 516, L. 2001, provided: "[This act] terminates December 31, 2005."

75-2-230. Commercial hazardous waste incinerators — additional permit requirements.

Compiler's Comments

1995 Statement of Intent: The statement of intent attached to Ch. 498, L. 1995, provided: "A statement of intent is required for this bill because the bill gives the department authority to adopt administrative rules that specify meteorologic conditions that necessitate cessation of the burning of hazardous waste at a commercial hazardous waste incinerator if site-specific monitoring determines that inversion conditions exist."

Effective Date: Section 5, Ch. 498, L. 1995, provided: "[This act] is effective on passage and approval." Approved April 14, 1995.

75-2-231. Medical waste and hazardous waste incineration — additional permit requirements.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) in middle of first sentence and in last sentence of introductory paragraph, in (4)(a), and in (4)(b) substituted "department" for "board". Amendment effective July 1, 2021.

1995 Amendment: Chapter 498 in (1), near beginning of first sentence after "potential", substituted "emission" for "formation"; in (1)(a), near middle after "potential", substituted "emission" for "creation" and after "furans" deleted "heavy metals"; in (1)(b), after "emission rate", deleted "except when best available control technology is adequate", after "prevent" inserted "the public health risk from air emissions or ambient concentrations from", after "exceeding the" inserted "negligible risk standard required by 75-2-215 and any applicable federal", after "allowable" deleted "daily", and at end substituted "hazardous air pollutants" for "carcinogens"; in (1)(d)(i), after "including", inserted "heavy metals and" and after "furans" deleted "heavy metals"; in (3), near middle after "risk from", inserted "air emissions or ambient concentrations of", after "heavy metals, and other" substituted "hazardous air pollutants will not exceed the negligible risk standard required by 75-2-215 and any applicable" for "carcinogens will not exceed appropriate", and after "allowable" deleted "daily"; in (4)(a) and (4)(b), after "allowable", deleted "daily"; and made minor changes in style. Amendment effective April 14, 1995.

1995 Statement of Intent: The statement of intent attached to Ch. 498, L. 1995, provided: "A statement of intent is required for this bill because the bill gives the department authority to adopt administrative rules that specify meteorologic conditions that necessitate cessation of the burning of hazardous waste at a commercial hazardous waste incinerator if site-specific monitoring determines that inversion conditions exist."

1993 Statement of Intent: The statement of intent attached to Ch. 639, L. 1993, provided: "A statement of intent is required for this bill because [section 4] [75-2-231] directs the board of health and environmental sciences [now board of environmental review] to adopt rules establishing additional permit requirements for commercial medical waste and commercial hazardous waste incinerators. The rules adopted must ensure that the public is protected from potential exposure to chlorinated dioxins, furans, heavy metals, and carcinogens as a result of the incineration of medical waste and hazardous waste and must provide for the implementation of the additional permit requirements contained in 75-2-211, 75-2-215, and [sections 4 through 6] [75-2-231 through 75-2-233], as well as the coordination of those requirements with the permitting requirements contained in 75-2-211 and 75-2-215.

It is the intent of the legislature that the department coordinate the application review process and issuance of permits between the air quality bureau and the solid and hazardous waste bureau for incinerators that must receive both an air quality permit and a solid waste management license or a hazardous waste permit. In coordinating the permitting process of these two bureaus, the department shall also coordinate the environmental review process conducted pursuant to Title 75, chapter 1, part 1. At the discretion of the department, this coordination may be accomplished by preparing a joint environmental review document.

The legislature has not provided for definitions of lowest achievable emission rate and best available control technology in this legislation. It is the intent of the legislature that these terms be construed and applied in a manner that is consistent with the definitions contained in the federal Clean Air Act, 42 U.S.C. 7401, et seq. In adopting rules to implement this legislation, the board shall include rules defining these terms.

Finally, the legislature understands that the retroactive applicability of this bill will subject permit applicants, who have begun but not completed the permitting process, to the provisions of this bill. While the legislature understands that compliance with the provisions of this bill will require additional time and resources from the applicant, it is not the intent of the legislature that this legislation unnecessarily delay the permitting process or unnecessarily increase the permitting costs."

Severability: Section 8, Ch. 639, L. 1993, was a severability clause.

Effective Date — Retroactive Applicability: Sections 9 and 10, Ch. 639, L. 1993, provided that this section is effective May 13, 1993, and is applicable to all commercial medical waste incinerators that have applied for but not received a permit under Title 75, Ch. 2, and a license under 75-10-221 by that date and to all commercial hazardous waste incinerators that have applied for but not received a permit under Title 75, Ch. 2, and a permit under 75-10-406 by that date.

75-2-232. Disclosure statement required.

Compiler's Comments

Severability: Section 8, Ch. 639, L. 1993, was a severability clause.

Effective Date — Retroactive Applicability: Sections 9 and 10, Ch. 639, L. 1993, provided that this section is effective May 13, 1993, and is applicable to all commercial medical waste incinerators that have applied for but not received a permit under Title 75, Ch. 2, and a license under 75-10-221 by that date and to all commercial hazardous waste incinerators that have applied for but not received a permit under Title 75, Ch. 2, and a permit under 75-10-406 by that date.

75-2-233. Denial or modification of permit — mitigating factors.

Compiler's Comments

Severability: Section 8, Ch. 639, L. 1993, was a severability clause.

Effective Date — Retroactive Applicability: Sections 9 and 10, Ch. 639, L. 1993, provided that this section is effective May 13, 1993, and is applicable to all commercial medical waste incinerators that have applied for but not received a permit under Title 75, Ch. 2, and a license under 75-10-221 by that date and to all commercial hazardous waste incinerators that have applied for but not received a permit under Title 75, Ch. 2, and a permit under 75-10-406 by that date.

75-2-234. Registration.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 3, Ch. 142, L. 2023. Amendment effective April 18, 2023.

Saving Clause: Section 4, Ch. 142, L. 2023, was a saving clause.

2021 Amendment: Chapter 324 near beginning substituted "department" for "board". Amendment effective July 1, 2021.

Severability: Section 9, Ch. 231, L. 2003, was a severability clause.

Effective Date: Section 10, Ch. 231, L. 2003, provided: "[This act] is effective on passage and approval." Approved April 4, 2003.

Administrative Rules

Title 17, chapter 8, subchapter 17, ARM Registration of air contaminant sources.

Title 17, chapter 8, subchapter 18, ARM Standards and requirements for sand and gravel, concrete, and asphalt.

Part 3
Local Air Pollution Control

75-2-301. Local air pollution control programs — consistency with state and federal regulations — procedure for public notice and comment required.

Compiler's Comments

2021 Amendment: Chapter 324 throughout section substituted reference to department for reference to board; in (10) near end of first sentence substituted "it may assume" for "it may direct the department to assume"; in (11) in middle after "may" deleted "with the approval of the board"; and made minor changes in style. Amendment effective July 1, 2021.

2015 Amendment: Chapter 339 in (3)(a)(iii) in two places after "permit" inserted "or registration" and at end substituted "administration of local air pollution control program permitting or registration activities" for "administration of permitting activities". Amendment effective October 1, 2015.

2001 Amendment: Chapter 536 in (3)(a)(i) at beginning substituted "subject to subsection (4), provides by rule, ordinance" for "provides by ordinance"; in (3)(b) near beginning after "approval of" substituted "a rule, ordinance" for "an ordinance" and at end substituted "subsection (4)" for "75-2-207"; inserted (4) allowing a local air pollution control program to adopt a rule, ordinance, or local law that is more stringent than comparable state or federal regulation or guidelines only under certain circumstances; inserted (13) requiring that local air pollution control programs provide procedures for public notice, public hearing, public comment, and appeal for any proposed new or revised rules, ordinances, or local laws and providing requirements for those procedures; and made minor changes in style. Amendment effective May 1, 2001.

Applicability: Section 3, Ch. 536, L. 2001, provided: "[Section 2] [75-2-301] does not apply to proposals for new rules, ordinances, or local laws that have been noticed to the public and submitted to the local air pollution control program governing body before [the effective date of this act]." Effective May 1, 2001.

1995 Amendment: Chapter 471 inserted (3)(b) concerning Board approval of ordinance more stringent than state law; and made minor changes in style. Amendment effective April 14, 1995.

Applicability: Section 22(3), Ch. 471, L. 1995, provided: "(3) [This act] does not apply to the establishment of fees or public participation requirements."

1993 Amendment: Chapter 502 in (3)(a) inserted "75-2-217 through 75-2-219"; in second sentence of (3)(c), after "provisions of", substituted "75-2-220" for "75-2-211"; in (4), (5), and two places in (9), after "air", substituted "pollutant" for "contaminant"; and made minor changes in style.

Effective Dates: Section 24(2), Ch. 502, L. 1993, provided that 75-2-105, 75-2-204, 75-2-211, 75-2-217 through 75-2-220, subsections (1) and (3) of 75-2-221, 75-2-301, 75-2-401, 75-2-412, 75-2-413, and 75-2-421 are effective October 1, 1993, but that the Board and Department may adopt rules under these sections upon passage and approval. Approved April 24, 1993. Rules adopted to implement these sections may not be effective before October 1, 1993.

1991 Amendment: In (1), at beginning, inserted "After public hearing", after "establish" inserted "and administer", near middle, after "control program", deleted "on being petitioned by 15% of the qualified electors in its jurisdiction and", and at end, after "board", deleted remainder of former subsection that read: "after a public hearing conducted under 75-2-111, may thereafter administer in its jurisdiction the air pollution control program which:

(a) provides by ordinance or local law for requirements compatible with, more stringent, or more extensive than those imposed by 75-2-203, 75-2-212, and 75-2-402 and rules issued under these sections;

(b) provides for the enforcement of these requirements by appropriate administrative and judicial process; and

(c) provides for administrative organization, staff, financial, and other resources necessary to effectively and efficiently carry out its program"; inserted (2) requiring county and municipal approval of a county program that encompasses all or part of a municipality; inserted (3) establishing program criteria; inserted (4) excepting the grant of authority of a program to control certain air contaminant sources, except in emergencies; in (6), near beginning after "believe that", inserted "any part of"; in (7), near beginning after "determines that", inserted "any part of"; in (8), at end of first sentence, inserted "including the terms contained in any applicable board order, that are necessary to correct the deficiencies found by the board", in third sentence substituted "department's action is" for "program shall be", and at end substituted "jurisdiction" for "municipality or county"; in (10), near beginning after "administers", inserted "all or part of" and changed subsection references; and made minor changes in style. Amendment effective March 20, 1991.

Administrative Rules

ARM 17.8.132 Credible evidence.

Case Notes

Standing of Local Air Pollution Control Board to Challenge Validity of State Administrative Rules: A local pollution control board is a person within the statutory definition in 2-4-102, and in the same way as a citizen of a local area is more particularly affected by actions of the state Board of Environmental Review than is a citizen of another area, the interest of a local board is distinguishable from and greater than the interest of the public generally. Because of threatened injury to a local board in the form of potential economic harm from additional expenses necessary to implement state administrative rules, a local board has standing to challenge the validity of administrative rules concerning air pollution applicable within its area of jurisdiction. Missoula City-County Air Pollution Control Bd. v. Bd. of Envtl. Review, 282 M 255, 937 P2d 463, 54 St. Rep. 338 (1997), followed in Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236, 56 St. Rep. 964 (1999).

Attorney General's Opinions

Separate Tax Levy for Air Pollution Program Not Permitted: The County Commissioners may not impose a separate tax levy to fund local air pollution programs. 41 A.G. Op. 28 (1985).

75-2-302. State and federal aid.

Compiler's Comments

2021 Amendment: Chapter 324 in (3) near end substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 2021.

1991 Amendment: Near end of (1) substituted "up to 30%" for "equal to 30%"; inserted (2) clarifying that federal aid granted to the state and subsequently granted to a local program is not considered state aid; and at end of (3) substituted "the program is currently approved by the board under 75-2-301" for "that any such application is first submitted to and approved by the board. The board shall approve any such application if it is consistent with this chapter and any other applicable requirements of law". Amendment effective March 20, 1991.

Part 4
Enforcement, Appeal, and Penalties

75-2-401. Enforcement — notice — order for corrective action — administrative penalty.

Compiler's Comments

2021 Amendment: Chapter 535 in (3)(e) after "in which the violation occurred" deleted "or, if mutually agreed on by the parties in the action, in the district court of the first judicial district, Lewis and Clark County"; and made minor changes in style. Amendment effective October 1, 2021.

2005 Amendment: Chapter 487 in (3)(c) increased time to 2 years from 12 months; in (3)(d) at end inserted "the penalty factors in 75-1-1001"; deleted former (3)(d)(i) through (3)(d)(vii) that read: "(i) the alleged violator's ability to pay and the economic impact of the penalty on the alleged violator;

(ii) the alleged violator's full compliance history and good faith efforts to comply;

(iii) the duration of the violation as established by any credible evidence, including evidence other than the applicable test method;

(iv) payment by the violator of penalties previously assessed for the same violation;

(v) the economic benefit of noncompliance;

(vi) the seriousness of the violation; and

(vii) other matters as justice may require"; inserted (3)(e) relating to bringing an action to enforce a final administrative order; and made minor changes in style. Amendment effective January 1, 2006.

Saving Clause: Section 29, Ch. 487, L. 2005, was a saving clause.

2001 Amendment: Chapter 591 at end of (3)(b) substituted "alternative energy revolving loan account established in 75-25-101" for "state general fund". Amendment effective May 5, 2001.

Severability: Section 28, Ch. 591, L. 2001, was a severability clause.

1993 Amendment: Chapter 502 in (1), in first sentence near beginning after "rule", substituted "adopted" for "made" and before "certified" deleted "registered or" and in third sentence, after "in the order", inserted "or an order to pay an administrative penalty, or both"; in (2), in first sentence after "shall", deleted "either affirm or modify an order previously issued or" and at end, after "action", substituted "or assess an administrative penalty, or both" for "it considers appropriate" and in second sentence, at beginning, inserted "As appropriate", before "time limits" deleted "and may prescribe", and at end, after "emissions", inserted "or the date by which the administrative penalty must be paid"; inserted (3) relating to amount of administrative civil penalty; inserted (4) relating to contested case hearing; and made minor changes in style.

Saving Clause: Section 21, Ch. 502, L. 1993, was a saving clause.

Effective Dates: Section 24(2), Ch. 502, L. 1993, provided that 75-2-105, 75-2-204, 75-2-211, 75-2-217 through 75-2-220, subsections (1) and (3) of 75-2-221, 75-2-301, 75-2-401, 75-2-412, 75-2-413, and 75-2-421 are effective October 1, 1993, but that the Board and Department may adopt rules under these sections upon passage and approval. Approved April 24, 1993. Rules adopted to implement these sections may not be effective before October 1, 1993.

1983 Amendment: In middle of first sentence of (1), substituted "this chapter, or a condition or limitation imposed by a permit issued pursuant to this chapter" for "it"; in second sentence, after "rule" inserted ", or permit condition or limitation"; and made minor phraseology changes.

Administrative Rules

ARM 17.8.130 Enforcement procedures — notice of violation — order to take corrective action.
ARM 17.8.131 Enforcement procedures — appeal to Board.
ARM 17.8.132 Credible evidence.

75-2-402. Emergency procedure.

Compiler's Comments

2013 Amendment: Chapter 417 in (1) in last sentence substituted "start" for "commencement" and after "shall" substituted "confirm" for "affirm"; in (2) at beginning substituted "Except as provided" for "In the absence of a generalized condition such as that referred to" and near end after "hearing and" substituted "confirmation" for "affirmance"; deleted former (4) that read: "(4) Nothing in 75-2-205 may be construed to require a hearing before the issuance of an emergency order pursuant to this section"; and made minor changes in style. Amendment effective May 6, 2013.

75-2-403. Inspections.

Compiler's Comments

1995 Amendment: Chapter 85 in (1), after "department", inserted "or an authorized representative" and after "chapter or" substituted "a rule, order, or permit" for "rules and permits"; inserted (1)(b) concerning emissions-related activity; inserted (1)(c) concerning records; inserted (3) concerning access to and copying of records at reasonable times; inserted (4) providing for inspection at reasonable times; inserted (5) providing for sampling or monitoring at reasonable times; inserted (7) providing that inspections under this section must be conducted in compliance with all applicable federal or state rules or requirements for workplace safety; and made minor changes in style.

1983 Amendment: In (1), after "rules" inserted "and permits"; and made minor phraseology changes.

Law Review Articles

The Constitutionality of Civil Inspections, Angel & Corontzos, 21 Mont. L. Rev. 195 (1960).

75-2-411. Judicial review.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Administrative Rules

ARM 17.8.140 Rehearing procedures — form and filing of petition.
ARM 17.8.141 Rehearing procedures — filing requirements.
ARM 17.8.142 Rehearing procedures — board review.

Case Notes

Appeal Rendered Moot by Filing Similar Action in Proper County: Petitioner's appeal from a dismissal of a petition seeking review of a decision of the Board of Health and Environmental Sciences (now Board of Environmental Review) on the grounds that the petition had been filed in the wrong county was rendered moot when the petitioner subsequently filed a petition in the proper county seeking review of the identical issues. On appeal the petitioner was seeking reversal so as to permit venue to be transferred to the proper county, and petitioner has therefore received the relief it now requests. N. Plains Resource Council v. Bd. of Health & Environmental Sciences, 184 M 466, 603 P2d 684, 36 St. Rep. 2174 (1979).

Judicial Review Limited to County Court of Situs of Affected Property: To comply with the Clean Air Act of Montana, a petition for judicial review of an order of the Board of Health and Environmental Sciences (now Board of Environmental Review) granting a preconstruction permit for two power generating stations in Rosebud County could only have been filed and determined in Rosebud County. N. Plains Resource Council v. Bd. of Health & Environmental Sciences, 184 M 466, 603 P2d 684, 36 St. Rep. 2174 (1979).

Procedure for Judicial Review Under Administrative Procedure Act Not Controlling: Although the Montana Administrative Procedure Act provides generally for judicial review, the provisions of 2-4-702 exclude any possible conflict with the procedure set out in this section. N. Plains Resource Council v. Bd. of Health & Environmental Sciences, 184 M 466, 603 P2d 684, 36 St. Rep. 2174 (1979).

75-2-412. Criminal penalties — injunction preserved.

Compiler's Comments

1993 Amendment: Chapter 502 substituted (1) relating to when person is guilty of violating section for former (1) that read: "(1) A person who violates this chapter or a rule, order, or permit made or issued under it, other than 75-2-105, is guilty of an offense and subject to a fine not to exceed $1,000. Each day of violation constitutes a separate offense"; substituted (2) setting civil and criminal penalties for former (2) that read: "(2) A person who willfully violates 75-2-105 is guilty of an offense and subject to a fine not to exceed $1,000"; substituted (3) concerning deposit of fines collected except those collected by an approved local air pollution control program for former text that read: "Fines collected, except those collected in a justice's court, shall be deposited to the state general fund"; and in (4), after "appropriate", inserted "civil or administrative".

Saving Clause: Section 21, Ch. 502, L. 1993, was a saving clause.

Effective Dates: Section 24(2), Ch. 502, L. 1993, provided that 75-2-105, 75-2-204, 75-2-211, 75-2-217 through 75-2-220, subsections (1) and (3) of 75-2-221, 75-2-301, 75-2-401, 75-2-412, 75-2-413, and 75-2-421 are effective October 1, 1993, but that the Board and Department may adopt rules under these sections upon passage and approval. Approved April 24, 1993. Rules adopted to implement these sections may not be effective before October 1, 1993.

1987 Amendment: In (3), after "collected", inserted "except those collected in a justice's court".

1983 Amendment: In (1), after "order" inserted "or permit"; after "made" inserted "or issued"; in (4), substituted "a rule, order, or permit" for "rules or orders"; after "made" inserted "or issued"; and made minor phraseology changes.

Case Notes

Injunction of County Commissioners Proper: An injunction to prevent County Commissioners from taking any action which violates open burning permit requirements of the state was properly issued since such injunction is expressly authorized by the Clean Air Act of Montana. State ex rel. Dept. of Health & Environmental Sciences v. Lincoln County, 178 M 410, 584 P2d 1293, 35 St. Rep. 1402 (1978).

75-2-413. Civil penalties — venue — effect of action — presumption of continuing violation under certain circumstances.

Compiler's Comments

2021 Amendment: Chapter 535 in (2)(b) after "violation occurs or is threatened" deleted "or, if mutually agreed on by the parties in the action, in the district court of the first judicial district, Lewis and Clark County"; and made minor changes in style. Amendment effective October 1, 2021.

2005 Amendment: Chapter 487 inserted (1)(b) relating to use of penalty factors; in (2)(b) at end substituted "or, if mutually agreed on by the parties in the action, in the district court of the first judicial district, Lewis and Clark County" for "if the defendant cannot be located in Montana"; and made minor changes in style. Amendment effective January 1, 2006.

Saving Clause: Section 29, Ch. 487, L. 2005, was a saving clause.

2001 Amendment: Chapter 591 in (4) at end of first sentence substituted "alternative energy revolving loan account established in 75-25-101" for "state general fund". Amendment effective May 5, 2001.

Severability: Section 28, Ch. 591, L. 2001, was a severability clause.

1995 Amendments: Chapter 85 in (1), at end of last sentence, inserted "except for civil penalties for violation of the operating permit program required by Subchapter V of the federal Clean Air Act"; and made minor changes in style.

Chapter 498 inserted (3) regarding the presumption of a continuing violation under certain circumstances. Amendment effective April 14, 1995.

1995 Statement of Intent: The statement of intent attached to Ch. 498, L. 1995, provided: "A statement of intent is required for this bill because the bill gives the department authority to adopt administrative rules that specify meteorologic conditions that necessitate cessation of the burning of hazardous waste at a commercial hazardous waste incinerator if site-specific monitoring determines that inversion conditions exist."

1993 Amendment: Chapter 502 in (1), in first sentence after "rule", substituted "adopted under this chapter" for "enforced thereunder", after "issued" substituted "under this chapter" for "pursuant thereto and after notice thereof has been given by the department", and at end, after "$10,000", inserted "per violation" and in second sentence, before "violation", inserted "each"; in (3) inserted second sentence providing that subsection is inapplicable to money collected by approved local air pollution control program; and made minor changes in style.

Saving Clause: Section 8, Ch. 639, L. 1993, was a saving clause.

Effective Dates: Section 24(2), Ch. 502, L. 1993, provided that 75-2-105, 75-2-204, 75-2-211, 75-2-217 through 75-2-220, subsections (1) and (3) of 75-2-221, 75-2-301, 75-2-401, 75-2-412, 75-2-413, and 75-2-421 are effective October 1, 1993, but that the Board and Department may adopt rules under these sections upon passage and approval. Approved April 24, 1993. Rules adopted to implement these sections may not be effective before October 1, 1993.

1983 Amendment: In first sentence of (1), after "order" inserted "or permit"; after "made" inserted "or issued"; in (2)(a) and (2)(b), substituted "a rule, order, or permit made or issued" for "rules or orders made".

75-2-421. Persons subject to noncompliance penalties — exemptions.

Compiler's Comments

1993 Amendment: Chapter 502 in (1) substituted "may" for "shall"; in (1)(b), after "under", inserted "this chapter or" and after "7412" inserted "7477, or 7603"; inserted (1)(c) authorizing Department to impose noncompliance penalty against person owning or operating stationary source not in compliance with other chapter requirement or requirement of Subchapter V of federal Clean Air Act; in (1)(d), near beginning, inserted "or (1)(c)"; at end of (3) inserted "Title 2, chapter 4, part 6"; and made minor changes in style.

Saving Clause: Section 21, Ch. 502, L. 1993, was a saving clause.

Effective Dates: Section 24(2), Ch. 502, L. 1993, provided that 75-2-105, 75-2-204, 75-2-211, 75-2-217 through 75-2-220, subsections (1) and (3) of 75-2-221, 75-2-301, 75-2-401, 75-2-412, 75-2-413, and 75-2-421 are effective October 1, 1993, but that the Board and Department may adopt rules under these sections upon passage and approval. Approved April 24, 1993. Rules adopted to implement these sections may not be effective before October 1, 1993.

Saving Clause: Section 18, Ch. 560, L. 1979, was a saving clause.

Severability: Section 19, Ch. 560, L. 1979, was a severability clause.

75-2-422. Amount of noncompliance penalty — late charge.

Compiler's Comments

2021 Amendment: Chapter 324 in (1)(a) near beginning substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 2021.

Statement of Intent: The statement of intent attached to HB 716 (Ch. 560, L. 1979) provided: "The Legislature intends to grant to the Board of Health and Environmental Sciences [now Board of Environmental Review] rulemaking authority to adopt a permit fee schedule, and to adopt a schedule of penalty assessments for noncompliance with respect to any source under sections 7 through 15 of this act."

75-2-427. Deposit of noncompliance penalty fees.

Compiler's Comments

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

75-2-428. Effect of new standards on noncompliance penalty.

Compiler's Comments

2021 Amendment: Chapter 324 near beginning substituted "department" for "board". Amendment effective July 1, 2021.

Part 5
Asbestos Control

Part Compiler's Comments

Asbestos Advisory Group — Members — Duties: Section 1, Ch. 309, L. 2015, provided: "(1) The department of environmental quality shall convene an asbestos advisory group that represents a broad variety of people with interests in asbestos regulation.

(2) The asbestos advisory group shall advise the department on:

(a) regulatory thresholds for permits and whether a tiered permitting system is appropriate;

(b) the appropriate types of projects and the size of structures subject to permitting;

(c) the appropriate timeframe for asbestos project notification and issuance of permits;

(d) whether a registration program is appropriate for small scale projects;

(e) the scope of the department's enforcement and cleanup authority;

(f) appropriate funding options;

(g) the relationship between federal and state authority over various issues related to asbestos control and methods to clarify conflicts;

(h) options to streamline the permitting process while still protecting public health and safety;

(i) any other issues related to asbestos regulation considered appropriate by the advisory group.

(3) The asbestos advisory group shall complete its work, including issuing recommendations to the department, by December 31, 2016."

Saving Clause: Section 11, Ch. 581, L. 1989, was a saving clause.

Part Administrative Rules

Title 17, chapter 74, subchapters 3 and 4, ARM Asbestos control and fees.

75-2-501. Short title.

Compiler's Comments

Effective Date: Section 12(2), Ch. 581, L. 1989, provided that this section is effective January 1, 1990.

Administrative Rules

ARM 17.8.132 Credible evidence.

75-2-502. Definitions.

Compiler's Comments

2015 Amendment: Chapter 309 in (3) substituted "10 square feet" for "3 square feet". Amendment effective April 27, 2015.

Preamble: The preamble attached to Ch. 309, L. 2015, provided: "WHEREAS, in 1989 the Legislature created the "Asbestos Control Act" and allowed for rulemaking with the intent to establish standards and procedures consistent with federal law for accreditation of asbestos-related occupations and control of the work performed by persons in any asbestos-related occupation; and

WHEREAS, people exposed to airborne asbestos fibers suffer significantly increased rates of lung cancer, mesothelioma, and other diseases; and

WHEREAS, to prevent unnecessary public exposure to asbestos fibers it is necessary to regulate and establish criteria for asbestos abatement practices and to require statewide standards for training and accreditation of asbestos workers; and

WHEREAS, most portions of the Asbestos Control Act have not been updated in two decades, and the regulations and the program are in need of evaluation."

1995 Amendment — Code Commissioner Correction: Chapter 418 in definition of Department substituted "department of environmental quality provided for in 2-15-3501" for "department of health and environmental sciences as provided in 2-15-2101". Amendment effective July 1, 1995. The definition of Department referred to [section 22]. The Department of Environmental Quality was actually created in [section 20]. Pursuant to the authority contained in sec. 73, Ch. 18, L. 1995, the Code Commissioner has corrected the erroneous reference.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Effective Date: Section 12(2), Ch. 581, L. 1989, provided that this section is effective January 1, 1990.

75-2-503. Rulemaking authority — issuance of permits.

Compiler's Comments

2003 Amendment: Chapter 25 in (1)(k)(iii) after "issuance" inserted "and administration" and at end inserted "including annual asbestos project permits for facilities". Amendment effective February 13, 2003.

1995 Amendment: Chapter 471 in (1), near beginning, inserted "subject to the provisions of 75-2-207". Amendment effective April 14, 1995.

Applicability: Section 22(3), Ch. 471, L. 1995, provided: "(3) [This act] does not apply to the establishment of fees or public participation requirements."

1991 Amendment: Throughout section made minor changes in style.

1989 Statement of Intent: The statement of intent attached to Ch. 581, L. 1989, provided: "A statement of intent is required for this bill because [sections 3 and 4] [75-2-503 and 75-2-504] authorize the department of health and environmental sciences [now department of environmental quality] to adopt rules. It is the intent of the legislature that the rules establish standards and procedures consistent with federal law for accreditation of asbestos-related occupations and control of the work performed by persons in any asbestos-related occupation, including the setting of allowable levels of indoor airborne asbestos. It is the intent of the legislature that the rules for asbestos in indoor air include standards for the use of air monitoring for:

(1) evaluation of asbestos-containing materials in buildings; and

(2) completion and reoccupancy after an asbestos project.

WHEREAS, people exposed to airborne asbestos fibers suffer significantly increased rates of lung cancer, mesothelioma, and other diseases; and

WHEREAS, to prevent unnecessary public exposure to asbestos fibers it is necessary to regulate and establish criteria for asbestos abatement practices and to require statewide standards for training and accreditation of asbestos workers."

Advisory Committee: Section 8, Ch. 581, L. 1989, provided: "(1) An advisory committee is created to coordinate and advise the department on the formulation of rules to be promulgated by the department under [sections 3 and 4] [75-2-503 and 75-2-504]. This advisory committee consists of at least one representative from the following:

(a) asbestos manufacturing and construction industries;

(b) asbestos suppliers;

(c) building industries;
(d) labor organizations;
(e) employers with employees involved in on-premises asbestos abatement; and
(f) other individuals as considered appropriate by the department.
(2) The advisory committee must be abolished upon final adoption of rules provided for in [sections 3 and 4] [75-2-503 and 75-2-504]."

Effective Date: Section 12(1), Ch. 581, L. 1989, provided that this section is effective July 1, 1989.

Administrative Rules

Title 17, chapter 74, subchapters 3 and 4, ARM Asbestos control and fees.

75-2-504. Facility permits.

Compiler's Comments

2003 Amendment: Chapter 25 deleted former (2) that read: "(2) The fee for a facility permit must reflect the actual cost of the department's application review, permit issuance, and facility inspections"; and made minor changes in style. Amendment effective February 13, 2003.

Effective Date: Section 12(1), Ch. 581, L. 1989, provided that this section is effective July 1, 1989.

75-2-505. Small project review requirement.

Compiler's Comments

Preamble: The preamble attached to Ch. 309, L. 2015, provided: "WHEREAS, in 1989 the Legislature created the "Asbestos Control Act" and allowed for rulemaking with the intent to establish standards and procedures consistent with federal law for accreditation of asbestos-related occupations and control of the work performed by persons in any asbestos-related occupation; and

WHEREAS, people exposed to airborne asbestos fibers suffer significantly increased rates of lung cancer, mesothelioma, and other diseases; and

WHEREAS, to prevent unnecessary public exposure to asbestos fibers it is necessary to regulate and establish criteria for asbestos abatement practices and to require statewide standards for training and accreditation of asbestos workers; and

WHEREAS, most portions of the Asbestos Control Act have not been updated in two decades, and the regulations and the program are in need of evaluation."

Effective Date: Section 5, Ch. 309, L. 2015, provided: "[This act] is effective on passage and approval." Approved April 27, 2015.

75-2-508. Asbestos control account.

Compiler's Comments

1999 Amendment: Chapter 293 deleted former (1)(b) that read: "(b) civil penalties collected pursuant to 75-2-514"; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 11, Ch. 293, L. 1999, was a saving clause.

Severability: Section 12, Ch. 293, L. 1999, was a severability clause.

Effective Date: Section 5, Ch. 596, L. 1991, provided: "[This act] is effective July 1, 1991."

75-2-511. Accreditation requirements — restrictions.

Compiler's Comments

Effective Date: Section 12(2), Ch. 581, L. 1989, provided that this section is effective January 1, 1990.

75-2-513. Records.

Compiler's Comments

Effective Date: Section 12(2), Ch. 581, L. 1989, provided that this section is effective January 1, 1990.

75-2-514. Civil penalties — venue for actions to recover.

Compiler's Comments

2021 Amendment: Chapter 535 in (3) at end deleted "or, if mutually agreed on by the parties in the action, in the district court of the first judicial district, Lewis and Clark County". Amendment effective October 1, 2021.

2005 Amendment: Chapter 487 inserted (1)(b) relating to use of penalty factors; inserted (3) relating to an action to recover penalties; and made minor changes in style. Amendment effective January 1, 2006.

Saving Clause: Section 29, Ch. 487, L. 2005, was a saving clause.

1999 Amendment: Chapter 293 deleted former (1) through (4) that read: "(1) The department may suspend, deny, or revoke the accreditation of or reprimand a person who:

(a) fraudulently or deceptively obtains or attempts to obtain accreditation;

(b) fails to meet the qualifications for accreditation or comply with the requirements of this part or any rule adopted by the department; or

(c) fails to meet any applicable federal or state standard for asbestos projects.

(2) Notwithstanding the provisions of any other law, a person who purposely or knowingly violates any provision of this part or an adopted rule or order issued pursuant to this part is guilty of a misdemeanor.

(3) If the department determines that a violation of this part or a rule promulgated pursuant to this part has occurred, it may issue an order compelling the person receiving the order to end the violation immediately.

(4) In addition to or instead of the remedies listed in subsections (1) through (3), an accredited person who purposely or knowingly violates this part or a rule adopted pursuant to this part that concerns the conduct of an asbestos project may be assessed a civil penalty by the district court of not more than $1,000 a day for an initial violation and $5,000 a day for each subsequent violation occurring within a 3-year period from the date of the initial violation"; in (1) substituted "that violates any provision of this part, a rule adopted under this part, or a permit or order issued under this part" for "who engages in an asbestos project without valid accreditation or a permit"; inserted (2) providing that "an action under this section is not a bar to enforcement by injunction or other appropriate civil or administrative remedies"; deleted former (6) that read: "(6) Civil penalties collected under this part must be deposited into the account established in 75-2-508"; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 11, Ch. 293, L. 1999, was a saving clause.

Severability: Section 12, Ch. 293, L. 1999, was a severability clause.

1991 Amendment: At end of (6) substituted "account established in 75-2-508" for "resource indemnity trust fund created in 15-38-201". Amendment effective July 1, 1991.

Effective Date: Section 12(2), Ch. 581, L. 1989, provided that this section is effective January 1, 1990.

75-2-515. Administrative enforcement.

Compiler's Comments

2005 Amendment: Chapter 487 in (4)(c) at end inserted "the penalty factors in 75-1-1001"; and deleted former (4)(c)(i) through (4)(c)(vii) that read: "(i) the seriousness of the violation;

(ii) the duration of the violation;

(iii) any economic benefit derived from the violation;

(iv) the person's good faith efforts to comply with the requirements in question;

(v) the person's compliance history;

(vi) the person's ability to pay a penalty; and

(vii) other matters as justice may require". Amendment effective January 1, 2006.

Saving Clause: Section 29, Ch. 487, L. 2005, was a saving clause.

Saving Clause: Section 11, Ch. 293, L. 1999, was a saving clause.

Severability: Section 12, Ch. 293, L. 1999, was a severability clause.

Effective Date: This section is effective October 1, 1999.

75-2-516. Criminal penalties.

Compiler's Comments

Saving Clause: Section 11, Ch. 293, L. 1999, was a saving clause.

Severability: Section 12, Ch. 293, L. 1999, was a severability clause.

Effective Date: This section is effective October 1, 1999.

75-2-517. Injunctions.

Compiler's Comments

Saving Clause: Section 11, Ch. 293, L. 1999, was a saving clause.

Severability: Section 12, Ch. 293, L. 1999, was a severability clause.

Effective Date: This section is effective October 1, 1999.

75-2-518. Inspections — sampling.

Compiler's Comments

Saving Clause: Section 11, Ch. 293, L. 1999, was a saving clause.

Severability: Section 12, Ch. 293, L. 1999, was a severability clause.

Effective Date: This section is effective October 1, 1999.

75-2-519. Cleanup orders.

Compiler's Comments

Saving Clause: Section 11, Ch. 293, L. 1999, was a saving clause.

Severability: Section 12, Ch. 293, L. 1999, was a severability clause.

Effective Date: This section is effective October 1, 1999.

CHAPTER 3
RADON CONTROL

Part 6
Montana Radon Control Act

Part Compiler's Comments

Preamble: The preamble attached to Ch. 527, L. 1993, provided: "WHEREAS, radon is an odorless, colorless, tasteless, radioactive gas that occurs naturally in soil gas, underground water, and outdoor air;

WHEREAS, radon gas enters homes and buildings through exposures in foundations, decays to form radon progeny, and, unless exposed to the atmosphere, accumulates in structures and becomes hazardous to human health;

WHEREAS, prolonged exposure to elevated concentrations of radon decay products has been associated with increases in the risk of lung cancer;

WHEREAS, only four states in the country rank higher than Montana in the percentage of homes that exceed the United States Environmental Protection Agency action guidance of 4 picocuries per liter;

WHEREAS, property owners in affected areas should have their residences and other buildings tested to determine radon levels;

WHEREAS, property owners do contract for services to measure and reduce radon levels in specific buildings;

WHEREAS, other states' experiences with radon testing and with mitigation companies have proved that the possibility exists for fraudulent operations;

WHEREAS, public education and access to information concerning radon will protect the public health; and

WHEREAS, notification of the presence of radon to persons acquiring or selling real estate will protect the public health.

THEREFORE, the Legislature of the State of Montana finds it essential to protect the public health, safety, and welfare through public education concerning radon and through real estate transaction notification and to provide for recognition of a United States Environmental Protection Agency proficiency listing for persons who provide radon testing and mitigation services."

Saving Clause: Section 10, Ch. 527, L. 1993, was a saving clause.

Severability: Section 11, Ch. 527, L. 1993, was a severability clause.

Effective Date: Section 12, Ch. 527, L. 1993, provided: "[This act] [75-3-601 through 75-3-607] is effective July 1, 1993."

75-3-602. Definitions.

Compiler's Comments

1995 Amendments: Chapter 185 in definition of inhabitable real property inserted "The building must be designed to be primarily occupied by humans, either as a dwelling or as a place of business."

Chapter 418 in definition of Department substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

75-3-606. Radon disclosure statement on real estate documents — disclosure of prior radon testing — immunity from liability.

Compiler's Comments

1995 Amendment: Chapter 185 in (1), at beginning, deleted "After January 1, 1994" and in first sentence substituted "or contemporaneously with an offer" for "the execution of any contract";

and in (2), in first sentence, substituted "prior to or upon entry into a contract for the purchase of that building" for "with the contract of sale" and at end inserted sentence providing that this section does not create a contingency on the purchase of the property or any right to rescind a contract for purchase unless the contingency or right to rescind is an express term of the contract.

75-3-607. Radon control account.

Compiler's Comments

2003 Amendment: Chapter 28 in (1) near end of second sentence substituted "received from public or private sources, except for money received from the federal government" for "received from the federal government and from other sources, public or private". Amendment effective July 1, 2003.

CHAPTER 5
WATER QUALITY

Chapter Administrative Rules

Title 17, chapter 30, ARM Water quality.

Chapter Case Notes

Interpretation of Agency Rule Consistent With Water Quality Act — Arbitrary and Capricious Application: An environmental group filed a lawsuit against the state Department of Environmental Quality challenging a modified water discharge permit issued to a mining company. The plaintiff alleged that the Department's interpretation of its administrative rules regarding waters with ephemeral characteristics was unlawful and that terms of the permit allowed by the agency were arbitrary and capricious. After the District Court granted summary judgment for the plaintiff, the Department appealed to the Supreme Court. The Supreme Court reversed, concluding that the agency's interpretation was consistent with the Water Quality Act and deferred to its interpretation of its regulations. However, the Supreme Court also determined that the Department arbitrarily and capriciously applied its interpretation during the permitting process and remanded the matter for further factfinding. Mont. Envtl. Information Center v. Dept. of Environmental Quality, 2019 MT 213, 397 Mont. 161, 451 P.3d 493.

EPA Regulations Granting "Treatment as State" Status to Develop Water Standards Within Flathead Indian Reservation Upheld: In 1987, Congress added section 518(e) to the Clean Water Act, which authorized the Environmental Protection Agency (EPA) to permit Indian tribes "to be treated as a state" (TAS) for purposes of promulgating water quality standards. In 1992, the Confederated Salish and Kootenai Tribes (tribes) applied for TAS status for all surface waters within the Flathead Indian Reservation. Montana opposed the EPA's grant of TAS status to the tribes because it would extend to lands and surface water within reservation boundaries owned in fee by nontribal members. After the EPA Director, upon determining that the tribes possessed inherent authority over nonmembers on fee land, approved the tribes' TAS application, Montana filed suit, arguing that the EPA's regulations granting TAS status to all sources of pollutant emissions within the boundaries of the Flathead Indian Reservation permitted the tribes to exercise broader authority over nonmembers than the inherent tribal powers recognized as necessary to self-governance. The District Court granted summary judgment to the EPA and tribes. In affirming the District Court decision, the Ninth Circuit Court, citing its previous holdings in Mont. v. U.S., 450 US 544 (1981), and Strate v. A-1 Contractors, 520 US 438, 137 L Ed 2d 661, 117 S Ct 1404 (1997), ruled that based upon the finding that the activities of the nonmembers posed such a serious and substantial threat to tribal health and welfare, the EPA's decision to grant the tribes TAS authority was valid and reflected the appropriate application of inherent tribal regulatory authority over nonconsenting nonmembers. Mont. v. U.S. Envtl. Protection Agency, 137 F3d 1135 (9th Cir. 1998), certiorari denied, 142 L Ed 2d 227, 119 S Ct 275 (1998).

Chapter Law Review Articles

MEIC v. DEQ: An Inadequate Effort to Address the Meaning of Montana's Constitutional Environmental Provisions, Horwich, 62 Mont. L. Rev. 269 (2001).

The Effect of Federal Legislation on Historical State Powers of Pollution Control: Has Congress Muddied State Waters?, Renz, 43 Mont. L. Rev. 197 (1982).

Chapter Collateral References

Federal Water Pollution Control Act, 33 U.S.C. § 1251, et seq.

A Guide to Montana Water Quality Regulation, Montana Environmental Quality Council.

Part 1
General Provisions

Part Case Notes

Unenforceability of Buy-Sell Agreement on Grounds of Impossibility or Impracticality of Performance — Requiring Performance of Contract With Potential for Environmental Degradation Unconstitutional: Cape-France Enterprises (Cape-France) entered a buy-sell agreement with Peed (now deceased) and Moore to purchase some property near Bozeman for a subdivision. Before the subdivision could be completed, water needed to be procured for the site. According to the agreement, as buyers, Peed and Moore were responsible to bring water to the property, but because city water was not available, a well needed to be drilled. However, the presence of a pollution plume was discovered near the land. After the subdivision process was commenced, the Department of Environmental Quality notified Cape-France that: (1) the plume may have advanced under the property; (2) a subdivision would not be approved unless a well was drilled and tested; (3) a well could be drilled, but if testing showed pollution in the water, treatment would be extensive; and (4) if drilling or pumping of the water caused expansion of the pollution, then Cape-France, as owner of the property, would be held liable for cleanup costs. On cross-motions for summary judgment, the District Court held that the buy-sell agreement could be rescinded on the basis of mutual mistake of fact and impossibility or impracticality of performance and that specific performance would not be granted. The Supreme Court affirmed. A court may determine that an act is impossible in legal contemplation when it is not practicable, when the act can be done only at an excessive, unreasonable, and unbargained-for cost. The doctrine of impossibility or impracticability is applied when, aside from the object of a contract being unlawful, the public policy underlying the strict performance of the contract is outweighed by the senselessness of requiring performance. The doctrine is not limited to cases of literal impossibility but may also be applied in cases that present a potential for substantial and unbargained-for damages. In this case, requiring Cape-France to go forward with the performance of the contract when there was a very real possibility of substantial environmental degradation and resultant financial liability for cleanup was not in the public interest or in the interests of the contracting parties and was not in accord with the guarantee of a clean and healthful environment in Art. II, sec. 3, Mont. Const., or the mandate to maintain and improve a clean and healthful environment for present and future generations in Art. IX, sec. 1, Mont. Const. Thus, rescission of the contract was proper. Cape-France Enterprises v. Estate of Peed, 2001 MT 139, 305 M 513, 29 P3d 1011 (2001). See also Smith v. Zepp, 173 M 358, 567 P2d 923 (1977), and Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236 (1999).

Department of Health Grant of Water Quality Certification — Board of Health Jurisdiction to Reconsider — Writ of Prohibition Inappropriate: Three entities competing for the right to construct a hydroelectric generation facility at a federal site applied for and received "401 certification" from the Department of Health and Environmental Sciences (now Department of Environmental Quality) to allow application for a federal permit under section 401 of the Federal Water Pollution Control Act amendments of 1972, 33 U.S.C. 1341(a). One of the entities, Montana Renewable Resources (MRR), questioned whether its competitors' projects complied with state water quality standards and requested Department reconsideration of the other two entities' "401 certification". The Department refused to modify its decision, so MRR formally petitioned the Board of Health and Environmental Sciences (now Board of Environmental Review) for an appeal or declaratory ruling. The other two entities filed applications for Writs of Prohibition to halt further Board proceedings with respect to their certifications. The Supreme Court affirmed District Court dismissal of the applications, finding that the Board was acting within its jurisdiction under Montana water quality law and that since a speedy and adequate remedy of judicial appeal from any Board decisions was available, a Writ of Prohibition was inappropriate. Malta Irrigation District v. Mont. Bd. of Health & Environmental Sciences, 224 M 376, 729 P2d 1323, 43 St. Rep. 2264 (1986).

Trial Court's Refusal to Enjoin Installation of Sewage System Held Proper: The District Court denied the Smiths' motion for a preliminary injunction restraining their neighbor, Sacks, from placing a new septic system into operation and restraining the Board of Health from issuing permits for any septic systems in the area of the Smiths' property. The Supreme Court affirmed the denial. The granting of a preliminary injunction is vested in the discretion of the District

Court, and the Supreme Court will not interfere in the exercise of this discretion unless manifest abuse is shown. In this case, no abuse was shown since the evidence presented to the District Court did not clearly show that the Smiths' water well would be damaged if the sewage system were installed. Smith v. Ravalli County Bd. of Health, 209 M 292, 679 P2d 1249, 41 St. Rep. 716 (1984).

Part Law Review Articles

The Effect of Federal Legislation on Historical State Powers of Pollution Control: Has Congress Muddied State Waters?, Renz, 43 Mont. L. Rev. 197 (1982).

Part Collateral References

Water Pollution Control Act, 33 U.S.C. § 1251, et seq.

75-5-101. Policy.

Compiler's Comments

2003 Amendment: Chapter 361 inserted (3) relating to the balance of rights; and made minor changes in style. Amendment effective April 16, 2003.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Severability: Section 39, Ch. 361, L. 2003, was a severability clause.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

Law Review Articles

The Battle for the Environmental Provisions in Montana's 1972 Constitution, Cross, 51 Mont. L. Rev. 449 (1990).

The Montana Constitution and the Right to a Clean and Healthful Environment, Schmidt & Thompson, 51 Mont. L. Rev. 411 (1990).

Symposium—The Montana Constitution: Taking New Rights Seriously, Part I, Environmental Rights, 39 Mont. L. Rev. 221 (1978).

The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: "They Mean Something", Wyatt-Shaw, 15 Pub. Land L. Rev. 219 (1994).

Montana's Nondegradation Laws: Will We Allow Continued Degradation of Montana's Waters? Response to Horwich's Nondegradation Article: Protecting Montana's High Quality Waters From Degradation, Parker, 14 Pub. Land L. Rev. 185 (1993).

Water Quality Nondegradation in Montana: Is Any Deterioration Too Much?, Horwich, 14 Pub. Land L. Rev. 145 (1993).

Collateral References

A Guide to Montana Water Quality Regulation, Montana Environmental Quality Council.

75-5-102. Intent — purpose — rights of action not abridged.

Compiler's Comments

2003 Amendment: Chapter 361 in (1) at beginning inserted first and second sentences relating to constitutional obligations and legislative intent; and made minor changes in style. Amendment effective April 16, 2003.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Severability: Section 39, Ch. 361, L. 2003, was a severability clause.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

Law Review Articles

Attorney Fees: Slipping From the American Rule Strait Jacket, 40 Mont. L. Rev. 308 (1979).

75-5-103. Definitions.

Compiler's Comments

2021 Amendments — Composite Section: Chapter 324 in definition of associated supporting infrastructure in (g), in definition of high-quality waters in (a), in definition of mixing zone at end, in definition of outstanding resource waters in (b), in definition of pollution in (b)(i), and in definition of standard of performance substituted references to department for references to board. Amendment effective July 1, 2021.

Chapter 342 deleted definitions of base numeric nutrient standards and nutrient standards variance (see 2021 Session Law for former text); in (21) at end substituted "nutrient standards, the implementation of those standards, and associated economic impacts" for "the base numeric nutrient standards, the development of nutrient standards variances, and the implementation of those standards and variances together with associated economic impacts"; and made minor changes in style. Amendment effective April 30, 2021.

Chapter 409 in definition of energy development project deleted former (b) that read: "(b) The term does not include a nuclear facility as defined in 75-20-1202"; and made minor changes in style. Amendment effective May 7, 2021.

Chapter 503 in definition of energy development project deleted former (a)(vi) that read: "(vi) producing biodiesel and that are eligible for a tax incentive for the production of biodiesel pursuant to 15-32-701"; and made minor changes in style. Amendment effective January 1, 2022.

Effective Date — Applicability: Section 69, Ch. 503, L. 2021, provided: "(1) Except as provided in subsection (2), [this act] is effective January 1, 2024, and applies to income tax years beginning after December 31, 2023.

(2) [Sections 14, 31, 32, 54, 59 through 64, 66, 68, and 69] [15-30-2303, 15-32-104, 15-32-106, 50-51-114, 70-9-803, 75-2-103, 75-5-103, 87-2-102, and 87-2-105] and this section are effective January 1, 2022, and apply to income tax years beginning after December 31, 2021."

Saving Clause: Section 12, Ch. 342, L. 2021, was a saving clause.

Severability: Section 68, Ch. 503, L. 2021, was a severability clause.

2011 Amendments — Composite Section: Chapter 267 in definition of base numeric nutrient standards substituted "criteria" for "standards"; inserted definition of nutrient standards variance; in definition of nutrient work group substituted "nutrient standards variances" for "temporary nutrient criteria" and substituted "variances" for "criteria"; deleted definition that read: ""Temporary nutrient criteria" means numeric permit limits for nutrients that are based on a determination that the base numeric nutrient standards cannot be achieved by a particular point source discharger due to economic impacts or the limits of technology"; and made minor changes in style. Amendment effective October 1, 2011.

(Both versions) Chapter 398 in definition of pollution deleted former (b) that read: "(b) A discharge, seepage, drainage, infiltration, or flow that is authorized under the pollution discharge permit rules of the board is not pollution under this chapter. Activities conducted under the conditions imposed by the department in short-term authorizations pursuant to 75-5-308 are not considered pollution under this chapter" and inserted (b) and (c) regarding exemptions; and made minor changes in style. Amendment effective October 1, 2011.

(Version effective on occurrence of contingency) In definition of pollution deleted former (c) that read: "(c) Contamination of ground water within the boundaries of a geologic storage reservoir, as defined in 82-11-101, by a carbon dioxide injection well in accordance with a permit issued pursuant to Title 82, chapter 11, part 1, is not pollution and does not require a mixing zone."

Saving Clause: Section 6, Ch. 267, L. 2011, was a saving clause.

Section 6, Ch. 398, L. 2011, was a saving clause.

Severability: Section 7, Ch. 267, L. 2011, was a severability clause.

Section 7, Ch. 398, L. 2011, was a severability clause.

2009 Amendments — Composite Section: Chapter 267 inserted definitions of base numeric nutrient standards, nutrient work group, and temporary nutrient criteria; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 445 inserted definitions of associated supporting infrastructure and energy development project; and made minor changes in style. Amendment effective May 5, 2009.

Chapter 474 in definition of pollution inserted (c) providing that contamination of certain ground water by a permitted carbon dioxide injection well is not pollution and does not require a mixing zone. Amendment effective on occurrence of contingency.

Severability: Section 10, Ch. 445, L. 2009, was a severability clause.

Applicability: Section 12, Ch. 445, L. 2009, provided: "[This act] applies to judicial and board of environmental review hearing and appeal proceedings initiated on or after [the effective date of this act]." Effective May 5, 2009.

Saving Clause: Section 29, Ch. 474, L. 2009, was a saving clause.

Transition — Contingent Implementation: Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

1997 Amendment: Chapter 541 inserted definitions of currently available data, impaired water body, load allocation, loading capacity, sufficient credible data, threatened water body, total maximum daily load, waste load allocation, and watershed advisory group; and made minor changes in style. Amendment effective May 5, 1997.

1995 Amendments — Composite Section: Chapter 418 in definition of Board substituted "board of environmental review provided for in 2-15-3502" for "board of health and environmental sciences provided for in 2-15-2104"; in definition of Department substituted "department of environmental quality provided for in 2-15-3501" for "department of health and environmental sciences provided for in Title 2, chapter 15, part 21"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 495 in definition of high-quality waters, after "means", inserted "all", after "waters" substituted "except" for "whose quality for a parameter is better than standards established pursuant to 75-5-301. All waters are high-quality water unless classified by the board within a classification for waters that are not suitable for human consumption or not suitable for growth and propagation of fish and associated aquatic life", and inserted ground water and surface water exceptions in (a) and (b); in definition of interested person, in first sentence after "who", substituted "has a real property interest, a water right, or an economic interest that is or may be directly and adversely affected by" for "has submitted oral or written comments on"; and made minor changes in style.

Chapter 497 inserted definition of metal parameters; in definition of state waters inserted (b)(i) excluding certain ponds and lagoons from the definition and in (b)(ii), near beginning after "waters", substituted "or land application disposal waters when" for "where", after "irrigation" inserted "or land application disposal", and after "returned to" deleted "any other"; and made minor changes in style. Amendment effective April 15, 1995.

Chapter 501 inserted definition of outstanding resource waters; and made minor changes in style.

Chapter 546 deleted definition of Board that read: ""Board" means the board of health and environmental sciences provided for in 2-15-2104"; pursuant to sec. 568, Ch. 546, L. 1995, a coordination section, in definition of Department the Code Commissioner substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Because Ch. 418 inserted a reference to the Board of Environmental Review and Ch. 546 deleted a reference to the Board of Health and Environmental Sciences, the codifier has reflected both the insertion and the deletion.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 17, Ch. 497, L. 1995, provided: "[This act] does not apply to civil or administrative actions commenced prior to [the effective date of this act] [effective April 15, 1995] or to claims made in those actions, except that compliance plans resulting from those actions must reflect changes made by [this act]."

Section 571, Ch. 546, L. 1995, was a saving clause.

Preamble: The preamble attached to Ch. 495, L. 1995, provided: "WHEREAS, water quality nondegradation rules adopted by the Board of Health and Environmental Sciences [now Board of Environmental Review] in 1994 create a nondegradation review system that is unnecessarily cumbersome and that accordingly requires revision; and

WHEREAS, the water quality nondegradation statutes require amendment to remedy a conflict with the Montana Administrative Procedure Act and for clarification."

Preamble: The preamble attached to Ch. 497, L. 1995, provided: "WHEREAS, experience with implementation and enforcement of the Montana water quality statutes has revealed deficiencies in the statutes that have led to inefficiency and unfairness in administration and enforcement of the statutes; and

WHEREAS, those deficiencies can be addressed by selective amendment of the statutes."

1995 Statement of Intent: The statement of intent attached to Ch. 497, L. 1995, provided: "A statement of intent is required to provide guidance to the board of health and environmental sciences [now board of environmental review] regarding rulemaking. The legislature confirms the policy of this state, as reflected in 75-5-101. It is concerned that implementation of the water quality laws has in the past been too dependent on assumptions and conjecture springing from experiences and circumstances from other states and has not been sufficiently based on the conditions and needs of our state. The legislature intends that, in promulgating rules under this bill, the board of health and environmental sciences [now board of environmental review] should seriously consider the impact of proposed rules and that the rules should be adopted only on the basis of sound, scientific justification and never on the basis of projections or conjecture. The legislature is specifically concerned that water quality criteria must reflect concentrations that can be reliably measured, or the rules will, as a practical matter, be unenforceable. [Section 1] [75-5-309, now repealed], providing conditions for adoption of standards more stringent than federal standards, is not intended to prohibit the adoption of ground water quality standards."

1993 Amendments: Chapter 337 in definition of treatment works inserted "including sewage lagoons"; and inserted definition of water well.

Chapter 340 in definition of pollution inserted last sentence clarifying that short-term water authorizations are not considered pollution.

Chapter 595 inserted definitions of degradation, existing uses, high-quality waters, interested person, mixing zone, parameter, and water quality protection practices; and made minor changes in style. Amendment effective April 29, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 595, L. 1993, provided: "A statement of intent is required for this bill because the bill requires the board of health and environmental sciences [now board of environmental review] to adopt administrative rules. The legislature clearly intends that the nondegradation policy protect and maintain existing quality of state waters from any loss in the quality of those waters. The nondegradation policy is intended to apply to any activity that has the potential to affect existing water quality and requires department review of all such activities to ensure that degradation does not occur.

In recognition that certain activities promote general welfare and may justify lower water quality in a particular water segment, the legislature intends that degradation be allowed in limited circumstances and under certain conditions. For example, if there is no alternative to a proposed project that does not result in degradation and the project is found to be in the best interests of the state, degradation may be allowed provided that water quality protection practices are implemented that limit degradation to the extent determined to be economically and technologically feasible.

To promote the goal of maintaining existing high-quality water, the board is to develop rules specifying the level of protection or treatment required if degradation is allowed. Rules are to be developed that provide procedures for department review of applications to degrade state waters, that provide guidance or standards for the level of treatment required, and that establish criteria that allow the department to weigh the social and economic benefit to the public of allowing the proposed project against the loss of water quality. It is the intent of the legislature that the department's decision involve public and governmental agencies' comment prior to a final decision.

It is further the intent of the legislature that the board develop rules that will provide guidance to the department in the use and creation of mixing zones. The rules are to ensure that water quality impacts from the use of mixing zones are minimized."

Severability: Section 9, Ch. 595, L. 1993, was a severability clause.

Applicability: Section 10, Ch. 595, L. 1993, provided: "[This act] applies to all requests to degrade state waters filed with the department after [the effective date of this act]." Effective April 29, 1993.

Case Notes

Interpretation of Agency Rule Consistent With Water Quality Act — Arbitrary and Capricious Application: An environmental group filed a lawsuit against the state Department of Environmental Quality challenging a modified water discharge permit issued to a mining company. The plaintiff alleged that the Department's interpretation of its administrative rules regarding waters with ephemeral characteristics was unlawful and that terms of the permit allowed by the agency were arbitrary and capricious. After the District Court granted summary judgment for the plaintiff, the Department appealed to the Supreme Court. The Supreme Court reversed, concluding that the agency's interpretation was consistent with the Water Quality Act and deferred to its interpretation of its regulations. However, the Supreme Court also determined that the Department arbitrarily and capriciously applied its interpretation during the permitting process and remanded the matter for further factfinding. Mont. Envtl. Information Center v. Dept. of Environmental Quality, 2019 MT 213, 397 Mont. 161, 451 P.3d 493.

No Error in Adoption of Water Quality Rules — Standard of Review: Plaintiff contended that the District Court erroneously applied the incorrect standard of review in holding that the defendant Board of Environmental Review properly adopted rules regarding the numeric standards applicable to the sodium adsorption ratio and electrical conductivity as components of water produced with coal bed methane and discharged into state waterways. The court applied the standard of review in the declaratory judgment provisions of the Montana Administrative Procedure Act (MAPA), rather than the standard in MAPA for the adoption and publication of rules. On appeal, the Supreme Court affirmed. The District Court decision specifically addressed the factors in 2-4-305(6)(a) and (6)(b), in that the rules were consistent with requirements of the state Clean Water Act and the Water Quality Act and were reasonably necessary to protect state waters in light of projected growth in the coal bed methane sector and the difficulty in issuing objective and consistent discharge permits. The Board reviewed and relied on copious scientific data to draft rules that met the state law mandate for scientific justification. The Board did not adopt rules with an arbitrary and capricious disregard for the purpose of the statutes, and the District Court did not apply the incorrect standard of review under the circumstances with which it was presented. Pennaco Energy, Inc. v. Mont. Bd. of Envtl. Review, 2008 MT 425, 347 M 415, 199 P3d 191 (2008).

No Error in Reversal of Administrative Decision to Declare Sodium Adsorption Ratio and Electrical Conductivity Harmful in Coal Bed Methane Produced Water — Authority of Board of Environmental Review: In 2003, the Board of Environmental Review declined to designate as harmful the sodium adsorption ratio and electrical conductivity as components of water produced with coal bed methane and discharged into state waterways, but when presented with the same issue in 2006, the Board designated those components as harmful. Plaintiff asserted that the District Court erred in finding that the later designation was within the authority of the Board. The Supreme Court disagreed. It was within the Board's authority to reclassify the two parameters when it resulted in uniform treatment of all parameters for which numeric criteria had been established, rather than the irregular regulation of sodium adsorption ratio and electrical conductivity that resulted from the 2003 decision. The policy change was supported by scientific data and was required to protect Montana waters from degradation and provide regulatory consistency. Pennaco Energy, Inc. v. Mont. Bd. of Envtl. Review, 2008 MT 425, 347 M 415, 199 P3d 191 (2008), distinguishing Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 422 F3d 782 (9th Cir. 2005).

75-5-105. Confidentiality of records.

Compiler's Comments

2021 Amendment: Chapter 342 at start of sixth sentence deleted "Except as provided in 75-5-314"; and made minor changes in style. Amendment effective April 30, 2021.

Saving Clause: Section 12, Ch. 342, L. 2021, was a saving clause.

2011 Amendment: Chapter 267 in fifth sentence at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2011.

Saving Clause: Section 6, Ch. 267, L. 2011, was a saving clause.

Severability: Section 7, Ch. 267, L. 2011, was a severability clause.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: At beginning inserted exception clause. Amendment effective January 1, 1990.

75-5-106. Interagency cooperation — enforcement authorization.

Compiler's Comments

2021 Amendment: Chapter 324 in (2) at beginning of last sentence substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 2021.

1995 Amendment: Chapter 497 in (1) inserted second sentence requiring coordinated review of permit applications; and made minor changes in style. Amendment effective April 15, 1995.

Preamble: The preamble attached to Ch. 497, L. 1995, provided: "WHEREAS, experience with implementation and enforcement of the Montana water quality statutes has revealed deficiencies in the statutes that have led to inefficiency and unfairness in administration and enforcement of the statutes; and

WHEREAS, those deficiencies can be addressed by selective amendment of the statutes."

1995 Statement of Intent: The statement of intent attached to Ch. 497, L. 1995, provided: "A statement of intent is required to provide guidance to the board of health and environmental sciences [now board of environmental review] regarding rulemaking. The legislature confirms the policy of this state, as reflected in 75-5-101. It is concerned that implementation of the water quality laws has in the past been too dependent on assumptions and conjecture springing from experiences and circumstances from other states and has not been sufficiently based on the conditions and needs of our state. The legislature intends that, in promulgating rules under this bill, the board of health and environmental sciences [now board of environmental review] should seriously consider the impact of proposed rules and that the rules should be adopted only on the basis of sound, scientific justification and never on the basis of projections or conjecture. The legislature is specifically concerned that water quality criteria must reflect concentrations that can be reliably measured, or the rules will, as a practical matter, be unenforceable. [Section 1] [75-5-309, now repealed], providing conditions for adoption of standards more stringent than federal standards, is not intended to prohibit the adoption of ground water quality standards."

Saving Clause: Section 17, Ch. 497, L. 1995, provided:"[This act] does not apply to civil or administrative actions commenced prior to [the effective date of this act] [effective April 15, 1995] or to claims made in those actions, except that compliance plans resulting from those actions must reflect changes made by [this act]."

1991 Amendment: Inserted (2) authorizing enforcement by established local water quality district.

1991 Statement of Intent: The statement of intent attached to Ch. 357, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the board of health and environmental sciences [now board of environmental review] concerning rulemaking and approval of local water quality programs. The board shall adopt rules concerning the format of local water quality programs, including the level of information necessary for a local water quality district to show that its proposed program will be consistent with Title 75, chapter 5, and that its program will be effective in protecting, preserving, and improving the quality of surface water and ground water. The board may define by rule the types of best management practices that may be imposed upon each of the types of facilities and sources of pollution that may be regulated by local ordinances as authorized under [section 24(4)] [75-5-311(4)]. It is the intent of the legislature that administrative responsibilities be clearly allocated and, when necessary, clearly divided between the department of health and environmental sciences [now department of environmental quality] and a local water quality district, insofar as possible, to ensure that permitholders, permit applicants, and citizens are not subject to conflicting or duplicative requirements. Through its approval of local water quality programs, the board of health and environmental sciences [now board of environmental review] shall ensure that the department of health and environmental sciences' [now department of environmental quality] ability to continue to administer federally delegated water quality protection programs is not impaired. The board may also adopt rules to specify the procedures the department of health and environmental sciences [now department of environmental quality] shall follow pursuant to 75-5-106 to authorize a local water quality district to enforce provisions of Title 75, chapter 5. It is the intent of the legislature that the boundaries of local water quality districts should correspond to the area or areas in which water quality problems have been documented.

Except as expressly provided in this bill, nothing in this bill may be considered to limit or restrict the authority of local governments to adopt rules and regulations authorized by other laws of the state."

75-5-107. Venue generally.

Compiler's Comments

Effective Date: This section is effective October 1, 2021.

Part 2
Administrative Agencies

75-5-201. Rules authorized.

Compiler's Comments

2021 Amendment: Chapter 324 throughout section in three places substituted references to department for references to board. Amendment effective July 1, 2021.

2017 Amendment: Chapter 327 in (1)(a) near beginning inserted "except as provided in 75-5-411 and". Amendment effective October 1, 2017.

2003 Amendment: Chapter 468 inserted (1)(b) requiring board to adopt rules for suction dredging; and made minor changes in style. Amendment effective April 23, 2003.

1995 Amendment: Chapter 471 in (1) inserted "subject to the provisions of 75-5-203". Amendment effective April 14, 1995.

Applicability: Section 22(3), Ch. 471, L. 1995, provided: "(3) [This act] does not apply to the establishment of fees or public participation requirements."

1993 Amendment: Chapter 504 inserted (2) authorizing a fee schedule or system for assessment of administrative penalties.

Preamble: The preamble attached to Ch. 504, L. 1993, provided: "WHEREAS, it is necessary and reasonable for the Department of Health and Environmental Sciences [now Department of Environmental Quality] to actively enforce the provisions of Montana's water quality laws; and

WHEREAS, the use of the District Courts to achieve civil penalty assessments consumes significant financial resources from both the regulated public and the State of Montana; and

WHEREAS, many parties may wish to resolve violations of Montana's water quality laws in an administrative proceeding that authorizes direct payments to the State of Montana without the large expenses inherent with the filing of a judicial lawsuit; and

WHEREAS, the Board of Health and Environmental Sciences [now Board of Environmental Review] may specify situations in which the Department of Health and Environmental Sciences [now Department of Environmental Quality] should pursue an action administratively; and

WHEREAS, in several situations, the administrative assessment of civil penalties under Montana's water quality laws would be a more effective deterrent than resolution of cases through the District Courts; and

WHEREAS, the Department of Health and Environmental Sciences [now Department of Environmental Quality] would be able to apply its limited enforcement resources to a broader array of violations; and

WHEREAS, the Federal Water Pollution Control Act provides for a similar administrative penalty, which could ultimately become a condition of primacy for state administration of water quality programs in Montana; and

WHEREAS, the citizens and businesses of the State of Montana, as well as the Department of Health and Environmental Sciences [now Department of Environmental Quality], would benefit from the availability of an administrative penalty in Montana's water quality laws.

THEREFORE, the Legislature of the State of Montana finds it appropriate to authorize an administrative penalty within Montana's water quality laws."

1993 Statement of Intent: The statement of intent attached to Ch. 504, L. 1993, provided: "A statement of intent is provided for this bill in order to assist the board of health and environmental sciences [now board of environmental review] in promulgating rules. The legislature intends that the administrative penalty provided by this bill be used to encourage compliance with Montana's water quality laws by allowing more timely and efficient processing of certain enforcement actions without the need for a higher penalty sought through a district court. To promote these goals, the board should develop rules that prescribe penalties for specific types of violations. In doing so, the board shall ensure that its rules are consistent with the criteria set forth in 75-5-631(4). Further, the board and department shall take measures to ensure that the rules are disseminated to the regulated community.

The legislature also intends that the board's rules be no less stringent than the federal rules and guidance implementing the Federal Water Pollution Control Act."

Administrative Rules

Title 17, chapter 30, subchapter 6, ARM Surface water quality standards and procedures.

Title 17, chapter 30, subchapter 7, ARM Nondegradation of water quality.

Title 17, chapter 30, subchapter 10, ARM Montana ground water pollution control system.

Title 17, chapter 30, subchapter 12, ARM Montana pollutant discharge elimination system (MPDES) standards.

Title 17, chapter 30, subchapter 13, ARM Montana pollutant discharge elimination system (MPDES) permits.

Title 17, chapter 30, subchapter 18, ARM Procedures for local water quality district program approval and granting enforcement authority.

Title 17, chapter 36, subchapter 9, ARM Onsite subsurface wastewater treatment systems.

Title 17, chapter 38, subchapter 1, ARM Public water and sewer plans — cross-connections — drilling water wells.

Title 17, chapter 38, subchapter 2, ARM Public water supply requirements.

Title 17, chapter 38, subchapter 5, ARM Water hauled for cisterns.

75-5-202. Board hearings.

Case Notes

Department Grant of Water Quality Certification — Board Jurisdiction to Reconsider — Writ of Prohibition Inappropriate: Three entities competing for the right to construct a hydroelectric generation facility at a federal site applied for and received "401 certification" from the Department of Health and Environmental Sciences (now Department of Environmental Quality) to allow application for a federal permit under section 401 of the Federal Water Pollution Control Act amendments of 1972, 33 U.S.C. 1341(a). One of the entities, Montana Renewable Resources (MRR), questioned whether its competitors' projects complied with state water quality standards and requested Department reconsideration of the other two entities' "401 certification". The Department refused to modify its decision, so MRR formally petitioned the Board of Health and Environmental Sciences (now Board of Environmental Review) for an appeal or declaratory ruling. The other two entities filed applications for Writs of Prohibition to halt further Board proceedings with respect to their certifications. The Supreme Court affirmed District Court dismissal of the applications, finding that the Board was acting within its jurisdiction under Montana water quality law and that since a speedy and adequate remedy of judicial appeal from any Board decisions was available, a Writ of Prohibition was inappropriate. Malta Irrigation District v. Mont. Bd. of Health & Environmental Sciences, 224 M 376, 729 P2d 1323, 43 St. Rep. 2264 (1986).

75-5-203. State regulations no more stringent than federal regulations or guidelines.

Compiler's Comments

2021 Amendment: Chapter 324 throughout section in nine places substituted reference to department for reference to board; in (4)(a) near beginning of first sentence after "rule" deleted "of the board"; and made minor changes in style. Amendment effective July 1, 2021.

2015 Amendment: Chapter 378 in (1) at beginning deleted "After April 14, 1995" and in middle substituted "75-5-301, 75-5-302, 75-5-303, or 75-5-310" for "this chapter"; in (3) substituted "pertinent, ascertainable, and peer-reviewed scientific studies" for "information and peer-reviewed scientific studies"; in (4)(a) near beginning after "rule of the board" deleted "adopted after January 1, 1990, and before April 14, 1995" and near end of second sentence substituted "8 months" for "12 months"; in (4)(b) after "adopts a rule" deleted "after January 1, 1990"; and made minor changes in style. Amendment effective October 1, 2015.

Preamble: The preamble attached to Ch. 471, L. 1995, provided: "WHEREAS, the federal government frequently regulates areas that are also subject to state regulation; and

WHEREAS, differing state and federal policy goals and unique state prerogatives frequently result in different levels of regulation, different standards, and different requirements being imposed by state and federal programs covering the same subject matter; and

WHEREAS, Montana must simultaneously move toward reducing redundant and unnecessary regulation that dulls the state's competitive advantage while being ever vigilant in the protection of the public's health, safety, and welfare; and

WHEREAS, Montana's administrative agencies should consider applicable federal standards when adopting, readopting, or amending rules with analogous federal counterparts; and

WHEREAS, Montana's administrative agencies should analyze whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana's citizens; and

WHEREAS, as part of the formal rulemaking process, the public should be advised of the agencies' conclusions about whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana citizens."

1995 Statement of Intent: The statement of intent attached to Ch. 471, L. 1995, provided: "A statement of intent is required for this bill in order to provide guidance to the board of health and environmental sciences [now board of environmental review], the department of health and environmental sciences [now department of environmental quality], and local units of government in complying with [this act].

The legislature intends that in addition to all requirements imposed by existing law and rules, the board or the department include as part of the initial publication and all subsequent publications of a rule a written finding if the rule in question contains any standards or requirements that exceed the standards or requirements imposed by comparable federal law.

If the rules are more stringent than comparable federal law, the written finding must include but is not limited to a discussion of the policy reasons and an analysis that supports the board's or department's decision that the proposed state standards or requirements protect public health or the environment of the state and that the state standards or requirements to be imposed can mitigate harm to the public health or the environment and are achievable under current technology. The department is not required to show that the federal regulation is inadequate to protect public health. The written finding must also include information from the hearing record regarding the costs to the regulated community directly attributable to the proposed state standard or requirement."

Effective Date: Section 23, Ch. 471, L. 1995, provided that this section is effective on passage and approval. Approved April 14, 1995.

Applicability: Section 22(1) and (3), Ch. 471, L. 1995, provided: "(1) [Sections 1 through 3] are intended to apply to any rule that is in effect, adopted, or amended, and that regulates those resources or activities for which the state has been given primary authority to regulate by federal authority pursuant to Title 75, chapter 2; Title 75, chapter 3 [renumbered, except for part 6, as TItle 50, chapter 79]; Title 75, chapter 5; Title 75, chapter 6; or Title 75, chapter 10, as of [the effective date of this act] [April 14, 1995].

(3) [This act] does not apply to the establishment of fees or public participation requirements."

Case Notes

State Rules Consistent With Federal Clean Water Standards — Written Findings Not Required: Plaintiff contended that the Board of Environmental Review was required to issue written findings because it adopted water quality rules that were more stringent than corresponding federal rules. The District Court rejected plaintiff's argument that when the federal Environmental Protection Agency (EPA) approved the state narrative water quality standard around 1972, that standard became the federal standard, so that later adoption of numeric standards constituted a more stringent standard that required written findings of fact. The Supreme Court affirmed. The necessity for written findings is triggered by EPA-promulgated regulations or criteria, not by the mere approval of a state standard. The state standards were properly considered to be consistent with and not more stringent than the EPA's nondegradation policy, so written findings of fact were not required. Pennaco Energy, Inc. v. Mont. Bd. of Envtl. Review, 2008 MT 425, 347 M 415, 199 P3d 191 (2008).

75-5-212. Department research and information.

Compiler's Comments

1999 Amendment: Chapter 511 inserted (1)(c) concerning new methods, materials, and models in evaluation, design, and construction; inserted (2) concerning compilation and update of material and charge for hard copy of material; and made minor changes in style. Amendment effective July 1, 1999.

Severability: Section 3, Ch. 511, L. 1999, was a severability clause.

75-5-214. Pipeline reporting requirements.

Compiler's Comments

Effective Date: Section 3, Ch. 332, L. 2015, provided: "[This act] is effective July 1, 2015."

75-5-221. Water pollution control advisory council — general.

Compiler's Comments

1995 Amendments — Composite Section: Chapter 297 in (2), at beginning, substituted "Meetings must" for "It shall hold at least two regular meetings each calendar year. Special meetings shall"; inserted (5) allowing the designation of persons to participate in evaluating particular issues; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 418 in (1), in second sentence, substituted "environmental quality" for "health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

75-5-222. State regulation for natural conditions.

Compiler's Comments

2021 Amendment: Chapter 324 in (2)(a) in middle substituted "department" for "board". Amendment effective July 1, 2021.

Effective Date: This section is effective October 1, 2015.

Administrative Rules

ARM 17.30.618 Natural and nonanthropogenic water quality standards.

ARM 17.30.661 Variance from standard for water body conditions.

Part 3
Classification and Standards

Part Case Notes

Outstanding Resource Waters — Department Failure to Supplement Environmental Impact Statement Alleged — Abandoned Proposal Removed Obligation to Supplement. Mont. Rivers v. Dept. of Environmental Quality, 2022 MT 132, 409 Mont. 204, 512 P.3d 1193.

No Evidence That Use of Siphon Tube to Regulate Temperature of Dam Outlet Water Satisfied Water Quality Standards: The Board of Health and Environmental Sciences (now Board of Environmental Review) issued "401 certifications" to the Milk River Irrigation District and the city of Gillette, Wyoming, regarding a hydroelectric generating facility at the Tiber Dam that provided in part for the placing of a siphon 60 feet below the auxiliary outlet in order to regulate the temperature of outlet water and protect the downstream fishery. As part of its contested case review, the District Court correctly concluded that the "401" application had never been amended to include the siphon scheme and that there was no evidence to support the Board's conclusion that withdrawing water from 60 feet below the auxiliary outlet satisfied applicable water quality standards, the nondegradation requirements of the Water Quality Act, Board rules, and state public policy. The court properly determined that due process would be violated if the certification could be issued without an amendment to the original application and without the holding of public hearings respecting the siphon scheme. Hi-Line Sportsmen Club v. Milk River Irrigation District, 241 M 182, 786 P2d 13, 47 St. Rep. 184 (1990).

Department Grant of Water Quality Certification — Board Jurisdiction to Reconsider — Writ of Prohibition Inappropriate: Three entities competing for the right to construct a hydroelectric generation facility at a federal site applied for and received "401 certification" from the Department of Health and Environmental Sciences (now Department of Environmental Quality) to allow application for a federal permit under section 401 of the Federal Water Pollution Control Act amendments of 1972, 33 U.S.C. 1341(a). One of the entities, Montana Renewable Resources (MRR), questioned whether its competitors' projects complied with state water quality standards and requested Department reconsideration of the other two entities' "401 certification". The Department refused to modify its decision, so MRR formally petitioned the Board of Health and Environmental Sciences (now Board of Environmental Review) for an appeal or declaratory ruling. The other two entities filed applications for Writs of Prohibition to halt further Board proceedings with respect to their certifications. The Supreme Court affirmed District Court dismissal of the applications, finding that the Board was acting within its jurisdiction under Montana water quality law and that since a speedy and adequate remedy of judicial appeal from any Board decisions was available, a Writ of Prohibition was inappropriate. Malta Irrigation District v. Mont. Bd. of Health & Environmental Sciences, 224 M 376, 729 P2d 1323, 43 St. Rep. 2264 (1986).

75-5-301. Classification and standards for state waters.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 752, L. 2023. Amendment effective May 22, 2023.

2021 Amendment: Chapter 324 at end of introductory clause substituted "department" for "board"; in (2) in last sentence of introductory paragraph after "Standards" deleted "adopted by the board"; and made minor changes in style. Amendment effective July 1, 2021.

1999 Amendments — Composite Section: Chapter 195 in (5)(d)(i) substituted "from sources other than sewage" for "for nitrate as nitrogen sources other than domestic sewage"; in (5)(d)(ii) substituted "from sewage discharged from a system that does not use level two treatment in an area where the ground water nitrate as nitrogen is 5.0 milligrams per liter or less" for "for domestic sewage effluent discharged from a conventional septic system"; in (5)(d)(iii) substituted "from sewage discharged from a system" for "for domestic sewage effluent discharged from a septic system"; and in (5)(d)(iv) substituted "from sewage discharged from a system" for "for domestic sewage effluent discharged from a conventional septic system". Amendment effective March 26, 1999.

Chapter 588 in (5)(c)(i) inserted "a beneficial use"; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 9, Ch. 195, L. 1999, was a severability clause.

Section 9, Ch. 588, L. 1999, was a severability clause.

1997 Amendment: Chapter 40 in (5)(d), in two places, in (5)(d)(i), and in (5)(d)(iv), after "nitrate", legislatively adopted the phrase "as nitrogen" inserted as a comment by the Code Commissioner in 1995. Amendment effective March 12, 1997.

Severability: Section 2, Ch. 40, L. 1997, was a severability clause.

Retroactive Applicability: Section 3, Ch. 40, L. 1997, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to April 4, 1995."

1995 Amendments: Chapter 497 in introductory clause, after "provisions of", deleted "75-5-302 through 75-5-307 and" and after "80-15-201" inserted "and this chapter"; in (1), at beginning after "establish", deleted "and modify", after "all" inserted "state", and at end, after "uses", inserted "creating an appropriate classification for streams that, due to sporadic flow, do not support an aquatic ecosystem that includes salmonid or nonsalmonid fish"; in (2)(a), after "formulate", inserted "and adopt" and after "water" substituted "quality" for "purity and classification of water according to its most beneficial uses"; inserted (2)(b) setting out requirements for water standards; in (3), near middle after "3 years", inserted "and, to the extent permitted by this chapter, revise", after "waters and" inserted "adopted", and at end, after "water", substituted "quality" for "purity and classification"; inserted (5)(d) regarding nonsignificant nitrate changes in ground water; and made minor changes in style. Amendment effective April 15, 1995.

Chapter 501 in (5)(c) inserted "in addition to those activities identified in 75-5-317".

Chapter 539 in (2)(a) inserted second sentence regarding rules for temporary standards; and in (2)(a), near beginning, and in (3), near end after "water", substituted "quality" for "purity". Amendment effective April 27, 1995.

Code Commissioner Clarification: Pursuant to a request from the Department of Health and Environmental Sciences (now Department of Environmental Quality), in (5)(d), (5)(d)(i), and (5)(d)(iv), after "nitrate", the Code Commissioner has inserted the bracketed phrase "as nitrogen". The inserted language is to clarify intended conformity to current water quality nondegradation rules.

Preamble: The preamble attached to Ch. 497, L. 1995, provided: "WHEREAS, experience with implementation and enforcement of the Montana water quality statutes has revealed deficiencies in the statutes that have led to inefficiency and unfairness in administration and enforcement of the statutes; and

WHEREAS, those deficiencies can be addressed by selective amendment of the statutes."

1995 Statements of Intent: The statement of intent attached to Ch. 497, L. 1995, provided: "A statement of intent is required to provide guidance to the board of health and environmental sciences [now board of environmental review] regarding rulemaking. The legislature confirms the policy of this state, as reflected in 75-5-101. It is concerned that implementation of the water quality laws has in the past been too dependent on assumptions and conjecture springing from experiences and circumstances from other states and has not been sufficiently based on the conditions and needs of our state. The legislature intends that, in promulgating rules under this bill, the board of health and environmental sciences [now board of environmental review] should seriously consider the impact of proposed rules and that the rules should be adopted only on the basis of sound, scientific justification and never on the basis of projections or conjecture. The legislature is specifically concerned that water quality criteria must reflect concentrations that can be reliably measured, or the rules will, as a practical matter, be unenforceable. [Section 1] [75-5-309, now repealed], providing conditions for adoption of standards more stringent than federal standards, is not intended to prohibit the adoption of ground water quality standards."

The statement of intent attached to Ch. 501, L. 1995, provided: "A statement of intent is required for this bill because the bill gives the board of health and environmental sciences [now board of environmental review] the authority to adopt administrative rules. It is the intent of the legislature that this legislation and the rules adopted pursuant to this legislation serve as Montana's regulatory scheme for both outstanding national resource waters and outstanding state resource waters. It is the further intent of the legislature that surface and ground water in Montana be designated as outstanding resource waters only if there is no other reasonable means of protecting the water. The legislature intends that because this designation may severely limit future use of the designated water, the designation should be accomplished only after a very thorough examination of the environmental, social, and economic impacts."

The statement of intent attached to Ch. 539, L. 1995, provided: "A statement of intent is provided for this bill because it allows the board of health and environmental sciences [now board of environmental review] to adopt rules establishing temporary water quality standards.

The principle behind establishing temporary water quality standards is that there are Montana surface and ground waters that are of lower quality than the applicable water quality standards. The legislature intends that the temporary water quality standards may not be established for waters that are impaired but still support their beneficial uses. Temporary standards may be established only when substantive information indicates that the water body or water segment does not support a designated use for its classification. The goal of establishing temporary standards is to improve the quality of the water to the point at which it supports the beneficial uses for its classification.

The establishment of temporary standards provides a legal basis that facilitates improvement of the water quality for those waters and allows, in limited circumstances, discharges to those waters. The rules must reflect the legislature's intent that establishing temporary water quality standards will trigger development and implementation of a plan with the overall goal of continuously improving the quality of the water during the period of the modification to the point that beneficial uses are supported. At no time during the period of a modification should a discharge be allowed that will cause water quality to become worse than the quality of the water body or segment prior to the discharge.

The legislature recognizes that persons may desire to commence discharging to the water body or segment for which a standard has been temporarily modified during the period of the modification. Any discharges that are allowed should not in any way slow or impede the improvement of the water body or segment."

Saving Clause: Section 17, Ch. 497, L. 1995, provided: "[This act] does not apply to civil or administrative actions commenced prior to [the effective date of this act] [effective April 15, 1995] or to claims made in those actions, except that compliance plans resulting from those actions must reflect changes made by [this act]."

Severability: Section 5, Ch. 539, L. 1995, was a severability clause.

1993 Amendment: Chapter 595 in introductory clause, after "provisions of", inserted "75-5-302 through 75-5-307 and"; inserted (4) requiring adoption of rules governing mixing zones; inserted (5) requiring adoption of rules implementing the nondegradation policy; inserted (6) requiring that rules establish criteria for various parameters; and inserted (7) regarding rules to implement this section. Amendment effective April 29, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 595, L. 1993, provided: "A statement of intent is required for this bill because the bill requires the board of health and environmental sciences [now board of environmental review] to adopt administrative rules. The legislature clearly intends that the nondegradation policy protect and maintain existing quality of state waters from any loss in the quality of those waters. The nondegradation policy is intended to apply to any activity that has the potential to affect existing water quality and requires department review of all such activities to ensure that degradation does not occur.

In recognition that certain activities promote general welfare and may justify lower water quality in a particular water segment, the legislature intends that degradation be allowed in limited circumstances and under certain conditions. For example, if there is no alternative to a proposed project that does not result in degradation and the project is found to be in the best interests of the state, degradation may be allowed provided that water quality protection practices are implemented that limit degradation to the extent determined to be economically and technologically feasible.

To promote the goal of maintaining existing high-quality water, the board is to develop rules specifying the level of protection or treatment required if degradation is allowed. Rules are to be developed that provide procedures for department review of applications to degrade state waters, that provide guidance or standards for the level of treatment required, and that establish criteria that allow the department to weigh the social and economic benefit to the public of allowing the proposed project against the loss of water quality. It is the intent of the legislature that the department's decision involve public and governmental agencies' comment prior to a final decision.

It is further the intent of the legislature that the board develop rules that will provide guidance to the department in the use and creation of mixing zones. The rules are to ensure that water quality impacts from the use of mixing zones are minimized."

Severability: Section 9, Ch. 595, L. 1993, was a severability clause.

Applicability: Section 10, Ch. 595, L. 1993, provided: "[This act] applies to all requests to degrade state waters filed with the department after [the effective date of this act]." Effective April 29, 1993.

1989 Amendment: At beginning inserted "Consistent with the provisions of 80-15-201". Amendment effective January 1, 1990.

Administrative Rules

Title 17, chapter 30, subchapter 5, ARM Mixing zones in surface and ground water.

Title 17, chapter 30, subchapter 6, ARM Surface water quality standards and procedures.

Title 17, chapter 30, subchapter 7, ARM Nondegradation of water quality.

Title 17, chapter 30, subchapter 10, ARM Montana ground water pollution control system.

Case Notes

Area of Unique Ecological or Recreational Significance — General Permit for Storm Water Discharge Improper: The Department of Environmental Quality improperly granted the Rock Creek Mine a general permit for storm water discharge when, under ARM 17.30.1341, Rock Creek is an area of unique ecological significance because of its impacts on fishery resources and other local conditions at the proposed discharge site. Clark Fork Coalition v. Dept. of Environmental Quality, 2012 MT 240, 366 Mont. 427, 288 P.3d 183.

No Error in Adoption of Water Quality Rules — Standard of Review: Plaintiff contended that the District Court erroneously applied the incorrect standard of review in holding that the defendant Board of Environmental Review properly adopted rules regarding the numeric standards applicable to the sodium adsorption ratio and electrical conductivity as components of water produced with coal bed methane and discharged into state waterways. The court applied the standard of review in the declaratory judgment provisions of the Montana Administrative Procedure Act (MAPA), rather than the standard in MAPA for the adoption and publication of rules. On appeal, the Supreme Court affirmed. The District Court decision specifically addressed the factors in 2-4-305(6)(a) and (6)(b), in that the rules were consistent with requirements of the state Clean Water Act and the Water Quality Act and were reasonably necessary to protect state waters in light of projected growth in the coal bed methane sector and the difficulty in issuing objective and consistent discharge permits. The Board reviewed and relied on copious scientific data to draft rules that met the state law mandate for scientific justification. The Board did not adopt rules with an arbitrary and capricious disregard for the purpose of the statutes, and the District Court did not apply the incorrect standard of review under the circumstances with which it was presented. Pennaco Energy, Inc. v. Mont. Bd. of Envtl. Review, 2008 MT 425, 347 M 415, 199 P3d 191 (2008).

No Error in Reversal of Administrative Decision to Declare Sodium Adsorption Ratio and Electrical Conductivity Harmful in Coal Bed Methane Produced Water — Authority of Board of Environmental Review: In 2003, the Board of Environmental Review declined to designate as harmful the sodium adsorption ratio and electrical conductivity as components of water produced with coal bed methane and discharged into state waterways, but when presented with the same issue in 2006, the Board designated those components as harmful. Plaintiff asserted that the District Court erred in finding that the later designation was within the authority of the Board. The Supreme Court disagreed. It was within the Board's authority to reclassify the two parameters when it resulted in uniform treatment of all parameters for which numeric criteria had been established, rather than the irregular regulation of sodium adsorption ratio and electrical conductivity that resulted from the 2003 decision. The policy change was supported by scientific data and was required to protect Montana waters from degradation and provide regulatory consistency. Pennaco Energy, Inc. v. Mont. Bd. of Envtl. Review, 2008 MT 425, 347 M 415, 199 P3d 191 (2008), distinguishing Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 422 F3d 782 (9th Cir. 2005).

Statement That Perpetual Discharge of Polluted Water Will Always Be Treated Insufficient to Justify That Irreversible Discharge Nonsignificant: The Department of Environmental Quality (DEQ), interpreting ARM 17.30.715, determined that because a perpetual discharge of polluted water from a mine into the Clark Fork River would always be treated, the irreversible discharge was nonsignificant. The Supreme Court noted that under Juro's United Drug v. Dept. of Public Health and Human Services, 2004 MT 117, 321 M 167, 90 P3d 388 (2004), and Kirchner v. Dept. of Public Health and Human Services, 2005 MT 202, 328 M 203, 119 P3d 82 (2005), an agency's interpretation of a rule is afforded great weight and will be sustained so long as it lies within the range of reasonable interpretation but that the court was not obliged to defer to an incorrect agency decision. In this case, DEQ misinterpreted its own rule and did not take a hard look at the significance of the polluted discharge after the mine was closed and the operator was gone, and it was an arbitrary and capricious decision not to make an independent examination of the long-term environmental significance. DEQ's simple statement that a perpetual discharge would always be treated was insufficient to justify a determination that the irreversible discharge was nonsignificant, and the court remanded for reconsideration of the discharge permit. Clark Fork Coalition v. Dept. of Environmental Quality, 2008 MT 407, 347 M 197, 197 P3d 482 (2008), following Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362 (1995).

75-5-302. Revising classifications in accordance with existing, present, and future most beneficial uses of water bodies.

Compiler's Comments

2021 Amendment: Chapter 324 in first sentence near beginning substituted "department" for "board or department" and at end after "facts" deleted "and advise the board whether the water body is not properly classified"; in second sentence in two places substituted "department" for "board"; and in last sentence at beginning substituted "Action" for "Board action". Amendment effective July 1, 2021.

2015 Amendment: Chapter 131 substituted current text related to classifications for former (1) and (2) that read: "(1) Except as provided in subsection (2), in revising classifications or standards or in adopting new classifications or standards, the board may not formulate standards of water quality or classify state water in a manner that lowers the water quality standard applicable to state water below the level applicable under the classifications and standards adopted unless the board finds that a particular state water has been classified under a standard or classification of water quality that is higher than the actual water quality that existed at the time of classification and only if the action is taken pursuant to 75-5-307. When the board or department is presented with facts indicating that a body of water is misclassified, the board shall, within 90 days, initiate rulemaking to correct the misclassification.

(2) Establishment of a temporary water quality standard or classification does not require a finding that the affected state water was classified under a standard or classification that was higher than the actual water quality that existed at the time of the prior classification." Amendment effective October 1, 2015.

1995 Amendments: Chapter 497 in (1), in first sentence near beginning after "standards of water", substituted "quality" for "purity" and inserted second sentence requiring rulemaking to correct a misclassification; and made minor changes in style. Amendment effective April 15, 1995.

Chapter 539 in (1), at beginning, inserted exception clause and near middle, after "water", substituted "quality" for "purity"; inserted (2) clarifying that establishment of a temporary water quality standard does not require a finding of a previous higher classification; and made minor changes in style. Amendment effective April 27, 1995.

Preamble: The preamble attached to Ch. 497, L. 1995, provided: "WHEREAS, experience with implementation and enforcement of the Montana water quality statutes has revealed deficiencies in the statutes that have led to inefficiency and unfairness in administration and enforcement of the statutes; and

WHEREAS, those deficiencies can be addressed by selective amendment of the statutes."

1995 Statements of Intent: The statement of intent attached to Ch. 497, L. 1995, provided: "A statement of intent is required to provide guidance to the board of health and environmental sciences [now board of environmental review] regarding rulemaking. The legislature confirms the policy of this state, as reflected in 75-5-101. It is concerned that implementation of the water quality laws has in the past been too dependent on assumptions and conjecture springing from experiences and circumstances from other states and has not been sufficiently based on the conditions and needs of our state. The legislature intends that, in promulgating rules under this bill, the board of health and environmental sciences [now board of environmental review] should seriously consider the impact of proposed rules and that the rules should be adopted only on the basis of sound, scientific justification and never on the basis of projections or conjecture. The legislature is specifically concerned that water quality criteria must reflect concentrations that can be reliably measured, or the rules will, as a practical matter, be unenforceable. [Section 1] [75-5-309, now repealed], providing conditions for adoption of standards more stringent than federal standards, is not intended to prohibit the adoption of ground water quality standards."

The statement of intent attached to Ch. 539, L. 1995, provided: "A statement of intent is provided for this bill because it allows the board of health and environmental sciences [now board of environmental review] to adopt rules establishing temporary water quality standards.

The principle behind establishing temporary water quality standards is that there are Montana surface and ground waters that are of lower quality than the applicable water quality standards. The legislature intends that the temporary water quality standards may not be established for waters that are impaired but still support their beneficial uses. Temporary standards may be established only when substantive information indicates that the water body or water segment does not support a designated use for its classification. The goal of establishing temporary standards is to improve the quality of the water to the point at which it supports the beneficial uses for its classification.

The establishment of temporary standards provides a legal basis that facilitates improvement of the water quality for those waters and allows, in limited circumstances, discharges to those waters. The rules must reflect the legislature's intent that establishing temporary water quality standards will trigger development and implementation of a plan with the overall goal of continuously improving the quality of the water during the period of the modification to the point that beneficial uses are supported. At no time during the period of a modification should a discharge be allowed that will cause water quality to become worse than the quality of the water body or segment prior to the discharge.

The legislature recognizes that persons may desire to commence discharging to the water body or segment for which a standard has been temporarily modified during the period of the modification. Any discharges that are allowed should not in any way slow or impede the improvement of the water body or segment."

Saving Clause: Section 17, Ch. 497, L. 1995, provided: "[This act] does not apply to civil or administrative actions commenced prior to [the effective date of this act] [effective April 15, 1995] or to claims made in those actions, except that compliance plans resulting from those actions must reflect changes made by [this act]."

Severability: Section 5, Ch. 539, L. 1995, was a severability clause.

75-5-303. Nondegradation policy.

Compiler's Comments

2021 Amendment: Chapter 324 in (7) and (8) substituted "department" for "board". Amendment effective July 1, 2021.

1995 Amendments: Chapter 495 in (3)(a), after "feasible", substituted "modifications" for "alternatives"; in (3)(b), near middle after "development", deleted "that exceeds the benefit to society of maintaining existing high-quality waters" and after "and" inserted "that the benefit of the development"; and substituted (6) allowing Department review of degradation authorizations for former language that read: "(6) Every 5 years, the department shall review authorizations to degrade state waters. To enable the department to adequately review authorizations as required under this section, the authorization holder shall revise the initial authorization application no sooner than 3½ years and no later than 4 years after the date of the authorization or the date of the latest department review. The specific revised information required must be determined by the department. If, based on the review, the department determines that the standards and objectives of 75-5-303 or the rules adopted pursuant to 75-5-303 are not being met, it shall revoke or modify the authorization. A decision by the department to revoke or modify an authorization may be appealed to the board."

Chapter 501 in (2) inserted "or exempted from review under 75-5-317"; inserted (7) concerning prohibition to issue authorization to degrade waters classified as outstanding resource waters; and made minor changes in style.

Preamble: The preamble attached to Ch. 495, L. 1995, provided: "WHEREAS, water quality nondegradation rules adopted by the Board of Health and Environmental Sciences [now Board of Environmental Review] in 1994 create a nondegradation review system that is unnecessarily cumbersome and that accordingly requires revision; and

WHEREAS, the water quality nondegradation statutes require amendment to remedy a conflict with the Montana Administrative Procedure Act and for clarification."

1993 Amendment: Chapter 595 substituted present section establishing nondegradation policy for former section that read: "The board shall require:

(1) that any state waters whose existing quality is higher than the established water quality standards be maintained at that high quality unless it has been affirmatively demonstrated to the board that a change is justifiable as a result of necessary economic or social development and will not preclude present and anticipated use of these waters; and

(2) any industrial, public, or private project or development which would constitute a new source of pollution or an increased source of pollution to high-quality waters, referred to in subsection (1), to provide the degree of waste treatment necessary to maintain that existing high water quality." Amendment effective April 29, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 595, L. 1993, provided: "A statement of intent is required for this bill because the bill requires the board of health and environmental sciences [now board of environmental review] to adopt administrative rules. The legislature clearly intends that the nondegradation policy protect and maintain existing quality of state waters from any loss in the quality of those waters. The nondegradation policy is intended to apply to any activity that has the potential to affect existing water quality and requires department review of all such activities to ensure that degradation does not occur.

In recognition that certain activities promote general welfare and may justify lower water quality in a particular water segment, the legislature intends that degradation be allowed in limited circumstances and under certain conditions. For example, if there is no alternative to a proposed project that does not result in degradation and the project is found to be in the best interests of the state, degradation may be allowed provided that water quality protection practices are implemented that limit degradation to the extent determined to be economically and technologically feasible.

To promote the goal of maintaining existing high-quality water, the board is to develop rules specifying the level of protection or treatment required if degradation is allowed. Rules are to be developed that provide procedures for department review of applications to degrade state waters, that provide guidance or standards for the level of treatment required, and that establish criteria that allow the department to weigh the social and economic benefit to the public of allowing the proposed project against the loss of water quality. It is the intent of the legislature that the department's decision involve public and governmental agencies' comment prior to a final decision.

It is further the intent of the legislature that the board develop rules that will provide guidance to the department in the use and creation of mixing zones. The rules are to ensure that water quality impacts from the use of mixing zones are minimized."

Severability: Section 9, Ch. 595, L. 1993, was a severability clause.

Applicability: Section 10, Ch. 595, L. 1993, provided: "[This act] applies to all requests to degrade state waters filed with the department after [the effective date of this act]." Effective April 29, 1993.

Administrative Rules

Title 17, chapter 30, subchapter 7, ARM Nondegradation of water quality.

Case Notes

Unlawful Reliance on Order — Order Vacating Discharge Permit Proper — Remanded for Further Departmental Proceedings: The plaintiff filed a lawsuit against the Department of Environmental Quality challenging its issuance of a permit to allow the mine to discharge water pollution. The District Court vacated the permit and the Department appealed. On appeal, the Supreme Court concluded that the Department had unlawfully relied on a 1992 order by the Board of Health and Environmental Sciences when it issued the permit. Accordingly, the Supreme Court affirmed and remanded the matter to the Department for further proceedings.

Mont. Envtl. Information Center v. Dept. of Environmental Quality, 2020 MT 288, 402 Mont. 128, 476 P.3d 32.

Interpretation of Agency Rule Consistent With Water Quality Act — Arbitrary and Capricious Application: An environmental group filed a lawsuit against the state Department of Environmental Quality challenging a modified water discharge permit issued to a mining company. The plaintiff alleged that the Department's interpretation of its administrative rules regarding waters with ephemeral characteristics was unlawful and that terms of the permit allowed by the agency were arbitrary and capricious. After the District Court granted summary judgment for the plaintiff, the Department appealed to the Supreme Court. The Supreme Court reversed, concluding that the agency's interpretation was consistent with the Water Quality Act and deferred to its interpretation of its regulations. However, the Supreme Court also determined that the Department arbitrarily and capriciously applied its interpretation during the permitting process and remanded the matter for further factfinding. Mont. Envtl. Information Center v. Dept. of Environmental Quality, 2019 MT 213, 397 Mont. 161, 451 P.3d 493.

Improper Issuance of Discharge Permits Without Imposing Predischarge Treatment Standards — Reversed: It was a violation of the Montana Clean Water Act and reversible error for the Department of Environmental Quality to issue discharge permits to a water company, which extracted coal bed methane and discharged its ground water into a river, without imposing predischarge treatment standards. On remand, the Department was required to reevaluate the permit applications under the appropriate standards within 90 days. N. Cheyenne Tribe v. Dept. of Environmental Quality, 2010 MT 111, 356 Mont. 296, 234 P.3d 51.

Statement That Perpetual Discharge of Polluted Water Will Always Be Treated Insufficient to Justify That Irreversible Discharge Nonsignificant: The Department of Environmental Quality (DEQ), interpreting ARM 17.30.715, determined that because a perpetual discharge of polluted water from a mine into the Clark Fork River would always be treated, the irreversible discharge was nonsignificant. The Supreme Court noted that under Juro's United Drug v. Dept. of Public Health and Human Services, 2004 MT 117, 321 M 167, 90 P3d 388 (2004), and Kirchner v. Dept. of Public Health and Human Services, 2005 MT 202, 328 M 203, 119 P3d 82 (2005), an agency's interpretation of a rule is afforded great weight and will be sustained so long as it lies within the range of reasonable interpretation but that the court was not obliged to defer to an incorrect agency decision. In this case, DEQ misinterpreted its own rule and did not take a hard look at the significance of the polluted discharge after the mine was closed and the operator was gone, and it was an arbitrary and capricious decision not to make an independent examination of the long-term environmental significance. DEQ's simple statement that a perpetual discharge would always be treated was insufficient to justify a determination that the irreversible discharge was nonsignificant, and the court remanded for reconsideration of the discharge permit. Clark Fork Coalition v. Dept. of Environmental Quality, 2008 MT 407, 347 M 197, 197 P3d 482 (2008), following Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362 (1995).

Unenforceability of Buy-Sell Agreement on Grounds of Impossibility or Impracticality of Performance — Requiring Performance of Contract With Potential for Environmental Degradation Unconstitutional: Cape-France Enterprises (Cape-France) entered a buy-sell agreement with Peed (now deceased) and Moore to purchase some property near Bozeman for a subdivision. Before the subdivision could be completed, water needed to be procured for the site. According to the agreement, as buyers, Peed and Moore were responsible to bring water to the property, but because city water was not available, a well needed to be drilled. However, the presence of a pollution plume was discovered near the land. After the subdivision process was commenced, the Department of Environmental Quality notified Cape-France that: (1) the plume may have advanced under the property; (2) a subdivision would not be approved unless a well was drilled and tested; (3) a well could be drilled, but if testing showed pollution in the water, treatment would be extensive; and (4) if drilling or pumping of the water caused expansion of the pollution, then Cape-France, as owner of the property, would be held liable for cleanup costs. On cross-motions for summary judgment, the District Court held that the buy-sell agreement could be rescinded on the basis of mutual mistake of fact and impossibility or impracticality of performance and that specific performance would not be granted. The Supreme Court affirmed. A court may determine that an act is impossible in legal contemplation when it is not practicable, when the act can be done only at an excessive, unreasonable, and unbargained-for cost. The doctrine of impossibility or impracticability is applied when, aside from the object of a contract being unlawful, the public policy underlying the strict performance of the contract is outweighed by the senselessness of requiring performance. The doctrine is not limited to cases of literal impossibility but may also be applied in cases that present a potential for substantial and unbargained-for damages. In this case, requiring Cape-France to go forward with the performance of the contract when there was a very real possibility of substantial environmental degradation and resultant financial liability for cleanup was not in the public interest or in the interests of the contracting parties and was not in accord with the guarantee of a clean and healthful environment in Art. II, sec. 3, Mont. Const., or the mandate to maintain and improve a clean and healthful environment for present and future generations in Art. IX, sec. 1, Mont. Const. Thus, rescission of the contract was proper. Cape-France Enterprises v. Estate of Peed, 2001 MT 139, 305 M 513, 29 P3d 1011 (2001). See also Smith v. Zepp, 173 M 358, 567 P2d 923 (1977), and Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236 (1999).

Arbitrary, Blanket Exclusion of Certain Activities From Nondegradation Review Unconstitutional as Applied — Actual Danger Not Required — Degradation of Environment Sufficient to Implicate Fundamental Rights: The District Court erred when it held that the fundamental right to a clean and healthy environment is not implicated unless there is a finding of actual injury and that mere degradation of water quality, absent actual injury, is not sufficient to implicate the fundamental right or to require strict scrutiny analyses. The right to a clean and healthful environment contained in Art. II, sec. 3, Mont. Const., is fundamental. Therefore, as applied to the facts of this case, to the extent that 75-5-317(2)(j) arbitrarily excludes certain activities from nondegradation review without regard to the nature or volume of the substance being discharged, it violates the environmental rights guaranteed by Art. II, sec. 3, Mont. Const., and Art. IX, sec. 1, Mont. Const. (See 1999 amendments.) The intention of the framers of the constitution was to provide language and protections that are both anticipatory and preventative. The delegates did not intend to merely prohibit that degree of environmental degradation that can be conclusively linked to ill health or physical endangerment. Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236, 56 St. Rep. 964 (1999).

Fundamental Right to Clean and Healthful Environment — Strict Scrutiny of Compelling State Interest and Nondegradation Policy: The right to a clean and healthful environment contained in Art. II, sec. 3, Mont. Const., is fundamental. Any statute or rule implicating that right will be strictly scrutinized and will survive scrutiny only if the state establishes a compelling state interest and its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to meet the state's objectives. Because rights provided for in Art. IX, sec. 1, Mont. Const., are not found in the declaration of rights, a statute implicating Art. IX, sec. 1, rights would normally be subject to a middle-tier scrutiny test. However, those rights guaranteed by Art. II, sec. 3, and those rights provided for in Art. IX, sec. 1, were intended by the constitution's framers to be interrelated and interdependent, so state action under either section is subject to strict scrutiny. Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236, 56 St. Rep. 964 (1999). See also Butte Community Union v. Lewis, 219 M 426, 712 P2d 1309, 43 St. Rep. 65 (1986), and Wadsworth v. St., 275 M 287, 911 P2d 1165, 53 St. Rep. 146 (1996).

Standing to Challenge Mining Activity With Arguably Adverse Environmental Impact: Plaintiffs' uncontroverted allegations of a violation of their right to a clean and healthful environment established their standing to challenge mine water discharge activities that had an arguably adverse impact on the headwaters of the Blackfoot River in which they fished and recreated and that was a source of their drinking water. Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236, 56 St. Rep. 964 (1999), following Missoula City-County Air Pollution Control Bd. v. Bd. of Envtl. Review, 282 M 255, 937 P2d 463, 54 St. Rep. 338 (1997), and Gryczan v. St., 283 M 433, 942 P2d 112, 54 St. Rep. 699 (1997).

Law Review Articles

Antidegradation Policy and Outstanding National Resource Waters in the Northern Rocky Mountain States, Brawer, 20 Pub. Land & Resources L. Rev. 13 (1999).

Collateral References

Senate Joint Resolution 29 Water Quality Nondegradation Study, Montana Environmental Quality Council (1995).

75-5-304. Adoption of standards — pretreatment, effluent, performance.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) in introductory clause and in (2) substituted "department" for "board". Amendment effective July 1, 2021.

2013 Amendment: Chapter 156 inserted (1)(e) concerning cooling water intake structure rules; and made minor changes in style. Amendment effective April 5, 2013.

1995 Amendment: Chapter 497 inserted (2) requiring that standards be feasible; and made minor changes in style. Amendment effective April 15, 1995.

Preamble: The preamble attached to Ch. 497, L. 1995, provided: "WHEREAS, experience with implementation and enforcement of the Montana water quality statutes has revealed deficiencies in the statutes that have led to inefficiency and unfairness in administration and enforcement of the statutes; and

WHEREAS, those deficiencies can be addressed by selective amendment of the statutes."

1995 Statement of Intent: The statement of intent attached to Ch. 497, L. 1995, provided: "A statement of intent is required to provide guidance to the board of health and environmental sciences [now board of environmental review] regarding rulemaking. The legislature confirms the policy of this state, as reflected in 75-5-101. It is concerned that implementation of the water quality laws has in the past been too dependent on assumptions and conjecture springing from experiences and circumstances from other states and has not been sufficiently based on the conditions and needs of our state. The legislature intends that, in promulgating rules under this bill, the board of health and environmental sciences [now board of environmental review] should seriously consider the impact of proposed rules and that the rules should be adopted only on the basis of sound, scientific justification and never on the basis of projections or conjecture. The legislature is specifically concerned that water quality criteria must reflect concentrations that can be reliably measured, or the rules will, as a practical matter, be unenforceable. [Section 1] [75-5-309, now repealed], providing conditions for adoption of standards more stringent than federal standards, is not intended to prohibit the adoption of ground water quality standards."

Saving Clause: Section 17, Ch. 497, L. 1995, provided: "[This act] does not apply to civil or administrative actions commenced prior to [the effective date of this act] [effective April 15, 1995] or to claims made in those actions, except that compliance plans resulting from those actions must reflect changes made by [this act]."

Administrative Rules

Title 17, chapter 30, subchapter 12, ARM Montana pollutant discharge elimination system (MPDES) standards.

Title 17, chapter 30, subchapter 14, ARM Pretreatment.

75-5-305. Adoption of requirements for treatment of wastes — variance procedure — appeals.

Compiler's Comments

Direction to Department of Environmental Quality: Section 1, Ch. 518, L. 2023, provided: "The department of environmental quality, under its authority to promulgate rules pursuant to 75-5-305 and 76-4-104, shall amend the technical standards found in DEQ4 and all necessary administrative rules to allow for a new subsurface wastewater treatment system in an area that has been cut or filled.

(2) The amendments to DEQ4 and all necessary administrative rules required in subsection (1) must provide that soil testing conditions and 4 feet of natural soil separation to a limiting layer are required. Cut or fill may not be used to provide the required vertical or horizontal separation under rule or circular." Effective May 18, 2023.

2021 Amendment: Chapter 324 in (1) in three places, in (2) in three places, and in (4) at end of last sentence substituted references to department for references to board. Amendment effective July 1, 2021.

2009 Amendment: Chapter 73 in (2)(b) after "systems" deleted "in private, single-family residences". Amendment effective October 1, 2009.

2007 Amendments — Composite Section: Chapter 150 in (3) near middle of first sentence after "50-2-116" deleted "(1)(i)". Amendment effective October 1, 2007.

Chapter 312 inserted (2)(b) concerning gray water reuse systems; and made minor changes in style. Amendment effective October 1, 2007.

Applicability: Section 6, Ch. 312, L. 2007, provided: "(1) [This act] applies to gray water systems that are installed after [the effective date of this act]. [Effective October 1, 2007]

(2) [This act] and any rules or requirements adopted as a result of [this act] may not be imposed on a gray water system that was installed on or before [the effective date of this act]." Effective October 1, 2007.

1995 Amendment: Chapter 497 in (1) inserted second through fourth sentences regarding Board adoption of technology-based treatment requirements or other feasible requirements. Amendment effective April 15, 1995.

Preamble: The preamble attached to Ch. 497, L. 1995, provided: "WHEREAS, experience with implementation and enforcement of the Montana water quality statutes has revealed deficiencies in the statutes that have led to inefficiency and unfairness in administration and enforcement of the statutes; and

WHEREAS, those deficiencies can be addressed by selective amendment of the statutes."

1995 Statement of Intent: The statement of intent attached to Ch. 497, L. 1995, provided: "A statement of intent is required to provide guidance to the board of health and environmental sciences [now board of environmental review] regarding rulemaking. The legislature confirms the policy of this state, as reflected in 75-5-101. It is concerned that implementation of the water quality laws has in the past been too dependent on assumptions and conjecture springing from experiences and circumstances from other states and has not been sufficiently based on the conditions and needs of our state. The legislature intends that, in promulgating rules under this bill, the board of health and environmental sciences [now board of environmental review] should seriously consider the impact of proposed rules and that the rules should be adopted only on the basis of sound, scientific justification and never on the basis of projections or conjecture. The legislature is specifically concerned that water quality criteria must reflect concentrations that can be reliably measured, or the rules will, as a practical matter, be unenforceable. [Section 1] [75-5-309, now repealed], providing conditions for adoption of standards more stringent than federal standards, is not intended to prohibit the adoption of ground water quality standards."

Saving Clause: Section 17, Ch. 497, L. 1995, was a saving clause. "[This act] does not apply to civil or administrative actions commenced prior to [the effective date of this act] [effective April 15, 1995] or to claims made in those actions, except that compliance plans resulting from those actions must reflect changes made by [this act]."

1991 Amendment: Inserted (2) requiring Board to establish minimum requirements for control and disposal of sewage from buildings; and inserted (3) through (5) regarding application for, hearing on, and appeal of requests for variance from minimum requirements.

1991 Statement of Intent: The statement of intent attached to Ch. 479, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the board of health and environmental sciences [now board of environmental review] concerning rulemaking to establish minimum standards for the design, installation, and maintenance of new septic and sewage disposal systems that are connected to individual private and public buildings. The rules must include a procedure for the consideration of requests for variances from the minimum standards and for a variance to be granted if warranted, as determined by local boards of health. The rules must also provide a procedure for persons to appeal a local board of health's decision on a variance to the department of health and environmental sciences [now department of environmental quality]. Following the adoption of minimum state standards, local boards of health shall adopt regulations for new septic and sewage disposal systems that are no less stringent than the state standards. Local governments are not required to regulate septic and sewage disposal systems that the department of health and environmental sciences [now department of environmental quality] reviews and regulates under the requirements of Title 75, chapter 6, pertaining to public water supply systems, or the requirements of Title 76, chapter 4, pertaining to subdivisions."

Applicability: Section 3, Ch. 479, L. 1991, provided: "[This act] applies to proceedings begun after October 1, 1991."

Administrative Rules

Title 17, chapter 30, subchapter 12, ARM Montana pollutant discharge elimination system (MPDES) standards.

Title 17, chapter 36, subchapter 9, ARM Onsite subsurface wastewater treatment systems.

Case Notes

Improper Issuance of Discharge Permits Without Imposing Predischarge Treatment Standards — Reversed: It was a violation of the Montana Clean Water Act and reversible error for the Department of Environmental Quality to issue discharge permits to a water company, which extracted coal bed methane and discharged its ground water into a river, without imposing predischarge treatment standards. On remand, the Department was required to reevaluate the permit applications under the appropriate standards within 90 days. N. Cheyenne Tribe v. Dept. of Environmental Quality, 2010 MT 111, 356 Mont. 296, 234 P.3d 51.

75-5-306. Purer than natural unnecessary — dams — definition.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Administrative Rules

ARM 17.30.618 Natural and nonanthropogenic water quality standards.

75-5-307. Hearings required for classification, formulation of standards, and rulemaking.

Compiler's Comments

2021 Amendment: Chapter 324 throughout section in four places substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 2021.

75-5-308. Short-term water authorizations — water quality standards.

Compiler's Comments

2021 Amendment: Chapter 324 in (3) near end of last sentence after "adopted" deleted "by the board". Amendment effective July 1, 2021.

1999 Amendment: Chapter 588 at beginning of (1) inserted "Because these activities promote the public interest", after "may" inserted "if necessary", and after "standards" substituted "for the following activities" for "or short-term use that exceeds the water quality standards for the purposes of allowing construction"; in (1)(a) after "emergency" deleted "environmental" and after "remediation" inserted "activities that have been approved, authorized, or required by the department"; in (1)(b) substituted language regarding use of registered pesticide for former language that read: "pesticide application, elimination of undesirable and nonnative aquatic species, and treatment of water for the protection of public health"; in (2) in first sentence after "extent" substituted "practicable" for "possible", substituted "any change in the concentration of the parameters affected by the activity" for "any standard violation", and at end substituted "any change may occur" for "any standard violation may occur" and in second sentence after "authorization" inserted "must also include" and after "conditions" substituted "that prevent significant risk to public health and that ensure that existing and designated uses of state water are protected and maintained upon completion of the activity" for "must maximize the protection of state waters by ensuring the maintenance of beneficial uses immediately after the term of the authorization"; inserted (3) providing that person authorized to use pesticide must comply with Title 80, chapters 8 and 15, and prohibiting department from authorizing exemption from water quality standards for activity requiring discharge permit; and made minor changes in style. Amendment effective May 10, 1999.

Saving Clause: Section 8(1), Ch. 588, L. 1999, provided: "[This act] does not affect a right to conduct a construction activity in accordance with a short-term exemption granted pursuant to 75-5-308 before [the effective date of this act]." Effective May 10, 1999.

Severability: Section 9, Ch. 588, L. 1999, was a severability clause.

75-5-310. Site-specific standards of water quality for aquatic life.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) in middle of first sentence substituted "department" for "board". Amendment effective July 1, 2021.

Preamble: The preamble attached to Ch. 497, L. 1995, provided: "WHEREAS, experience with implementation and enforcement of the Montana water quality statutes has revealed deficiencies in the statutes that have led to inefficiency and unfairness in administration and enforcement of the statutes; and

WHEREAS, those deficiencies can be addressed by selective amendment of the statutes."

1995 Statement of Intent: The statement of intent attached to Ch. 497, L. 1995, provided: "A statement of intent is required to provide guidance to the board of health and environmental sciences [now board of environmental review] regarding rulemaking. The legislature confirms the policy of this state, as reflected in 75-5-101. It is concerned that implementation of the water quality laws has in the past been too dependent on assumptions and conjecture springing from experiences and circumstances from other states and has not been sufficiently based on the conditions and needs of our state. The legislature intends that, in promulgating rules under this bill, the board of health and environmental sciences [now board of environmental review] should seriously consider the impact of proposed rules and that the rules should be adopted only on the basis of sound, scientific justification and never on the basis of projections or conjecture.

The legislature is specifically concerned that water quality criteria must reflect concentrations that can be reliably measured, or the rules will, as a practical matter, be unenforceable. [Section 1] [75-5-309, now repealed], providing conditions for adoption of standards more stringent than federal standards, is not intended to prohibit the adoption of ground water quality standards."

Saving Clause: Section 17, Ch. 497, L. 1995, provided: "[This act] does not apply to civil or administrative actions commenced prior to [the effective date of this act] [effective April 15, 1995] or to claims made in those actions, except that compliance plans resulting from those actions must reflect changes made by [this act]."

Effective Date: Section 18, Ch. 497, L. 1995, provided: "[This act] is effective on passage and approval." Approved April 15, 1995.

75-5-311. Local water quality districts — department approval — local water quality programs.

Compiler's Comments

2021 Amendment: Chapter 324 in (2), in (3), in (4) in introductory clause, in (5)(b), in (7) in three places, in (9) in two places, in (10) in two places, and in (12) at beginning of first sentence substituted references to department for reference to board; in (8) deleted former last sentence (see 2021 Session Law for former text); and in (12) near end of first sentence after "level" substituted "the department may assume" for "the board may direct the department to assume". Amendment effective July 1, 2021.

1995 Amendment: Chapter 471 inserted (5)(b) concerning Board approval of ordinance more stringent than state law; and made minor changes in style. Amendment effective April 14, 1995.

Applicability: Section 22(3), Ch. 471, L. 1995, provided: "(3) [This act] does not apply to the establishment of fees or public participation requirements."

1991 Statement of Intent: The statement of intent attached to Ch. 357, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the board of health and environmental sciences [now board of environmental review] concerning rulemaking and approval of local water quality programs. The board shall adopt rules concerning the format of local water quality programs, including the level of information necessary for a local water quality district to show that its proposed program will be consistent with Title 75, chapter 5, and that its program will be effective in protecting, preserving, and improving the quality of surface water and ground water. The board may define by rule the types of best management practices that may be imposed upon each of the types of facilities and sources of pollution that may be regulated by local ordinances as authorized under [section 24(4)] [75-5-311(4)]. It is the intent of the legislature that administrative responsibilities be clearly allocated and, when necessary, clearly divided between the department of health and environmental sciences [now department of environmental quality] and a local water quality district, insofar as possible, to ensure that permitholders, permit applicants, and citizens are not subject to conflicting or duplicative requirements. Through its approval of local water quality programs, the board of health and environmental sciences [now board of environmental review] shall ensure that the department of health and environmental sciences' [now department of environmental quality] ability to continue to administer federally delegated water quality protection programs is not impaired. The board may also adopt rules to specify the procedures the department of health and environmental sciences [now department of environmental quality] shall follow pursuant to 75-5-106 to authorize a local water quality district to enforce provisions of Title 75, chapter 5. It is the intent of the legislature that the boundaries of local water quality districts should correspond to the area or areas in which water quality problems have been documented.

Except as expressly provided in this bill, nothing in this bill may be considered to limit or restrict the authority of local governments to adopt rules and regulations authorized by other laws of the state."

75-5-312. Temporary water quality standards.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) at beginning of first sentence substituted "The department may, on its own accord" for "The board may, upon recommendation of the department" and near beginning of last sentence substituted "department" for "board"; in (2) near end of first and last sentences, in (5) near beginning of introductory clause, in (5)(a), in (7) near beginning, in (8)(b), in (10) in three places, in (11) in introductory clause, and in (13) near beginning of last sentence substituted references to department for references to board; in (9) in middle substituted "department shall report at least every 3 years" for "department shall report to the board at least every 3 years or upon request of the board"; and in (11)(c), in (12), and in (13) in first sentence substituted references to department for references to board or department. Amendment effective July 1, 2021.

2001 Amendment: Chapter 384 in (1) at beginning of first sentence after "The board may" deleted "on its own" and after "rulemaking" inserted "as provided in 2-4-315" and at end of second sentence substituted "all the beneficial uses designated for that water body or segment are supported" for "an additional beneficial use or uses are supported"; in (2) in first sentence before "implementation plan" inserted "a preliminary" and inserted second sentence requiring submission of a support document and preliminary implementation plan for review at least 60 days prior to filing a petition requesting adoption of temporary water quality standards; in (3) substituted introductory clause concerning support document for former language that read: "If a person petitions for rulemaking under this section, the petition must specifically describe the affected state water, the existing ambient water quality for the parameter or parameters at issue, the water quality standard or standards affected, and the temporary modifications sought. Within 180 days after the board grants a petition to initiate rulemaking, the petitioner shall prepare and submit to the board and the department a proposed support document and implementation plan that sets forth"; inserted (3)(a) requiring a description of the chemical, biological, and physical condition of the water; in (3)(b) at beginning after "the" inserted "specific"; in (3)(c) at beginning after "the existing" substituted "water quality standards that are not being achieved" for "beneficial use or uses and the beneficial use or uses considered attainable in the absence of the water quality limiting factors"; deleted former (3)(c) and (3)(d) that read: "(c) an implementation plan to eliminate the water quality limiting factors to the extent considered achievable; and

(d) a schedule for implementing the plan that ensures that the water quality standards for the parameter or parameters at issue are met as soon as reasonably practicable and in no event later than the time allowed by the board in the temporary standard"; inserted (3)(d) requiring a description of temporary modifications to existing water quality standards; inserted (3)(e) requiring a description of existing beneficial uses; inserted (3)(f) requiring a description of designated uses considered attainable in the absence of the water quality limiting factors; inserted (4) setting out criteria that a preliminary implementation plan must contain; inserted (5) requiring certain action by the department or petitioner within 30 days after the board's adoption of temporary water quality standards; inserted (6) requiring submission of detailed annual work plans; in (10) near middle of first sentence after "standards" inserted "and implementation plan", inserted second sentence requiring consideration of progress made in restoring water quality to a level that achieves the goal of the temporary water quality standards, and in third sentence after "terminate" inserted "or modify" and at end after "review" deleted "that the applicant is not complying with the approved implementation plan"; in (11)(c) near end after "modifications to that" inserted "plan or"; in (12) at beginning after "The board" inserted "or the department", after "modify the" inserted "implementation" and after "if" substituted "there is convincing evidence" for "the permittee submits convincing evidence to the board" and deleted former second sentence that read: "The board may not extend the plan beyond a total period of 20 years"; in (13) at end of first sentence substituted "an implementation plan that meet the requirements of subsection (4)" for "a plan that meet the requirements of subsections (2) and (3)"; and made minor changes in style. Amendment effective October 1, 2001.

1995 Statement of Intent: The statement of intent attached to Ch. 539, L. 1995, provided: "A statement of intent is provided for this bill because it allows the board of health and environmental sciences [now board of environmental review] to adopt rules establishing temporary water quality standards.

The principle behind establishing temporary water quality standards is that there are Montana surface and ground waters that are of lower quality than the applicable water quality standards. The legislature intends that the temporary water quality standards may not be established for waters that are impaired but still support their beneficial uses. Temporary standards may be established only when substantive information indicates that the water body or water segment does not support a designated use for its classification. The goal of establishing temporary standards is to improve the quality of the water to the point at which it supports the beneficial uses for its classification.

The establishment of temporary standards provides a legal basis that facilitates improvement of the water quality for those waters and allows, in limited circumstances, discharges to those waters. The rules must reflect the legislature's intent that establishing temporary water quality standards will trigger development and implementation of a plan with the overall goal of continuously improving the quality of the water during the period of the modification to the point that beneficial uses are supported. At no time during the period of a modification should a discharge be allowed that will cause water quality to become worse than the quality of the water body or segment prior to the discharge.

The legislature recognizes that persons may desire to commence discharging to the water body or segment for which a standard has been temporarily modified during the period of the modification. Any discharges that are allowed should not in any way slow or impede the improvement of the water body or segment."

Severability: Section 5, Ch. 539, L. 1995, was a severability clause.

Effective Date: Section 6, Ch. 539, L. 1995, provided: "[This act] is effective on passage and approval." Approved April 27, 1995.

75-5-315. Outstanding resource waters — statement of purpose.

Compiler's Comments

2021 Amendment: Chapter 324 in (2) in middle substituted "department" for "board". Amendment effective July 1, 2021.

2003 Amendment: Chapter 208 in (1) near middle of first sentence after "should" inserted "upon a showing of necessity"; in (2) near middle after "protection" inserted "when necessary"; and made minor changes in style. Amendment effective April 3, 2003.

Severability: Section 3, Ch. 208, L. 2003, was a severability clause.

Applicability: Section 5, Ch. 208, L. 2003, provided: "[This act] applies to petitions for rulemaking to classify waters as outstanding resource waters that are filed after [the effective date of this act]." Effective April 3, 2003.

1995 Statement of Intent: The statement of intent attached to Ch. 501, L. 1995, provided: "A statement of intent is required for this bill because the bill gives the board of health and environmental sciences [now board of environmental review] the authority to adopt administrative rules. It is the intent of the legislature that this legislation and the rules adopted pursuant to this legislation serve as Montana's regulatory scheme for both outstanding national resource waters and outstanding state resource waters. It is the further intent of the legislature that surface and ground water in Montana be designated as outstanding resource waters only if there is no other reasonable means of protecting the water. The legislature intends that because this designation may severely limit future use of the designated water, the designation should be accomplished only after a very thorough examination of the environmental, social, and economic impacts."

75-5-316. Outstanding resource water classification — rules — criteria — limitations — procedure — definition.

Compiler's Comments

2021 Amendment: Chapter 324 in (1), in (3) in six places, in (4) in three places in introductory clause, in (5) in four places, in (6)(b)(iv), in (7), in (8) in four places, in (10) in three places, and in (11) substituted references to department for references to board; in (3)(d)(i) in middle before "serve" deleted "the board believes"; in (6)(a) in middle substituted "the department shall prepare" for "the board shall direct the department to prepare"; in (6)(b)(iv) at end substituted "is received" for "has been received by the department"; and made minor changes in style. Amendment effective July 1, 2021.

2003 Amendment: Chapter 208 in (3)(a) in first sentence after "classify" inserted "state"; in (3)(c) in introductory clause after "petition and" substituted "makes a written finding containing the provisions enumerated in subsection (3)(d)" for "finds"; in (3)(c)(ii) at beginning after "the" inserted "increased protection under the" and near middle after "(3)(a)" inserted "because of a finding that the outstanding resource is at risk of having one or more of the criteria provided in subsection (4) compromised as a result of pollution"; in (3)(c)(iii) at beginning inserted "classification as an outstanding resource water is necessary because of a finding that"; inserted (3)(d) concerning criteria identification; inserted (5) requiring the board to publish notice, provide a comment period, hold a public meeting, issue a proposed decision, allow public comment of the proposed decision, and issue a final decision on acceptance or rejection of the petition; in (6)(a) near beginning after "shall" substituted "direct the department to prepare" for "require the preparation of" and at end substituted "and this section" for "when classification as an outstanding resource water may cause significant adverse impacts to the environment, including significant adverse impacts to social or economic values"; inserted (6)(b) concerning payment of costs; in (7) after "agencies" inserted "and county governments"; in (8)(a) at beginning substituted "After completion of an environmental impact statement and consultation with state agencies and local governments" for "In accordance with 2-4-315"; inserted (8)(c) requiring the board to initiate rulemaking to classify the waters as outstanding resource waters if the petition is granted; inserted (11) defining petitioner; and made minor changes in style. Amendment effective April 3, 2003.

Severability: Section 3, Ch. 208, L. 2003, was a severability clause.

Applicability: Section 5, Ch. 208, L. 2003, provided: "[This act] applies to petitions for rulemaking to classify waters as outstanding resource waters that are filed after [the effective date of this act]." Effective April 3, 2003.

1999 Amendment: Chapter 588 deleted former second sentence in (1) that read: "Neither this section nor rules adopted pursuant to this section apply to an activity that is identified as nonsignificant under 75-5-301(5)(c) and that is exempted from nondegradation review required under 75-5-303"; and substituted language in (2)(b) prohibiting department from allowing new or increased point source discharge resulting in permanent water quality change for former language that read: "grant an authorization to degrade if that authorization would cause significant degradation, as defined by board rules adopted under 75-5-301(5), in outstanding resource waters". Amendment effective May 10, 1999.

Severability: Section 9, Ch. 588, L. 1999, was a severability clause.

1995 Statement of Intent: The statement of intent attached to Ch. 501, L. 1995, provided: "A statement of intent is required for this bill because the bill gives the board of health and environmental sciences [now board of environmental review] the authority to adopt administrative rules. It is the intent of the legislature that this legislation and the rules adopted pursuant to this legislation serve as Montana's regulatory scheme for both outstanding national resource waters and outstanding state resource waters. It is the further intent of the legislature that surface and ground water in Montana be designated as outstanding resource waters only if there is no other reasonable means of protecting the water. The legislature intends that because this designation may severely limit future use of the designated water, the designation should be accomplished only after a very thorough examination of the environmental, social, and economic impacts."

Case Notes

Outstanding Resource Waters — Department Failure to Supplement Environmental Impact Statement Alleged — Abandoned Proposal Removed Obligation to Supplement. Mont. Rivers v. Dept. of Environmental Quality, 2022 MT 132, 409 Mont. 204, 512 P.3d 1193.

75-5-317. Nonsignificant activities.

Compiler's Comments

2021 Amendment: Chapter 342 inserted (2)(u) regarding certain discharges of phosphorus or nitrogen; and made minor changes in style. Amendment effective April 30, 2021.

Saving Clause: Section 12, Ch. 342, L. 2021, was a saving clause.

2009 Amendment: Chapter 73 inserted (2)(i) including the use of gray water from nonpublic gray water reuse systems for irrigation as an activity that causes a nonsignificant change in water quality; and made minor changes in style. Amendment effective October 1, 2009.

1999 Amendment: Chapter 588 near beginning in (2)(e) before "water" inserted "ground"; at end of (2)(f) inserted "and if no discharge to surface water will occur"; in (2)(j) inserted "to ground water"; in (2)(k) inserted "that do not result in discharges to surface water and that are"; in (2)(m) inserted "that does not result in a discharge to surface water, that does not involve a test pit located in surface water or that may affect surface water, and that is"; in (2)(p) inserted "that does not result in a discharge to surface water and that is"; in (2)(q) substituted language regarding stream-related construction or enhancement projects for former language that read: "nonpoint sources of pollution that cause short-term changes in existing water quality resulting from:

(i) activities authorized under Title 75, chapter 7, part 1; or

(ii) customary activities involving the use of water established by an existing water right or permit recognized under Montana law"; inserted (2)(r) regarding diversions or withdrawals of water; and made minor changes in style. Amendment effective May 10, 1999.

Saving Clause: Section 8(2), Ch. 588, L. 1999, provided: "(2) A discharge from a facility or source that discharged to surface water prior to [the effective date of this act] [effective May 10, 1999] and that was exempt from 75-5-303 pursuant to 75-5-317(2)(e), (2)(k), or (2)(p) or 75-5-401(1)(b) as those sections read prior to [the effective date of this act] [effective May 10, 1999] continues to be exempt from 75-5-303 as long as the facility or source has not since [the effective date of this act] [effective May 10, 1999] been expanded in a manner that increases the volume of discharge or the concentration or nature of pollutants in the discharge."

Severability: Section 9, Ch. 588, L. 1999, was a severability clause.

Case Notes

Arbitrary, Blanket Exclusion of Certain Activities From Nondegradation Review Unconstitutional as Applied — Actual Danger Not Required — Degradation of Environment Sufficient to Implicate Fundamental Rights: The District Court erred when it held that the fundamental right to a clean and healthy environment is not implicated unless there is a finding of actual injury and that mere degradation of water quality, absent actual injury, is not sufficient to implicate the fundamental right or to require strict scrutiny analyses. The right to a clean and healthful environment contained in Art. II, sec. 3, Mont. Const., is fundamental. Therefore, as applied to the facts of this case, to the extent that subsection (2)(j) of this section arbitrarily excludes certain activities from nondegradation review without regard to the nature or volume of the substance being discharged, it violates the environmental rights guaranteed by Art. II, sec. 3, Mont. Const., and Art. IX, sec. 1, Mont. Const. (See 1999 amendments.) The intention of the framers of the constitution was to provide language and protections that are both anticipatory and preventative. The delegates did not intend to merely prohibit that degree of environmental degradation that can be conclusively linked to ill health or physical endangerment. Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236, 56 St. Rep. 964 (1999).

Fundamental Right to Clean and Healthful Environment — Strict Scrutiny of Compelling State Interest and Nondegradation Policy: The right to a clean and healthful environment contained in Art. II, sec. 3, Mont. Const., is fundamental. Any statute or rule implicating that right will be strictly scrutinized and will survive scrutiny only if the state establishes a compelling state interest and its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to meet the state's objectives. Because rights provided for in Art. IX, sec. 1, Mont. Const., are not found in the declaration of rights, a statute implicating Art. IX, sec. 1, rights would normally be subject to a middle-tier scrutiny test. However, those rights guaranteed by Art. II, sec. 3, and those rights provided for in Art. IX, sec. 1, were intended by the constitution's framers to be interrelated and interdependent, so state action under either section is subject to strict scrutiny. Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236, 56 St. Rep. 964 (1999). See also Butte Community Union v. Lewis, 219 M 426, 712 P2d 1309, 43 St. Rep. 65 (1986), and Wadsworth v. St., 275 M 287, 911 P2d 1165, 53 St. Rep. 146 (1996).

Standing to Challenge Mining Activity With Arguably Adverse Environmental Impact: Plaintiffs' uncontroverted allegations of a violation of their right to a clean and healthful environment established their standing to challenge mine water discharge activities that had an arguably adverse impact on the headwaters of the Blackfoot River in which they fished and recreated and that was a source of their drinking water. Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236, 56 St. Rep. 964 (1999), following Missoula City-County Air Pollution Control Bd. v. Bd. of Envtl. Review, 282 M 255, 937 P2d 463, 54 St. Rep. 338 (1997), and Gryczan v. St., 283 M 433, 942 P2d 112, 54 St. Rep. 699 (1997).

75-5-318. Short-term water quality standards for turbidity.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) near end of first sentence and in middle of last sentence substituted "department" for "board"; and in (2) in middle of last sentence after "adopted" and in (3) near end of third sentence after "adopted" deleted "by the board". Amendment effective July 1, 2021.

Severability: Section 9, Ch. 588, L. 1999, was a severability clause.

Effective Date: Section 10, Ch. 588, L. 1999, provided that this section is effective on passage and approval. Approved May 10, 1999.

75-5-320. Temporary water quality standards variances.

Compiler's Comments

2021 Amendment: Chapter 342 in (1) after "Except as provided in 75-5-222(2)" deleted "and 75-5-313". Amendment effective April 30, 2021.

Saving Clause: Section 12, Ch. 342, L. 2021, was a saving clause.

Effective Date: This section is effective October 1, 2019.

75-5-321. Transition for nutrient standards.

Compiler's Comments

Effective Date: Section 13, Ch. 342, L. 2021, provided: "[This act] is effective on passage and approval." Approved April 30, 2021.

Saving Clause: Section 12, Ch. 342, L. 2021, was a saving clause.

Administrative Rules

ARM 17.30.1388 Development of an adaptive management program implementing narrative nutrient standards.

75-5-325. Definitions.

Compiler's Comments

2009 Amendment: Chapter 73 in definition of gray water reuse system after "plumbing system" deleted "for a private, single-family residence". Amendment effective October 1, 2009.

Effective Date: This section is effective October 1, 2007.

Applicability: Section 6, Ch. 312, L. 2007, provided: "(1) [This act] applies to gray water systems that are installed after [the effective date of this act]. [Effective October 1, 2007]

(2) [This act] and any rules or requirements adopted as a result of [this act] may not be imposed on a gray water system that was installed on or before [the effective date of this act]." Effective October 1, 2007.

75-5-326. Gray water reuse — restrictions.

Compiler's Comments

Effective Date: This section is effective October 1, 2007.

Applicability: Section 6, Ch. 312, L. 2007, provided: "(1) [This act] applies to gray water systems that are installed after [the effective date of this act]. [Effective October 1, 2007]

(2) [This act] and any rules or requirements adopted as a result of [this act] may not be imposed on a gray water system that was installed on or before [the effective date of this act]." Effective October 1, 2007.

75-5-327. Local gray water regulations.

Compiler's Comments

Effective Date: This section is effective October 1, 2007.

Applicability: Section 6, Ch. 312, L. 2007, provided: "(1) [This act] applies to gray water systems that are installed after [the effective date of this act]. [Effective October 1, 2007]

(2) [This act] and any rules or requirements adopted as a result of [this act] may not be imposed on a gray water system that was installed on or before [the effective date of this act]." Effective October 1, 2007.

Part 4
Permits

Part Case Notes

No Evidence That Use of Siphon Tube to Regulate Temperature of Dam Outlet Water Satisfied Water Quality Standards: The Board of Health and Environmental Sciences (now Board of Environmental Review) issued "401 certifications" to the Milk River Irrigation District and the city of Gillette, Wyoming, regarding a hydroelectric generating facility at the Tiber Dam that provided in part for the placing of a siphon 60 feet below the auxiliary outlet in order to regulate the temperature of outlet water and protect the downstream fishery. As part of its contested case review, the District Court correctly concluded that the "401" application had never been amended to include the siphon scheme and that there was no evidence to support the Board's conclusion that withdrawing water from 60 feet below the auxiliary outlet satisfied applicable water quality standards, the nondegradation requirements of the Water Quality Act, Board rules, and state public policy. The court properly determined that due process would be violated if the certification could be issued without an amendment to the original application and without the holding of public hearings respecting the siphon scheme. Hi-Line Sportsmen Club v. Milk River Irrigation District, 241 M 182, 786 P2d 13, 47 St. Rep. 184 (1990).

Department Grant of Water Quality Certification — Board Jurisdiction to Reconsider — Writ of Prohibition Inappropriate: Three entities competing for the right to construct a hydroelectric generation facility at a federal site applied for and received "401 certification" from the Department of Health and Environmental Sciences (now Department of Environmental Quality) to allow application for a federal permit under section 401 of the Federal Water Pollution Control

Act amendments of 1972, 33 U.S.C. 1341(a). One of the entities, Montana Renewable Resources (MRR), questioned whether its competitors' projects complied with state water quality standards and requested Department reconsideration of the other two entities' "401 certification". The Department refused to modify its decision, so MRR formally petitioned the Board of Health and Environmental Sciences (now Board of Environmental Review) for an appeal or declaratory ruling. The other two entities filed applications for Writs of Prohibition to halt further Board proceedings with respect to their certifications. The Supreme Court affirmed District Court dismissal of the applications, finding that the Board was acting within its jurisdiction under Montana water quality law and that since a speedy and adequate remedy of judicial appeal from any Board decisions was available, a Writ of Prohibition was inappropriate. Malta Irrigation District v. Mont. Bd. of Health & Environmental Sciences, 224 M 376, 729 P2d 1323, 43 St. Rep. 2264 (1986).

Part Collateral References

Montana Index of Environmental Permits, Montana Environmental Quality Council.

75-5-401. Rules for permits — ground water exclusions.

Compiler's Comments

2021 Amendment: Chapter 324 in both versions in (1) in introductory clause, in (1)(b) at beginning of second sentence, in (4), in (8), and in (9) substituted "department" for "board". Amendment effective July 1, 2021.

2009 Amendment: Chapter 474 inserted (5)(l) providing that a ground water permit is not required for activities associated with a permitted carbon dioxide injection well; and made minor changes in style. Amendment effective on occurrence of contingency.

Saving Clause: Section 29, Ch. 474, L. 2009, was a saving clause.

Transition — Contingent Implementation: Section 30, Ch. 474, L. 2009, provided: "If the United States environmental protection agency adopts regulations allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program adopted by the environmental protection agency, the board of oil and gas conservation shall in consultation with the department of environmental quality and the department of natural resources and conservation develop draft rules to implement [this act] [Chapter 474, L. 2009] and seek primacy." A final rule allowing states to apply for primacy over carbon dioxide sequestration wells under the federal underground injection control program was adopted by the environmental protection agency and is found at Volume 75 of the Federal Register, pages 77229 through 77303.

2003 Amendment: Chapter 231 inserted (9) allowing board to adopt rules authorizing general permits for categories of point source discharges and providing that rules may authorize discharge upon issuance of individual authorization or upon receipt of notice of intent to be covered under general permit. Amendment effective April 4, 2003.

Severability: Section 9, Ch. 231, L. 2003, was a severability clause.

2001 Amendment: Chapter 413 in (1)(a) near middle substituted "state waters" for "state surface waters and ground waters"; and inserted (1)(c) concerning rules governing discharge under a general permit for storm water associated with construction activity. Amendment effective April 28, 2001.

1999 Amendment: Chapter 588 at end of (1)(b) after "part" deleted "and is not degradation". Amendment effective May 10, 1999.

Saving Clause: Section 8(2), Ch. 588, L. 1999, provided: "(2) A discharge from a facility or source that discharged to surface water prior to [the effective date of this act] [effective May 10, 1999] and that was exempt from 75-5-303 pursuant to 75-5-317(2)(e), (2)(k), or (2)(p) or 75-5-401(1)(b) as those sections read prior to [the effective date of this act] [effective May 10, 1999] continues to be exempt from 75-5-303 as long as the facility or source has not since [the effective date of this act] [effective May 10, 1999] been expanded in a manner that increases the volume of discharge or the concentration or nature of pollutants in the discharge."

Severability: Section 9, Ch. 588, L. 1999, was a severability clause.

1995 Amendments: Chapter 297 in (4), near middle, substituted "permitted activities" for "disposal systems"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 497 in (1)(b), at end of first sentence, inserted remainder of subsection providing that a permit is not required for discharge of certain waters under specific circumstances; and made minor changes in style. Amendment effective April 15, 1995.

Chapter 582 at beginning of (1) inserted exception clause; near middle of (1)(a) substituted "state surface waters and ground waters" for "state waters"; inserted (5) concerning discharges not subject to permit requirements; inserted (6) concerning mixing zones for excluded activities; inserted (7) concerning monitoring of excluded activities; inserted (8) concerning the adoption of rules; and made minor changes in style.

Preamble: The preamble attached to Ch. 497, L. 1995, provided: "WHEREAS, experience with implementation and enforcement of the Montana water quality statutes has revealed deficiencies in the statutes that have led to inefficiency and unfairness in administration and enforcement of the statutes; and

WHEREAS, those deficiencies can be addressed by selective amendment of the statutes."

1995 Statement of Intent: The statement of intent attached to Ch. 497, L. 1995, provided: "A statement of intent is required to provide guidance to the board of health and environmental sciences [now board of environmental review] regarding rulemaking. The legislature confirms the policy of this state, as reflected in 75-5-101. It is concerned that implementation of the water quality laws has in the past been too dependent on assumptions and conjecture springing from experiences and circumstances from other states and has not been sufficiently based on the conditions and needs of our state. The legislature intends that, in promulgating rules under this bill, the board of health and environmental sciences [now board of environmental review] should seriously consider the impact of proposed rules and that the rules should be adopted only on the basis of sound, scientific justification and never on the basis of projections or conjecture. The legislature is specifically concerned that water quality criteria must reflect concentrations that can be reliably measured, or the rules will, as a practical matter, be unenforceable. [Section 1] [75-5-309, now repealed], providing conditions for adoption of standards more stringent than federal standards, is not intended to prohibit the adoption of ground water quality standards."

Saving Clause: Section 17, Ch. 497, L. 1995, provided: "[This act] does not apply to civil or administrative actions commenced prior to [the effective date of this act] [effective April 15, 1995] or to claims made in those actions, except that compliance plans resulting from those actions must reflect changes made by [this act]."

1991 Amendment: Inserted (4) allowing adoption of rules governing reclamation of disturbed sites for which a bond is voluntarily filed.

1991 Statement of Intent: The statement of intent attached to Ch. 412, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the board of health and environmental sciences [now board of environmental review] for the adoption of rules concerning the reclamation of sites disturbed by construction, modification, or operation of disposal systems for which a performance bond or other surety is voluntarily filed by a permit applicant or permittee pursuant to [section 3] [75-5-405]. The board's rules should establish criteria that the department of health and environmental sciences [now department of environmental quality] shall apply in determining the requirements that are necessary for individual permittees to achieve acceptable site reclamation on a case-by-case basis and to prevent pollution of state waters. The board's rules should also establish procedures governing the release of bonds and other surety, including provisions for releasing a portion of a bond or other surety in situations in which acceptable reclamation and prevention of water pollution have been completed upon a portion of a site where a permitted pollutant discharge project has operated or a permitted activity has occurred."

Administrative Rules

Title 17, chapter 30, subchapter 1, ARM 401 certification.

Title 17, chapter 30, subchapter 7, ARM Nondegradation of water quality.

Title 17, chapter 30, subchapter 10, ARM Montana ground water pollution control system.

Title 17, chapter 30, subchapter 12, ARM Montana pollutant discharge elimination system (MPDES) standards.

Title 17, chapter 30, subchapter 13, ARM Montana pollutant discharge elimination system (MPDES) permits.

Case Notes

Identification of Actual Owner or Operator Required in Permit Application Based on Administrative Rules: The Montana Environmental Policy Act requires the Department of Environmental Quality (DEQ) to identify the actual owner or operator of a proposed retail facility prior to issuing a Montana Water Quality Act groundwater discharge permit. The Supreme Court reasoned that Board of Environmental Review administrative rules expressly provide that the owner or operator of any proposed source that may discharge pollutants into state ground waters is required to file a completed Montana groundwater pollution control system permit application. Moreover, pursuant to 75-5-402, the Supreme Court held that DEQ must issue, suspend, revoke, modify, or deny permits to discharge sewage into state waters consistently with Board rules.

Bitterrooters for Planning, Inc. v. Dept. of Environmental Quality, 2017 MT 222, 388 Mont. 453, 401 P.3d 712.

Area of Unique Ecological or Recreational Significance — General Permit for Storm Water Discharge Improper: The Department of Environmental Quality improperly granted the Rock Creek Mine a general permit for storm water discharge when, under ARM 17.30.1341, Rock Creek is an area of unique ecological significance because of its impacts on fishery resources and other local conditions at the proposed discharge site. Clark Fork Coalition v. Dept. of Environmental Quality, 2012 MT 240, 366 Mont. 427, 288 P.3d 183.

Improper Issuance of Discharge Permits Without Imposing Predischarge Treatment Standards — Reversed: It was a violation of the Montana Clean Water Act and reversible error for the Department of Environmental Quality to issue discharge permits to a water company, which extracted coal bed methane and discharged its ground water into a river, without imposing predischarge treatment standards. On remand, the Department was required to reevaluate the permit applications under the appropriate standards within 90 days. N. Cheyenne Tribe v. Dept. of Environmental Quality, 2010 MT 111, 356 Mont. 296, 234 P.3d 51.

State Exemption From Federal Law Not Allowed: In the process of extracting coal bed methane, Fidelity pumps ground water to the surface and discharges this water into the Tongue River. The water discharged is salty, contains several chemical constituents identified as pollutants by Environmental Protection Agency (EPA) regulations, has characteristics that may degrade soil, and is unfit for irrigation. The Montana Department of Environmental Quality advised Fidelity that no permit was required to discharge the coal bed methane ground water because Montana state law exempts unaltered ground water from state water quality requirements. This section provides that a discharge to surface water of ground water that is not altered from its ambient quality does not constitute a discharge requiring a permit under this part if: the discharge does not contain industrial waste, sewage, or other wastes; the water discharged does not cause the receiving waters to exceed applicable standards for any parameters; and to the extent that the receiving waters in their ambient state exceed standards for any parameters, the discharge does not increase the concentration of the parameters. This provision does not allow an exemption for a discharge permit that is required by the federal Clean Water Act, nor does the EPA's approval of the provision allow the exemption because the EPA cannot itself allow the exemption and cannot allow a state to do what the EPA cannot itself do. N. Plains Resource Council v. Fidelity Exploration & Dev. Co., 325 F3d 1155 (9th Cir. 2003).

75-5-402. Duties of department.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) at end substituted "department" for "board". Amendment effective July 1, 2021.

1991 Amendment: Inserted (4) requiring Department to establish certain requirements as conditions to the issuance of permits for which a performance bond or other surety is voluntarily filed.

1991 Statement of Intent: The statement of intent attached to Ch. 412, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the board of health and environmental sciences [now board of environmental review] for the adoption of rules concerning the reclamation of sites disturbed by construction, modification, or operation of disposal systems for which a performance bond or other surety is voluntarily filed by a permit applicant or permittee pursuant to [section 3] [75-5-405]. The board's rules should establish criteria that the department of health and environmental sciences [now department of environmental quality] shall apply in determining the requirements that are necessary for individual permittees to achieve acceptable site reclamation on a case-by-case basis and to prevent pollution of state waters. The board's rules should also establish procedures governing the release of bonds and other surety, including provisions for releasing a portion of a bond or other surety in situations in which acceptable reclamation and prevention of water pollution have been completed upon a portion of a site where a permitted pollutant discharge project has operated or a permitted activity has occurred."

Case Notes

Identification of Actual Owner or Operator Required in Permit Application Based on Administrative Rules: The Montana Environmental Policy Act requires the Department of Environmental Quality (DEQ) to identify the actual owner or operator of a proposed retail facility prior to issuing a Montana Water Quality Act groundwater discharge permit. The Supreme Court reasoned that Board of Environmental Review administrative rules expressly provide that the owner or operator of any proposed source that may discharge pollutants into state ground waters is required to file a completed Montana groundwater pollution control system permit application. Moreover, pursuant to 75-5-402, the Supreme Court held that DEQ must issue, suspend, revoke, modify, or deny permits to discharge sewage into state waters consistently with Board rules. Bitterrooters for Planning, Inc. v. Dept. of Environmental Quality, 2017 MT 222, 388 Mont. 453, 401 P.3d 712.

Improper Issuance of Discharge Permits Without Imposing Predischarge Treatment Standards — Reversed: It was a violation of the Montana Clean Water Act and reversible error for the Department of Environmental Quality to issue discharge permits to a water company, which extracted coal bed methane and discharged its ground water into a river, without imposing predischarge treatment standards. On remand, the Department was required to reevaluate the permit applications under the appropriate standards within 90 days. N. Cheyenne Tribe v. Dept. of Environmental Quality, 2010 MT 111, 356 Mont. 296, 234 P.3d 51.

75-5-403. Denial, issuance, or modification of permit — time for review of permit application and hearing.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 512, L. 2023. Amendment effective May 18, 2023.

Applicability: Section 3, Ch. 512, L. 2023, provided: "[This act] applies to permits issued, modified, or denied on or after [the effective date of this act]." Effective May 18, 2023.

1995 Amendment: Chapter 497 inserted (1) regarding application review for completeness of information; deleted former (2) that read: "(2) This section does not apply to any modification made in permit conditions at the time of reissuance, but only to those modifications made in existing permits during their terms"; and made minor changes in style. Amendment effective April 15, 1995.

Preamble: The preamble attached to Ch. 497, L. 1995, provided: "WHEREAS, experience with implementation and enforcement of the Montana water quality statutes has revealed deficiencies in the statutes that have led to inefficiency and unfairness in administration and enforcement of the statutes; and

WHEREAS, those deficiencies can be addressed by selective amendment of the statutes."

1995 Statement of Intent: The statement of intent attached to Ch. 497, L. 1995, provided: "A statement of intent is required to provide guidance to the board of health and environmental sciences [now board of environmental review] regarding rulemaking. The legislature confirms the policy of this state, as reflected in 75-5-101. It is concerned that implementation of the water quality laws has in the past been too dependent on assumptions and conjecture springing from experiences and circumstances from other states and has not been sufficiently based on the conditions and needs of our state. The legislature intends that, in promulgating rules under this bill, the board of health and environmental sciences [now board of environmental review] should seriously consider the impact of proposed rules and that the rules should be adopted only on the basis of sound, scientific justification and never on the basis of projections or conjecture. The legislature is specifically concerned that water quality criteria must reflect concentrations that can be reliably measured, or the rules will, as a practical matter, be unenforceable. [Section 1] [75-5-309, now repealed], providing conditions for adoption of standards more stringent than federal standards, is not intended to prohibit the adoption of ground water quality standards."

Saving Clause: Section 17, Ch. 497, L. 1995, provided: "[This act] does not apply to civil or administrative actions commenced prior to [the effective date of this act] [effective April 15, 1995] or to claims made in those actions, except that compliance plans resulting from those actions must reflect changes made by [this act]."

75-5-404. Suspension or revocation of permit — procedure.

Case Notes

Failure to Exhaust Administrative Remedies — Petition for Writ of Mandate Properly Quashed: The plaintiff filed a petition for a writ of mandate to allow him to install a septic system on a flood plain after the new county sanitarian voided his previously issued permit. The District Court quashed the petition. On appeal, the Supreme Court affirmed, holding that the plaintiff was not entitled to mandamus relief and that he had failed to exhaust administrative remedies, which included appealing to the Department of Environmental Quality. Boehm v. Park County, 2018 MT 165, 392 Mont. 72, 421 P.3d 789.

75-5-405. Voluntary filing of performance bond — terms — hearing.

Compiler's Comments

1991 Statement of Intent: The statement of intent attached to Ch. 412, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the board of health and environmental sciences [now board of environmental review] for the adoption of rules concerning the reclamation of sites disturbed by construction, modification, or operation of disposal systems for which a performance bond or other surety is voluntarily filed by a permit applicant or permittee pursuant to [section 3] [75-5-405]. The board's rules should establish criteria that the department of health and environmental sciences [now department of environmental quality] shall apply in determining the requirements that are necessary for individual permittees to achieve acceptable site reclamation on a case-by-case basis and to prevent pollution of state waters. The board's rules should also establish procedures governing the release of bonds and other surety, including provisions for releasing a portion of a bond or other surety in situations in which acceptable reclamation and prevention of water pollution have been completed upon a portion of a site where a permitted pollutant discharge project has operated or a permitted activity has occurred."

Effective Date: Section 5(1), Ch. 412, L. 1991, provided: "[Section 3 [75-5-405] and this section] are effective on passage and approval." Approved April 10, 1991.

75-5-410. Water quality requirements — aquifer recharge or certain mitigation plans — minimum requirements.

Compiler's Comments

2009 Amendment: Chapter 104 in (1)(a) at beginning inserted exception clause, after "proposes" deleted "to use sewage from a system requiring a water quality permit for the purposes of aquifer recharge pursuant to 85-2-362 or plans to use sewage from a system requiring a water quality permit as a return flow to minimize the amount of water necessary to offset adverse effects resulting from net depletion of surface water through", after "recharge" inserted "or mitigation", and after "shall" substituted "apply for, if necessary" for "obtain"; inserted (1)(b) providing that this section does not apply to the portion of a mitigation plan that consists of a change in appropriation rights for instream flow; inserted (4) requiring sewage systems to meet either primary drinking water standards or nondegradation requirements; deleted former (4) that read: "(4) The appropriate interim legislative committee shall review drinking water standards and effluent treatment standards in other jurisdictions and recommend appropriate treatment standards for purposes of aquifer recharge and mitigation"; in (5) at end after "project" inserted "and "aquifer recharge" and "mitigation" have the meanings provided in 85-2-102"; and made minor changes in style. Amendment effective April 1, 2009.

Applicability: Section 7, Ch. 104, L. 2009, provided: "[This act] applies to applications received by the department of natural resources and conservation on or after [the effective date of this act]." Effective April 1, 2009.

Preamble: The preamble attached to Ch. 391, L. 2007, provided: "WHEREAS, it is the policy of this state to encourage the wise use of the state's water resources by making them available for appropriation and to provide wise utilization, development, and conservation of the water of the state for the maximum benefit of its people with the least possible degradation of the state's natural aquatic ecosystems; and

WHEREAS, there has been confusion regarding ground water issues in closed basins and the Department of Natural Resources and Conservation needs guidance from the Legislature on how to proceed; and

WHEREAS, the basin closure laws were passed to protect senior appropriators while the state water adjudication is ongoing; and

WHEREAS, ground water development in closed basins should be able to proceed as long as the applicant collects the necessary scientific information to determine if there will be an adverse effect on a prior appropriator and takes the necessary actions to mitigate or prevent any adverse effects on a prior appropriator; and

WHEREAS, it is critical that the Legislature develop state water policies in a way that protects the prior appropriation doctrine while at the same time protecting the quality of Montana's water and the ability to appropriate water consistent with section 85-1-101, MCA, and Article IX, section 3, of the Montana Constitution; and

WHEREAS, augmentation is statutorily authorized for the Clark Fork River Basin only; and

WHEREAS, the Department of Natural Resources and Conservation has developed administrative rules and applied augmentation through these administrative rules to all basins even though not specifically statutorily authorized; and

WHEREAS, administrative rules and rulemaking must comply with section 2-4-305, MCA, and may not engraft material not contemplated by the Legislature; and

WHEREAS, this bill provides definitions and a new procedure for mitigation and aquifer recharge."

Severability: Section 29, Ch. 391, L. 2007, was a severability clause.

Effective Date: Section 30, Ch. 391, L. 2007, provided that this section is effective on passage and approval. Approved May 3, 2007.

Applicability: Section 31, Ch. 391, L. 2007, provided: "[This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]." Effective May 3, 2007.

75-5-411. Establishing setbacks — rulemaking.

Compiler's Comments

Effective Date: This section is effective October 1, 2017.

Administrative Rules

ARM 17.30.1702 Setbacks between sewage lagoons and water wells.

Part 5
Financial Provisions

Part Compiler's Comments

Section Not Codified: Section 69-4808.3, R.C.M. 1947, pertaining to administration of funds aiding local governments by the Department of Health and Environmental Sciences (now Department of Environmental Quality), was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 122, L. 1973.

75-5-502. Department authorized to accept loans and grants.

Compiler's Comments

2021 Amendment: Chapter 324 near beginning substituted "department" for "board". Amendment effective July 1, 2021.

75-5-514. When department to establish rates and collect charges.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) in middle before "may adopt" substituted "department" for "board". Amendment effective July 1, 2021.

75-5-515. Determination of costs payable by users.

Compiler's Comments

2021 Amendment: Chapter 324 in middle substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 2021.

75-5-516. Fees authorized for recovery — process — rulemaking.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) in introductory clause substituted "the department shall by rule prescribe fees sufficient to cover the department's documented costs" for "the board shall by rule prescribe fees to be assessed by the department that are sufficient to cover the board's and department's documented costs"; in (2) in introductory clause after "promulgated" deleted "by the board"; in (2)(a) at end of last sentence and in (2)(b)(i) at end before "rule" deleted "board"; and in (8) near end of first sentence before "fee" deleted "department's" and near beginning of last sentence after "appeal" deleted "to the board". Amendment effective July 1, 2021.

2019 Amendment: Chapter 436 in (1) after "(12)" inserted "and (13)"; inserted (13) regarding local governments and conservation districts not being subject to certain fees and certifications; and made minor changes in style. Amendment effective May 10, 2019.

2003 Amendment: Chapter 468 in (1) and (2) at beginning inserted exception clause; inserted (12) establishing application fees and annual fees for suction dredging; and made minor changes in style. Amendment effective April 23, 2003.

1999 Amendment: Chapter 427 in (5)(a) at end substituted "as provided in 15-1-216" for "at the rate established under 15-31-510". Amendment effective January 1, 2000.

Applicability: Section 57, Ch. 427, L. 1999, provided that this section applies to all tax periods beginning after December 31, 1999.

1997 Amendment: Chapter 51 in (5)(a) substituted "15-31-510" for "15-31-510(3)". Amendment effective March 13, 1997.

1995 Amendment: Chapter 297 in (2)(a), in second sentence after "not be", deleted "less than $250 or" and after "multiple" deleted "storm water"; in (2)(b), in second sentence after "not be", deleted "less than $250 and may not be"; in (2)(b)(i), after "multiple", deleted "storm water"; inserted (2)(b)(ii) allowing reductions in the annual permit fee under certain conditions; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1995.

Preamble: The preamble attached to Ch. 507, L. 1993, provided: "WHEREAS, section 402 of the Federal Water Pollution Control Act provides that states may be authorized by the U.S. Environmental Protection Agency to administer the national pollutant discharge elimination system wastewater discharge permit program; and

WHEREAS, the Montana Department of Health and Environmental Sciences [now Department of Environmental Quality] administers all water quality permit programs in Montana through an agreement with the U.S. Environmental Protection Agency under section 402 of the Federal Water Pollution Control Act; and

WHEREAS, the Department of Health and Environmental Sciences' [now Department of Environmental Quality] water quality permit programs are inextricably linked to its other water pollution control and ambient water quality monitoring programs; and

WHEREAS, both the citizens and businesses of the State of Montana benefit from implementation of these programs by the Department of Health and Environmental Sciences [now Department of Environmental Quality]; and

WHEREAS, federal grants for Montana's water quality programs are currently inadequate and are being further reduced, and Montana's general fund is stressed by competing government programs; and

WHEREAS, if the Department of Health and Environmental Sciences [now Department of Environmental Quality] fails to obtain authorization, the national pollutant discharge elimination system program will be administered within Montana by the U.S. Environmental Protection Agency; and

WHEREAS, the persons who discharge or may discharge wastes to Montana's water resources and who are required to obtain a water quality permit should pay a fair share to ensure protection of Montana's water resources; and

WHEREAS, the annual fee system may be an incentive to the regulated community to design activities that reduce the amount of pollutants discharged to state waters or otherwise lower the potential for harm to state waters.

THEREFORE, the Legislature of the State of Montana finds that it is appropriate to authorize the development of permit fee systems to support Montana's comprehensive water pollution control program."

1993 Statement of Intent: The statement of intent attached to Ch. 507, L. 1993, provided: "A statement of intent is required for this bill because it authorizes the board of health and environmental sciences [now board of environmental review] to adopt rules regarding fees to be assessed to applicants for or holders of certain permits or licenses. The intent of this bill is to allow the department of health and environmental sciences [now department of environmental quality] to charge for its services in administering its comprehensive water permitting program. These services include both the permitting function and followup monitoring and enforcement programs to ensure that activities are complying with the terms and conditions of the permit. In addition, the legislature anticipates that fees will be assessed to applicants or permittees under other statutory authorities for which an exclusion from a water quality permit requirement is provided by rule.

The board shall attempt to develop a structured fee system that can be clearly applied to all activities addressed under this bill and that results in revenue that approximates the department's documented cost of implementing its comprehensive water quality permit program. The permit review fee system must be based on an average assessment of the department's direct and indirect cost of reviewing permit applications, including the cost of support services, inservice training, and correspondence. The annual fee system may involve fees that are prescribed by category according to the criteria in [section 1(2)(b)] [75-5-516(2)(b)].

The board shall consider the following fee structures as prima facie indicators of appropriate fee assessments.

	Application fee	Annual fee
Publicly owned treatment works	$250 — $1,000	$250 — $2,500
Industrial storm and ground water systems	$1,000	$1,000 — $2,500

Industrial cooling water systems	$500	$200 — $500
Industrial systems with toxic substances	$2,500 — $5,000	$2,500
General permits	$200 — $500	$250 — $2,500
Nondegradation review:		
(1) Domestic sewage treatment	$2,500	
(2) Industrial	$2,500 — $5,000	
(3) Subdivision	$120— $200 per lot	

The annual fee is to be assessed for each million gallons of waste discharged per day on a yearly average and is specific to each discharge at a facility. The lower values are minimum fees, regardless of the amount of waste discharged. For either the application fee or annual fee for storm water discharges, a facility may not be charged for more than the five storm water discharge points that yield the highest fees.

The legislature also intends that a facility that consistently discharges effluent at less than or equal to one-half of its permit limit concentration, using the previous year's discharge data, is entitled to a 25% fee reduction in its annual fee. Further, any facility that consistently discharges effluent at levels between 50% and 100% of its permit limit concentration is entitled to a proportionate fee reduction of up to 25%. For a permit with multiple parameter limits, the annual average of the percentage of use of each parameter limit should be used to determine an overall percentage. A new permittee is not eligible for fee reduction in its first year of operation, and dilution is not intended as a means to justify lower annual fees.

Further, the board's rules should provide a mechanism for coordinating collection of fees for the review and monitoring of projects and activities authorized by [section 1] [75-5-516] with any other fees that are collected by other state agencies for the review and monitoring of those projects and activities. The fees collected by the department may not duplicate the fees collected by another state agency for services in reviewing permit, certificate, and license applications and in conducting monitoring."

Applicability: Section 5(1), Ch. 507, L. 1993, provided that subsection (1) of 75-5-516 applies to all applications or petitions filed on or after October 1, 1993, and to all current and future holders of permits, licenses, or other authorizations described in subsection (1) of 75-5-516.

Section 5(2) authorized the Board of Health and Environmental Sciences (now Board of Environmental Review) to begin rulemaking prior to October 1, 1993.

Coordination: Section 8, Ch. 595, L. 1993, provided: "If House Bill No. 388 is passed and approved and if it requires the department of health and environmental sciences [now department of environmental quality] to impose and collect fees for authorizations to degrade state waters, then [section 6 of this act] is void." House Bill No. 388 was approved as Ch. 507, L. 1993, and included the imposition of fees for authorizations to degrade state waters in 75-5-516; therefore, sec. 6, Ch. 595, L. 1993, which enacted similar application fees, was void.

Administrative Rules

ARM 17.30.201 Permit application, degradation authorization, and annual permit fees.

75-5-517. Disposition of water quality permit fees.

Compiler's Comments

Preamble: The preamble attached to Ch. 507, L. 1993, provided: "WHEREAS, section 402 of the Federal Water Pollution Control Act provides that states may be authorized by the U.S. Environmental Protection Agency to administer the national pollutant discharge elimination system wastewater discharge permit program; and

WHEREAS, the Montana Department of Health and Environmental Sciences [now Department of Environmental Quality] administers all water quality permit programs in Montana through an agreement with the U.S. Environmental Protection Agency under section 402 of the Federal Water Pollution Control Act; and

WHEREAS, the Department of Health and Environmental Sciences' [now Department of Environmental Quality] water quality permit programs are inextricably linked to its other water pollution control and ambient water quality monitoring programs; and

WHEREAS, both the citizens and businesses of the State of Montana benefit from implementation of these programs by the Department of Health and Environmental Sciences [now Department of Environmental Quality]; and

WHEREAS, federal grants for Montana's water quality programs are currently inadequate and are being further reduced, and Montana's general fund is stressed by competing government programs; and

WHEREAS, if the Department of Health and Environmental Sciences [now Department of Environmental Quality] fails to obtain authorization, the national pollutant discharge elimination system program will be administered within Montana by the U.S. Environmental Protection Agency; and

WHEREAS, the persons who discharge or may discharge wastes to Montana's water resources and who are required to obtain a water quality permit should pay a fair share to ensure protection of Montana's water resources; and

WHEREAS, the annual fee system may be an incentive to the regulated community to design activities that reduce the amount of pollutants discharged to state waters or otherwise lower the potential for harm to state waters.

THEREFORE, the Legislature of the State of Montana finds that it is appropriate to authorize the development of permit fee systems to support Montana's comprehensive water pollution control program."

1993 Statement of Intent: The statement of intent attached to Ch. 507, L. 1993, provided: "A statement of intent is required for this bill because it authorizes the board of health and environmental sciences [now board of environmental review] to adopt rules regarding fees to be assessed to applicants for or holders of certain permits or licenses. The intent of this bill is to allow the department of health and environmental sciences [now department of environmental quality] to charge for its services in administering its comprehensive water permitting program. These services include both the permitting function and followup monitoring and enforcement programs to ensure that activities are complying with the terms and conditions of the permit. In addition, the legislature anticipates that fees will be assessed to applicants or permittees under other statutory authorities for which an exclusion from a water quality permit requirement is provided by rule.

The board shall attempt to develop a structured fee system that can be clearly applied to all activities addressed under this bill and that results in revenue that approximates the department's documented cost of implementing its comprehensive water quality permit program. The permit review fee system must be based on an average assessment of the department's direct and indirect cost of reviewing permit applications, including the cost of support services, inservice training, and correspondence. The annual fee system may involve fees that are prescribed by category according to the criteria in [section 1(2)(b)] [75-5-516(2)(b)].

The board shall consider the following fee structures as prima facie indicators of appropriate fee assessments.

	Application fee	Annual fee
Publicly owned treatment works	$250 — $1,000	$250 — $2,500
Industrial storm and ground water systems	$1,000	$1,000 — $2,500
Industrial cooling water systems	$500	$200 — $500
Industrial systems with toxic substances	$2,500 — $5,000	$2,500
General permits	$200 — $500	$250 — $2,500
Nondegradation review:		
(1) Domestic sewage treatment	$2,500	
(2) Industrial	$2,500 — $5,000	
(3) Subdivision	$120 — $200 per lot	

The annual fee is to be assessed for each million gallons of waste discharged per day on a yearly average and is specific to each discharge at a facility. The lower values are minimum fees, regardless of the amount of waste discharged. For either the application fee or annual fee for storm water discharges, a facility may not be charged for more than the five storm water discharge points that yield the highest fees.

The legislature also intends that a facility that consistently discharges effluent at less than or equal to one-half of its permit limit concentration, using the previous year's discharge data, is entitled to a 25% fee reduction in its annual fee. Further, any facility that consistently discharges effluent at levels between 50% and 100% of its permit limit concentration is entitled to a proportionate fee reduction of up to 25%. For a permit with multiple parameter limits, the annual average of the percentage of use of each parameter limit should be used to determine an overall percentage. A new permittee is not eligible for fee reduction in its first year of operation, and dilution is not intended as a means to justify lower annual fees.

Further, the board's rules should provide a mechanism for coordinating collection of fees for the review and monitoring of projects and activities authorized by [section 1] [75-5-516] with any other fees that are collected by other state agencies for the review and monitoring of those projects and activities. The fees collected by the department may not duplicate the fees collected by another state agency for services in reviewing permit, certificate, and license applications and in conducting monitoring."

Part 6
Enforcement, Appeal, and Penalties

Part Administrative Rules

Title 17, chapter 30, subchapter 16, ARM Water quality administrative enforcement procedure.

75-5-601. Cleanup orders.

Compiler's Comments

1995 Amendment: Chapter 297 in (1), near beginning after "department", substituted "may issue an order" for "shall issue orders"; and made minor changes in style. Amendment effective July 1, 1995.

1991 Amendment: Inserted (2) authorizing Department to order units of state or local government issuing licenses or permits regarding waste discharge to take steps to ensure that the pollution is cleaned up; inserted (3) providing that the Department, in an order issued pursuant to subsection (2) to a County Commission, may request that the Commission create a sewer district; and made minor changes in style.

75-5-602. Power to require monitoring.

Case Notes

Agency Ruling Upheld — Deference to Agency When Acting in Area of Expertise and Substantial Evidence in Support: An environmental group challenged the issuance of a storm water pollution general permit, alleging that the decision by the Department of Environmental Quality to incorporate pollution monitoring requirements into a general permit was arbitrary and capricious. The Supreme Court disagreed, ruling that the court would defer to the agency's discretion to require representative monitoring because it was acting within its area of expertise and was supported by substantial evidence. Upper Missouri Waterkeeper v. Dept. of Environmental Quality, 2019 MT 81, 395 Mont. 263, 438 P.3d 792.

Best Practice Methods for Sewer System — No Public Participation Required: An environmental group challenged the issuance of a storm water pollution general permit, alleging that the Department of Environmental Quality had violated public participation requirements. The District Court granted summary judgment to the defendants. The plaintiff appealed and the Supreme Court affirmed, ruling that the act of a small municipal separate storm sewer system choosing best practice methods does not require public participation. Upper Missouri Waterkeeper v. Dept. of Environmental Quality, 2019 MT 81, 395 Mont. 263, 438 P.3d 792.

75-5-603. Power to inspect.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Law Review Articles

The Constitutionality of Civil Inspections, Angel & Corontzos, 21 Mont. L. Rev. 195 (1960).

75-5-605. Prohibited activity — exemption.

Compiler's Comments

2017 Amendment: Chapter 327 deleted former (1)(c) that read: "(c) site and construct a sewage lagoon less than 500 feet from an existing water well"; and made minor changes in style. Amendment effective October 1, 2017.

2003 Amendment: Chapter 460 inserted (3) exempting certain activities from prohibited activities with regard to water quality; and made minor changes in style. Amendment effective April 22, 2003.

1995 Amendments: Chapter 497 in (1)(a), in first sentence after "wastes", substituted "where they will" for "in a location where they are likely to" and inserted second sentence providing that placement of materials authorized by permit is not a prohibited placement of wastes if review provisions are in place; and made minor changes in style. Amendment effective April 15, 1995.

Chapter 582 at beginning of (2) inserted exception clause.

Preamble: The preamble attached to Ch. 497, L. 1995, provided: "WHEREAS, experience with implementation and enforcement of the Montana water quality statutes has revealed deficiencies in the statutes that have led to inefficiency and unfairness in administration and enforcement of the statutes; and

WHEREAS, those deficiencies can be addressed by selective amendment of the statutes."

1995 Statement of Intent: The statement of intent attached to Ch. 497, L. 1995, provided: "A statement of intent is required to provide guidance to the board of health and environmental sciences [now board of environmental review] regarding rulemaking. The legislature confirms the policy of this state, as reflected in 75-5-101. It is concerned that implementation of the water quality laws has in the past been too dependent on assumptions and conjecture springing from experiences and circumstances from other states and has not been sufficiently based on the conditions and needs of our state. The legislature intends that, in promulgating rules under this bill, the board of health and environmental sciences [now board of environmental review] should seriously consider the impact of proposed rules and that the rules should be adopted only on the basis of sound, scientific justification and never on the basis of projections or conjecture. The legislature is specifically concerned that water quality criteria must reflect concentrations that can be reliably measured, or the rules will, as a practical matter, be unenforceable. [Section 1] [75-5-309, now repealed], providing conditions for adoption of standards more stringent than federal standards, is not intended to prohibit the adoption of ground water quality standards."

Saving Clause: Section 17, Ch. 497, L. 1995, provided: "[This act] does not apply to civil or administrative actions commenced prior to [the effective date of this act] [effective April 15, 1995] or to claims made in those actions, except that compliance plans resulting from those actions must reflect changes made by [this act]."

1993 Amendments: Chapter 337 inserted (1)(c) prohibiting construction of a sewage lagoon less than 500 feet from an existing water well; and made minor changes in style.

Chapter 595 inserted (1)(d) prohibiting degradation of state waters without authorization. Amendment effective April 29, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 595, L. 1993, provided: "A statement of intent is required for this bill because the bill requires the board of health and environmental sciences [now board of environmental review] to adopt administrative rules. The legislature clearly intends that the nondegradation policy protect and maintain existing quality of state waters from any loss in the quality of those waters. The nondegradation policy is intended to apply to any activity that has the potential to affect existing water quality and requires department review of all such activities to ensure that degradation does not occur.

In recognition that certain activities promote general welfare and may justify lower water quality in a particular water segment, the legislature intends that degradation be allowed in limited circumstances and under certain conditions. For example, if there is no alternative to a proposed project that does not result in degradation and the project is found to be in the best interests of the state, degradation may be allowed provided that water quality protection practices are implemented that limit degradation to the extent determined to be economically and technologically feasible.

To promote the goal of maintaining existing high-quality water, the board is to develop rules specifying the level of protection or treatment required if degradation is allowed. Rules are to be developed that provide procedures for department review of applications to degrade state waters, that provide guidance or standards for the level of treatment required, and that establish criteria that allow the department to weigh the social and economic benefit to the public of allowing the proposed project against the loss of water quality. It is the intent of the legislature that the department's decision involve public and governmental agencies' comment prior to a final decision.

It is further the intent of the legislature that the board develop rules that will provide guidance to the department in the use and creation of mixing zones. The rules are to ensure that water quality impacts from the use of mixing zones are minimized."

Severability: Section 9, Ch. 595, L. 1993, was a severability clause.

Applicability: Section 10, Ch. 595, L. 1993, provided: "[This act] applies to all requests to degrade state waters filed with the department after [the effective date of this act]." Effective April 29, 1993.

Case Notes

Area of Unique Ecological or Recreational Significance — General Permit for Storm Water Discharge Improper: The Department of Environmental Quality improperly granted the Rock Creek Mine a general permit for storm water discharge when, under ARM 17.30.1341, Rock Creek is an area of unique ecological significance because of its impacts on fishery resources and other local conditions at the proposed discharge site. Clark Fork Coalition v. Dept. of Environmental Quality, 2012 MT 240, 366 Mont. 427, 288 P.3d 183.

Violation of Permit: Failure by city to notify the Department of Health and Environmental Sciences (now Department of Environmental Quality) and the federal Environmental Protection Agency of its bypass of raw sewage away from treatment plant into Yellowstone River in violation of its permit to make limited discharges was not actionable under this section where state and federal agencies had actual notice of the discharges. State ex rel. Dept. of Health & Environmental Sciences v. Livingston, 169 M 431, 548 P2d 155 (1976).

75-5-610. Written undertaking.

Compiler's Comments

Severability: Section 10, Ch. 445, L. 2009, was a severability clause.

Effective Date: Section 11, Ch. 445, L. 2009, provided that this section is effective on passage and approval. Approved May 5, 2009.

Applicability: Section 12, Ch. 445, L. 2009, provided: "[This act] applies to judicial and board of environmental review hearing and appeal proceedings initiated on or after [the effective date of this act]." Effective May 5, 2009.

75-5-611. Violation of chapter — administrative actions and penalties — notice and hearing.

Compiler's Comments

2021 Amendment: Chapter 535 in (5) at end deleted "or in Lewis and Clark County". Amendment effective October 1, 2021.

2015 Amendment: Chapter 443 in (9)(a) at beginning inserted exception clause; in (9)(c) at end inserted "and subsection (9)(d)"; inserted (9)(d) limiting administrative penalties assessed for certain violations; and made minor changes in style. Amendment effective October 1, 2015.

2005 Amendment: Chapter 487 in (9)(c) substituted "penalty factors in 75-1-1001" for "criteria stated in 75-5-631(4)". Amendment effective January 1, 2006.

Saving Clause: Section 29, Ch. 487, L. 2005, was a saving clause.

1993 Amendment: Chapter 504 in (1), after "rule", substituted "adopted" for "made", after "under" substituted "this chapter, or a condition of a permit or authorization required by a rule adopted under this chapter" for "it", in two places, after "notice", inserted "letter", and near end, before "mail", inserted "certified"; in (1)(a), after "provision", inserted "of statute, rule, permit, or approval"; in (1)(c), before "nature", inserted "specific"; inserted (1)(d) requiring notice letter to state amount of administrative penalty for lack of corrective action; in (1)(e), at beginning of first sentence, inserted "as applicable", before "action" inserted "corrective", and after "taken" inserted "or the administrative penalty will be assessed", in second sentence, before "mail", inserted "certified" and at end substituted "receipt" for "mailing", and inserted third sentence relating to assessment of administrative penalty; inserted (2) authorizing Department to issue administrative notice and order in lieu of notice letter; in (3), in two places, and in (4), after "notice", inserted "and order"; in (4), at end of second sentence, substituted "subsection (2)" for "subsection (1)" and inserted fourth sentence relating to waiver of contested case appeal; in (5), near beginning before "hearing", inserted "contested case", after "and must" deleted "if the board considers it practicable", and at end, after "occurred", inserted "or in Lewis and Clark County"; in (6)(a), after "hearing", deleted "or on failure of an alleged violator to make a timely request for a hearing", after "board" deleted "may", and inserted "shall make findings and conclusions that explain its decision"; in (6)(b), at beginning, inserted "If the board determines that a violation has occurred, it shall also" and at end, after "pollution", inserted "the assessment of administrative penalties, or both"; in (6)(c), at beginning, inserted "If the order requires abatement or control of pollution, the board"; inserted (6)(d) requiring Board to explain determination of administrative penalty; inserted (6)(e) requiring Board to declare Department's notice void if it determines no violation has occurred; in (8), at beginning, deleted "In addition to or"; inserted (9) relating to penalty amounts and application of the Montana Administrative Procedure Act; and made minor changes in style.

Preamble: The preamble attached to Ch. 504, L. 1993, provided: "WHEREAS, it is necessary and reasonable for the Department of Health and Environmental Sciences [now Department of Environmental Quality] to actively enforce the provisions of Montana's water quality laws; and

WHEREAS, the use of the District Courts to achieve civil penalty assessments consumes significant financial resources from both the regulated public and the State of Montana; and

WHEREAS, many parties may wish to resolve violations of Montana's water quality laws in an administrative proceeding that authorizes direct payments to the State of Montana without the large expenses inherent with the filing of a judicial lawsuit; and

WHEREAS, the Board of Health and Environmental Sciences [now Board of Environmental Review] may specify situations in which the Department of Health and Environmental Sciences [now Department of Environmental Quality] should pursue an action administratively; and

WHEREAS, in several situations, the administrative assessment of civil penalties under Montana's water quality laws would be a more effective deterrent than resolution of cases through the District Courts; and

WHEREAS, the Department of Health and Environmental Sciences [now Department of Environmental Quality] would be able to apply its limited enforcement resources to a broader array of violations; and

WHEREAS, the Federal Water Pollution Control Act provides for a similar administrative penalty, which could ultimately become a condition of primacy for state administration of water quality programs in Montana; and

WHEREAS, the citizens and businesses of the State of Montana, as well as the Department of Health and Environmental Sciences [now Department of Environmental Quality], would benefit from the availability of an administrative penalty in Montana's water quality laws.

THEREFORE, the Legislature of the State of Montana finds it appropriate to authorize an administrative penalty within Montana's water quality laws."

1993 Statement of Intent: The statement of intent attached to Ch. 504, L. 1993, provided: "A statement of intent is provided for this bill in order to assist the board of health and environmental sciences [now board of environmental review] in promulgating rules. The legislature intends that the administrative penalty provided by this bill be used to encourage compliance with Montana's water quality laws by allowing more timely and efficient processing of certain enforcement actions without the need for a higher penalty sought through a district court. To promote these goals, the board should develop rules that prescribe penalties for specific types of violations. In doing so, the board shall ensure that its rules are consistent with the criteria set forth in 75-5-631(4). Further, the board and department shall take measures to ensure that the rules are disseminated to the regulated community.

The legislature also intends that the board's rules be no less stringent than the federal rules and guidance implementing the Federal Water Pollution Control Act."

Administrative Rules

Title 17, chapter 30, subchapter 16, ARM Water quality administrative enforcement procedure.

Case Notes

Failure to Exhaust Administrative Remedies — Petition for Writ of Mandate Properly Quashed: The plaintiff filed a petition for a writ of mandate to allow him to install a septic system on a flood plain after the new county sanitarian voided his previously issued permit. The District Court quashed the petition. On appeal, the Supreme Court affirmed, holding that the plaintiff was not entitled to mandamus relief and that he had failed to exhaust administrative remedies, which included appealing to the Department of Environmental Quality. Boehm v. Park County, 2018 MT 165, 392 Mont. 72, 421 P.3d 789.

75-5-613. Compliance orders.

Case Notes

Service of Compliance Order on City — Personal Service on Mayor Not Required: City's contention that service of compliance order was defective personal service because served on city clerk and not Mayor was erroneous because express provisions relating to service of compliance order in this section prevail over general statutes relating to service of process in a civil action upon a municipality (former Rule 4D(2)(g), M.R.Civ.P., now superseded). State ex rel. Dept. of Health & Environmental Sciences v. Livingston, 169 M 431, 548 P2d 155 (1976).

75-5-614. Injunctions authorized.

Compiler's Comments

2009 Amendment: Chapter 416 in (1) at beginning of first sentence and in (2) at beginning of first sentence inserted exception clause; and made minor changes in style. Amendment effective October 1, 2009.

1995 Amendment: Chapter 497 in (1), in second sentence after "court of the", deleted "county in which the defendant is located or resides or is doing business or any" and after "threatened" deleted "if the defendant cannot be located in Montana"; and made minor changes in style. Amendment effective April 15, 1995.

Preamble: The preamble attached to Ch. 497, L. 1995, provided: "WHEREAS, experience with implementation and enforcement of the Montana water quality statutes has revealed deficiencies in the statutes that have led to inefficiency and unfairness in administration and enforcement of the statutes; and

WHEREAS, those deficiencies can be addressed by selective amendment of the statutes."

1995 Statement of Intent: The statement of intent attached to Ch. 497, L. 1995, provided: "A statement of intent is required to provide guidance to the board of health and environmental sciences [now board of environmental review] regarding rulemaking. The legislature confirms the policy of this state, as reflected in 75-5-101. It is concerned that implementation of the water quality laws has in the past been too dependent on assumptions and conjecture springing from experiences and circumstances from other states and has not been sufficiently based on the conditions and needs of our state. The legislature intends that, in promulgating rules under this bill, the board of health and environmental sciences [now board of environmental review] should seriously consider the impact of proposed rules and that the rules should be adopted only on the basis of sound, scientific justification and never on the basis of projections or conjecture. The legislature is specifically concerned that water quality criteria must reflect concentrations that can be reliably measured, or the rules will, as a practical matter, be unenforceable. [Section 1] [75-5-309, now repealed], providing conditions for adoption of standards more stringent than federal standards, is not intended to prohibit the adoption of ground water quality standards."

Saving Clause: Section 17, Ch. 497, L. 1995, provided: "[This act] does not apply to civil or administrative actions commenced prior to [the effective date of this act] [effective April 15, 1995] or to claims made in those actions, except that compliance plans resulting from those actions must reflect changes made by [this act]."

Case Notes

Venue Properly Based Solely Upon Allegations in Complaint — Affidavits Not Considered — Venue Found Proper for Both Defendants: The Department of Health and Environmental Sciences (now Department of Environmental Quality) brought an action in Lewis and Clark County against Pegasus Gold Corporation (Pegasus) and Zortman Mining, Inc. (ZMI), for numerous violations of the Montana water quality laws at the Zortman and Landusky mines located in Phillips County. The complaint alleged that Pegasus owned or controlled the mines and that both Pegasus and ZMI did business in Lewis and Clark County, making that county a proper place for venue. ZMI moved to change venue to Phillips County, alleging that Pegasus did not own or control ZMI, and attached affidavits of Fletcher and Erickson to support its motion. Citing Petersen v. Tucker, 228 M 393, 742 P2d 483 (1987), the Supreme Court held that the District Court properly relied upon the allegations in the complaint without considering the two affidavits. The Supreme Court held that inasmuch as Pegasus was a named defendant at the time of the complaint and did business in Lewis and Clark County, that county was proper for venue. The Supreme Court noted that because the motion for change of venue did not refer to or rely upon the Fletcher affidavit, it was properly not considered by the District Court. The Supreme Court also noted that because the Erickson affidavit did not contradict the allegations in the complaint that Pegasus owned or controlled ZMI, the District Court was correct in focusing on the allegations in the complaint. The Supreme Court held that venue was properly found in Lewis and Clark County for both defendants because under the provisions of 25-2-117, a county that is proper venue for one defendant is proper for both. (See 2005 amendment to 75-5-631.) State ex rel. Dept. of Health and Environmental Sciences v. Pegasus Gold Corp., 270 M 32, 889 P2d 1197, 52 St. Rep. 64 (1995).

75-5-616. Enforcement of permits and chapter.

Compiler's Comments

1995 Amendment: Chapter 297 near beginning, after "authorized", deleted "or required" and after "under" substituted "this part" for "75-5-612 through 75-5-615"; and made minor changes in style. Amendment effective July 1, 1995.

75-5-617. Enforcement response.

Compiler's Comments

Effective Date: Section 12, Ch. 297, L. 1995, provided: "[This act] is effective July 1, 1995."

75-5-618. Liability — defense and exclusions.

Compiler's Comments

Saving Clause: Section 7, Ch. 159, L. 2013, was a saving clause.

Severability: Section 8, Ch. 159, L. 2013, was a severability clause.

Effective Date: Section 10, Ch. 159, L. 2013, provided: "[This act] is effective on passage and approval." Approved April 5, 2013.

75-5-621. Emergencies.

Compiler's Comments

2009 Amendment: Chapter 416 in (3) at beginning of last sentence inserted exception clause; and made minor changes in style. Amendment effective October 1, 2009.

1997 Amendment: Chapter 42 in (3), at end of fifth sentence, substituted "information required in 75-5-611(6)" for "statement specified in 75-5-611(5)". Amendment effective March 12, 1997.

1995 Amendment: Chapter 297 in (1), in first sentence near end after "department", substituted "may" for "shall"; and made minor changes in style. Amendment effective July 1, 1995.

75-5-631. Civil penalties — injunctions not barred — venue.

Compiler's Comments

2021 Amendment: Chapter 535 in (3) at end deleted "or, if mutually agreed on by the parties in the action, in the district court of the first judicial district, Lewis and Clark County". Amendment effective October 1, 2021.

2005 Amendment: Chapter 487 in (3) inserted second and third sentences relating to actions to enforce a penalty and venue for the actions; in (4) substituted "In determining the amount of penalties under this section, the district court shall take into account the penalty factors in 75-1-1001" for "In an action seeking penalties under this section, the department shall take into account the following factors in determining an appropriate settlement or judgment, as appropriate:

(a) the nature, circumstances, extent, and gravity of the violation; and

(b) with respect to the violator, the violator's ability to pay and prior history of violations, the economic benefit or savings, if any, to the violator resulting from the violator's action, the amounts voluntarily expended by the violator to address or mitigate the violation or impacts of the violation to waters of the state, and other matters that justice may require"; and made minor changes in style. Amendment effective January 1, 2006.

Saving Clause: Section 29, Ch. 487, L. 2005, was a saving clause.

1995 Amendments: Chapter 297 in (1), at beginning, substituted "In an action initiated by the department to collect civil penalties against a person who is found to have violated" for "A person who violates"; in (4), in introductory clause after "settlement", substituted "or judgment, as appropriate" for "if any, subsequent to the filing of a complaint"; in (4)(b), near middle after "violator's action", inserted "the amounts voluntarily expended by the violator to address or mitigate the violation or impacts of the violation to waters of the state"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 497 in (4)(b), near middle after "action", inserted "amounts voluntarily expended by the violator to address or mitigate the violation or impacts of the violation to waters of the state"; and made minor changes in style. Amendment effective April 15, 1995.

Preamble: The preamble attached to Ch. 497, L. 1995, provided: "WHEREAS, experience with implementation and enforcement of the Montana water quality statutes has revealed deficiencies in the statutes that have led to inefficiency and unfairness in administration and enforcement of the statutes; and

WHEREAS, those deficiencies can be addressed by selective amendment of the statutes."

1995 Statement of Intent: The statement of intent attached to Ch. 497, L. 1995, provided: "A statement of intent is required to provide guidance to the board of health and environmental sciences [now board of environmental review] regarding rulemaking. The legislature confirms the policy of this state, as reflected in 75-5-101. It is concerned that implementation of the water quality laws has in the past been too dependent on assumptions and conjecture springing from experiences and circumstances from other states and has not been sufficiently based on the conditions and needs of our state. The legislature intends that, in promulgating rules under this bill, the board of health and environmental sciences [now board of environmental review] should seriously consider the impact of proposed rules and that the rules should be adopted only on the basis of sound, scientific justification and never on the basis of projections or conjecture. The legislature is specifically concerned that water quality criteria must reflect concentrations that can be reliably measured, or the rules will, as a practical matter, be unenforceable. [Section 1] [75-5-309, now repealed], providing conditions for adoption of standards more stringent than federal standards, is not intended to prohibit the adoption of ground water quality standards."

Saving Clause: Section 17, Ch. 497, L. 1995, provided: "[This act] does not apply to civil or administrative actions commenced prior to [the effective date of this act] [effective April 15, 1995] or to claims made in those actions, except that compliance plans resulting from those actions must reflect changes made by [this act]."

1991 Amendment: In (1) increased maximum civil penalty from $10,000 to $25,000; and inserted (4) requiring Department, when seeking civil penalties subsequent to filing of complaint, to consider certain factors in determining appropriate settlement.

1991 Statement of Intent: The statement of intent attached to Ch. 644, L. 1991, provided: "It is the legislature's intent that the department of health and environmental sciences [now department of environmental quality] develop penalty guidelines to ensure that the civil penalty provided by 75-5-631 is fairly applied by the department in reaching settlement agreements with persons who have violated Title 75, chapter 5, part 6. The legislature recognizes that the department may, in its initial filings, seek the maximum penalty of $25,000 for each day of violation. However, it is the legislature's intent that the actual amount assessed in a settlement reflect the factors listed in 75-5-631(4) and that the department apply these factors uniformly to all violators.

This bill does not direct the department to adopt rules to ensure the uniform application of the factors listed in 75-5-631(4). The enforcement guidelines developed by the department should include a process for applying the factors to each violator, guidance for determining the amount to request in a civil complaint, and, most importantly, a format for determining an equitable settlement value. The format may include a clear and concise description of penalty settlement ranges by type of violation. The department should complete the guidelines by October 1, 1991."

75-5-632. Criminal penalties.

Compiler's Comments

1995 Amendment: Chapter 297 in first sentence, near middle, inserted "upon conviction"; and made minor changes in style. Amendment effective July 1, 1995.

75-5-633. Penalties for false statements and falsifying monitoring.

Compiler's Comments

1991 Amendment: Increased maximum fine from $10,000 to $25,000.

1991 Statement of Intent: The statement of intent attached to Ch. 644, L. 1991, provided: "It is the legislature's intent that the department of health and environmental sciences [now department of environmental quality] develop penalty guidelines to ensure that the civil penalty provided by 75-5-631 is fairly applied by the department in reaching settlement agreements with persons who have violated Title 75, chapter 5, part 6. The legislature recognizes that the department may, in its initial filings, seek the maximum penalty of $25,000 for each day of violation. However, it is the legislature's intent that the actual amount assessed in a settlement reflect the factors listed in 75-5-631(4) and that the department apply these factors uniformly to all violators.

This bill does not direct the department to adopt rules to ensure the uniform application of the factors listed in 75-5-631(4). The enforcement guidelines developed by the department should include a process for applying the factors to each violator, guidance for determining the amount to request in a civil complaint, and, most importantly, a format for determining an equitable settlement value. The format may include a clear and concise description of penalty settlement ranges by type of violation. The department should complete the guidelines by October 1, 1991."

75-5-634. Disposition of fines and civil penalties.

Compiler's Comments

1995 Amendment: Chapter 509 at beginning deleted "Except as provided in subsections (2) and (3)" and after "the" substituted "state general fund" for "water quality rehabilitation account provided in 75-5-507"; deleted (2) that read: "(2) A maximum of $20,000 in fines and civil penalties may be deposited in the water quality rehabilitation account in any fiscal year. Fines and penalties in excess of $20,000 must be deposited in the general fund"; deleted (3) that read: "(3) Whenever the amount of money in the water rehabilitation account exceeds $100,000, all subsequent fines and civil penalties must be deposited in the general fund"; and made minor changes in style. Amendment effective July 1, 1995.

1991 Amendment: Substituted present section allocating a portion of fines and civil penalties to the water quality rehabilitation account for former section allocating fines to the general fund. Amendment effective July 1, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 600, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the department of health and environmental sciences [now department of environmental quality] concerning its authority to make rules on the following subjects:

(1) the nature of water pollution prevention and water quality repair, restoration, and rehabilitation activities undertaken by the department;

(2) the nature of investigative and information-gathering activities the department may undertake to evaluate instances of pollution of state waters for purposes of implementing this bill; and

(3) the criteria the department may use to prioritize use of funds from the water quality rehabilitation account."

1987 Amendment: After "collected" inserted "except those collected in a justice's court".

75-5-635. Costs and expenses — recovery by department.

Compiler's Comments

1995 Amendment: Chapter 509 in (2), after "(1)", substituted "must be deposited in the state general fund" for "for actions that the department financed with money from the water quality rehabilitation account authorized in 75-5-507 must be deposited in the water quality rehabilitation account"; and made minor changes in style. Amendment effective July 1, 1995.

1991 Amendment: Inserted (2) allocating certain costs and expenses recovered by Department to the water quality rehabilitation account. Amendment effective July 1, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 600, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the department of health and environmental sciences [now department of environmental quality] concerning its authority to make rules on the following subjects:

(1) the nature of water pollution prevention and water quality repair, restoration, and rehabilitation activities undertaken by the department;

(2) the nature of investigative and information-gathering activities the department may undertake to evaluate instances of pollution of state waters for purposes of implementing this bill; and

(3) the criteria the department may use to prioritize use of funds from the water quality rehabilitation account."

75-5-636. Investigation of complaints by other parties.

Compiler's Comments

1995 Amendments — Composite Section: Chapter 297 in first sentence, after "government may", substituted "notify the department of an alleged" for "apply to the department protesting a", at beginning of second sentence inserted "Based upon information submitted by the person, association, corporation, or agency", near middle substituted "conduct" for "make", and at end substituted "to determine the validity of the complaint" for "and make a written report to the person, association, corporation, or agency which made the protest", and in third sentence, near middle after "investigation", inserted "the department shall initiate an" and at end substituted "response as described in 75-5-617" for "action shall be taken"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 497 inserted fourth sentence allowing recovery of investigatory costs if a protest is made without reasonable cause; and made minor changes in style. Amendment effective April 15, 1995.

Because Ch. 297 substituted "notify the department" for "apply to the department" and Ch. 497 inserted a reference to "the application", for consistency, the codifier has changed the Ch. 497 reference to "the notification".

Preamble: The preamble attached to Ch. 497, L. 1995, provided: "WHEREAS, experience with implementation and enforcement of the Montana water quality statutes has revealed deficiencies in the statutes that have led to inefficiency and unfairness in administration and enforcement of the statutes; and

WHEREAS, those deficiencies can be addressed by selective amendment of the statutes."

1995 Statement of Intent: The statement of intent attached to Ch. 497, L. 1995, provided: "A statement of intent is required to provide guidance to the board of health and environmental sciences [now board of environmental review] regarding rulemaking. The legislature confirms the policy of this state, as reflected in 75-5-101. It is concerned that implementation of the water quality laws has in the past been too dependent on assumptions and conjecture springing from experiences and circumstances from other states and has not been sufficiently based on the conditions and needs of our state. The legislature intends that, in promulgating rules under this bill, the board of health and environmental sciences [now board of environmental review] should seriously consider the impact of proposed rules and that the rules should be adopted only on the basis of sound, scientific justification and never on the basis of projections or conjecture. The legislature is specifically concerned that water quality criteria must reflect concentrations that can be reliably measured, or the rules will, as a practical matter, be unenforceable. [Section 1] [75-5-309, now repealed], providing conditions for adoption of standards more stringent than federal standards, is not intended to prohibit the adoption of ground water quality standards."

Saving Clause: Section 17, Ch. 497, L. 1995, provided: "[This act] does not apply to civil or administrative actions commenced prior to [the effective date of this act] [effective April 15, 1995] or to claims made in those actions, except that compliance plans resulting from those actions must reflect changes made by [this act]."

75-5-641. Appeals from board orders — review by district court.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 416 in (4) at beginning of introductory clause inserted exception clause; and made minor changes in style. Amendment effective October 1, 2009.

Part 7
Water Quality Assessment

75-5-701. Purpose.

Compiler's Comments

Effective Date: Section 8, Ch. 541, L. 1997, provided: "[This act] is effective on passage and approval." Approved May 5, 1997.

75-5-702. Monitoring — water quality assessment listing — costs payable by department — statewide advisory group.

Compiler's Comments

2015 Amendment: Chapter 319 in (7) and (8) at beginning inserted exception clause; inserted (9) regarding process to develop a TMDL when the department receives a new permit application; and made minor changes in style. Amendment effective April 27, 2015.

1999 Amendment: Chapter 93 in (5) and (6) inserted language requiring consultation with the statewide TMDL advisory group; in (9)(a) in first sentence substituted "75-5-703, 75-5-704, and this section" for "75-5-704(2)(a) and subsections (7) and (8) of this section" and in second sentence after "members" inserted "and any replacement members that may be necessary"; and made minor changes in style. Amendment effective March 17, 1999.

Effective Date: Section 8, Ch. 541, L. 1997, provided: "[This act] is effective on passage and approval." Approved May 5, 1997.

75-5-703. Development and implementation of total maximum daily loads.

Compiler's Comments

2021 Amendment: See 2021 Session Law for amendment made by sec. 100, Ch. 261, L. 2021. Amendment effective April 20, 2021.

2015 Amendment: Chapter 122 in (3) at end substituted "water policy committee established in 5-5-231" for "environmental quality council". Amendment effective March 25, 2015.

2011 Amendment: Chapter 302 in (3) at beginning deleted "Within 15 years from May 5, 1997, the department shall develop TMDLs for all water bodies on the list of waters that are threatened or impaired, as that list read on May 5, 1997. This provision does not apply to water bodies that are subsequently added or removed from the list according to the provisions of 75-5-702. The department shall establish a schedule for completing the TMDLs within the 15-year period established by this subsection", in first sentence substituted "The department shall establish a schedule that provides" for "The schedule must also provide", and near end after "water bodies that are" substituted current language for "listed subsequent to May 5, 1997, and are prioritized as set forth in 75-5-702". Amendment effective October 1, 2011.

2003 Amendment: Chapter 128 in (3) at beginning of first sentence after "Within" substituted "15 years" for "10 years" and near middle of third sentence after "within the" substituted "15-year period" for "10-year period"; and made minor changes in style. Amendment effective October 1, 2003.

1999 Amendment: Chapter 93 in (3) at beginning of third sentence deleted "Within 1 year from May 5, 1997"; in (7) near beginning after "department shall" inserted "in consultation with the statewide TMDL advisory group"; and made minor changes in style. Amendment effective March 17, 1999.

Effective Date: Section 8, Ch. 541, L. 1997, provided: "[This act] is effective on passage and approval." Approved May 5, 1997.

75-5-704. Watershed advisory groups.

Compiler's Comments

Effective Date: Section 8, Ch. 541, L. 1997, provided: "[This act] is effective on passage and approval." Approved May 5, 1997.

Code Commissioner Correction: Pursuant to the authority contained in sec. 314, Ch. 42, L. 1997, in (2)(a) the Code Commissioner substituted a reference to sec. 3(7) and (8) (75-5-702(7) and (8)) for reference to sec. 2(7) and (8).

75-5-705. Nonimpairment of water rights.

Compiler's Comments

Effective Date: Section 8, Ch. 541, L. 1997, provided: "[This act] is effective on passage and approval." Approved May 5, 1997.

Part 8
Concentrated Animal Feeding Operations

Part Compiler's Comments

Effective Date: Section 5, Ch. 403, L. 2005, provided: "[This act] is effective on passage and approval." Approved April 25, 2005.

Retroactive Applicability: Section 6, Ch. 403, L. 2005, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to concentrated animal feeding operations that are permitted or reviewed on or after January 1, 2005."

75-5-801. Definitions.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

75-5-802. Permitting — concentrated animal feeding operation.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) in middle substituted "department" for "board". Amendment effective July 1, 2021.

Part 9
Phosphorus-Containing Household Cleaning Products

Part Compiler's Comments

Effective Date: Section 8, Ch. 245, L. 2009, provided that this part is effective July 1, 2010.

Part 11
Water Pollution Control
State Revolving Fund

Part Compiler's Comments

Requirements for Approval of State Debt — Severability: Section 16, Ch. 678, L. 1989, provided: "Because [section 13] [75-5-1122] authorizes the creation of a state debt, a vote of two-thirds of the members of each house is required for enactment of [section 13] [75-5-1122]. If [this act] is not approved by the required vote, [section 13] [75-5-1122] is void. The remaining sections of [this act] are valid and remain in effect in all valid applications upon enactment." House Bill No. 601, which enacted Ch. 678, L. 1989, was approved by the House of Representatives on March 23, 1989, by a vote of 95 to 2 and by the Senate on April 19, 1989, by a vote of 50 to 0.

Effective Date: Section 17, Ch. 678, L. 1989, provided that this part is effective July 1, 1989.

75-5-1101. Short title.

Compiler's Comments

1997 Amendment: Chapter 538 before "Revolving" substituted "Water Pollution Control State" for "Wastewater Treatment". Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

75-5-1102. Definitions.

Compiler's Comments

2009 Amendment: Chapter 489 in definition of federal act at end inserted language referring to conditions and exclusions contained in the American Recovery and Reinvestment Act of 2009. Amendment effective May 14, 2009, and terminates June 30, 2011.

2001 Amendment: Chapter 506 in definition of project deleted former (b) that read: "(b) "Project" does not include a solid waste management system, as defined in 75-10-203, except for a project that is intended specifically for the closure or postclosure care of or ground water corrective action at a landfill that:

(i) was in operation on May 5, 1997, and that accepts an annual average of less than 20,000 tons of solid waste a year; or

(ii) was closed prior to May 5, 1997"; and made minor changes in style. Amendment effective May 1, 2001.

1999 Amendment: Chapter 498 in definition of municipality inserted reference to regional water and wastewater authorities; and made minor changes in style. Amendment effective April 27, 1999.

Severability: Section 26, Ch. 498, L. 1999, was a severability clause.

1997 Amendment: Chapter 538 in definition of cost, near beginning before "project", deleted "wastewater treatment works", near middle, after "private", substituted "person" for "concern", and after "engineering" inserted "construction"; inserted definition of intended use plan and private person; deleted definition of private concern (see 1997 Session Law for former text); in definition of municipality, near beginning after "any", inserted "state agency" and after "other" substituted "public body created pursuant to state law" for "local government unit having authority to own and operate a sewage system and wastewater treatment works"; in definition of program, after "means the", substituted "water pollution control state revolving fund" for "wastewater treatment works revolving loan"; in (a) of definition of project substituted language providing that a project means an activity eligible for financing by the program under the federal act and for which a municipality or private person applies for a loan or other financial assistance for "means a wastewater treatment works or part of a wastewater treatment works for which a municipality or private concern makes an application for a loan or other financial assistance" and inserted (b) providing that a project does not include a solid waste management system except for a project specifically intended for the closure or postclosure care of a ground water corrective action at certain landfills; and made minor changes in style. Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

75-5-1103. Water pollution control state revolving fund program.

Compiler's Comments

1997 Amendment: Chapter 538 in first sentence, near middle, substituted "private persons" for "private concerns". Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

75-5-1104. Authorization of agreement — content.

Compiler's Comments

1997 Amendment: Chapter 538 in (2)(c), near middle, substituted "private persons" for "private concerns"; and in (2)(h) substituted "private person" for "private concern". Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

75-5-1105. Rulemaking.

Compiler's Comments

1997 Amendment: Chapter 538 in (4), near middle, substituted "private persons" for "private concerns". Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

Saving Clause — Rules: Section 29(2), Ch. 538, L. 1997, provided: "Rules that were adopted pursuant to Title 75, chapter 5, part 11, or Title 75, chapter 6, part 2, prior to [the effective date of this act] [effective May 5, 1997] continue in force until amended or repealed pursuant to those parts."

1995 Amendment: Chapter 418 in introductory clause substituted "The department and the department of natural resources and conservation may adopt rules to implement" for "The board and the board of natural resources and conservation may adopt rules within their respective authorities established within". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1989 Statement of Intent: The statement of intent attached to Ch. 678, L. 1989, provided: "This bill creates a revolving loan program capitalized with federal and state funds to provide financial assistance for water pollution control projects. A statement of intent is required for this bill because it delegates rulemaking authority to the board of health and environmental sciences [now board of environmental review] and the board of natural resources and conservation [now department of natural resources and conservation] to implement the provisions of this bill.

The boards are authorized to adopt rules necessary for the establishment and administration of the water treatment works revolving loan program. The authority includes establishing rules:

(1) prescribing the form and content of applications for loans and refinancing agreements;

(2) governing the application of the criteria for awarding loans;

(3) establishing additional terms and conditions for making the loans and the security instruments and other necessary agreements; and

(4) establishing ceilings on the amount of individual loans, if deemed appropriate and necessary for the successful administration of the program, to be made to municipalities and private concerns."

Administrative Rules

Title 17, chapter 40, subchapter 3, ARM Wastewater treatment works revolving fund — procedures and criteria.

ARM 17.40.318 State revolving fund projects eligible for categorical exclusion from MEPA review.

75-5-1106. Revolving fund.

Compiler's Comments

1999 Amendment: Chapter 421 in (2)(b)(i) at end inserted phrase relating to deposit to the administration account; in (2)(c) after "account" inserted "an amount not to exceed" and at end inserted "and that may include a combination of"; inserted (2)(c)(i) and (2)(c)(ii) relating to federal funds and proceeds of state bonds; in (3) inserted last sentence relating to transfers to the revolving fund; in (5) after U.S.C. cite substituted remainder of section concerning fund transfer for "and with the governor's permission, an amount equivalent to up to 33% of each year's drinking water state revolving fund federal capitalization grant may be transferred from the federal allocation account, established under subsection (2)(a), to the drinking water state revolving fund federal allocation account established in 75-6-211"; and made minor changes in style. Amendment effective April 23, 1999.

Retroactive Applicability: Section 11, Ch. 421, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all existing loans on [the effective date of this act]." Effective April 23, 1999.

1997 Amendment: Chapter 538 in (1), in first sentence before "revolving", substituted "water pollution control state" for "wastewater treatment works"; at end of (2)(a) inserted "from the following sources"; at beginning of (2)(a)(i) inserted "funds provided" and at end substituted "projects" for "wastewater treatment works"; in(2)(a)(ii), at end, substituted "projects" for "construction of wastewater treatment works"; inserted (2)(a)(iii) requiring that money transferred to the fund from the drinking water state revolving fund be credited to the federal allocation account; inserted (5) allowing up to 33% of each year's drinking water state revolving fund federal capitalization grant to be transferred from the federal allocation account to the drinking water state revolving fund federal allocation account; and made minor changes in style. Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

1995 Amendment: Chapter 418 in (3), in first sentence after first "department", inserted "and the department". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: In (2)(b), before "proceeds", inserted "net"; in (2)(d), after "amounts in", substituted "those" for "the other" and inserted language at end referring to designation by Board of Examiners; in (2)(e), after "service account", deleted "all interest earnings on bond proceeds and"; in (3), at end of first sentence, deleted "and all amounts received in repayment of principal of a loan must be credited in the same proportion to the federal allocation account or the state allocation account, or both", in second sentence inserted "principal or", and in last sentence, after "may be transferred", deleted "by the board of examiners, upon request of the department of natural resources and conservation" and inserted language at end referring to resolution or trust indenture. Amendment effective May 17, 1991.

75-5-1107. Uses of revolving fund.

Compiler's Comments

2011 Amendment: Chapter 297 near beginning after "revolving fund" substituted "may" for "must"; inserted (8) relating to additional subsidization in the form of forgiveness of principal; and made minor changes in style. Amendment effective April 29, 2011.

2009 Amendment: Chapter 489 inserted (2) concerning money received under the American Recovery and Reinvestment Act of 2009; and made minor changes in style. Amendment effective May 14, 2009, and terminates June 30, 2011.

1997 Amendment: Chapter 538 near beginning substituted "must be used" for "may be used"; in (1), near beginning after "municipalities", deleted "and private concerns" and at end inserted "and to make loans to private persons to finance all or a portion of the cost of nonpoint source pollution control projects"; in (7), near middle before "program", deleted "revolving loan"; and made minor changes in style. Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

75-5-1108. Use of funds — statutory appropriation.

Compiler's Comments

1997 Amendment: Chapter 422 deleted second sentence that read: "Money in the special administrative costs account authorized by 75-5-1113 is subject to legislative appropriation constraints, and expenditures from this account must be made from temporary appropriations, as described in 17-7-501(1) or (2), made for that purpose." Amendment effective July 1, 1997.

75-5-1111. Applications.

Compiler's Comments

1997 Amendment: Chapter 538 inserted (1)(f) requiring the loan application to include a current financial statement; in (1)(g), in two places, inserted "loans" and near end, after "municipality's", substituted "project or system of which the project is a part" for "sewage system"; inserted (1)(h) requiring the loan application of a private person to contain a statement of whether there are any outstanding loans, notes, or other obligations; in (2)(d), in two places, inserted "loans" and at end substituted "project" for "sewage system"; and made minor changes in style. Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

75-5-1112. Evaluation of projects and loan applications.

Compiler's Comments

1997 Amendment: Chapter 538 in first sentence, at beginning, deleted "After consultation with", after "conservation" inserted "and", and at end substituted "and loan applications" for "for loans and other financial assistance and place them on a priority list or intended use plan" and in second sentence, after "projects", inserted "and loan applications"; inserted (1) through (4) requiring the consideration of technical design of the project, financial capacity to repay the loan, the ability of the applicant to operate and maintain the project, and the feasibility of completion of the project; in (5) substituted "private person" for "private concern"; in (6), at beginning, substituted "total amount of loan funds" for "amount"; in (8) substituted "the ranking of the project on the priority list or intended use plan" for "the need for and benefit to be derived from the project"; deleted former (5) that read: "(5) in the case of an application to refinance an outstanding obligation, the benefit of refinancing as measured by a decrease in interest rates and whether the refinancing permits the construction of an additional project by the municipality"; and made minor changes in style. Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

1995 Amendment: Chapter 553 in first sentence substituted "projects" for "and annually rank applications" and inserted "and place them on a priority list or intended use plan" and in second sentence substituted "evaluating projects" for "ranking the applications"; and made minor changes in style. Amendment effective April 27, 1995.

Severability: Section 23, Ch. 553, L. 1995, was a severability clause.

75-5-1113. Conditions on loans.

Compiler's Comments

2015 Amendment: Chapter 72 in (2) after "installments" deleted "the first of which must be received not more than 1 year after the completion date of the project and, except as provided in subsection (2)(b), the last of which must be received not more than 20 years after the completion date"; deleted former (2)(b) that read: "(b) If the applicant is a disadvantaged community, as defined by rule, that has qualified for and applied for a loan subsidy, the department may determine that the last installment must be received not more than 30 years after the completion date of the project if the period of the loan does not exceed the expected design life of the project being financed"; and made minor changes in style. Amendment effective February 27, 2015.

2009 Amendment: Chapter 342 in (2)(a) near middle after "project and" inserted exception clause; inserted (2)(b) allowing for the last loan payment by a disadvantaged community within 30 years of project completion under certain circumstances; and made minor changes in style. Amendment effective April 24, 2009.

1999 Amendment: Chapter 421 in (3)(b) inserted last sentence relating to use of excess reserve payments; and made minor changes in style. Amendment effective April 23, 1999.

Retroactive Applicability: Section 11, Ch. 421, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all existing loans on [the effective date of this act]." Effective April 23, 1999.

1997 Amendments: Chapter 42 in (5)(b) substituted "75-5-1106" for "75-6-211"; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 538 in (1), in middle of first sentence and second sentence, substituted "private person" for "private concern"; at end of (1)(b) substituted "the term of the loan" for "20 years"; in middle of (1)(c) substituted "generally accepted accounting standards" for "recognized government accounting procedures"; in (1)(g), after "requirements", substituted "and other requirements" for "for public wastewater systems" and at end substituted "department" for "board"; in (4), in first sentence near middle, substituted "private person" for "private concern" and inserted third sentence allowing the Department of Natural Resources and Conservation to require further security for loans to private persons; in (5), at end of first sentence, substituted "private person" for "private concern"; and made minor changes in style. Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

1995 Amendment: Chapter 553 in (1), near beginning, substituted "a project" for "an application"; and in (5)(b), in first full sentence after "deposited in the", deleted "special administrative costs account or the" and after "account" inserted "established in 75-6-211" and inserted last sentence regarding use of special administration costs account. Amendment effective April 27, 1995.

Severability: Section 23, Ch. 553, L. 1995, was a severability clause.

1991 Amendment: In (1)(a) inserted last phrase conditioning the loan upon establishment and maintenance of a reserve or revolving fund; in (3) inserted language regarding sufficiency of loan, timely payment, and investment income; in (5), in last phrase, substituted "may" for "must"; in (5)(b), in two places, inserted language referring to the administration account; and made minor changes in style. Amendment effective May 17, 1991.

75-5-1121. Authorization of bonds — allocation of proceeds.

Compiler's Comments

2021 Amendment: Chapter 29 in (1) in first sentence after "conservation" deleted "and upon certification by the department that the state has entered into a capitalization grant agreement or other agreement with the United States government pursuant to 75-6-204 and that federal capitalization grants have been made to the state for the program". Amendment effective February 26, 2021.

2015 Amendment: Chapter 74 in (2)(a) at beginning inserted exception clause and after "proceeds of the bonds" deleted "other than any premium and accrued interest received or amounts to be used to pay interest on the bonds or the costs of issuing the bonds"; in (2)(b) near beginning after "Any" deleted "premium and" and at end inserted "of the revolving fund"; inserted (2)(d) concerning premium deposits; and made minor changes in style. Amendment effective February 27, 2015.

Saving Clause: Section 5, Ch. 74, L. 2015, was a saving clause.

Severability: Section 6, Ch. 74, L. 2015, was a severability clause.

1999 Amendment: Chapter 421 in (2) in first sentence after "issuing the bonds" substituted "are allocated to the state allocation account or the administration account of the revolving fund, as provided in 75-5-1106" for "are appropriated to the state allocation account of the revolving fund"; and made minor changes in style. Amendment effective April 23, 1999.

The amendment to this section made by sec. 7, Ch. 3, L. 1999, was rendered void by sec. 16, Ch. 3, L. 1999, a contingent voidness section, which provided that if Constitutional Initiative No. 75, enacting Article VIII, section 17, of the Montana constitution, was declared invalid, then [this act] was void. The initiative was declared invalid February 24, 1999.

Retroactive Applicability: Section 11, Ch. 421, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all existing loans on [the effective date of this act]." Effective April 23, 1999.

1997 Amendment: Chapter 538 in first sentence of (1), near beginning after "department", deleted "of natural resources and conservation" and at end, before "program", deleted "revolving loan"; and in (2), near end of first sentence before "revolving fund", deleted "wastewater treatment works". Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

1995 Amendment: Chapter 553 in (1), after "conservation", inserted clause regarding certification of entry into agreement with United States and making of capitalization grants and substituted "as authorized by the legislature" for "in an aggregate principal amount not exceeding $10 million". Amendment effective April 27, 1995.

Severability: Section 23, Ch. 553, L. 1995, was a severability clause.

1991 Amendment: In first sentence of (2) inserted language referring to amounts used to pay interest on or cost of issuing bonds, in second sentence inserted reference to bond proceeds used to pay interest, in third sentence, after "Proceeds of bonds", deleted "deposited in the state allocation account may" and after "bonds" inserted remainder of third sentence requiring proceeds to be deposited in cost of issuance account established by Board of Examiners in resolution or trust indenture, and in fourth sentence inserted reference to cost of issuance account; inserted (4) specifying powers of Board of Examiners and contents of trust indenture; and made minor changes in style. Amendment effective May 17, 1991.

75-5-1122. Creation of debt.

Compiler's Comments

2021 Amendment: Chapter 29 in middle of introductory clause substituted "$70 million" for "$40 million"; and in (1) substituted "funding" for "providing the state's share of". Amendment effective February 26, 2021.

2005 Amendment: Chapter 323 in introductory clause at end substituted "in principal amount of general obligation bonds outstanding from time to time for the purpose of" for "and the issuance and sale of general obligation bonds in this amount for the purpose of"; inserted (2) relating to funding portions of loans on an interim basis; and made minor changes in style. Amendment effective April 21, 2005.

2003 Amendment: Chapter 18 near middle increased maximum authorized state debt for providing the state's share of the program from $30 million to $40 million. Amendment effective July 1, 2003.

1999 Amendment: Chapter 73 increased bond authorization to $30 million. Amendment effective March 16, 1999.

Preamble: The preamble attached to Ch. 73, L. 1999, provided: "WHEREAS, Chapter 678, Laws of 1989, created the wastewater treatment works revolving fund (later renamed as the water pollution control state revolving fund), authorized the issuance and sale of general obligation bonds to provide a state match to federal program funds, and created a related state debt ceiling of $10 million; and

WHEREAS, section 21, Chapter 553, Laws of 1995, increased this debt ceiling to $15 million, but was not codified; and

WHEREAS, the federal government has continued to contribute to the program beyond the 5 to 10 years envisioned in 1989, and the state is approaching its debt ceiling for this program; and

WHEREAS, the debt ceiling should be raised to $30 million and the result codified."

Requirements for Approval of State Debt — Severability: Section 16, Ch. 678, L. 1989, provided: "Because [section 13] [75-5-1122] authorizes the creation of a state debt, a vote of two-thirds of the members of each house is required for enactment of [section 13] [75-5-1122]. If [this act] is not approved by the required vote, [section 13] [75-5-1122] is void. The remaining sections of [this act] are valid and remain in effect in all valid applications upon enactment." House Bill No. 601, which enacted Ch. 678, L. 1989, was approved by the House of Representatives on March 23, 1989, by a vote of 95 to 2 and by the Senate on April 19, 1989, by a vote of 50 to 0.

75-5-1126. Projects funded by federal government appropriations.

Compiler's Comments

Effective Date: Section 4, Ch. 9, L. 2001, provided that this section is effective on passage and approval. Approved February 9, 2001.

CHAPTER 6
PUBLIC WATER SUPPLIES, DISTRIBUTION, AND TREATMENT

Chapter Administrative Rules

Title 17, chapter 38, ARM Public water and sewage system requirements.

Chapter Collateral References

Safe Drinking Water Act of 1974, 42 U.S.C. § 300f, et seq.

Part 1
Public Water Supply

Part Administrative Rules

Title 17, chapter 38, ARM Public water and sewage system requirements.

ARM 37.111.326 Bed and breakfast establishments — water supply.

ARM 37.111.1207 Water supply requirements.

75-6-101. Policy.

Case Notes

Authority of Water and Sewer Association to Ban Private Wells Within Subdivision: A private, nonprofit water and sewer association was created to regulate the use of water and the handling and disposition of sewage within a subdivision. A drought forced the temporary shutdown of the association's water system and the institution of watering restrictions in order to preserve sufficient pressure and capacity in the water system to meet subdivision residents' demands for drinking water, household use, and fire suppression activities. Defendants decided to explore the possibility of drilling a private well for lawn and garden purposes. The association board subsequently decided to ban private wells in the subdivision for all purposes. Nevertheless, defendants drilled an untreated well solely for lawn and garden use. The association then demanded that defendants abandon their well, and when defendants refused, the association sought a declaratory judgment that the rule prohibiting private wells was valid and enforceable and requested the District Court to require defendants to abandon their well. Defendants denied that the association had the authority to burden private property interests or to require removal of the well. The District Court concluded that the rule was valid, granted summary judgment for the association, and ordered removal of defendants' well. On appeal, the Supreme Court affirmed. The rule was reasonably related to the association's obligation to preserve the health, safety, and financial viability of its water system and was valid and legal. The fact that the rule affected a well that was not directly owned by the association did not affect the validity of the rule because, as members of the association, defendants were bound by association rules intended to protect the public water system. The possibility that defendants' untreated well could be attached to the subdivision water system posed a cross-contamination threat to the system, and the well also posed a threat of depletion of the aquifer that the association depended upon in part for its public water supply, so abandonment of the well was warranted. Eastgate Village Water & Sewer Ass'n v. Davis, 2008 MT 141, 343 M 108, 183 P3d 873 (2008), following Appeal of Two Crow Ranch, Inc., 159 M 16, 494 P2d 915 (1972).

Dismissal for Lack of Subject Matter Jurisdiction Proper Upon Failure to Exhaust Administrative Remedies Absent Showing of Futility: Plaintiff filed for declaratory judgment and injunctive relief against state agencies and a subdivision water development company regarding plaintiff's provision of water to subdivisions developed by the company. The District Court dismissed for lack of subject matter jurisdiction, and plaintiff appealed. Generally, before a party can seek declaratory relief in District Court, the party must exhaust its administrative remedies, although courts generally will not require exhaustion of administrative remedies when recourse to an administrative remedy would be futile. However, the mere possibility of an adverse decision does not mean that resort to an administrative agency is futile, nor does the possibility that agencies might render decisions that could in some degree conflict justify bypassing the administrative process. Plaintiff in this case could not demonstrate futility, and seeking to skip the administrative process constituted an unwarranted intrusion into the agencies' regulatory authority. Thus, the District Court did not abuse its discretion by dismissing the action for lack of subject matter jurisdiction when plaintiff did not first exhaust its administrative remedies before seeking judicial review. Mtn. Water Co. v. Dept. of Public Service Regulation, 2005 MT 84, 326 M 416, 110 P3d 20 (2005), following Brisendine v. St., 253 M 361, 833 P2d 1019 (1992), and Art v. Dept. of Labor and Industry, 2002 MT 327, 313 M 197, 60 P3d 958 (2002).

Attorney General's Opinions

Fluoridation of Public Water Supplies: The Montana State Board of Health (now Board of Environmental Review) does not have statutory authority to require fluoridation of municipal water supplies. The requirement of fluoridation of public water supplies is within the general police power, but the Legislature has not specifically authorized the Board to require fluoridation. 33 A.G. Op. 16 (1970).

75-6-102. Definitions.

Compiler's Comments

2021 Amendment: Chapter 341 inserted definition of applicant; and made minor changes in style. Amendment effective October 1, 2021.

2011 Amendment: Chapter 85 inserted definition of reclaimed wastewater; and made minor changes in style. Amendment effective October 1, 2011.

2007 Amendment: Chapter 423 substituted certified source water protection area for certified wellhead protection area as defined term, substituted "identifies" for "protects", and before "water for" deleted "ground"; deleted definition of industrial waste discharge system that read: ""Industrial waste discharge system" means a system that discharges industrial waste into state waters"; deleted definition of Montana wellhead protection program that read: ""Montana wellhead protection program" means a program administered by the department to certify wellhead protection areas and review wellhead protection ordinances"; inserted definition of source water protection program; and made minor changes in style. Amendment effective October 1, 2007.

2001 Amendment: Chapter 315 in definition of person substituted "individual, firm, partnership, company, association, corporation, city, town, local government entity, federal agency, or any other governmental or private entity, whether organized for profit or not" for "individual, corporation, association, partnership, municipality, other political subdivision of the state, or federal agency"; and in definitions of public sewage system and public water supply system substituted "any 60 or more days" for "a period of at least 60 days". Amendment effective April 21, 2001.

Saving Clause: Section 5, Ch. 315, L. 2001, was a saving clause.

Severability: Section 6, Ch. 315, L. 2001, was a severability clause.

1995 Amendments — Code Commissioner Correction — Composite Section: Chapter 418 in definition of Board substituted "board of environmental review provided for in 2-15-3502" for "board of health and environmental sciences provided for in 2-15-2104"; in definition of Department substituted "department of environmental quality provided for in 2-15-3501" for "department of health and environmental sciences provided for in Title 2, chapter 15, part 21"; and made minor changes in style. Amendment effective July 1, 1995. The definition of Board referred to [section 23]. The Board of Environmental Review was actually created in [section 21]. Pursuant to the authority contained in sec. 73, Ch. 18, L. 1995, the Code Commissioner has corrected the erroneous reference. The definition of Department referred to [section 22]. The Department of Environmental Quality was actually created in [section 20]. Pursuant to the authority contained in sec. 73, Ch. 18, L. 1995, the Code Commissioner has corrected the erroneous reference.

Chapter 488 inserted definitions of certified wellhead protection area, cross-connection, industrial waste discharge system, and Montana wellhead protection program; in definition of public sewage system, near middle after "that", substituted "serves 15" for "is designed to serve or serves 10"; in definition of public water supply system, near middle after "that", substituted "has at least 15 service connections or that regularly serves at least 25 persons daily for a period of" for "is designed to serve or serves 10 or more families or 25 or more persons daily or has at least 10 service connections"; in definition of transient noncommunity water system, at end, substituted "does not regularly serve at least 25 of the same persons for at least 6 months a year" for "serves persons on a transient basis"; and made minor changes in style.

Chapter 546 deleted definition of Board that read: ""Board" means the board of health and environmental sciences provided for in 2-15-2104"; pursuant to sec. 568, Ch. 546, L. 1995, a coordination section, in definition of Department the Code Commissioner substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Because Ch. 418 inserted a reference to the Board of Environmental Review and Ch. 546 deleted a reference to the Board of Health and Environmental Sciences, the codifier has reflected both the insertion and the deletion.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment: Inserted definitions of community water system and transient noncommunity water system; and in definition of public water supply system inserted "is designed to serve or".

1991 Statement of Intent: The statement of intent attached to Ch. 645, L. 1991, provided: "A statement of intent is provided for this bill because rulemaking authority is delegated to the board of health and environmental sciences [now board of environmental review] to prescribe procedures for administrative enforcement actions undertaken by the department of health and environmental sciences [now department of environmental quality] in administering the public water supply laws, as provided in Title 75, chapter 6, and to develop a fee schedule to enable the department to recover costs in administering these laws. Rulemaking authority is also delegated to the department to develop fees to pay for costs of reviewing plats and subdivisions under the laws related to sanitation in subdivisions, as provided in Title 76, chapter 4. It is the intent of the legislature that the rules establish a reasonable fee schedule that approximates the department's actual and necessary costs.

The legislature anticipates that the department will expand its enforcement activity in order to address ongoing and increasing health problems with public water supply systems and public sewage systems in Montana. In undertaking this effort, the legislature expects that the department will have the option to pursue administrative enforcement as a means of expediting and encouraging compliance with Title 75, chapter 6. Nonetheless, it is the department's duty to clearly inform each violator of:

(1) the nature of the action taken against it;
(2) what the department requires to resolve the matter; and
(3) what legal avenues are available to the violator if he desires to contest the matter.

The legislature recognizes that an economic hardship may be imposed on a public water supply system in order for that system to be brought into compliance with state and federal public water supply laws and that this hardship may be further increased by the levying of administrative and civil penalties for noncompliance. It is the intention of the legislature that the department adopt rules that establish a procedure for the progressive enforcement of this act in which the levying of administrative and civil penalties is a final action. The department may adopt rules that allow for the bypass of the enforcement procedures and the immediate assessment of penalties if specific circumstances warrant this action.

The rules also require the board of health and environmental sciences [now board of environmental review] to develop fees for recovery of costs incurred by the department in delivering services to persons who own or operate or intend to own or operate a public water supply system or public sewage system. These costs include costs associated with review of engineering plans and specifications, inspections, and general assistance. To assist the board in developing these rules, the department shall prepare and submit to the board a detailed estimate of projected costs associated with these services for fiscal years 1992 and 1993. The board shall develop a fee schedule that will provide revenues that are commensurate with the projected costs. A similar approach should be used by the department in developing rules setting new fees for review of plats and subdivisions under 76-4-105."

1989 Amendment: Inserted definition of public sewage system.

Administrative Rules

ARM 17.38.202 Public water supply requirements — definitions.

Case Notes

Authority of Water and Sewer Association to Ban Private Wells Within Subdivision: A private, nonprofit water and sewer association was created to regulate the use of water and the handling and disposition of sewage within a subdivision. A drought forced the temporary shutdown of the association's water system and the institution of watering restrictions in order to preserve sufficient pressure and capacity in the water system to meet subdivision residents' demands for drinking water, household use, and fire suppression activities. Defendants decided to explore the possibility of drilling a private well for lawn and garden purposes. The association board subsequently decided to ban private wells in the subdivision for all purposes. Nevertheless, defendants drilled an untreated well solely for lawn and garden use. The association then demanded that defendants abandon their well, and when defendants refused, the association sought a declaratory judgment that the rule prohibiting private wells was valid and enforceable and requested the District Court to require defendants to abandon their well. Defendants denied that the association had the authority to burden private property interests or to require removal of the well. The District Court concluded that the rule was valid, granted summary judgment for the association, and ordered removal of defendants' well. On appeal, the Supreme Court affirmed. The rule was reasonably related to the association's obligation to preserve the health, safety, and financial viability of its water system and was valid and legal. The fact that the rule affected a well that was not directly owned by the association did not affect the validity of the rule because, as members of the association, defendants were bound by association rules intended to protect the public water system. The possibility that defendants' untreated well could be attached to the subdivision water system posed a cross-contamination threat to the system, and the well also posed a threat of depletion of the aquifer that the association depended upon in part for its public water supply, so abandonment of the well was warranted. Eastgate Village Water & Sewer Ass'n v. Davis, 2008 MT 141, 343 M 108, 183 P3d 873 (2008), following Appeal of Two Crow Ranch, Inc., 159 M 16, 494 P2d 915 (1972).

Attorney General's Opinions

Fluoridation of Public Water Supplies: The Montana State Board of Health (now Board Environmental Review) does not have statutory authority to require fluoridation of municipal water supplies. The requirement of fluoridation of public water supplies is within the general police power, but the Legislature has not specifically authorized the Board to require fluoridation. 33 A.G. Op. 16 (1970).

75-6-104. Duties of department.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 3, Ch. 353, L. 2023. Amendment effective May 2, 2023.

2021 Amendments — Composite Section — Code Commissioner Correction: Chapter 324 inserted (1) through (4) providing the department with general supervision of and rulemaking authority for state waters used for a public water supply system, for domestic purposes, or as a source of ice and providing the department or the board authority to issue orders implementing the part; in (5)(h) substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 2021.

Chapter 341 inserted (5)(m) concerning review of applications for use of reclaimed wastewater for snowmaking; and made minor changes in style. Amendment effective October 1, 2021.

Pursuant to sec. 14, Ch. 14, L. 2021, in (5)(m) in the introductory clause the Code Commissioner substituted "subsection (2)(k)" for "75-6-103(2)(k)" to reflect the repeal of 75-6-103 and the enactment of similar provisions in this section by Ch. 324, L. 2021.

2007 Amendment: Chapter 423 in (7) after "sewage" deleted "and industrial waste"; and made minor changes in style. Amendment effective October 1, 2007.

1991 Amendment: Near beginning of (6) inserted "as described in 75-6-108", after "services" deleted "rendered in analyzing water and conducting inspections to cover costs of the service", before "special" substituted "public drinking water" for "state", and after "fund" substituted "established in 75-6-115" for "for use by the department".

1991 Statement of Intent: The statement of intent attached to Ch. 645, L. 1991, provided: "A statement of intent is provided for this bill because rulemaking authority is delegated to the board of health and environmental sciences [now board of environmental review] to prescribe procedures for administrative enforcement actions undertaken by the department of health and environmental sciences [now department of environmental quality] in administering the public water supply laws, as provided in Title 75, chapter 6, and to develop a fee schedule to enable the department to recover costs in administering these laws. Rulemaking authority is also delegated to the department to develop fees to pay for costs of reviewing plats and subdivisions under the laws related to sanitation in subdivisions, as provided in Title 76, chapter 4. It is the intent of the legislature that the rules establish a reasonable fee schedule that approximates the department's actual and necessary costs.

The legislature anticipates that the department will expand its enforcement activity in order to address ongoing and increasing health problems with public water supply systems and public sewage systems in Montana. In undertaking this effort, the legislature expects that the department will have the option to pursue administrative enforcement as a means of expediting and encouraging compliance with Title 75, chapter 6. Nonetheless, it is the department's duty to clearly inform each violator of:

(1) the nature of the action taken against it;
(2) what the department requires to resolve the matter; and
(3) what legal avenues are available to the violator if he desires to contest the matter.

The legislature recognizes that an economic hardship may be imposed on a public water supply system in order for that system to be brought into compliance with state and federal public water supply laws and that this hardship may be further increased by the levying of administrative and civil penalties for noncompliance. It is the intention of the legislature that the department adopt rules that establish a procedure for the progressive enforcement of this act in which the levying of administrative and civil penalties is a final action. The department may adopt rules that allow for the bypass of the enforcement procedures and the immediate assessment of penalties if specific circumstances warrant this action.

The rules also require the board of health and environmental sciences [now board of environmental review] to develop fees for recovery of costs incurred by the department in delivering services to persons who own or operate or intend to own or operate a public water supply system or public sewage system. These costs include costs associated with review of engineering plans and specifications, inspections, and general assistance. To assist the board in developing these rules, the department shall prepare and submit to the board a detailed estimate of projected costs associated with these services for fiscal years 1992 and 1993. The board shall develop a fee schedule that will provide revenues that are commensurate with the projected costs. A similar approach should be used by the department in developing rules setting new fees for review of plats and subdivisions under 76-4-105."

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

Law Review Articles

The Constitutionality of Civil Inspections, Angel & Corontzos, 21 Mont. L. Rev. 195 (1960).

75-6-105. Records required for wells drilled to supply water to public.

Compiler's Comments

2021 Amendment: Chapter 324 at end of first sentence substituted "department" for "board"; and made minor changes in style. Amendment effective July 1, 2021.

75-6-106. Laboratory license required.

Compiler's Comments

2021 Amendment: Chapter 324 in middle after "department" deleted "or board". Amendment effective July 1, 2021.

1997 Amendment: Chapter 73 near middle, after "made by the", substituted "department of public health and human services' laboratory" for "laboratory of the department" and near end, after "department", inserted "of public health and human services"; deleted former second sentence that read: "The department shall issue a license to any laboratory that can meet criteria for licensing established in the rules adopted by the board"; deleted former (2) and (3) that read: "(2) An application for a license under this section shall be made on forms furnished by the department.

(3) A person aggrieved by a decision of the department to grant, deny, or revoke a license may appeal the department's decision to the board as provided in the Montana Administrative Procedure Act"; and made minor changes in style. Amendment effective July 1, 1997.

Administrative Rules

Title 37, chapter 12, subchapter 3, ARM Licensure of laboratories conducting analyses of public water supplies.

75-6-107. Variances and exemptions.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) at end substituted "department" for "board". Amendment effective July 1, 2021.

2011 Amendment: Chapter 213 in (1) and (2) inserted exception clause; inserted (3) regarding variance or exception for public water system to use bottled water; and made minor changes in style. Amendment effective April 18, 2011.

75-6-108. Department to prescribe fees — opportunity for appeal.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 4, Ch. 353, L. 2023. Amendment effective May 2, 2023.

2021 Amendment: Chapter 324 in (1) and (3) near beginning of first sentence and in (5)(b) at end of last sentence substituted "department" for "board"; in (1) in middle of first sentence after "annually" deleted "by the department"; and in (3) in middle of first sentence substituted "fees assessed" for "fees to be assessed by the department". Amendment effective July 1, 2021.

1991 Statement of Intent: The statement of intent attached to Ch. 645, L. 1991, provided: "A statement of intent is provided for this bill because rulemaking authority is delegated to the board of health and environmental sciences [now board of environmental review] to prescribe procedures for administrative enforcement actions undertaken by the department of health and environmental sciences [now department of environmental quality] in administering the public water supply laws, as provided in Title 75, chapter 6, and to develop a fee schedule to enable the department to recover costs in administering these laws. Rulemaking authority is also delegated to the department to develop fees to pay for costs of reviewing plats and subdivisions under the laws related to sanitation in subdivisions, as provided in Title 76, chapter 4. It is the intent of the legislature that the rules establish a reasonable fee schedule that approximates the department's actual and necessary costs.

The legislature anticipates that the department will expand its enforcement activity in order to address ongoing and increasing health problems with public water supply systems and public sewage systems in Montana. In undertaking this effort, the legislature expects that the department will have the option to pursue administrative enforcement as a means of expediting and encouraging compliance with Title 75, chapter 6. Nonetheless, it is the department's duty to clearly inform each violator of:

(1) the nature of the action taken against it;

(2) what the department requires to resolve the matter; and

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The legislature recognizes that an economic hardship may be imposed on a public water supply system in order for that system to be brought into compliance with state and federal public water supply laws and that this hardship may be further increased by the levying of administrative and civil penalties for noncompliance. It is the intention of the legislature that the department adopt rules that establish a procedure for the progressive enforcement of this act in which the levying of administrative and civil penalties is a final action. The department may adopt rules that allow for the bypass of the enforcement procedures and the immediate assessment of penalties if specific circumstances warrant this action.

The rules also require the board of health and environmental sciences [now board of environmental review] to develop fees for recovery of costs incurred by the department in delivering services to persons who own or operate or intend to own or operate a public water supply system or public sewage system. These costs include costs associated with review of engineering plans and specifications, inspections, and general assistance. To assist the board in developing these rules, the department shall prepare and submit to the board a detailed estimate of projected costs associated with these services for fiscal years 1992 and 1993. The board shall develop a fee schedule that will provide revenues that are commensurate with the projected costs. A similar approach should be used by the department in developing rules setting new fees for review of plats and subdivisions under 76-4-105."

Administrative Rules

ARM 17.38.106 Fees.

ARM 17.38.248 Service connection fees.

75-6-109. Administrative enforcement.

Compiler's Comments

2021 Code Commissioner Correction: In (7) the Code Commissioner substituted "75-6-104(2)(i)" for "75-6-103(2)(i)". Section 75-6-103 was repealed by Ch. 324, L. 2021, and 75-6-104, as amended by Ch. 324, deals with the same subject matter as the repealed section.

2005 Amendment: Chapter 487 in (7) near middle substituted "penalty factors under 75-1-1001" for "criteria stated in 75-6-114". Amendment effective January 1, 2006.

Saving Clause: Section 29, Ch. 487, L. 2005, was a saving clause.

1999 Amendment: Chapter 195 in (6)(a)(i) and (ii) substituted language establishing penalties not to exceed $1,000 per day for violations pertaining to public water systems serving more than 10,000, other than a water hauler or bottling plant, and not to exceed $500 per day for other violations for "$500 for each day of violation"; and made minor changes in style. Amendment March 26, 1999.

Severability: Section 9, Ch. 195, L. 1999, was a severability clause.

1997 Amendment: Chapter 73 at end of (7) substituted "75-6-103(2)(i)" for "75-6-103(2)(j)". Amendment effective July 1, 1997.

1995 Amendments: Chapter 302 inserted (7) requiring Department or Board to consider established criteria and rules when assessing administrative penalties; and made minor changes in style.

Chapter 509 in (6), at end, substituted "state general fund" for "public drinking water special revenue fund established in 75-6-115"; and made minor changes in style. Amendment effective July 1, 1995.

75-6-111. Appeal from rule or standard — injunction to require compliance.

Compiler's Comments

1991 Amendment: In (1), at end of first sentence, inserted "except as otherwise provided in 75-6-109"; and at end of (2) inserted "or a civil penalty as provided in 75-6-114".

1991 Statement of Intent: The statement of intent attached to Ch. 645, L. 1991, provided: "A statement of intent is provided for this bill because rulemaking authority is delegated to the board of health and environmental sciences [now board of environmental review] to prescribe procedures for administrative enforcement actions undertaken by the department of health and environmental sciences [now department of environmental quality] in administering the public water supply laws, as provided in Title 75, chapter 6, and to develop a fee schedule to enable the department to recover costs in administering these laws. Rulemaking authority is also delegated to the department to develop fees to pay for costs of reviewing plats and subdivisions under the laws related to sanitation in subdivisions, as provided in Title 76, chapter 4. It is the intent of the legislature that the rules establish a reasonable fee schedule that approximates the department's actual and necessary costs.

The legislature anticipates that the department will expand its enforcement activity in order to address ongoing and increasing health problems with public water supply systems and public sewage systems in Montana. In undertaking this effort, the legislature expects that the department will have the option to pursue administrative enforcement as a means of expediting and encouraging compliance with Title 75, chapter 6. Nonetheless, it is the department's duty to clearly inform each violator of:

(1) the nature of the action taken against it;
(2) what the department requires to resolve the matter; and
(3) what legal avenues are available to the violator if he desires to contest the matter.

The legislature recognizes that an economic hardship may be imposed on a public water supply system in order for that system to be brought into compliance with state and federal public water supply laws and that this hardship may be further increased by the levying of administrative and civil penalties for noncompliance. It is the intention of the legislature that the department adopt rules that establish a procedure for the progressive enforcement of this act in which the levying of administrative and civil penalties is a final action. The department may adopt rules that allow for the bypass of the enforcement procedures and the immediate assessment of penalties if specific circumstances warrant this action.

The rules also require the board of health and environmental sciences [now board of environmental review] to develop fees for recovery of costs incurred by the department in delivering services to persons who own or operate or intend to own or operate a public water supply system or public sewage system. These costs include costs associated with review of engineering plans and specifications, inspections, and general assistance. To assist the board in developing these rules, the department shall prepare and submit to the board a detailed estimate of projected costs associated with these services for fiscal years 1992 and 1993. The board shall develop a fee schedule that will provide revenues that are commensurate with the projected costs. A similar approach should be used by the department in developing rules setting new fees for review of plats and subdivisions under 76-4-105."

1985 Amendment: In (2) inserted second sentence authorizing the court to award the Department costs and expenses incurred in investigating and abating a rule, standard, or order violation.

Section Not Codified — Saving Clause: Section 2, Ch. 412, L. 1985, was a saving clause.

75-6-112. Prohibited acts.

Compiler's Comments

2021 Amendment: Chapter 324 in (2) in middle substituted "department" for "board". Amendment effective July 1, 2021.

2007 Amendment: Chapter 423 deleted former (1) and (2) that read: "(1) discharge sewage, drainage, industrial waste, or other wastes that will cause pollution of state waters used by a person for domestic use or as a source for a public water supply system or water or ice company;

(2) discharge sewage, drainage, industrial waste, or other waste into state waters or on the banks of state waters or into an abandoned or operating water well unless the sewage, drainage, industrial waste, or other waste is treated as prescribed by the board"; in (1) in two places near beginning after "that is" substituted "intended to be used as" for "designed to be", after "or a system" deleted "of sewer, drainage, waste, or sewage disposal", and after "sewage system" deleted "or industrial waste discharge system" and deleted former second sentence that read: "However, any facility reviewed by the department under Title 75, chapter 5, is not subject to the provisions of this section"; and made minor changes in style. Amendment effective October 1, 2007.

2001 Amendment: Chapter 315 in (3) near beginning after "commence" inserted "or continue". Amendment effective April 21, 2001.

Saving Clause: Section 5, Ch. 315, L. 2001, was a saving clause.

Severability: Section 6, Ch. 315, L. 2001, was a severability clause.

1999 Amendment: Chapter 195 deleted former (3) that stated a person may not: "(3) build or operate a railroad, logging road, logging camp, or electric or manufacturing plant of any kind on a watershed of a public water supply system unless:

(a) the water supply is protected from pollution by sanitary precautions prescribed by the board; and

(b) a permit has been issued by the department after approval of detailed plans and specifications for sanitary precautions"; and made minor changes in style. Amendment effective March 26, 1999.

Severability: Section 9, Ch. 195, L. 1999, was a severability clause.

1995 Amendments: Chapter 488 in (4), near beginning after "extension", inserted "or operation", after "distribution" inserted "that is designed to be a public water supply system or a system of", after "drainage" substituted "waste" for "wastewater", and after "disposal" inserted "that is designed to be a public sewage system or industrial waste discharge system"; and made minor changes in style.

Chapter 497 in (4) inserted second sentence that read: "However, any facility reviewed by the department under Title 75, chapter 5, is not subject to the provisions of this section"; and made minor changes in style. Amendment effective April 15, 1995.

Preamble: The preamble attached to Ch. 497, L. 1995, provided: "WHEREAS, experience with implementation and enforcement of the Montana water quality statutes has revealed deficiencies in the statutes that have led to inefficiency and unfairness in administration and enforcement of the statutes; and

WHEREAS, those deficiencies can be addressed by selective amendment of the statutes."

1995 Statement of Intent: The statement of intent attached to Ch. 497, L. 1995, provided: "A statement of intent is required to provide guidance to the board of health and environmental sciences [now board of environmental review] regarding rulemaking. The legislature confirms the policy of this state, as reflected in 75-5-101. It is concerned that implementation of the water quality laws has in the past been too dependent on assumptions and conjecture springing from experiences and circumstances from other states and has not been sufficiently based on the conditions and needs of our state. The legislature intends that, in promulgating rules under this bill, the board of health and environmental sciences [now board of environmental review] should seriously consider the impact of proposed rules and that the rules should be adopted only on the basis of sound, scientific justification and never on the basis of projections or conjecture. The legislature is specifically concerned that water quality criteria must reflect concentrations that can be reliably measured, or the rules will, as a practical matter, be unenforceable. [Section 1] [75-5-309, now repealed], providing conditions for adoption of standards more stringent than federal standards, is not intended to prohibit the adoption of ground water quality standards."

Saving Clause: Section 17, Ch. 497, L. 1995, provided: "[This act] does not apply to civil or administrative actions commenced prior to [the effective date of this act] [effective April 15, 1995] or to claims made in those actions, except that compliance plans resulting from those actions must reflect changes made by [this act]."

1989 Amendment: In introductory clause substituted "may not" for "shall not"; in (4), at beginning, substituted "commence construction, alteration, or extension of" for "construct, alter, or extend" and after "sewage disposal" substituted "before he submits to the department necessary maps, plans, and specifications for its review and the department approves those maps, plans, and specifications" for "without first submitting necessary maps, plans, and specifications to the department for its review and approval"; inserted (6) relating to violation of part or rule; and inserted (7) relating to violation of a condition or requirement of an approval.

Severability: Section 2, Ch. 230, L. 1989, was a severability clause.

Saving Clause: Section 7, Ch. 556, L. 1979, was a saving clause.

Severability: Section 8, Ch. 556, L. 1979, was a severability clause.

Case Notes

Ex Parte Investigation: Section 69-1314, R.C.M. 1947 (now repealed), authorizing investigation of alleged pollution of water supply upon complaint and entry of order prohibiting continuance of pollution, did not provide for a public trial but contemplated an ex parte investigation by the State Board of Health (now Board of Environmental Review); the Board could, therefore, upon information from any source and before it had heard any testimony, make a valid order prohibiting a city from polluting a stream that was a source of water supply for domestic uses. Miles City v. St. Bd. of Health, 39 M 405, 102 P 696 (1909).

75-6-114. Civil penalty.

Compiler's Comments

2021 Amendment: Chapter 535 in (1) at end deleted "or, if mutually agreed on by the parties in the action, in the district court of the first judicial district, Lewis and Clark County". Amendment effective October 1, 2021.

2005 Amendment: Chapter 487 in (1) inserted last sentence relating to venue for a district court action; in (4) near middle substituted "penalty factors in 75-1-1001" for "following factors"; deleted former (4)(a) and (4)(b) that read: "(a) the nature, circumstances, extent, and gravity of the violation; and

(b) with respect to the violator, the violator's ability to pay, prior history of violations, the economic benefit or savings, if any, to the violator resulting from the violator's action, the amounts voluntarily expended by the violator to address or mitigate the violation or impacts of the violation to waters of the state, and other matters that justice may require"; and made minor changes in style. Amendment effective January 1, 2006.

Saving Clause: Section 29, Ch. 487, L. 2005, was a saving clause.

1995 Amendments: Chapter 302 at beginning of (1) inserted language referring to an action initiated by the Department to collect civil penalties and after "who" substituted "is found to have violated" for "violates"; inserted (4) enumerating particular factors that the Department is required to consider when seeking penalties; and made minor changes in style.

Chapter 509 in (5) substituted "state general fund" for "public drinking water special revenue fund established in 75-6-115". Amendment effective July 1, 1995.

75-6-115. Public drinking water special revenue fund.

Compiler's Comments

1995 Amendment: Chapter 509 in (1) deleted second sentence that read: "There are established in the public drinking water special revenue fund an operator training account and a public drinking water program account"; deleted (2)(a) that read: "(a) the operator training account all administrative and civil penalties collected under 75-6-109 and 75-6-114"; in (2) substituted "special revenue fund the revenue" for "program account revenues"; deleted (3) that read: "(3) Funds from the operator training account may be used only to finance public water supply system and public sewage system operator training programs"; in (2), in second sentence, substituted "special revenue fund" for "program account"; and made minor changes in style. Amendment effective July 1, 1995.

75-6-116. State regulations no more stringent than federal regulations or guidelines.

Compiler's Comments

2021 Amendment: Chapter 324 throughout section substituted references to department for references to board; in (4)(b) near middle after "if the board" inserted "of environmental review or the department" and at end before "rule" deleted "board"; and made minor changes in style. Amendment effective July 1, 2021.

Preamble: The preamble attached to Ch. 471, L. 1995, provided: "WHEREAS, the federal government frequently regulates areas that are also subject to state regulation; and

WHEREAS, differing state and federal policy goals and unique state prerogatives frequently result in different levels of regulation, different standards, and different requirements being imposed by state and federal programs covering the same subject matter; and

WHEREAS, Montana must simultaneously move toward reducing redundant and unnecessary regulation that dulls the state's competitive advantage while being ever vigilant in the protection of the public's health, safety, and welfare; and

WHEREAS, Montana's administrative agencies should consider applicable federal standards when adopting, readopting, or amending rules with analogous federal counterparts; and

WHEREAS, Montana's administrative agencies should analyze whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana's citizens; and

WHEREAS, as part of the formal rulemaking process, the public should be advised of the agencies' conclusions about whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana citizens."

1995 Statement of Intent: The statement of intent attached to Ch. 471, L. 1995, provided: "A statement of intent is required for this bill in order to provide guidance to the board of health and environmental sciences [now board of environmental review], the department of health and environmental sciences [now department of environmental quality], and local units of government in complying with [this act].

The legislature intends that in addition to all requirements imposed by existing law and rules, the board or the department include as part of the initial publication and all subsequent publications of a rule a written finding if the rule in question contains any standards or requirements that exceed the standards or requirements imposed by comparable federal law.

If the rules are more stringent than comparable federal law, the written finding must include but is not limited to a discussion of the policy reasons and an analysis that supports the board's or department's decision that the proposed state standards or requirements protect public health or the environment of the state and that the state standards or requirements to be imposed can mitigate harm to the public health or the environment and are achievable under current technology. The department is not required to show that the federal regulation is inadequate to protect public health. The written finding must also include information from the hearing record regarding the costs to the regulated community directly attributable to the proposed state standard or requirement."

Effective Date: Section 23, Ch. 471, L. 1995, provided that this section is effective on passage and approval. Approved April 14, 1995.

Applicability: Section 22(1) and (3), Ch. 471, L. 1995, provided: "(1) [Sections 1 through 3] are intended to apply to any rule that is in effect, adopted, or amended, and that regulates those resources or activities for which the state has been given primary authority to regulate by federal authority pursuant to Title 75, chapter 2; Title 75, chapter 3 [renumbered, except for part 6, as Title 50, chapter 79]; Title 75, chapter 5; Title 75, chapter 6; or Title 75, chapter 10, as of [the effective date of this act] [April 14, 1995].

(3) [This act] does not apply to the establishment of fees or public participation requirements."

75-6-120. Wellhead and source water protection programs — voluntary petitions.

Compiler's Comments

2007 Amendment: Chapter 423 in (1) in first sentence near beginning after "42 U.S.C. 300h-7" inserted "and 300j-13", after "wellhead protection" substituted "and source water assessment programs that involve delineation of the boundaries of the assessment areas from which a public water system receives supplies of drinking water" for "program that involves", in two places substituted "source water" for "wellhead", and after "protection areas" inserted "assessment of source water susceptibility to regulated contaminants"; in (2), (3), (3)(b) in two places, (4)(a) in two places, (4)(b), (4)(c), (5)(a), (5)(b) in two places, and (6) substituted "source water" for "wellhead"; and made minor changes in style. Amendment effective October 1, 2007.

75-6-121. Delegation of review of small public water and sewer construction.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 611, L. 2023. Amendment effective October 1, 2023.

Applicability: Section 11, Ch. 611, L. 2023, provided: "[This act] applies to applications received on or after January 1, 2024."

Saving Clause: Section 9, Ch. 611, L. 2023, was a saving clause.

Nonseverability: Section 10, Ch. 611, L. 2023, was a nonseverability clause.

2021 Amendment: Chapter 324 in (2) near beginning substituted "department" for "board". Amendment effective July 1, 2021.

1989 Statement of Intent: The statement of intent attached to Ch. 312, L. 1989, provided: "A statement of intent is required for [this act] because section 1(2) [75-6-121(2)] grants rulemaking authority to the board of health and environmental sciences [now board of environmental review]. The board would adopt rules governing the delegation to local governments of review of small public water systems and extensions or alterations of existing public water and sewer systems.

The rules are intended to establish criteria that would be used to determine whether a division of a local government has a review program suitable for delegation of review. The rules would specify the acceptable level of expertise and other factors necessary for local review and, if review authority has been granted, the circumstances under which the authority should be terminated or reviewed.

The rules are also intended to address the size of public water and sewer systems that would be subject to local review."

75-6-126. Ownership of public water supply system or public sewage system — change in status.

Compiler's Comments

Saving Clause: Section 5, Ch. 315, L. 2001, was a saving clause.

Severability: Section 6, Ch. 315, L. 2001, was a severability clause.

Effective Date: Section 7, Ch. 315, L. 2001, provided that this section is effective on passage and approval. Approved April 21, 2001.

75-6-130. Development plans — department requirements — rulemaking.

Compiler's Comments

Effective Date: Section 8, Ch. 353, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 2, 2023.

75-6-131. Rules for regional public water supply systems.

Compiler's Comments

2021 Amendment: Chapter 324 near beginning of introductory clause substituted "department" for "board". Amendment effective July 1, 2021.

Effective Date: This section is effective October 1, 2009.

Applicability: Section 4, Ch. 449, L. 2009, provided: "[This act] applies to plans and specifications for a regional public water supply system submitted after [the effective date of this act]." Effective October 1, 2009.

Part 2
Drinking Water State Revolving Fund Act

Part Compiler's Comments

Noncodified Sections: Sections 16 and 21, Ch. 553, L. 1995, provided: "Section 16. Creation of debt. The legislature, through enactment of this section, authorizes the creation of state debt in an amount not to exceed $10 million and authorizes the issuance and sale of general obligation bonds in this amount for the purpose of providing the state's share of the drinking water program."

"Section 21. Creation of debt. The legislature through enactment of [this section], authorizes the creation of state debt in an amount not to exceed $5 million and the issuance and sale of general obligation bonds in this amount for the purpose of providing the state's share of the waste water treatment works revolving loan program."

Severability: Section 23, Ch. 553, L. 1995, was a severability clause.

Effective Date: Section 25, Ch. 553, L. 1995, provided: "[This act] is effective on passage and approval." Approved April 27, 1995.

75-6-201. Short title.

Compiler's Comments

1997 Amendment: Chapter 538 before "Drinking" deleted "Safe" and after "Water" substituted "State" for "Treatment". Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

75-6-202. Definitions.

Compiler's Comments

2009 Amendment: Chapter 489 in definition of federal act at end inserted language referring to conditions and exclusions contained in the American Recovery and Reinvestment Act of 2009. Amendment effective May 14, 2009, and terminates June 30, 2011.

1999 Amendment: Chapter 498 in definition of municipality inserted reference to regional water and wastewater authorities; and made minor changes in style. Amendment effective April 27, 1999.

Severability: Section 26, Ch. 498, L. 1999, was a severability clause.

1997 Amendment: Chapter 538 inserted definitions of community water system, Department, disadvantaged community, intended use plan, municipality, noncommunity water system, and private person; deleted definitions of governmental agency, grant, and investor-owned public water system (see 1997 Session Law for former text); in definition of cost inserted (c) including construction; in definition of federal act, at end, inserted "42 U.S.C. 300f, et seq., as that act read on May 5, 1997"; in definition of Indian tribe, near beginning after "tribe", substituted "that has a federally recognized governing body carrying out substantial governmental duties and powers over any area" for "within the state of Montana that is recognized by the secretary of the U.S. department of interior"; substituted nonprofit noncommunity water system for nonprofit organization as defined term and after "means" inserted "a noncommunity water system owned by"; in definition of program, near beginning before "drinking", deleted "safe" and after "water" substituted "state revolving fund" for "treatment revolving loan"; in definition of project, near beginning after "improvements", inserted "or activities"; in first sentence of definition of public water system, near beginning before "water", deleted "piped" and after "consumption" inserted "through pipes or other constructed conveyances"; in definition of revolving fund, near beginning, substituted "drinking water state revolving fund" for "safe drinking water treatment revolving fund"; and made minor changes in style. Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

75-6-203. Drinking water state revolving fund program.

Compiler's Comments

1997 Amendment: Chapter 538 in first sentence, at end, substituted "community water systems and nonprofit noncommunity water systems" for "public water systems". Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

75-6-204. Authorization of agreement — content.

Compiler's Comments

1997 Amendment: Chapter 538 inserted (2)(c) allowing for a state match equal dollar-for-dollar to the capitalization grant deposited in the nonproject account for Department programs; in (2)(i) substituted "make biennial reports and provide annual audits" for "make annual reports"; and made minor changes in style. Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

75-6-205. Rulemaking authority.

Compiler's Comments

1997 Amendments: Chapter 42 in introductory clause substituted "department of natural resources and conservation" for "board of natural resources and conservation". Amendment effective March 12, 1997.

Chapter 538 in two places, at beginning, substituted "department" for "board"; at end of (1) and (2) substituted "technical assistance" for "grants"; in (4), after "loans", deleted "and grants"; inserted (5) allowing the adoption of rules establishing affordability criteria for awarding subsidies to disadvantaged communities; and made minor changes in style. Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

Saving Clause — Rules: Section 29(2), Ch. 538, L. 1997, provided: "Rules that were adopted pursuant to Title 75, chapter 5, part 11, or Title 75, chapter 6, part 2, prior to [the effective date of this act] [effective May 5, 1997] continue in force until amended or repealed pursuant to those parts."

1995 Statement of Intent: The statement of intent attached to Ch. 553, L. 1995, provided: "A statement of intent is required for this bill because rulemaking authority is granted to the board of health and environmental sciences [now board of environmental quality] and the board of natural resources and conservation [now department of natural resources and conservation] to implement a new state financial assistance program for communities that need to improve their public water systems. The legislature understands and anticipates that the program will provide low interest loans and grants to Montana entities to construct needed improvements for water supply and treatment systems and that the program will be supported through federal grant funds and state matching funds raised through the issuance of general obligation bonds and repaid by interest charges of the loan. The bill requires rulemaking by both boards to establish procedures and criteria by which these loans and grants are awarded. In developing these rules, the legislature desires that the application review process should be straightforward and efficient for both the agencies and the applicant. Also, the criteria for awarding grants and loans should be clear and maximize the potential for state grants and loans to communities that need the funding.

Fundamentally, the legislature views this bill as providing a funding source for Montana entities required to meet drinking water standards or faced with upgrading or expanding their systems. Therefore, the rules should facilitate availability of this funding to the widest number of eligible entities at the lowest possible costs, taking into consideration the state's interest in protecting the viability of the program."

75-6-211. Revolving fund.

Compiler's Comments

1999 Amendment: Chapter 421 in (1) at end changed the status of a nonproject account for a program to be a separate account outside the revolving fund; in (2)(b)(i) at end inserted provision relating to deposits to the administration account; in (2)(c) near beginning after "account" inserted "an amount not to exceed" and at end inserted "and that may include a combination of"; inserted (2)(c)(i) and (2)(c)(ii) relating to federal funds and proceeds of state bonds; in (3) inserted last sentence relating to transfers to the revolving fund program; in (5) after "federal act" substituted present language relating to transfers to the revolving fund from the drinking water revolving fund for "and with the governor's permission, the department may transfer up to 33% of each year's federal capitalization grant from the federal allocation account, established under subsection (2)(a), to the water pollution control state revolving fund federal allocation account established in 75-5-1106"; and made minor changes in style. Amendment effective April 23, 1999.

Retroactive Applicability: Section 11, Ch. 421, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all existing loans on [the effective date of this act]." Effective April 23, 1999.

1997 Amendments: Chapter 42 in (3), near beginning, substituted "75-6-224" for "75-6-225" (voided by ch. 538 amendment). Amendment effective March 12, 1997.

Chapter 538 in (1), in first sentence near end before "revolving", substituted "drinking water state" for "safe drinking water treatment" and at end of third sentence inserted "and a nonproject account"; in (2)(a)(i), at end after "fund to", substituted "provide loans or other assistance, as authorized under this part, to community water systems and nonprofit noncommunity water systems" for "assist construction of or improvements to public water systems"; inserted (2)(a)(ii) requiring that all amounts transferred from the water pollution control state revolving fund to the federal allocation account be credited to that account; inserted (2)(b)(iii) providing that other available qualifying funds be credited to the state allocation account; inserted (2)(f) requiring that up to 10% of capitalization grant and state's match be credited to the nonproject account for Department programs; at beginning of (3), after "made", substituted "under this part" for "as authorized by 75-6-225"; inserted (5) allowing the Department to transfer up to 33% of each year's federal capitalization grant to the water pollution control state revolving fund; and made minor changes in style. Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

75-6-212. Use of revolving fund.

Compiler's Comments

2011 Amendment: Chapter 297 inserted (1)(i) relating to additional subsidization in the form of forgiveness of principal; and made minor changes in style. Amendment effective April 29, 2011.

1997 Amendment: Chapter 538 in (1), near beginning after "fund", substituted "may" for "must"; in (1)(a), before "provided", substituted "make loans to community water systems and nonprofit noncommunity water systems as" for "for providing financial assistance that is in the form of loans and grants to public water systems and that is of the type"; inserted (1)(b) through (1)(h) itemizing the ways in which the money in the revolving fund may be used; deleted former (2)(a) that read: "(2)(a)Financial assistance may be used by a public water system only for expenditures that the U.S. environmental protection agency has determined through its regulations are appropriate. Financial assistance may be used for acquisition, from willing sellers at fair market value, of real property or interests that are integral to establishing a public water system"; at beginning of (2) substituted "Except as provided in subsection (3), money in the fund" for"Financial assistance"; inserted (2)(b) through (2)(d) itemizing things for which the money in the fund may not be used; inserted (3) pertaining to circumstances under which a public water system may receive assistance; and made minor changes in style. Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

75-6-214. Use of funds — statutory appropriation.

Compiler's Comments

1997 Amendment: Chapter 422 deleted second sentence that read: "Money in the administration account authorized by 75-6-211 is subject to legislative appropriation, and expenditures from this account must be made from temporary appropriations, as described in 17-7-501(1) or (2), that are made for that purpose." Amendment effective July 1, 1997.

75-6-221. General loan and assistance program.

Compiler's Comments

1997 Amendment: Chapter 538 in (1), at beginning before "subject to", substituted "The program may" for "The department may provide financial assistance in the form of a loan to public water systems owned by a governmental agency, an intergovernmental agency, a nonprofit corporation, an Indian tribe, or any combination of those entities" and after "75-6-224" inserted "make loans to community water systems and nonprofit noncommunity water systems that"; inserted (1)(a) and (1)(b) requiring that loans be made to water systems that facilitate compliance with national primary drinking water regulations or further the health protection objectives of the federal act; inserted (2) authorizing loans to public water systems to acquire land or easements, to implement local, voluntary source protection measures, or to provide funding for certain projects for partners within a delineated source water area; inserted (3) allowing the Department to provide assistance as part of a capacity development strategy and make expenditures to assess source water protection areas and establish wellhead protection programs; in first sentence of (4), at beginning, substituted "The program may provide financial assistance to a public water system" for "The department may provide financial assistance only in the form of a loan to an investor-owned public water system" and at end, after "department", substituted "in the department's intended use plan adopted pursuant to 75-6-231" for "based on greatest public health needs and financial needs", in second sentence, near beginning after "loan to", deleted "an investor-owned" and near middle, after "department", inserted "of natural resources and conservation", and deleted third sentence that read: "A loan to an investor-owned public water system is subject to the requirements of 75-6-222 through 75-6-224"; inserted (5) limiting the total amount of assistance and expenditures made under the program; and made minor changes in style. Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

75-6-222. Evaluation of projects and loan applications.

Compiler's Comments

1997 Amendment: Chapter 538 at beginning of first sentence substituted "The department and the department of natural resources and conservation" for "After consultation with the department of natural resources and conservation, the department" and at end, after "projects", substituted "and loan applications" for "for loans and grants and place them on a priority list or intended use plan" and near beginning of second sentence, after "projects", substituted "and applications, the following factors must be considered" for "the department shall consider the following factors"; inserted (1) through (4) requiring consideration of the technical design of the project, financial capacity of the applicant, certain abilities of the applicant, and total financing of the project; in (7), at beginning, substituted "the total amount of loan funds" for "the amount"; in (9) substituted "the ranking of the project on the priority list in the intended use plan" for "the need for and the benefit to be derived from the project"; and made minor changes in style. Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

75-6-223. Applications for loans.

Compiler's Comments

1997 Amendment: Chapter 538 in (1), in first sentence near middle after "loan", deleted "and grant"; inserted (1)(f) requiring loan applications to include a current financial statement; in (1)(g), in two places, inserted reference to loans; inserted (1)(h) requiring a private person applicant to include a statement pertaining to outstanding loans, notes, or other obligations; in (2), near beginning before "must include", substituted "loan subsidy" for "grant"; in (2)(d), near end, substituted "loan" for "grant"; in (2)(e), in two places, inserted reference to loans; in (2)(f), after "explanation", inserted "including supporting information" and after "why a" substituted "a loan subsidy" for "a grant rather than a loan"; inserted (2)(g) requiring evidence that the applicant qualifies as a disadvantaged community; and made minor changes in style. Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

75-6-224. Loan conditions.

Compiler's Comments

2015 Amendment: Chapter 72 in (2) after "installments" deleted "the first of which must be received not more than 1 year after the completion date of the project and the last of which must be received not more than 20 years after the completion date. If the applicant is a disadvantaged community that has qualified and applied for a loan subsidy, the department may determine that the last installment must be received not more than 30 years after the completion date, provided that the period of the loan does not exceed the expected design life of the project"; and made minor changes in style. Amendment effective February 27, 2015.

1999 Amendment: Chapter 421 in (3)(b) inserted last sentence relating to use of excess reserve payments; and made minor changes in style. Amendment effective April 23, 1999.

Retroactive Applicability: Section 11, Ch. 421, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all existing loans on [the effective date of this act]." Effective April 23, 1999.

1997 Amendment: Chapter 538 in (1)(a), near middle after "including the establishment", inserted "of a dedicated source of revenue and the establishment"; inserted (1)(b) requiring a private person applicant to provide additional security to a dedicated source of revenue; at end of (1)(c) substituted "the term of the loan" for "20 years"; in (1)(h), after "complying with", substituted "plan, specification, and other requirements" for "plan and specification requirements"and at end, substituted "Department" for "board"; inserted (1)(j) requiring applicants to meet certain capabilities for compliance with the federal act; in (2) inserted second sentence providing a guideline for when the last installment for a loan subsidy may be received; in (5), at end of first sentence, substituted "person" for "concern"; and made minor changes in style. Amendment effective May 5, 1997.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

75-6-225. Authorization of bonds — allocation of proceeds.

Compiler's Comments

2015 Amendment: Chapter 74 in (2)(a) at beginning inserted exception clause and after "proceeds of the bonds" deleted "other than any premium and accrued interest received, the amounts to be used to pay interest on the bonds, or the costs of issuing the bonds"; in (2)(b) near beginning after "Any" deleted "premium and"; inserted (2)(d) requiring premiums to be deposited in certain accounts as directed by the board of examiners; and made minor changes in style. Amendment effective February 27, 2015.

Saving Clause: Section 5, Ch. 74, L. 2015, was a saving clause.

Severability: Section 6, Ch. 74, L. 2015, was a severability clause.

1999 Amendment: Chapter 421 in (2) at end of first sentence substituted "are allocated to the state allocation account or the administration account of the revolving fund, as provided in 75-6-211" for "are appropriated to the state allocation account of the revolving fund"; and made minor changes in style. Amendment effective April 23, 1999.

The amendment to this section made by sec. 8, Ch. 3, L. 1999, was rendered void by sec. 16, Ch. 3, L. 1999, a contingent voidness section, which provided that if Constitutional Initiative No. 75, enacting Article VIII, section 17, of the Montana constitution, was declared invalid, then [this act] was void. The initiative was declared invalid February 24, 1999.

Retroactive Applicability: Section 11, Ch. 421, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all existing loans on [the effective date of this act]." Effective April 23, 1999.

75-6-226. Loan subsidy for disadvantaged communities.

Compiler's Comments

2009 Amendment: Chapter 489 inserted (3) concerning money received under the American Recovery and Reinvestment Act of 2009. Amendment effective May 14, 2009, and terminates June 30, 2011.

2005 Amendment: Chapter 323 in (1) at end inserted "the forgiveness of principal, or a combination of both". Amendment effective April 21, 2005.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

Effective Date: Section 30(1), Ch. 538, L. 1997, provided: "[This act] is effective on passage and approval." Approved May 5, 1997.

75-6-227. Creation of debt.

Compiler's Comments

2021 Amendment: Chapter 29 in introductory clause substituted "$50 million" for "$30 million"; and in (1) substituted "funding" for "providing the state's share of". Amendment effective February 26, 2021.

2005 Amendment: Chapter 323 in introductory clause at end substituted "in principal amount of general obligation bonds outstanding from time to time for the purpose of" for "and authorizes the issuance and sale of general obligation bonds in this amount for the purpose of"; inserted (2) relating to funding portions of loans on an interim basis; and made minor changes in style. Amendment effective April 21, 2005.

2003 Amendment: Chapter 18 near middle increased maximum authorized state debt for providing the state's share of the drinking water program from $20 million to $30 million. Amendment effective July 1, 2003.

1999 Amendment: Chapter 421 increased state debt amount from $10 million to $20 million. Amendment effective April 23, 1999.

Retroactive Applicability: Section 11, Ch. 421, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all existing loans on [the effective date of this act]." Effective April 23, 1999.

75-6-231. Intended use plan — advisory committee.

Compiler's Comments

2007 Special Session Amendment: Chapter 4 in (4)(a)(v) near middle after "senate, and" inserted "subject to 5-5-234" and at end substituted "one must be from the majority party and one must be from the minority party" for "they may not represent the same political party". Amendment effective May 25, 2007.

Retroactive Applicability: Section 22, Ch. 4, Sp. L. May 2007, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to appointments made for members of the 60th legislature."

2003 Amendment: Chapter 90 in (4)(a)(v) substituted "legislature" for "joint legislative subcommittee on natural resources". Amendment effective October 1, 2003.

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

Effective Date: Section 30(1), Ch. 538, L. 1997, provided: "[This act] is effective on passage and approval." Approved May 5, 1997.

75-6-232. Insurance and guarantee program.

Compiler's Comments

Saving Clause: Section 29(1), Ch. 538, L. 1997, was a saving clause.

Effective Date: Section 30(1), Ch. 538, L. 1997, provided: "[This act] is effective on passage and approval." Approved May 5, 1997.

75-6-236. Projects funded by federal government appropriations.

Compiler's Comments

Effective Date: Section 4, Ch. 9, L. 2001, provided that this section is effective on passage and approval. Approved February 9, 2001.

Part 3
Regional Water and Wastewater Authority Act

Part Compiler's Comments

Severability: Section 26, Ch. 498, L. 1999, was a severability clause.

Effective Date: Section 27, Ch. 498, L. 1999, provided: "[This act] is effective on passage and approval." Approved April 27, 1999.

75-6-304. Definitions.

Compiler's Comments

2013 Amendment: Chapter 187 inserted definitions of district customer, municipal customer, and rural customer; and made minor changes in style. Amendment effective October 1, 2013.

75-6-305. Joint exercise of powers by certain public agencies — agreements among agencies — filing of agreement — prohibition against competition — retirement of bonds — consent of public agency.

Compiler's Comments

2011 Amendment: Chapter 13 inserted (8) regarding provision of water or wastewater services. Amendment effective July 1, 2011.

Severability: Section 6, Ch. 13, L. 2011, was a severability clause.

75-6-326. Rates, fees, and charges — establishment and changes.

Compiler's Comments

2013 Amendment: Chapter 187 inserted (1)(b) requiring a review of rates, fees, and charges at least annually; in (1)(c) inserted "in addition to grants or any other revenue"; in (1)(c)(iv) at end deleted "The rates, fees, or charges must be sufficient to"; inserted (3) through (9) regarding hearing and notice; and made minor changes in style. Amendment effective October 1, 2013.

CHAPTER 7
AQUATIC ECOSYSTEM PROTECTIONS

Chapter Case Notes

Intermittently Flowing Stream That Would Be Perennially Flowing Absent Human Intervention Classified as Stream Subject to Natural Streambed and Land Preservation Act — 1975 Status of Perennial Flow Not Determinative of Act Jurisdiction — No Error in Considering Effect of

Ground Water: On finding that Montana Gulch would have flowed perennially without human activity, the Broadwater Conservation District and the District Court did not err in determining it was a "natural, perennial-flowing stream" under the jurisdiction of the Natural Streambed and Land Preservation Act. Because nothing in the statutory text or relevant case law suggests that a conservation district may not look to the effect of pre-1975 human activity on a waterway's natural flow characteristics to determine if it would have otherwise been perennially flowing, the conservation district and the District Court did not err in examining historical evidence when determining that despite Montana Gulch's current intermittent surface flow it would have flowed perennially in the absence of human activity. Because it was within the conservation district's purview to assess the credibility of witnesses and to reasonably reconcile conflicting evidence, its determination that human mining activity, rather than natural geology, was responsible for the lack of perennial flow on Montana Gulch was not arbitrary or capricious. In addition, neither the conservation district nor the District Court erred in considering the effect of ground water when determining whether the waterway was a natural, perennially flowing stream. Fortner v. Broadwater Conservation District, 2021 MT 240, 405 Mont. 393, 495 P.3d 425.

Part 1
Streambeds

Part Compiler's Comments

Section Not Codified: Section 26-1520, R.C.M. 1947, pertaining to rules and minimum standards promulgated by the Department of Natural Resources and Conservation, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 11, Ch. 463, L. 1975.

Part Administrative Rules

Title 36, chapter 2, subchapter 4, ARM Minimum standards and guidelines for Natural Streambed and Land Preservation Act of 1975.

Part Case Notes

Determining Conservation District Jurisdiction — Totality of Circumstances — No Abuse of Discretion if Substantial Evidence Supports Decision Even When Other Decisions Supported by Evidence. Pfeil Acquisitions, LLC v. Gallatin County Conserv. District, 2022 MT 237, 411 Mont. 18, 521 P.3d 47.

Flow Through Historical Channels Considered Perennial Stream — Proper Assertion of Jurisdiction by Conservation District: Litigants applied for permits with the Flathead Conservation District to conduct dredging on their property. The conservation district found that the water bodies on the litigants' property met the definition of "stream" and asserted jurisdiction, reasoning that although the creek in question shifts channels and during dry periods flowed partially in subterranean form, it remained within the definition of "perennial stream" because existing stream channels containing historical surface flows were documented in the review process. The District Court affirmed and, on appeal, the Supreme Court did as well, ruling that the District Court did not err when it upheld the conservation district's declaratory ruling asserting jurisdiction over the litigants' project. The Supreme Court found that under the limited factual circumstances of the case, groundwater flowing through a historical channel supported a finding of jurisdiction. Stalowy v. Flathead Conserv. Dist., 2020 MT 155, 400 Mont. 266, 465 P.3d 1170. See also Fortner v. Broadwater Conservation District, 2021 MT 240, 405 Mont. 393, 495 P.3d 425.

Channel Adjacent to Yellowstone River Subject to Act: The Park Conservation District correctly determined that a channel adjacent to the Yellowstone River is subject to the Natural Streambed and Land Preservation Act. The conservation district's decision was not arbitrary or capricious when the actual physical characteristics of the channel clearly showed that it was a natural channel. Livingston v. Park Conserv. Dist., 2013 MT 234, 371 Mont. 303, 307 P.3d 317.

Conservation District Afforded Public Fundamentally Fair Participation in Process: Though exempt from the dictates of the Montana Administrative Procedure Act as a political subdivision of the state, the conservation district followed its own rules, provided notice, and allowed an extended opportunity for the submission of oral and written information in deciding Mitchell Slough's status under The Natural Streambed and Land Preservation Act of 1975, also known as the "310 Law", Title 75, chapter 7, part 1. Bitterroot River Protective Assoc., Inc. v. Bitterroot Conserv. Dist., 2008 MT 377, 346 M 507, 198 P3d 219 (2008).

Part Attorney General's Opinions

Diversion Dike Construction — Permit or Plan Required: The construction of a diversion dike with heavy equipment requires either a "310 permit" or an approved operation plan under this part. When this work is performed within a designated flood plain or floodway, the construction additionally requires a permit from the responsible political subdivision. 42 A.G. Op. 106 (1988).

Permit Necessary Before Altering Stream Channel — Irrigation: In accordance with The Natural Streambed and Land Preservation Act of 1975, an irrigator must apply to the supervisors of a local conservation district for a "310 permit" before altering a stream channel to divert water. All alterations, however slight, are subject to the permit process. 41 A.G. Op. 62 (1986).

Application of Part: Title 87, ch. 5, part 5, was enacted to regulate projects undertaken by governmental entities, and the Natural Streambed and Land Preservation Act of 1975 was enacted to control projects not subject to Title 87, ch. 5, part 5. 40 A.G. Op. 71 (1984).

Applicability of Natural Streambed and Land Preservation Act: The Montana Natural Streambed and Land Preservation Act is not applicable to federal projects, wherever located, unless Congress consents to regulation. The Act is applicable to nonfederal projects on federal lands unless a specific act of Congress preempts state regulation or unless the Act conflicts with applicable state regulation. The Act is applicable to private projects, but not state or local projects, on state lands. The Act is not applicable to Indian projects on Indian reservations but is applicable to non-Indian projects on non-Indian owned reservation lands if the Act does not conflict with tribal self-government. 37 A.G. Op. 15 (1977).

Part Law Review Articles

Survey Analysis of Natural Streambed and Land Preservation Act of 1975, Goetz, 38 Mont. L. Rev. 165 (Vol. 1, 1977).

Preserving Stream Flows in Montana Through the Constitutional Public Trust Doctrine: An Underrated Solution, Clifford, 16 Pub. Land L. Rev. 117 (1995).

Instream Flow Policy in Montana: A History and Blueprint for the Future, McKinney, 11 Pub. Land L. Rev. 81 (1990).

75-7-102. Intent — policy.

Compiler's Comments

2003 Amendment: Chapter 361 inserted (1) relating to constitutional obligations and legislative intent; and made minor changes in style. Amendment effective April 16, 2003.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the

Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Severability: Section 39, Ch. 361, L. 2003, was a severability clause.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

Case Notes

District Court Erred in Affirming Conservation District's Determination Regarding Mitchell Slough: The District Court's narrow, technical definition of "natural" as meaning "in the absence of any man-made manipulation" and resulting conclusions led to errors of law. The totality of the circumstances of the factual record should have been considered in determining whether the Mitchell Slough is a "natural, perennial-flowing stream or river" for the purpose of Title 75, chapter 7, part 1. Bitterroot River Protective Assoc., Inc. v. Bitterroot Conserv. Dist., 2008 MT 377, 346 M 507, 198 P3d 219 (2008), followed in Pfeil Acquisitions, LLC v. Gallatin County Conserv. District, 2022 MT 237, 411 Mont. 18, 521 P.3d 47.

District Court in Error When Concluding That Mitchell Slough Was Not Natural Water Body: The District Court's use of the dictionary definition of "natural" as pristine and unaffected by humans in relation to the stream access laws under Title 23, chapter 2, part 3, leads to an absurd result that prohibits the very public recreational access it was designed to allow. The proper conclusion is that the return flows that find their way to and join the flow in the Mitchell Slough's historic channel are to be appropriately analyzed as freed, appropriative waters. Bitterroot River Protective Assoc., Inc. v. Bitterroot Conserv. Dist., 2008 MT 377, 346 M 507, 198 P3d 219 (2008).

Scope of Writ of Prohibition — Writ Inappropriate to Stop Conservation District From Making Initial Determination of Whether Body of Water Considered Natural Perennial Flowing Stream When Other Remedies Exist: After unsuccessfully attempting to have the Department of Natural Resources and Conservation, the Department of Fish, Wildlife, and Parks, and the Department of Environmental Quality make the determination as to whether a slough east of Victor was a perennial flowing stream and thus subject to The Natural Streambed and Land Preservation Act of 1975, the county conservation district decided to use a public hearing process to make the determination. Plaintiffs sought a writ of prohibition to stop the conservation district from determining the status of the slough. After the writ was denied in District Court, plaintiffs submitted it to the Supreme Court. A writ of prohibition serves to stop an entity exercising judicial functions from acting when the proceedings are beyond that entity's jurisdiction and are clearly unlawful, but should not replace an appeal or perform the function of a writ of review. A writ of prohibition is justified only by extreme necessity when the grievance cannot be redressed by ordinary proceedings at law, in equity, or by appeal. The existence of another remedy, even if inconvenient or indirect, prevents a party from seeking a writ of prohibition. In the interest of both judicial economy and agency efficiency, an exhaustion of administrative remedies allows a governmental agency to make a factual record and to correct its own errors within its specific expertise before a court interferes. After noting that the Act does not specifically authorize a conservation district or any other entity with the power to classify bodies of water as streams, the Supreme Court found that the conservation district was simply attempting to apply the Legislature's articulated requirement of a natural perennial flowing stream and declined to interfere with the conservation district's ability to initially determine the scope of its jurisdiction and exercise its expertise to decide whether the slough was in fact a stream. Further, once the status of the slough was determined, there was nothing to prevent plaintiffs from seeking judicial review of the conservation district's declaratory rulings. Because extreme necessity and lack of redress did not exist, a writ of prohibition was inappropriate to stop the conservation district from making the initial ruling on the status of the slough, so the writ was denied. Bitterroot River Protection Ass'n, Inc. v. Bitterroot Conserv. District, 2002 MT 66, 309 M 207, 45 P3d 24 (2002), followed in Paulson v. Flathead Conserv. District, 2004 MT 136, 321 M 364, 91 P3d 569 (2004).

Attorney General's Opinions

Permit Necessary Before Altering Stream Channel — Irrigation: In accordance with The Natural Streambed and Land Preservation Act of 1975, an irrigator must apply to the supervisors of a local conservation district for a "310 permit" before altering a stream channel to divert water. All alterations, however slight, are subject to the permit process. 41 A.G. Op. 62 (1986).

Conservation District Supervisors' Review of Impact on Land Between Stream Crossings: Conservation district supervisors do not have authority under the Natural Streambed and Land Preservation Act of 1975 (Title 75, ch. 7, part 1) to review the route of a proposed pipeline within the county at places other than stream crossings. This is true even though a lawful review of several stream crossings may amount to a review of the land between the crossings. The Act and the standards adopted by the Board of Natural Resources and Conservation (now Department of Natural Resources and Conservation) make clear that the review applies only to the stream sites themselves. However, the supervisors may formulate regulations under 76-15-701 to address the issue of land use in their jurisdiction. 39 A.G. Op. 2 (1981).

Scope of Natural Streambed and Land Preservation Act: Under both the Natural Streambed and Land Preservation Act and the regulations implementing the Act, the scope of the projects subject to review and approval by a conservation district has been limited to those actually located at the site of a stream and the immediately adjacent property. 39 A.G. Op. 2 (1981).

75-7-103. Definitions.

Compiler's Comments

2003 Amendment: Chapter 447 in definition of project in (a) after "modification" substituted "that results in a change in the state of a natural, perennial-flowing stream or river, its bed, or its immediate banks" for "of a stream in the state of Montana that results in a change in the state of the stream" and inserted (b)(iii) providing that project does not include livestock grazing activities; and made minor changes in style. Amendment effective April 21, 2003.

Retroactive Applicability: Section 3, Ch. 447, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all notices of projects pending before a conservation district on [the effective date of this act]." Effective April 21, 2003.

1995 Amendment: Chapter 426 in definition of district, in (c) after "commissioners", inserted "in a county"; in definition of project, in (a) after "stream", deleted "in contravention of 75-7-102" and in (b) substituted language establishing that project does not include activity submitted to and approval by district and historic maintenance and repair not significantly modifying stream for former language that read: "(b) Project does not include customary and historic maintenance and repair of existing irrigation facilities:

(i) that do not significantly alter or modify the stream in contravention of 75-7-102; or

(ii) for which a plan of annual operation has been submitted to and approved by the district. The plan is subject to future review and approval by the district at its option. Any modification to the plan must have prior approval of the district"; at end of definition of stream, after "banks", inserted exception clause; inserted definition of written consent of the supervisors; and made minor changes in style. Amendment effective April 13, 1995.

1987 Amendment: Inserted actions not falling within definition of project.

Administrative Rules

ARM 36.2.402 Definitions.

Case Notes

Intermittently Flowing Stream That Would Be Perennially Flowing Absent Human Intervention Classified as Stream Subject to Natural Streambed and Land Preservation Act — 1975 Status of Perennial Flow Not Determinative of Act Jurisdiction — No Error in Considering Effect of Ground Water: On finding that Montana Gulch would have flowed perennially without human activity, the Broadwater Conservation District and the District Court did not err in determining it was a "natural, perennial-flowing stream" under the jurisdiction of the Natural Streambed and Land Preservation Act. Because nothing in the statutory text or relevant case law suggests that a conservation district may not look to the effect of pre-1975 human activity on a waterway's natural flow characteristics to determine if it would have otherwise been perennially flowing, the conservation district and the District Court did not err in examining historical evidence when determining that despite Montana Gulch's current intermittent surface flow it would have flowed perennially in the absence of human activity. Because it was within the conservation district's purview to assess the credibility of witnesses and to reasonably reconcile conflicting evidence, its determination that human mining activity, rather than natural geology, was responsible for the lack of perennial flow on Montana Gulch was not arbitrary or capricious. In addition, neither the conservation district nor the District Court erred in considering the effect of ground water when determining whether the waterway was a natural, perennially flowing stream. Fortner v. Broadwater Conservation District, 2021 MT 240, 405 Mont. 393, 495 P.3d 425.

Channel Adjacent to Yellowstone River Subject to Act: The Park Conservation District correctly determined that a channel adjacent to the Yellowstone River is subject to the Natural Streambed and Land Preservation Act. The conservation district's decision was not arbitrary or capricious when the actual physical characteristics of the channel clearly showed that it was a natural channel. Livingston v. Park Conserv. Dist., 2013 MT 234, 371 Mont. 303, 307 P.3d 317.

Consideration of Record and of Totality of Circumstances Leads to Reversal of District Court Judgment: The Supreme Court held that the Mitchell Slough is a "natural, perennial-flowing stream or river" and thus is subject to this part. Bitterroot River Protective Assoc., Inc. v. Bitterroot Conserv. Dist., 2008 MT 377, 346 M 507, 198 P3d 219 (2008).

District Court Erred in Affirming Conservation District's Determination Regarding Mitchell Slough: The District Court's narrow, technical definition of "natural" as meaning "in the absence of any man-made manipulation" and resulting conclusions led to errors of law. The totality of the circumstances of the factual record should have been considered in determining whether the Mitchell Slough is a "natural, perennial-flowing stream or river" for the purpose of Title 75, chapter 7, part 1. Bitterroot River Protective Assoc., Inc. v. Bitterroot Conserv. Dist., 2008 MT 377, 346 M 507, 198 P3d 219 (2008), followed in Pfeil Acquisitions, LLC v. Gallatin County Conserv. District, 2022 MT 237, 411 Mont. 18, 521 P.3d 47.

Scope of Writ of Prohibition — Writ Inappropriate to Stop Conservation District From Making Initial Determination of Whether Body of Water Considered Natural Perennial Flowing Stream When Other Remedies Exist: After unsuccessfully attempting to have the Department of Natural Resources and Conservation, the Department of Fish, Wildlife, and Parks, and the Department of Environmental Quality make the determination as to whether a slough east of Victor was a perennial flowing stream and thus subject to The Natural Streambed and Land Preservation Act of 1975, the county conservation district decided to use a public hearing process to make the determination. Plaintiffs sought a writ of prohibition to stop the conservation district from determining the status of the slough. After the writ was denied in District Court, plaintiffs submitted it to the Supreme Court. A writ of prohibition serves to stop an entity exercising judicial functions from acting when the proceedings are beyond that entity's jurisdiction and are clearly unlawful, but should not replace an appeal or perform the function of a writ of review. A writ of prohibition is justified only by extreme necessity when the grievance cannot be redressed by ordinary proceedings at law, in equity, or by appeal. The existence of another remedy, even if inconvenient or indirect, prevents a party from seeking a writ of prohibition. In the interest of both judicial economy and agency efficiency, an exhaustion of administrative remedies allows a governmental agency to make a factual record and to correct its own errors within its specific expertise before a court interferes. After noting that the Act does not specifically authorize a conservation district or any other entity with the power to classify bodies of water as streams (see 75-7-125), the Supreme Court found that the conservation district was simply attempting to apply the Legislature's articulated requirement of a natural perennial flowing stream and declined to interfere with the conservation district's ability to initially determine the scope of its jurisdiction and exercise its expertise to decide whether the slough was in fact a stream. Further, once the status of the slough was determined, there was nothing to prevent plaintiffs from seeking judicial review of the conservation district's declaratory rulings. Because extreme necessity and lack of redress did not exist, a writ of prohibition was inappropriate to stop the conservation district from making the initial ruling on the status of the slough, so the writ was denied. Bitterroot River Protection Ass'n, Inc. v. Bitterroot Conserv. District, 2002 MT 66, 309 M 207, 45 P3d 24 (2002), followed in Paulson v. Flathead Conserv. District, 2004 MT 136, 321 M 364, 91 P3d 569 (2004).

Attorney General's Opinions

Diversion Dike Construction — Permit or Plan Required: The construction of a diversion dike with heavy equipment requires either a "310 permit" or an approved operation plan under Title 75, ch. 7, part 1. When this work is performed within a designated flood plain or floodway, the construction additionally requires a permit from the responsible political subdivision. 42 A.G. Op. 106 (1988).

Irrigation District as Person: An irrigation district is a "person" within the meaning of subsection (4) of this section. 42 A.G. Op. 33 (1987).

75-7-106. Junked motor vehicles as reinforcement prohibited — penalty.

Compiler's Comments

1995 Amendment: Chapter 426 in (1), after "between", deleted "high water"; in (2), after "who", deleted "willfully" and substituted "is subject to penalties as provided in 75-7-123" for "is guilty of a misdemeanor and upon conviction shall be fined not to exceed $250, imprisoned in the county jail for a term not to exceed 30 days, or both"; and deleted (3) that read: "(3) A person who violates subsection (1) shall be subject to a civil penalty of not more than $50. Each day upon which a violation occurs is a separate violation." Amendment effective April 13, 1995.

75-7-111. Notice of project.

Compiler's Comments

2003 Amendment: Chapter 581 in (3) near middle substituted "may" for "shall". Amendment effective October 1, 2003.

1995 Amendment: Chapter 426 in (1), before second "project", inserted "proposed"; inserted (3) requiring applicant to sign arbitration agreement at time of filing notice of proposed project; inserted (4) allowing district to authorize representative to accept proposed project notices; and made minor changes in style.

Attorney General's Opinions

Permit Necessary Before Altering Stream Channel — Irrigation: In accordance with The Natural Streambed and Land Preservation Act of 1975, an irrigator must apply to the supervisors of a local conservation district for a "310 permit" before altering a stream channel to divert water. All alterations, however slight, are subject to the permit process. 41 A.G. Op. 62 (1986).

75-7-112. Procedure for considering projects — team.

Compiler's Comments

2019 Amendment: Chapter 124 in (5)(a) after "other than an applicant" deleted "that has not agreed to arbitration"; in (5)(b) after "When an applicant" deleted "that has not agreed to arbitration under 75-7-111" and near middle substituted "30 working days" for "15 working days"; in (6) after "in writing within" substituted "30 days" for "15 days"; and made minor changes in style. Amendment effective October 1, 2019.

2003 Amendment: Chapter 581 in (5)(a) near beginning after "team" inserted "other than an applicant that has not agreed to arbitration"; inserted (5)(b) concerning applicant who has not agreed to arbitration and who disagrees with supervisors' decision; and made minor changes in style. Amendment effective October 1, 2003.

1995 Amendment: Chapter 426 substituted (1) regarding proposed project notification procedure for former language that read: "(1) The supervisors shall receive all notices of proposed projects within their district. They shall, within 5 days of receipt of a notice, examine and investigate the notice and determine whether the proposal is for a project. Within the 5 days, they shall send a copy of their determination to the department and the applicant. If the supervisors determine that the proposal is not a project, the applicant may, upon receipt of written notice, proceed with the proposed activity.

(2) If the supervisors determine that the proposal is for a project"; in (1), (2), and (5) substituted "within 5 working days" for "within 5 days"; in (1) substituted "receipt of the notification, inform the supervisors" for "receipt of the determination, notify the supervisors"; in last sentence in (2), after "deny", substituted "approve or modify" for "or approve the project or may make recommendations for alternative plans"; in (3) substituted "within 30 days of the date of inspection" for "within 50 days of the date of application"; in (6) substituted "Upon written consent of the supervisors, the applicant shall notify" for "Upon written notice, with a recommendation or alternative plan, by the supervisors to the applicant, the applicant, within 15 days, shall notify" and after "accordance" substituted "with the supervisor's decision" and last sentence prohibiting work on project before end of 15-day waiting period without team and district permission for former language that read: "with the recommendations or alternative plans. No work may be commenced on a project before the end of this 15-day period unless written permission is given by all team members. If the written decision of the supervisors approves the proposed project without recommendation or alternative plan, the applicant may proceed with the project upon the expiration of 10 days after receipt of the decision"; inserted (9) outlining criteria that team and supervisors are required to determine in recommending, denying, approving, or modifying project; inserted (10) concerning modification; inserted (11) concerning reasonable means; adjusted subsection references; and made minor changes in style.

Administrative Rules

ARM 36.2.403 Standard forms.

Attorney General's Opinions

Conservation District Supervisors' Review of Impact on Land Between Stream Crossings: Conservation district supervisors do not have authority under the Natural Streambed and Land Preservation Act of 1975 (Title 75, ch. 7, part 1) to review the route of a proposed pipeline within the county at places other than stream crossings. This is true even though a lawful review of several stream crossings may amount to a review of the land between the crossings. The Act and the standards adopted by the Board of Natural Resources and Conservation (now Department of Natural Resources and Conservation) make clear that the review applies only to the stream sites themselves. However, the supervisors may formulate regulations under 76-15-701 to address the issue of land use in their jurisdiction. 39 A.G. Op. 2 (1981).

Scope of Natural Streambed and Land Preservation Act: Under both the Natural Streambed and Land Preservation Act itself and the regulations implementing the Act, the scope of the projects subject to review and approval by a conservation district has been limited to those actually located at the site of a stream and the immediately adjacent property. 39 A.G. Op. 2 (1981).

75-7-113. Emergencies — procedure.

Compiler's Comments

2019 Amendment: Chapter 124 in (8)(a) after "other than an applicant" deleted "that has not agreed to arbitration"; in (8)(b) after "When an applicant" deleted "that has not agreed to arbitration under 75-7-111" and near end substituted "30 working days" for "15 working days". Amendment effective October 1, 2019.

2003 Amendment: Chapter 581 in (8)(a) near beginning after "team" inserted "other than an applicant that has not agreed to arbitration"; inserted (8)(b) concerning applicant who has not agreed to arbitration and who disagrees with supervisors' decision; and made minor changes in style. Amendment effective October 1, 2003.

1995 Amendment: Chapter 426 in second sentence in (1) substituted "taking action" for "project"; inserted (2) outlining information required in emergency notice; in beginning of (3) inserted "If the supervisors determine that the action taken meets the definition of a project" and after "5" inserted "working"; in (4) substituted "75-7-112(2)" for "75-7-112(3)" and substituted requirement that team make "onsite inspection within 20 days of receipt of the emergency notice" for "onsite inspection and individual written reports to the supervisors within 30 days, giving its observations and opinions on the emergency project"; substituted (5) through (9) regarding emergency notice, review of emergency project and action, and penalty for former (4) through (6) that read: "(4) If the same or a similar emergency occurs to the same applicant more than once within a 5-year period, the supervisors shall request the team members to include in their reports a determination of the validity of the emergency action and to ascertain the feasibility of a more permanent solution to the emergency.

(5) The supervisors shall determine the feasibility of a more permanent solution and shall, within 30 days, recommend that the person put the solution into effect within a reasonable period of time as determined by the supervisors. Failure of the person to put that solution into effect is not a violation of this part unless a subsequent emergency action results from this failure.

(6) When a member a the team or the applicant disagrees with the supervisors' recommendation, he may ask that an arbitration panel as provided in 75-7-114 be appointed to hear the dispute and make a final written decision thereon"; and made minor changes in style.

75-7-114. Arbitration panel — selection.

Compiler's Comments

1995 Amendment: Chapter 426 at end of third sentence, before "policy", inserted "arbitration agreement and the"; and made minor changes in style.

Case Notes

No Abuse of Discretion in Refusing to Vacate Arbitration Award Based on Allegations of Arbitrator Partiality Absent Showing of Evident Partiality: Plaintiffs contended that an arbitration award should be vacated because one of the arbitrators, a former employee of one of the agencies involved in the arbitration, was not neutral. The motion to vacate was denied, and on appeal, the Supreme Court affirmed. Employment status is insufficient, of itself, to establish partiality, and plaintiffs' argument amounted to a speculative and conclusory allegation of partiality, rather than the direct and demonstrable evidence of partiality required to vacate an award. Paulson v. Flathead Conserv. District, 2004 MT 136, 321 M 364, 91 P3d 569 (2004).

75-7-116. Modification of plan — assignment of costs.

Compiler's Comments

2003 Amendment: Chapter 581 in (1) in two places after "panel" inserted "or district court". Amendment effective October 1, 2003.

75-7-117. Rules — minimum standards — arbitration agreement.

Compiler's Comments

2003 Amendment: Chapter 581 in (3) at end of first sentence inserted "when an applicant chooses to use arbitration". Amendment effective October 1, 2003.

1995 Amendments: Chapter 418 at beginning of (1) substituted "department of natural resources and conservation" for "board of natural resources and conservation"; and near end of (2) substituted "department" for "board". Amendment effective July 1, 1995.

Chapter 426 inserted (3) requiring Department, after consultation with conservation districts, to prepare arbitration agreement containing certain provisions; and made minor changes in style.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1987 Amendment: At beginning of (1) deleted "By July 1, 1975" and after "adopt" inserted "and may from time to time revise"; at beginning of (2) deleted "By January 1, 1976", after "adopt" inserted "and may from time to time revise", and after "exceed" inserted "or are not covered by"; and made minor changes in phraseology and punctuation.

Administrative Rules

Title 36, chapter 2, subchapter 4, ARM Minimum standards and guidelines for Natural Streambed and Land Preservation Act of 1975.

75-7-121. Review.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 361 at end inserted "and must be brought in the county where the action is proposed to occur". Amendment effective April 16, 2003.

Chapter 581 in (1) at end of first sentence after "75-7-113" substituted "may be by arbitration or by the district court of the county where the project is located" for "must be by arbitration"; inserted (2) concerning choice of judicial review; and made minor changes in style. Amendment effective October 1, 2003.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75,

chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Severability: Section 39, Ch. 361, L. 2003, was a severability clause.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

1995 Amendment: Chapter 426 at beginning, after "Any", inserted "review of" and after "action" substituted "by the supervisors under 75-7-112 or 75-7-113 must be by arbitration. Judicial review of an arbitration action is under the provisions of Title 27, chapter 5, part 3" for "under this part may be appealed within 30 days to the district court".

75-7-122. Public nuisance.

Compiler's Comments

1995 Amendment: Chapter 426 after "approval" inserted "or activities performed outside the scope of written consent of the supervisors" and substituted "prescribed in this chapter" for "prescribed in this part". Amendment effective April 13, 1995.

75-7-123. Penalties — restoration.

Compiler's Comments

2021 Amendment: Chapter 331 in (3)(b) in two places increased amount from $15,000 to $15,000. Amendment effective October 1, 2021.

2011 Amendment: Chapter 284 in (3)(b) in two places increased jurisdictional limits from $7,000 to $12,000. Amendment effective July 1, 2011.

2003 Amendment: Chapter 470 at end of (1)(b) substituted "be in violation" for "physically alter or modify the stream"; inserted (2) providing that each day constitutes separate violation and requiring district to work with violator to resolve amount of penalty prior to initiating enforcement action; inserted (3)(b) providing for civil liability for amount necessary to restore stream; inserted (4) providing for deposit of money; and made minor changes in style. Amendment effective April 23, 2003.

Retroactive Applicability: Section 6, Ch. 470, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all notices of projects pending before a conservation district on [the effective date of this act]." Approved April 23, 2003.

1995 Amendment: Chapter 426 near beginning, after "supervisors", inserted "performs activities outside the scope of written consent of the supervisors, violates emergency procedures provided for in 75-7-113, or violates 75-7-106", substituted "fine not to exceed $500 or by a civil penalty not to exceed $500 for each day" for "fine of not less than $25 or more than $500 or by a civil penalty of not less than $25 or more than $500 for each day", and near end, after "recommended by the", deleted "team and approved by the"; and made minor changes in style. Amendment effective April 13, 1995.

1993 Amendment: Chapter 255 near middle inserted "or by a civil penalty of not less than $25 or more than $500".

75-7-125. Jurisdiction — declaratory ruling — standards — judicial review.

Compiler's Comments

Effective Date: Section 3, Ch. 288, L. 2003, provided that this section is effective on passage and approval. Approved April 11, 2003.

Retroactive Applicability — Applicability: Section 4, Ch. 288, L. 2003, provided: "(1) [This act] applies retroactively, within the meaning of 1-2-109, to all notices of a project pending before a conservation district on [the effective date of this act]. [Effective April 11, 2003]

(2) [Section 1] [75-7-125] does not apply retroactively to a declaratory ruling proceeding that was initiated before [the effective date of this act]."

Case Notes

Determining Conservation District Jurisdiction — Totality of Circumstances — No Abuse of Discretion if Substantial Evidence Supports Decision Even When Other Decisions Supported by Evidence. Pfeil Acquisitions, LLC v. Gallatin County Conserv. District, 2022 MT 237, 411 Mont. 18, 521 P.3d 47.

Part 2
Lakeshores

Part Case Notes

Standard of Review for Lakeshore Protection Act — MAPA Arbitrary and Capricious Standard: A Board of County Commissioners approved the construction of a bridge on the shore of Flathead Lake. The District Court reviewed the approval and found that it violated Title 75, ch. 7, part 2, commonly known as the Lakeshore Protection Act. On review, the Supreme Court considered the proper standard of review for addressing substantive arguments under the Lakeshore Protection Act and concluded that the District Court had correctly utilized the arbitrary and capricious standard in 2-4-704 of the Montana Administrative Procedure Act (MAPA). Community Ass'n for N. Shore Conserv., Inc. v. Flathead County, 2019 MT 147, 396 Mont. 194, 445 P.3d 1195.

Part Attorney General's Opinions

Visual Impact of Any Work on Natural Scenic Values — Consideration Required: Under Title 75, ch. 7, part 2, a local governing body is required to consider the visual impact that any work subject to permitting under 75-7-204 may have on natural scenic values where such values form the predominant landscape elements. 42 A.G. Op. 24 (1987).

Part Law Review Articles

Survey Analysis of Lakeshore Protection Act, Goetz, 38 Mont. L. Rev. 163 (1977).

75-7-201. Policy.

Case Notes

Standing Under Lakeshore Protection Act — Requirements for Associational Standing Satisfied: A Board of County Commissioners approved the construction of a bridge on the shore of Flathead Lake connecting the mainland to a privately owned island. An association was formed for the purpose of challenging the approval in District Court. On appeal, the Supreme Court considered the association's standing to sue. It found that an association has standing to bring suit on behalf of its members when at least one member would have standing to sue in his or her individual capacity, the interests the association seeks to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires the individual participation of each allegedly injured party. In this case, the Supreme Court found that the District Court correctly determined that the association had standing because the Legislature approved Title 75, ch. 7, part 2, commonly known as the Lakeshore Protection Act, for the benefit of Montana's residents and visitors who use and enjoy its lakes and specifically created a legal right for "interested persons" to sue. The members of the association were interested persons because they used and enjoyed Flathead Lake. The association was formed to protect Flathead Lake from development and degradation, so its purpose was germane to the interests it sought to protect. Further, neither the claim the association asserted nor the relief it requested required the individual participation of each allegedly injured party in the lawsuit, and the association's claims represented its members' united interest in asserting their rights as interested persons under the Act. Community Ass'n for N. Shore Conserv., Inc. v. Flathead County, 2019 MT 147, 396 Mont. 194, 445 P.3d 1195.

Attorney General's Opinions

Failure of Local Governing Body to Act — Authority of Department to Adopt Rules: Where a local governing body failed to adopt rules by January 1, 1976, governing the issuance or denial of permits for work in lakes, the Department of Natural Resources and Conservation had the power under 75-7-209 to adopt rules for the issuance or denial of such permits. Such an interpretation is consistent with other statutory schemes authorizing state agencies to act if the local governing body has not acted first. There was no exclusive reservation of power for the local governing body, and to hold otherwise would frustrate the purposes of the lakeshores protection law. 40 A.G. Op. 20 (1983).

75-7-204. Work for which permit required.

Attorney General's Opinions

Visual Impact of Any Work on Natural Scenic Values — Consideration Required: Under Title 75, ch. 7, part 2, a local governing body is required to consider the visual impact that any work subject to permitting under 75-7-204 may have on natural scenic values where such values form the predominant landscape elements. 42 A.G. Op. 24 (1987).

Regulation of Home Owner's Retaining Wall: A city council has authority under this section to regulate, control, and issue conditional permits for the construction and installation of a home owner's retaining wall, constructed for the purpose of preventing erosion to his land by the action of high water, and which is located within 20 horizontal feet of the mean annual high water elevation. 39 A.G. Op. 42 (1981).

75-7-205. Unauthorized work.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Order to Restore Lakeshore to Natural State — No Abuse of Discretion: A Board of County Commissioners approved the construction of a bridge on the shore of Flathead Lake connecting the mainland to a privately owned island. The District Court found that the approval was arbitrary and capricious because the Board failed to determine whether the bridge created a visual impact discordant with natural scenic values. The District Court ordered restoration of the lakeshore to its natural state. On review, the Supreme Court found that the District Court did not abuse its discretion because remand to the Board would have been futile, restoration appears to be a key component of Title 75, ch. 7, part 2, commonly known as the Lakeshore Protection Act, and the remedy of restoration is explicitly authorized in 75-7-205 and 75-7-215. Community Ass'n for N. Shore Conserv., Inc. v. Flathead County, 2019 MT 147, 396 Mont. 194, 445 P.3d 1195.

75-7-207. Regulations for issuance of permits.

Attorney General's Opinions

Failure of Local Governing Body to Act — Authority of Department to Adopt Rules: Where a local governing body failed to adopt rules by January 1, 1976, governing the issuance or denial of permits for work in lakes, the Department of Natural Resources and Conservation had the power under 75-7-209 to adopt rules for the issuance or denial of such permits. Such an interpretation is consistent with other statutory schemes authorizing state agencies to act if the local governing body has not acted first. There was no exclusive reservation of power for the local governing body, and to hold otherwise would frustrate the purposes of the lakeshores protection law. 40 A.G. Op. 20 (1983).

75-7-208. Factors favoring issuance of permit.

Case Notes

Failure to Consider Visual Impacts of Bridge — Approval Arbitrary and Capricious: A Board of County Commissioners approved the construction of a bridge on the shore of Flathead Lake connecting the mainland to a privately owned island. The District Court reviewed the approval and found that the Board's failure to determine whether the bridge created a visual impact discordant with natural scenic values, where those values form the predominant landscape elements, violated Title 75, ch. 7, part 2, commonly known as the Lakeshore Protection Act and the approval was therefore arbitrary and capricious. On review, the Supreme Court affirmed. Community Ass'n for N. Shore Conserv., Inc. v. Flathead County, 2019 MT 147, 396 Mont. 194, 445 P.3d 1195.

Attorney General's Opinions

Visual Impact of Any Work on Natural Scenic Values — Consideration Required: Under Title 75, ch. 7, part 2, a local governing body is required to consider the visual impact that any work subject to permitting under 75-7-204 may have on natural scenic values where such values form the predominant landscape elements. 42 A.G. Op. 24 (1987).

75-7-209. Regulations for particular lake.

Attorney General's Opinions

Failure of Local Governing Body to Act — Authority of Department to Adopt Rules: Where a local governing body failed to adopt rules by January 1, 1976, governing the issuance or denial of permits for work in lakes, the Department of Natural Resources and Conservation had the power under this section to adopt rules for the issuance or denial of such permits. Such an interpretation is consistent with other statutory schemes authorizing state agencies to act if the local governing body has not acted first. There was no exclusive reservation of power for the local governing body, and to hold otherwise would frustrate the purposes of the lakeshores protection law. 40 A.G. Op. 20 (1983).

75-7-210. Application for permit — fee.

Compiler's Comments

2001 Amendment: Chapter 40 in (2) in second sentence substituted "permit fee must be commensurate with" for "permit fee must reasonably address"; deleted former (2)(b) that read: "(b) The fees established in this subsection may not exceed the following limits:

(i) $25 for residential permits not requiring a variance from the local governing authority;

(ii) $60 for residential permits requiring a variance from the local governing authority;

(iii) $60 for commercial permits not requiring a variance from the local governing authority; and

(iv) $150 for commercial permits requiring a variance from the local governing authority"; and made minor changes in style. Amendment effective July 1, 2001.

Preamble: The preamble attached to Ch. 40, L. 2001, provided: "WHEREAS, the revenue from the maximum local lakeshore protection fees established in Montana law is substantially less than the cost of administering the lakeshore protection laws; and

WHEREAS, the lakeshore protection laws impose a significantly underfunded mandate on local governments."

1991 Amendment: In (1), after "lake", inserted "or on a lakeshore" and after "pay" substituted "a permit fee established by the governing body under subsection (2)" for "an application fee of $10 to the governing body"; and inserted (2) authorizing establishment of a permit fee and setting limits on the fee.

75-7-212. Issuance of permit.

Attorney General's Opinions

Regulation of Home Owner's Retaining Wall: A city council has authority under 75-7-204 to regulate, control, and issue conditional permits for the construction and installation of a home owner's retaining wall, constructed for the purpose of preventing erosion to his land by the action of high water, and which is located within 20 horizontal feet of the mean annual high water elevation. 39 A.G. Op. 42 (1981).

75-7-215. Judicial enforcement and review.

Case Notes

Order to Restore Lakeshore to Natural State — No Abuse of Discretion: A Board of County Commissioners approved the construction of a bridge on the shore of Flathead Lake connecting the mainland to a privately owned island. The District Court found that the approval was arbitrary and capricious because the Board failed to determine whether the bridge created a visual impact discordant with natural scenic values. The District Court ordered restoration of the lakeshore to its natural state. On review, the Supreme Court found that the District Court did not abuse its discretion because remand to the Board would have been futile, restoration appears to be a key component of Title 75, ch. 7, part 2, commonly known as the Lakeshore Protection Act, and the remedy of restoration is explicitly authorized in 75-7-205 and 75-7-215. Community Ass'n for N. Shore Conserv., Inc. v. Flathead County, 2019 MT 147, 396 Mont. 194, 445 P.3d 1195.

Standing Under Lakeshore Protection Act — Requirements for Associational Standing Satisfied: A Board of County Commissioners approved the construction of a bridge on the shore of Flathead Lake connecting the mainland to a privately owned island. An association was formed for the purpose of challenging the approval in District Court. On appeal, the Supreme Court considered the association's standing to sue. It found that an association has standing to bring suit on behalf of its members when at least one member would have standing to sue in his or her individual capacity, the interests the association seeks to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires the individual participation of each allegedly injured party. In this case, the Supreme Court found that the District Court correctly determined that the association had standing because the Legislature approved Title 75, ch. 7, part 2, commonly known as the Lakeshore Protection Act, for the benefit of Montana's residents and visitors who use and enjoy its lakes and specifically created a legal right for "interested persons" to sue. The members of the association were interested persons because they used and enjoyed Flathead Lake. The association was formed to protect Flathead Lake from development and degradation, so its purpose was germane to the interests it sought to protect. Further, neither the claim the association asserted nor the relief it requested required the individual participation of each allegedly injured party in the lawsuit, and the association's claims represented its members' united interest in asserting their rights as interested persons under the Act. Community Ass'n for N. Shore Conserv., Inc. v. Flathead County, 2019 MT 147, 396 Mont. 194, 445 P.3d 1195.

75-7-216. Penalty.

Compiler's Comments

1987 Amendment: In (2), after "section", inserted "except those collected in a justice's court".

Part 4
Phosphorus Compounds — Model Rule

Part Compiler's Comments

Preamble and Statement of Intent: The preamble to Ch. 574, L. 1985, provided: "WHEREAS, Montana's outstanding environmental and economic values depend on maintaining excellent water quality; and

WHEREAS, phosphorus is a nutrient that stimulates the growth of algae and contributes to a decline in water quality in certain lakes and rivers; and

WHEREAS, substantial amounts of phosphorus enter Montana's aquatic ecosystems as a result of the use of detergents; and

WHEREAS, many studies have shown that regional restrictions on the use of nonessential detergent phosphorus compounds have protected and enhanced water quality; and

WHEREAS, the Department of Health and Environmental Sciences [now Department of Environmental Quality] has determined that excessive amounts of culturally derived phosphorus are jeopardizing water quality in some of Montana's most outstanding waters; and

WHEREAS, the Department of Health and Environmental Sciences [now Department of Environmental Quality] has the expertise to develop a model rule to effectively limit the amount of detergent phosphorus compounds that will enter state waters; and

WHEREAS, a limitation on the sale and distribution of certain detergent phosphorus compounds may best be enacted to meet local needs and circumstances; and

WHEREAS, such a limitation will not cause additional costs or burdens to consumers and retailers.

THEREFORE, the Legislature finds it appropriate to allow county governments to protect and enhance water quality by prohibiting the sale and distribution of certain nonessential detergent phosphorus compounds, following the technical standards established by the Department of Health and Environmental Sciences [now Department of Environmental Quality]."

The statement of intent attached to Ch. 574, L. 1985, provided: "(1) It is the intent of the legislature that the department of health and environmental sciences [now department of environmental quality] adopt a model rule with standards that may be adopted and enforced by a governing body of a county to prohibit the sale and distribution of certain phosphorus compounds used for cleaning purposes. The standards in the model rule must be designed to protect water quality and aquatic ecosystems by reducing the amount of phosphorus that enters state waters. In adopting the initial model rule, the department shall demonstrate strong consideration of the following provisions:

(a) Definitions:

(i) "Chemical water conditioner" means a water-softening chemical or other substance containing phosphorus intended to treat water for machine laundry use.

(ii) "Commercial establishment" means any premises used for the purpose of carrying on or exercising any trade, business, profession, vocation, or commercial or charitable activity, including but not limited to laundries, hospitals, hotels, motels, and food or restaurant establishments.

(iii) "Household cleaning product" means any product, including but not limited to soaps and detergents, used for domestic or commercial cleaning purposes, including but not limited to the cleaning of fabrics, dishes, food utensils, and household and commercial premises. Household cleaning product does not mean foods, drugs, cosmetics, or personal care items such as toothpaste, shampoo, or hand soap.

(iv) "Person" means any individual, proprietor of a commercial establishment, corporation, municipality, the state or any department, agency, or subdivision of the state, and any partnership, unincorporated association, or other legal entity.

(v) "Phosphorus" means elemental phosphorus.

(vi) "Trace quantity" means an incidental amount of phosphorus which is not part of the household cleaning product formulation, is present only as a consequence of manufacturing, and does not exceed 0.5% of the content of the product by weight expressed as elemental phosphorus.

(b) Prohibitions and exceptions:

(i) Except as provided in (1)(b)(ii) through (1)(b)(iv), no household cleaning product may be distributed, sold, offered, or exposed for sale if it contains a phosphorus compound in concentrations in excess of a trace quantity.

(ii) No dishwashing detergent may be distributed, sold, offered, or exposed for sale if it contains a phosphorus compound in excess of 8.7% by weight expressed as elemental phosphorus.

(iii) No chemical water conditioner which contains more than 20% phosphorus by weight may be distributed, sold, offered, or exposed for sale.

(iv) Cleaning agents used for industrial processes, cleaning food and beverage processing equipment, cleaning medical or surgical equipment, or cleaning dairy equipment are exempt from the provisions of this rule.

(2) It is the intent of the legislature that an ordinance with standards designated by the model rule may be adopted at the option of a county government and, if adopted, must be enforced by the county government. Any ordinance applies only in a county that has adopted it through proper procedures. The department of health and environmental sciences [now department of environmental quality] may not enforce any standards or provisions of the model rule.

(3) It is the intent of the legislature that standards in the model rule may not include standards that would adversely affect public health through the restriction of any cleaning agent necessary for food and beverage processing or for health care services or facilities and may not include standards that would restrict the use of detergents or other phosphorus compounds necessary for agricultural operations or industrial processes."

75-7-401. Adoption and amendment of model rule on sale and distribution of certain phosphorus compounds.

Compiler's Comments

1995 Amendment: Chapter 418 near beginning of (1) substituted "department of environmental quality" for "department of health and environmental sciences". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Administrative Rules

Title 17, chapter 30, subchapter 3, ARM Prohibited compounds (phosphorus).

75-7-411. County regulation of sale and distribution of certain phosphorus compounds.

Compiler's Comments

2009 Amendment: Chapter 245 inserted (5) providing that this part does not apply to counties where the sale of phosphorus-containing household cleaning products is banned. Amendment effective July 1, 2010.

1995 Amendment: Chapter 418 in (2)(a) and (3) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

CHAPTER 8
COAL-FIRED GENERATING UNIT REMEDIATION

Part 1
Coal-Fired Generating Unit Remediation Act

Part Compiler's Comments

Effective Date: Section 17, Ch. 320, L. 2017, provided that this part is effective on passage and approval." Approved May 4, 2017.

Retroactive Applicability: Section 18, Ch. 320, L. 2017, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to a coal-fired generating unit retired on or after January 1, 2017."

Saving Clause: Section 15, Ch. 320, L. 2017, was a saving clause.

Severability: Section 16, Ch. 320, L. 2017, was a severability clause.

75-8-103. Definitions.

Compiler's Comments

2021 Amendment: Chapter 441 in definition of applicable legal obligations inserted (b) regarding compliance with 75-8-110; and made minor changes in style. Amendment effective May 10, 2021.

Applicability: Section 6, Ch. 441, L. 2021, provided: "[This act] applies to remediation plans filed on or after [the effective date of this act]." Effective May 10, 2021.

Severability: Section 4, Ch. 441, L. 2021, was a severability clause.

75-8-107. Degree of cleanup required — labor requirements.

Compiler's Comments

2019 Amendment: Chapter 262 in (1) near beginning inserted "demonstrate that it will meet the requirements of subsection (2) and"; inserted (2) requiring owners to use contractors that use a skilled and trained workforce to perform remediation; inserted (2)(a) and (2)(b) regarding prevailing wages for remediation and prevailing wages for apprentices performing remediation; and made minor changes in style. Amendment effective May 2, 2019.

Applicability: Section 3, Ch. 262, L. 2019, provided: "[This act] applies to remediation that occurs on or after [the effective date of this act]." Effective May 2, 2019.

75-8-110. Water feasibility study.

Compiler's Comments

Effective Date: Section 5, Ch. 441, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 10, 2021.

Applicability: Section 6, Ch. 441, L. 2021, provided: "[This act] applies to remediation plans filed on or after [the effective date of this act]." Effective May 10, 2021.

Severability: Section 4, Ch. 441, L. 2021, was a severability clause.

CHAPTER 10
WASTE AND LITTER CONTROL

Chapter Administrative Rules

Title 17, chapter 50, ARM Solid waste management.

Title 17, chapter 53, ARM Hazardous waste.

Chapter Collateral References

Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq.

Part 1
Plans, Funds, and Administration

Part Compiler's Comments

Section Not Codified: Section 69-4011, R.C.M. 1947, a short title section, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 575, L. 1977.

75-10-101. Purpose.

Compiler's Comments

2009 Amendment: Chapter 2 near end after "waste" inserted "management"; and made minor changes in style. Amendment effective October 1, 2009.

75-10-102. Public policies.

Compiler's Comments

2009 Amendment: Chapter 2 in (1)(h) at end after "waste" inserted "management and resource recovery"; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendments: Chapter 215 inserted (1)(i) requiring Department to consult with local governments when licensing solid waste management systems.

Chapter 643 inserted (1)(e) providing that management and regulation of solid waste management systems costs be charged to persons generating waste to encourage reduction of solid waste stream. Amendment effective July 1, 1991.

Retroactive Applicability: Section 10, Ch. 643, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all applications provided for in 75-10-221 received after January 1, 1990."

75-10-103. Definitions.

Compiler's Comments

2009 Amendment: Chapter 2 in (9) revised defined term by substituting "state solid waste management and resource recovery plan" for "state solid waste plan". Amendment effective October 1, 2009.

2003 Amendment: Chapter 405 deleted definition of front-end implementation funds that read: ""Front-end implementation funds" means the money granted to local governments for purchase of capital equipment to be used for a solid waste management system"; deleted definition of front-end organizational funds that read: ""Front-end organizational funds" means the money to be loaned to local governments for initial operating capital, site evaluation and negotiation, final design engineering and cost estimates, construction contract documents, final contract negotiations with energy users, material markets, and waste suppliers, contract negotiations with private operational managers, and financial and legal consultations"; deleted definition of front-end planning funds that read: ""Front-end planning funds" means the money granted to local governments for contract negotiations between local governments, predesign engineering and cost estimates, administrative costs, preliminary contract negotiations with energy users and waste suppliers, financial feasibility analysis by a financial consultant, legal consultations, opinions, and review of contracts"; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 7 in definition of local government substituted "solid waste management district" for "refuse disposal district". Amendment effective October 1, 2001.

1999 Amendment: Chapter 294 in definition of container site deleted (b)(i) that read: "(i) is located in a fifth-, sixth-, or seventh-class county, as defined in 7-1-2111"; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 2, Ch. 294, L. 1999, was a saving clause.

1997 Amendment: Chapter 372 in definition of container site inserted (b) establishing criteria for a site that receives waste from waste collection vehicles; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendments — Composite Section: Chapter 418 in definition of Board substituted "board of environmental review provided for in 2-15-3502" for "board of health and environmental sciences provided for in 2-15-2104"; in definition of Department substituted "department of environmental quality provided for in 2-15-3501" for "department of health and environmental sciences provided for in Title 2, chapter 15, part 21"; in definition of solid waste, in (b), with regard to reclamation, substituted "department of environmental quality" for "department of state lands" and, with regard to slash and forest debris, substituted "department of natural resources and conservation" for "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 deleted definition of Board that read: ""Board" means the board of health and environmental sciences provided for in 2-15-2104"; pursuant to sec. 568, Ch. 546, L. 1995, a coordination section, in definition of Department the Code Commissioner substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Because Ch. 418 inserted a reference to the Board of Environmental Review and Ch. 546 deleted a reference to the Board of Health and Environmental Sciences, the codifier has reflected both the insertion and the deletion.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 201 inserted definition of container site; and in definition of solid waste management system inserted last sentence regarding container sites. Amendment effective July 1, 1993.

1991 Amendment: In definition of solid waste, in first sentence after "refuse", deleted "hazardous wastes", after "facilities" deleted "septic tank and cesspool pumpings", after "wood" substituted "products or wood byproducts" for "wastes", and at end of second sentence inserted reference to slash and forest debris or marketable byproducts; and made minor changes in style.

1981 Amendment: Deleted "state" after "means the" at the beginning of (3) and (4); inserted (5) defining front-end implementation funds.

Saving Clause: Section 6, Ch. 482, L. 1981, was a saving clause.

Severability: Section 7, Ch. 482, L. 1981, was a severability clause.

Attorney General's Opinions

Refuse District Not Special Taxing District or Political Subdivision: Under the rationale of 17-5-1604 and 42 A.G. Op. 80 (1988), a refuse disposal district (now solid waste management district) has no independent governing body and therefore does not fall within the definition of "special taxing district". Further, under the rationale of 43 A.G. Op. 56 (1990), because a refuse board is not a separate and independent body and has not been delegated supervisory authority over a refuse disposal district, a refuse disposal district cannot be considered a political subdivision, as that term is used in 17-5-1604. 43 A.G. Op. 68 (1990).

75-10-104. Duties of department.

Compiler's Comments

2021 Amendment: Chapter 324 in (2) in introductory clause at beginning substituted "adopt" for "prepare" and in middle after "part" deleted "for submission to the board"; inserted (2)(b)(ii) concerning rules providing fees for solid waste management systems; and made minor changes in style. Amendment effective July 1, 2021.

2007 Amendment: Chapter 54 in (1) at beginning after "prepare" inserted "adopt, and implement", after "by" inserted "75-10-111 and", and at end deleted "for submission to the board"; deleted former (2)(g) that read: "(g) providing guidelines for integrated waste management"; and made minor changes in style. Amendment effective October 1, 2007.

2003 Amendment: Chapter 405 deleted former (2)(b) and (2)(c) that read: "(b) governing procedures to be followed in applying for and making loans;

(c) governing agreements between a local government and the department for grants or loans under this part"; deleted former (3) that read: "(3) provide financial assistance to local governments for front-end planning activities for a proposed solid waste management system that is compatible with the state plan whenever financial assistance is available"; in (3)(c) before "small" deleted "conditionally exempt" and substituted "that are exempt from regulation under Title 75, chapter 10, part 4" for "as defined in ARM 16.44.402"; deleted former (5) that read: "(5) provide front-end organizational loans for the implementation of an approved solid waste management system whenever funds for loans are available"; deleted former (7) that read: "(7) administer loans made by the state under the provisions of this part"; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 170 in (2)(d) inserted "tonnage or volume-based" and substituted "75-10-115(1)(c)" for "75-10-118"; inserted (2)(e), (2)(f), and (2)(g) requiring adoption of rules establishing the license application fee that facility is subject to under 75-10-115(1)(a), the flat annual license renewal fee that a facility is subject to under 75-10-115(1)(b), and the tonnage or volume-based annual renewal fee that a facility is subject to under 75-10-115(1)(c); in (2)(h) substituted "75-10-204(6)" for "75-10-118"; and made minor changes in style. Amendment effective March 30, 2001.

1993 Amendment: Chapter 145 in (2)(d) and (2)(e) inserted reference to 75-10-115; and made minor changes in style. Amendment effective July 1, 1993.

Code Commissioner Note: The version of this section effective July 1, 1995, in (2)(d) and (2)(e) substituted "75-10-118" for "75-10-115". The Code Commissioner has not reflected this change because it would be redundant with the amendment made by Ch. 145.

1993 Statement of Intent: The statement of intent attached to Ch. 145, L. 1993, provided: "A statement of intent is desirable for this bill in order to coordinate certain provisions of existing law with Chapter 398, Laws of 1991. Chapter 398 provided a delayed effective date, and when its provisions become effective on July 1, 1993, certain provisions of law will be amended. The purpose of this bill is to reinstate certain provisions of law that will be deleted when Chapter 398 becomes effective.

It is the intent of the legislature that [sections 1, 2, 4, and 5] [75-10-104, 75-10-105, 75-10-116, and 75-10-117] of this bill maintain the existing authority of the department of health and environmental sciences [now department of environmental quality] rather than add new authority.

It is also the purpose of this bill to repeal a section of The Montana Solid Waste Management Act that was not included in Chapter 398. Chapter 398 repealed 75-10-110, effective July 1, 1993. [Section 6] of this bill repeals 75-10-218, a section of The Montana Solid Waste Management Act that is subordinate to 75-10-110."

Extension of Effective Date: The July 1, 1993, effective date in sec. 8, Ch. 398, L. 1991, was extended to July 1, 1995, by sec. 1, Ch. 273, L. 1993. The effective date of the extension in sec. 1, Ch. 273, L. 1993, was October 1, 1993. Technically, the July 1, 1993, version of this section is in effect for the period from July 1, 1993, until October 1, 1993. The Code Commissioner has not codified the temporary version because the apparent legislative intent was to not have that version effective.

1991 Amendments: Chapter 222 in (1), near beginning after "plan", inserted "as required by 75-10-807"; inserted (2)(f) requiring rules providing guidelines for integrated waste management; inserted (4)(b) requiring Department to provide technical assistance for integrated waste management programs; inserted (4)(c) requiring that technical assistance be provided regarding certain hazardous waste collection, disposal, reduction, and educational programs; inserted (9) requiring Department to serve as an information clearinghouse; and made minor changes in style.

Chapter 398 in (2)(d) and (2)(e) substituted "75-10-118" for "75-10-115"; deleted former (2)(f) requiring preparation of rules providing guidelines for waiver of fees for certain incineration or disposal of solid waste; and made minor changes in style. Amendment effective July 1, 1993.

Chapter 643 deleted (2)(f) requiring preparation of rules providing guidelines for waiver of fees for certain incineration or disposal of solid waste; and made minor changes in style. Amendment effective July 1, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 222, L. 1991, provided: "A statement of intent is required for this bill because the department of health and environmental sciences [now department of environmental quality] will need to promulgate rules in order to implement this bill. It is the intent of the legislature that these regulations reflect an emphasis on integrated waste management and achieving the 25% waste reduction goal by 1996. In addition, the regulations must be designed to protect the public health, safety, and welfare and the environment. It is also the intent of the legislature that state government assume a leadership role in the development and implementation of source reduction and recycling programs and in the establishment of markets for the purchase and use of recyclable materials."

Preamble: The preamble attached to Ch. 398, L. 1991, provided: "WHEREAS, the State of Montana presently is faced with proposals to import out-of-state waste for disposal in Montana; and

WHEREAS, [LC 798] [Ch. 643, L. 1991] would enact a tipping fee on disposal of solid waste generated within Montana to fund the development of an adequate solid waste regulatory program; and

WHEREAS, the citizens of Montana should not have to subsidize the regulation of solid waste that originates in other states."

Retroactive Applicability: Section 10, Ch. 643, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all applications provided for in 75-10-221 received after January 1, 1990."

1989 Amendment: At end of (2)(a) and (2)(b) deleted reference to rules; inserted (2)(d), (2)(e), and (2)(f) requiring the Department to adopt rules establishing methods for determining how much solid waste is incinerated or disposed of at a facility, providing procedures for quarterly collection of the fee, and providing guidelines for waiver of fees for certain incinerations and disposals; and made minor changes in style. Amendment effective May 22, 1989.

Severability: Section 15, Ch. 696, L. 1989, was a severability clause.

75-10-105. Powers of department.

Compiler's Comments

2003 Amendment: Chapter 405 deleted former (2) and (3) that read: "(2) make loans to a local government for the planning, design, and implementation of a solid waste management system;

(3) make grants for a local government for planning or implementation of a solid waste management system"; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 170 in (4) substituted "fees provided for in 75-10-115" for "fee provided for in 75-10-118". Amendment effective March 30, 2001.

1993 Amendment: Chapter 145 in (4) inserted reference to 75-10-115; and made minor changes in style. Amendment effective July 1, 1993.

Code Commissioner Note: The version of this section effective July 1, 1995, in (4) substituted "75-10-118" for "75-10-115". The Code Commissioner has not reflected this change because it would be redundant with the amendment made by Ch. 145.

1993 Statement of Intent: The statement of intent attached to Ch. 145, L. 1993, provided: "A statement of intent is desirable for this bill in order to coordinate certain provisions of existing law with Chapter 398, Laws of 1991. Chapter 398 provided a delayed effective date, and when its provisions become effective on July 1, 1993, certain provisions of law will be amended. The purpose of this bill is to reinstate certain provisions of law that will be deleted when Chapter 398 becomes effective.

It is the intent of the legislature that [sections 1, 2, 4, and 5] [75-10-104, 75-10-105, 75-10-116, and 75-10-117] of this bill maintain the existing authority of the department of health and environmental sciences [now department of environmental quality] rather than add new authority.

It is also the purpose of this bill to repeal a section of The Montana Solid Waste Management Act that was not included in Chapter 398. Chapter 398 repealed 75-10-110, effective July 1, 1993. [Section 6] of this bill repeals 75-10-218, a section of The Montana Solid Waste Management Act that is subordinate to 75-10-110."

Extension of Effective Date: The July 1, 1993, effective date in sec. 8, Ch. 398, L. 1991, was extended to July 1, 1995, by sec. 1, Ch. 273, L. 1993. The effective date of the extension in sec. 1, Ch. 273, L. 1993, was October 1, 1993. Technically, the July 1, 1993, version of this section is in effect for the period from July 1, 1993, until October 1, 1993. The Code Commissioner has not codified the temporary version because the apparent legislative intent was to not have that version effective.

1991 Amendment: At end of (4) substituted "75-10-118" for "75-10-115". Amendment effective July 1, 1993.

Preamble: The preamble attached to Ch. 398, L. 1991, provided: "WHEREAS, the State of Montana presently is faced with proposals to import out-of-state waste for disposal in Montana; and

WHEREAS, [LC 798] [Ch. 643, L. 1991] would enact a tipping fee on disposal of solid waste generated within Montana to fund the development of an adequate solid waste regulatory program; and

WHEREAS, the citizens of Montana should not have to subsidize the regulation of solid waste that originates in other states."

1989 Amendment: Inserted (4) allowing the Department to collect fees. Amendment effective May 22, 1989.

Severability: Section 15, Ch. 696, L. 1989, was a severability clause.

1981 Amendment: Added (3) authorizing the Department to make grants for a local government for planning or implementation of a solid waste management system.

Saving Clause: Section 6, Ch. 482, L. 1981, was a saving clause.

Severability: Section 7, Ch. 482, L. 1981, was a severability clause.

75-10-107. State regulations no more stringent than federal regulations or guidelines.

Compiler's Comments

Preamble: The preamble attached to Ch. 471, L. 1995, provided: "WHEREAS, the federal government frequently regulates areas that are also subject to state regulation; and

WHEREAS, differing state and federal policy goals and unique state prerogatives frequently result in different levels of regulation, different standards, and different requirements being imposed by state and federal programs covering the same subject matter; and

WHEREAS, Montana must simultaneously move toward reducing redundant and unnecessary regulation that dulls the state's competitive advantage while being ever vigilant in the protection of the public's health, safety, and welfare; and

WHEREAS, Montana's administrative agencies should consider applicable federal standards when adopting, readopting, or amending rules with analogous federal counterparts; and

WHEREAS, Montana's administrative agencies should analyze whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana's citizens; and

WHEREAS, as part of the formal rulemaking process, the public should be advised of the agencies' conclusions about whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana citizens."

1995 Statement of Intent: The statement of intent attached to Ch. 471, L. 1995, provided: "A statement of intent is required for this bill in order to provide guidance to the board of health and environmental sciences [now board of environmental review], the department of health and environmental sciences [now department of environmental quality], and local units of government in complying with [this act].

The legislature intends that in addition to all requirements imposed by existing law and rules, the board or the department include as part of the initial publication and all subsequent publications of a rule a written finding if the rule in question contains any standards or requirements that exceed the standards or requirements imposed by comparable federal law.

If the rules are more stringent than comparable federal law, the written finding must include but is not limited to a discussion of the policy reasons and an analysis that supports the board's or department's decision that the proposed state standards or requirements protect public health or the environment of the state and that the state standards or requirements to be imposed can mitigate harm to the public health or the environment and are achievable under current technology. The department is not required to show that the federal regulation is inadequate to protect public health. The written finding must also include information from the hearing record regarding the costs to the regulated community directly attributable to the proposed state standard or requirement."

Effective Date: Section 23, Ch. 471, L. 1995, provided that this section is effective on passage and approval. Approved April 14, 1995.

Applicability: Section 22(1) and (3), Ch. 471, L. 1995, provided: "(1) [Sections 1 through 3] are intended to apply to any rule that is in effect, adopted, or amended, and that regulates those resources or activities for which the state has been given primary authority to regulate by federal authority pursuant to Title 75, chapter 2; Title 75, chapter 3 [renumbered, except for part 6, as Title 50, chapter 79]; Title 75, chapter 5; Title 75, chapter 6; or Title 75, chapter 10, as of [the effective date of this act] [April 14, 1995].

(3) [This act] does not apply to the establishment of fees or public participation requirements."

75-10-111. State solid waste management and resource recovery plan — hearings.

Compiler's Comments

2021 Amendment: See 2021 Session Law for amendment made by sec. 101, Ch. 261, L. 2021. Amendment effective April 20, 2021.

2007 Amendment: Chapter 54 in first sentence at beginning substituted "The department shall adopt the" for "A proposed", after "management" inserted "and resource recovery", and after "plan" substituted "required in 75-10-104 and 75-10-807 according to the rulemaking procedures of the Montana Administrative Procedure Act under Title 2, chapter 4, part 3" for "shall be prepared by the department", at beginning of second sentence inserted "The department shall prepare the plan" and after "state" substituted "citizens, solid waste and recycling industries, environmental organizations, and others involved or interested in the management of solid waste" for "and any other interested person", at beginning of third sentence substituted "Within 3 days after the notice of proposed rulemaking to adopt the plan is published pursuant to Title 2, chapter 4, part 3" for "After a draft of a proposed solid waste management plan has been prepared", after "shall" substituted "mail" for "circulate", after "copy of the" inserted "notice and the", and at end after "person" deleted "for at least 90 days prior to submission of a final proposed solid waste management plan to the board", and in fourth sentence at beginning after "During the" deleted "90-day", after "comments on the" substituted "proposed rulemaking concerning the" for "draft", and at end after "least" substituted "one public hearing" for "three public hearings around the state on the draft plan"; deleted former (2) that read: "(2) A final proposed plan shall be prepared based on the comments and objections received at the public hearings and from the persons who have submitted comments on the draft solid waste management plan. The final plan submitted to the board shall include a discussion of all comments and objections received and the reasons why recommendations for changes or amendments to the proposed plan were accepted or rejected. The board shall consider the final proposed solid waste management plan after giving notice and holding at least one public hearing pursuant to the rulemaking procedures outlined in the Montana Administrative Procedure Act"; and made minor changes in style. Amendment effective October 1, 2007.

75-10-112. Powers and duties of local government.

Compiler's Comments

2021 Amendment: Chapter 324 in (2) near beginning after "adoption of the state plan" deleted "by the board". Amendment effective July 1, 2021.

2019 Amendment: Chapter 187 inserted (10)(b) concerning the fixing and collecting by ordinance or resolution of rates, rentals, and charges; and made minor changes in style. Amendment effective April 18, 2019.

2011 Amendment: Chapter 196 in (16) inserted exception clause; and made minor changes in style. Amendment effective April 15, 2011.

2009 Amendment: Chapter 2 in (1) in two places after "waste" inserted "management and resource recovery". Amendment effective October 1, 2009.

1999 Amendment: Chapter 584 in (10) inserted reference to 15-10-420. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1993 Amendments: Chapter 145 in (11) and (13), at end after "rules", inserted "adopted to implement this part"; in (18), near end, substituted "solid waste management" for "refuse disposal"; and made minor changes in style. Amendment effective July 1, 1993.

Chapter 201 inserted (20) regarding container sites. Amendment effective July 1, 1993.

Case Notes

County Commission's Approval Power — Solid Waste — Withdrawal of Approval: A county refuse board contracted with an individual to operate a sanitary landfill. Difficulties arose from the failure of the operator to obtain an operator's license. The County Commissioners sued the operator and prevailed. On appeal, the operator questioned the power of the County Commission to withdraw its contract approval and thereby direct the refuse board to terminate the contract. The Supreme Court held that when a Board of County Commissioners was given an express power of approval, such power was to be complemented by the implied power to withhold approval upon a showing of adequate cause. A logical extension of an implied power to withhold approval was an implied power to withdraw approval. Here, the contract required the operator to satisfy state licensing requirements. The refuse board failed to enforce the provision and allowed the landfill to be operated in violation of law. The Department of Health (now Department of Environmental Quality) began refusing to approve subdivisions in the area, exposing the County Commissioners to possible liability. The withdrawal of approval of the defendant's contract was an obvious necessity supported by adequate cause and should be considered proper under the circumstances, which virtually eliminated the propriety of the approval. Ryan v. Bd. of County Comm'rs, 190 M 273, 620 P2d 1203, 37 St. Rep. 1965 (1980).

Landfill Operator to Be Licensed: The appellant had contracted with the refuse board of his county to operate a sanitary landfill. The trial court found that the appellant was required by his contract to obtain a license to operate the landfill. The Supreme Court on review said that when read together, it is apparent that under 75-10-203 and 75-10-221, the County Commissioners, the refuse board, or the appellant could be proper applicants for the landfill license. Finding no exemption from the obligation to seek the required license, it was a question of the parties' contract requirements. The Supreme Court declined to find that 75-10-112 requires all local governments to obtain the requisite license for operation of a disposal site when the operations by contract are to be performed by another individual. Citing 28-3-301 and 28-3-303 and noting that the language in the contract here was clear and unambiguous, the Supreme Court found its duty to enforce the contract as made. The license requirement imposed by 75-1-221 was clearly applicable to the operation of the disposal site. Therefore, the appellant was required by the terms of the contract to obtain the operator's license. Ryan v. Bd. of County Comm'rs, 190 M 273, 620 P2d 1203, 37 St. Rep. 1965 (1980).

75-10-115. Solid waste management fee.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) near beginning of first sentence after "may" substituted "adopt rules, pursuant to 75-10-104" for "prepare rules for adoption by the board, pursuant to 75-10-104 and 75-10-106" and near beginning of second sentence after "adoption" deleted "by the board". Amendment effective July 1, 2021.

2013 Amendment: Chapter 229 in (1)(a) after "facility" inserted "from the time an application is made until the license is issued or denied"; in (1)(b) inserted second sentence regarding initial fee year; and made minor changes in style. Amendment effective April 19, 2013.

Applicability: Section 3, Ch. 229, L. 2013, provided: "[This act] applies to fees collected after [the effective date of this act]." Effective April 19, 2013.

2001 Amendment: Chapter 170 in (1) in first sentence after "may" substituted "prepare rules for adoption by the board, pursuant to 75-10-104 and 75-10-106, that set" for "establish and collect" and after "waste" substituted "at facilities subject to regulation pursuant to part 2 of this chapter" for "disposal" and inserted second sentence authorizing department to collect fees upon board's adoption of rules; at beginning of (1)(b) substituted "a flat annual license renewal fee" for "an annual license renewal fee" and at end substituted language basing fee on categorization of solid waste management systems into separate classes by three outlined criteria for former language that read: "based upon the following formula:

(i) for a major facility with a planned capacity of more than 25,000 tons of solid waste a year, $3,500;

(ii) for an intermediate facility with a planned capacity of more than 5,000 tons a year but not more than 25,000 tons a year, $3,000;

(iii) for a minor facility with a planned capacity of not more than 5,000 tons a year, $2,500"; and in (1)(c) inserted "tonnage or". Amendment effective March 30, 2001.

1991 Amendment: Substituted (1) authorizing Department to establish and collect fees for solid waste disposal management and regulation and providing guidelines for fees for former (1) and (2) requiring that, with exceptions, any person who owns an incinerator burning more than 1,000 tons of solid waste a year or a facility licensed pursuant to 75-10-221 and that disposes of more than 1,000 tons of waste a year shall pay quarterly a $1 fee per ton of waste generated in different region and disposed of at facility and requiring waiver of fee upon finding that disposal is consistent with state solid waste management goals and is equal to or improves protection when compared to intraregional incineration or disposal; and deleted (3) that read: "(3) The incineration or disposal of solid waste at a licensed facility in the manner and quantity incinerated or disposed of before May 22, 1989, is exempt from the solid waste management fee". Amendment effective July 1, 1991.

Retroactive Applicability: Section 10, Ch. 643, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all applications provided for in 75-10-221 received after January 1, 1990."

1989 Statement of Intent: The statement of intent attached to Ch. 696, L. 1989, provided: "It is the intent of the legislature that the department of health and environmental sciences [now department of environmental quality] adopt rules establishing procedures for the determination and collection of the solid waste management fee provided for in [section 1] [75-10-115] and for the waiver of the fee when consistent with the criteria provided in [section 1(2)] [75-10-115(2)]. It is the intent of the legislature that the department be able to use this fee to bolster its solid waste management program in a manner, including the hiring of adequate staff, that will:

(1) protect the public health, welfare, and safety and the environment of Montana;

(2) provide assistance to local governments in meeting the pending federal solid waste management requirements;

(3) develop an effective and coordinated regional approach to solid waste management in Montana; and

(4) ensure a state and local capability to effectively manage the importation of solid waste into Montana for disposal purposes.

It is the intent of the legislature that the department of health and environmental sciences [now department of environmental quality] waive the fee for interregional solid waste incineration or disposal in situations where the incineration or disposal is consistent with state solid waste management goals and results in equivalent or improved protection of Montana's public health, safety, welfare, and environment when compared to the alternative of intraregional incineration or disposal. The incineration or disposal of solid waste at a licensed facility in the manner and quantity incinerated or disposed of before [the effective date of this act] [May 22, 1989] is exempt from the solid waste management fee and from the requirement for local government approval under [section 6] [75-10-218, now repealed].

It is the intent of the legislature that the department of health and environmental sciences [now department of environmental quality] not issue an air quality permit for any new commercial incinerator of solid waste and not authorize any existing incinerator to change the amount, form, kind, or content of the material it incinerates or to incinerate any material that would change the nature, character, or composition of the emissions until the department and the public have necessary information to understand the composition and concentrations of the emissions and until the emissions and projected ambient concentrations are known to constitute a negligible risk to the public health, safety, and welfare and to the environment. For a permitted solid waste incinerator, the department shall consider an increase in the amount of medical waste incinerated as sufficient to trigger the additional permit and review requirements provided in [section 5] [75-2-215], including consideration of emissions of hydrochloric acid, compounds deriving from plastic incineration, and other hazardous air pollutants."

Severability: Section 15, Ch. 696, L. 1989, was a severability clause.

Effective Date: Section 16, Ch. 696, L. 1989, provided that this section is effective May 22, 1989.

Administrative Rules

Title 17, chapter 50, subchapter 4, ARM License and operation fees.

75-10-116. Penalties for failure to pay fee.

Compiler's Comments

2001 Amendment: Chapter 170 near beginning substituted "the fees under 75-10-115" for "a fee under 75-10-118"; and made minor changes in style. Amendment effective March 30, 2001.

1993 Amendment: Chapter 145 near beginning inserted reference to 75-10-115. Amendment effective July 1, 1993.

Code Commissioner Note: The version of this section effective July 1, 1995, near beginning substituted "75-10-118" for "75-10-115". The Code Commissioner has not reflected this change because it would be redundant with the amendment made by Ch. 145.

1993 Statement of Intent: The statement of intent attached to Ch. 145, L. 1993, provided: "A statement of intent is desirable for this bill in order to coordinate certain provisions of existing law with Chapter 398, Laws of 1991. Chapter 398 provided a delayed effective date, and when its provisions become effective on July 1, 1993, certain provisions of law will be amended. The purpose of this bill is to reinstate certain provisions of law that will be deleted when Chapter 398 becomes effective.

It is the intent of the legislature that [sections 1, 2, 4, and 5] [75-10-104, 75-10-105, 75-10-116, and 75-10-117] of this bill maintain the existing authority of the department of health and environmental sciences [now department of environmental quality] rather than add new authority.

It is also the purpose of this bill to repeal a section of The Montana Solid Waste Management Act that was not included in Chapter 398. Chapter 398 repealed 75-10-110, effective July 1, 1993. [Section 6] of this bill repeals 75-10-218, a section of The Montana Solid Waste Management Act that is subordinate to 75-10-110."

Extension of Effective Date: The July 1, 1993, effective date in sec. 8, Ch. 398, L. 1991, was extended to July 1, 1995, by sec. 1, Ch. 273, L. 1993. The effective date of the extension in sec. 1, Ch. 273, L. 1993, was October 1, 1993. Technically, the July 1, 1993, version of this section is in effect for the period from July 1, 1993, until October 1, 1993. The Code Commissioner has not codified the temporary version because the apparent legislative intent was to not have that version effective.

1991 Amendment: Near beginning substituted "75-10-118" for "75-10-115". Amendment effective July 1, 1993.

Preamble: The preamble attached to Ch. 398, L. 1991, provided: "WHEREAS, the State of Montana presently is faced with proposals to import out-of-state waste for disposal in Montana; and

WHEREAS, [LC 798] [Ch. 643, L. 1991] would enact a tipping fee on disposal of solid waste generated within Montana to fund the development of an adequate solid waste regulatory program; and

WHEREAS, the citizens of Montana should not have to subsidize the regulation of solid waste that originates in other states."

Severability: Section 15, Ch. 696, L. 1989, was a severability clause.

Effective Date: Section 16, Ch. 696, L. 1989, provided that this section is effective May 22, 1989.

75-10-117. Solid waste management account.

Compiler's Comments

2001 Amendment: Chapter 170 in (2)(a) substituted "fees provided for in 75-10-115" for "fee provided for in 75-10-118"; and made minor changes in style. Amendment effective March 30, 2001.

1993 Amendment: Chapter 145 in (2)(a) inserted reference to 75-10-115; inserted (2)(b) requiring deposit of fees, taxes, fines, and penalties collected under 75-10-910; inserted (2)(c) requiring deposit of fees collected under 75-10-1006; and made minor changes in style. Amendment effective July 1, 1993.

Code Commissioner Note: The version of this section effective July 1, 1995, in (2)(a) substituted "75-10-118" for "75-10-115". The Code Commissioner has not reflected this change because it would be redundant with the amendment made by Ch. 145.

1993 Statement of Intent: The statement of intent attached to Ch. 145, L. 1993, provided: "A statement of intent is desirable for this bill in order to coordinate certain provisions of existing law with Chapter 398, Laws of 1991. Chapter 398 provided a delayed effective date, and when its provisions become effective on July 1, 1993, certain provisions of law will be amended. The purpose of this bill is to reinstate certain provisions of law that will be deleted when Chapter 398 becomes effective.

It is the intent of the legislature that [sections 1, 2, 4, and 5] [75-10-104, 75-10-105, 75-10-116, and 75-10-117] of this bill maintain the existing authority of the department of health and environmental sciences [now department of environmental quality] rather than add new authority.

It is also the purpose of this bill to repeal a section of The Montana Solid Waste Management Act that was not included in Chapter 398. Chapter 398 repealed 75-10-110, effective July 1, 1993. [Section 6] of this bill repeals 75-10-218, a section of The Montana Solid Waste Management Act that is subordinate to 75-10-110."

Extension of Effective Date: The July 1, 1993, effective date in sec. 8, Ch. 398, L. 1991, was extended to July 1, 1995, by sec. 1, Ch. 273, L. 1993. The effective date of the extension in sec. 1, Ch. 273, L. 1993, was October 1, 1993. Technically, the July 1, 1993, version of this section is in effect for the period from July 1, 1993, until October 1, 1993. The Code Commissioner has not codified the temporary version because the apparent legislative intent was to not have that version effective.

1991 Amendment: In (2)(a) substituted "75-10-118" for "75-10-115". Amendment effective July 1, 1993.

Preamble: The preamble attached to Ch. 398, L. 1991, provided: "WHEREAS, the State of Montana presently is faced with proposals to import out-of-state waste for disposal in Montana; and

WHEREAS, [LC 798] [Ch. 643, L. 1991] would enact a tipping fee on disposal of solid waste generated within Montana to fund the development of an adequate solid waste regulatory program; and

WHEREAS, the citizens of Montana should not have to subsidize the regulation of solid waste that originates in other states."

Severability: Section 15, Ch. 696, L. 1989, was a severability clause.

Effective Date: Section 16, Ch. 696, L. 1989, provided that this section is effective May 22, 1989.

Part 2

Licensing of Refuse Disposal and Transportation Montana Solid Waste Management Act

Part Compiler's Comments

Rule Revision — Statement of Intent: Rules promulgated pursuant to this part, specifically pursuant to the hazardous waste statutory provisions, will be revised by the Department of Health and Environmental Sciences (now Department of Environmental Quality) in order to comply with expanded rulemaking authority provisions in (SB 212) Ch. 358, L. 1981 (see Title 75, Ch. 10, part 4, and statement of intent under 75-10-405).

Part Administrative Rules

Title 17, chapter 50, subchapter 5, ARM Refuse disposal.

Title 17, chapter 50, subchapter 6, ARM Procedure for variances.

Part Case Notes

Establishment of Refuse Disposal District by County With Self-Governing Power: Title 7, ch. 13, part 2 [now repealed], is not mandatory upon a county charter form of government when it establishes a refuse disposal district and system. That part applies to the establishment of a refuse disposal district by governments that are of general power status, not those with self-government status. Title 7, ch. 13, part 2 [now repealed], does not direct or require a local government to provide a service within the meaning of 7-1-114. Clopton v. Madison County Comm'n, 216 M 335, 701 P2d 347, 42 St. Rep. 851 (1985).

75-10-202. Legislative intent, findings, and policy.

Compiler's Comments

2003 Amendment: Chapter 361 inserted (1) relating to constitutional obligations and legislative intent; and made minor changes in style. Amendment effective April 16, 2003.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Severability: Section 39, Ch. 361, L. 2003, was a severability clause.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

1981 Amendment: Deleted "hazardous" before "wastes" near the end of the first sentence.

75-10-203. Definitions.

Compiler's Comments

1997 Amendment: Chapter 373 inserted definition of waste tire. Amendment effective July 1, 1997.

1997 Statement of Intent: The statement of intent attached to Ch. 373, L. 1997, provided: "A statement of intent is required for this bill because it authorizes the department of environmental quality to adopt additional rules requiring that solid waste management systems that are licensed primarily for the management and disposal of waste tires provide financial assurance sufficient to cover the cost of transport, treatment, and disposal of the waste tires if the facility is not capable of proper management. It is the intent that the amount of financial assurance be adjusted as necessary if there are changing operational circumstances at the licensed facility and in the waste tire market. It is not the intent of the legislature to require licensing or financial assurance of retail facilities that store reusable tires for the purposes of recapping, retreading, or reuse as tires."

Waste Tire Study: Section 4, Ch. 373, L. 1997, provided: "(1) The environmental quality council shall study the issues associated with managing, processing, treating, transporting, and disposing of waste tires.

(2) The environmental quality council shall report the results of the study, including any recommendations for legislation, to the legislature no later than October 1, 1998."

Applicability: Section 6, Ch. 373, L. 1997, provided: "(1) [This act] applies to a facility that initially applied for or received a solid waste management system license pursuant to Title 75, chapter 10, part 2, after July 1, 1997.

(2) [This act] does not apply to a facility that was licensed pursuant to Title 75, chapter 10, part 2, prior to July 1, 1997."

1995 Amendments — Composite Section: Chapter 418 in definition of Board substituted "board of environmental review provided for in 2-15-3502" for "board of health and environmental sciences provided for in 2-15-2104"; in definition of Department substituted "department of environmental quality provided for in 2-15-3501" for "department of health and environmental sciences provided for in Title 2, chapter 15, part 21"; in definition of solid waste, in (b), with regard to reclamation, substituted "department of environmental quality" for "department of state lands" and, with regard to slash and forest debris, substituted "department of natural resources and conservation" for "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 deleted definition of Board that read: ""Board" means the board of health and environmental sciences provided for in 2-15-2104"; pursuant to sec. 568, Ch. 546, L. 1995, a coordination section, in definition of Department the Code Commissioner substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Because Ch. 418 inserted a reference to the Board of Environmental Review and Ch. 546 deleted a reference to the Board of Health and Environmental Sciences, the codifier has reflected both the insertion and the deletion.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 201 in definition of solid waste management system inserted last sentence regarding container sites. Amendment effective July 1, 1993.

1991 Amendment: Inserted definition of household hazardous waste.

1989 Amendment: Inserted definitions of household waste and municipal solid waste landfill.

1981 Amendments: Chapter 358 deleted "or hazardous waste" after "solid waste" in two places in (3); deleted former subsection (4) defining "hazardous waste"; deleted former subsection (5) defining "hazardous waste management"; deleted "hazardous wastes" after "refuse" in (8); deleted "wood" before "byproducts" at the end of (8); deleted "nonhazardous" after "render it" in (12).

Chapter 529 substituted "the department of state lands" for "the department of natural resources and conservation" near the end of (8). This substitution was made because Ch. 529, L. 1981, transferred the regulation of slash and forest debris to the department of state lands.

Severability Clause: Section 9, Ch. 529, L. 1981, was a severability clause.

Administrative Rules

ARM 17.50.403 and 17.50.502 Definitions.

Case Notes

Landfill Operator to Be Licensed: The appellant had contracted with the refuse board of his county to operate a sanitary landfill. The trial court found that the appellant was required by his contract to obtain a license to operate the landfill. The Supreme Court on review said that when read together, it is apparent that under 75-10-203 and 75-10-221, the County Commissioners, the refuse board, or the appellant could be proper applicants for the landfill license. Finding no exemption from the obligation to seek the required license, it was a question of the parties' contract requirements. The Supreme Court declined to find that 75-10-112 requires all local governments to obtain the requisite license for operation of a disposal site when the operations by contract are to be performed by another individual. Citing 28-3-301 and 28-3-303 and noting that the language in the contract here was clear and unambiguous, the Supreme Court found its duty to enforce the contract as made. The license requirement imposed by 75-1-221 was clearly applicable to the operation of the disposal site. Therefore, the appellant was required by the terms of the contract to obtain the operator's license. Ryan v. Bd. of County Comm'rs, 190 M 273, 620 P2d 1203, 37 St. Rep. 1965 (1980).

75-10-204. Powers and duties of department.

Compiler's Comments

2013 Amendment: Chapter 411 inserted (8) concerning coal combustion residues; and made minor changes in style. Amendment effective May 6, 2013.

2001 Amendment: Chapter 170 deleted former (6) and (7) that read: "(6) fees related to the review of solid waste management system license applications;

(7) the renewal of solid waste management system licenses and related fees"; and made minor changes in style. Amendment effective March 30, 2001.

1997 Amendment: Chapter 373 inserted (9) requiring that rules address surety requirements to maintain financial assurance; and made minor changes in style. Amendment effective July 1, 1997.

1997 Statement of Intent: The statement of intent attached to Ch. 373, L. 1997, provided: "A statement of intent is required for this bill because it authorizes the department of environmental quality to adopt additional rules requiring that solid waste management systems that are licensed primarily for the management and disposal of waste tires provide financial assurance sufficient to cover the cost of transport, treatment, and disposal of the waste tires if the facility is not capable of proper management. It is the intent that the amount of financial assurance be adjusted as necessary if there are changing operational circumstances at the licensed facility and in the waste tire market. It is not the intent of the legislature to require licensing or financial assurance of retail facilities that store reusable tires for the purposes of recapping, retreading, or reuse as tires."

Waste Tire Study: Section 4, Ch. 373, L. 1997, provided:"(1) The environmental quality council shall study the issues associated with managing, processing, treating, transporting, and disposing of waste tires.

(2) The environmental quality council shall report the results of the study, including any recommendations for legislation, to the legislature no later than October 1, 1998."

Applicability: Section 6, Ch. 373, L. 1997, provided: "(1) [This act] applies to a facility that initially applied for or received a solid waste management system license pursuant to Title 75, chapter 10, part 2, after July 1, 1997.

(2) [This act] does not apply to a facility that was licensed pursuant to Title 75, chapter 10, part 2, prior to July 1, 1997."

1995 Amendment: Chapter 471 in introductory clause inserted "subject to the provisions of 75-10-107"; and made minor changes in style. Amendment effective April 14, 1995.

Applicability: Section 22(3), Ch. 471, L. 1995, provided: "(3) [This act] does not apply to the establishment of fees or public participation requirements."

1993 Amendment: Chapter 273 inserted (8) relating to a quarterly fee based on the justifiable costs to the state of administering Title 75, chapter 10, parts 1 and 2, for solid waste generated outside Montana and disposed of or incinerated in Montana. Amendment effective April 7, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 273, L. 1993, provided: "A statement of intent is required for this bill because of the rulemaking authority granted to the department of health and environmental sciences [now department of environmental quality] in [section 3] [75-10-204]. It is the intent of the legislature that the department adopt rules to establish a rationally based, legally defensible fee on the disposal or incineration of solid waste generated outside Montana. The purpose of the fee is to prevent Montana citizens from subsidizing the disposal of out-of-state waste. Therefore, the fee is to be based on the justifiable direct and indirect costs to the state of regulating the disposal or incineration of out-of-state waste under Title 75, chapter 10, parts 1 and 2. It is the intent of the legislature that, until July 1, 1995, the fee established by the department under 75-10-204(8) apply to all solid waste imported from out of state to solid waste incinerators and solid waste disposal facilities in this state. Effective July 1, 1995, the fee established by the department under 75-10-204(8) applies only to solid waste imported from out of state to solid waste disposal facilities that receive less than 25,000 tons of solid waste annually. Also effective July 1, 1995, solid waste disposal facilities receiving 25,000 tons or more of solid waste annually and all solid waste incinerators, regardless of tonnage amounts, must be charged a fee of $5 per ton, pursuant to 75-10-118, on each ton of solid waste imported from out of state. The department shall report to the 1995 legislature on the implementation of the fee established under the authority of 75-10-204(8) so that the legislature may consider an amendment to 75-10-118 to adopt the fee amount established by the department."

1991 Amendment: Inserted (6) requiring Department to adopt rules establishing fees related to the review of solid waste management system license applications; inserted (7) requiring adoption of rules governing the renewal of solid waste management system licenses and related fees; and made minor changes in style. Amendment effective July 1, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 643, L. 1991, provided: "A statement of intent is required for this bill to:

(1) provide the department of health and environmental sciences [now department of environmental quality] with guidelines for adopting rules to implement [sections 1 through 7] [7-13-231, 75-10-102, 75-10-104, 75-10-115, 75-10-204, and 75-10-221];

(2) indicate the structure and amount of fees that are intended to be charged to license solid waste management systems; and

(3) indicate the method of collection.

A fee for review of a license application for a new solid waste management system or for substantial modifications to an existing system will be charged. The fees must be based on the capacity of the proposed system and reflect the relative cost of reviewing the proposal. The following fee structure is suggested:

(1) Megafacility. $15,000 for a facility with a planned capacity of more than 200,000 tons of solid waste per year.

(2) Major facility. $10,000 for a facility with a planned capacity of more than 25,000 tons of solid waste per year but not more than 200,000 tons per year.

(3) Intermediate facility. $7,500 for a facility with a planned capacity of more than 5,000 tons of solid waste per year but not more than 25,000 tons per year.

(4) Minor facility. $5,000 for a facility with a planned capacity of not more than 5,000 tons of solid waste per year.

A fee will be charged to issue a license for a solid waste management system, and an annual fee will be charged to renew a solid waste management system license. The fees are intended to reflect a minimal base fee related to the fixed costs of an annual inspection and license renewal and a volume fee related to the estimated amount of solid waste to be disposed of each year. All solid waste systems must pay these fees in order to receive a license under 75-10-221. The initial volume fee may not exceed 31 cents per ton.

For the purposes of estimating the volume for small solid waste management systems or for systems that choose not to weigh or measure the volume of waste managed, the following formulas are suggested:

Solid waste should be assumed to be generated at the following per capita rates:
PopulationTons Per Year
Greater than 5,0001.04
1,000 - 5,0000.59
Less than 1,000 and unincorporated areas0.41

For the purpose of conversion between solid waste weight and volume, the following equivalents are suggested:

(1) One uncompacted cubic yard equals 300 pounds; and

(2) One compacted cubic yard equals 700 pounds."

Retroactive Applicability: Section 10, Ch. 643, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all applications provided for in 75-10-221 received after January 1, 1990."

1989 Amendment: Inserted (5) relating to groundwater monitoring; and made minor change in phraseology.

1989 Statement of Intent: The statement of intent attached to Ch. 677, L. 1989, provided: "A statement of intent is required for this bill in order to provide guidance to the department of health and environmental sciences [now department of environmental quality] concerning the adoption of rules authorized by the bill. The purpose of the new rules is to establish appropriate requirements for groundwater monitoring at municipal solid waste landfills and other disposal sites as specified in the bill. The rules must address the following topics:

(a) the types and quality of information the department requires from owners and operators of municipal solid waste landfills and other disposal sites in order to prepare the groundwater monitoring priority compliance list;

(b) requirements concerning the number and placement of monitoring wells, considering hydrologic, geologic, and other relevant factors;

(c) the content of plans for the design, construction, and maintenance of monitoring wells and systems; and

(d) requirements for collecting, recording, and reporting monitoring results."

1981 Amendment: Deleted former subsection (5) concerning reports on operation and maintenance of hazardous waste sites, transportation, and generation.

Administrative Rules

Title 17, chapter 50, ARM Solid waste management.

Case Notes

License Approval Conditioned on Obtaining Permit Under Section 404 of Federal Clean Water Act Satisfied Department Rules — Analysis of Alternative Project or Facility Not Required — No Conflict Between Statutes and Rules — Summary Judgment Upheld. Hillcrest Natural Area Foundation, Inc. v. Dept. of Environmental Quality, 2022 MT 240, 411 Mont. 30, 521 P.3d 766.

75-10-205. Inspections.

Administrative Rules

ARM 17.50.525 Inspections.

Law Review Articles

The Constitutionality of Civil Inspections, Angel & Corontzos, 21 Mont. L. Rev. 195 (1960).

75-10-206. Variance.

Compiler's Comments

2001 Amendment: Chapter 170 at end of first sentence in (1) substituted "75-10-204(6)" for "75-10-204(8)"; and made minor changes in style. Amendment effective March 30, 2001.

1993 Amendment: Chapter 273 in (1), after "75-10-204", inserted "except for rules adopted pursuant to 75-10-204 (8)".

Incorporation into Existing Law: This section was enacted without any codification instruction. The apparent intent of the Legislature was that it become part of Title 75, chapter 10, part 2, and that the provisions in Title 75, chapter 10, part 2, apply to it. The Code Commissioner has codified it accordingly. See 1-11-103(4).

Administrative Rules

Title 17, chapter 50, subchapter 6, ARM Procedure for variances.

Collateral References

Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901, et seq.

75-10-207. Ground water monitoring.

Administrative Rules

Title 17, chapter 50, subchapter 13, ARM Ground water monitoring and corrective action.

75-10-208. Department rulemaking authority for infectious waste.

Compiler's Comments

Effective Date: This section is effective October 1, 2007.

75-10-212. Disposal in unauthorized area prohibited — exception.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: In (2)(b) and (2)(c), after "public", deleted "recreational"; and inserted (3) imposing absolute liability on any person disposing of solid waste and imposing a civil penalty.

1981 Amendment: Deleted "or transport hazardous waste" after "dispose of solid waste" in (1).

Case Notes

Landfills Operating Under Department License Are Exception to Prohibited Activities Under 75-10-212(2) — Summary Judgment Upheld. Hillcrest Natural Area Foundation, Inc. v. Dept. of Environmental Quality, 2022 MT 240, 411 Mont. 30, 521 P.3d 766.

75-10-213. Unlawful disposition of dead animals — exception.

Compiler's Comments

2009 Amendment: Chapter 243 inserted (2)(b) providing that a dead animal may be placed in a licensed composting facility; and made minor changes in style. Amendment effective April 16, 2009.

Section Not Codified: Section 69-4010, R.C.M. 1947, stating "Section 94-3542 [69-4518, R.C.M. 1947, now codified as 75-10-213] is not affected by this act [referring to the Montana Solid Waste Management Act]", was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 10, Ch. 35, L. 1965, as amended by sec. 27, Ch. 349, L. 1974.

75-10-214. Exclusions — exceptions to exclusions.

Compiler's Comments

2013 Amendment: Chapter 411 in (1)(b) at beginning inserted exception clause; and made minor changes in style. Amendment effective May 6, 2013.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: In (1)(a), in first sentence after "generated in", substituted "reasonable association with his household or agricultural operations" for "Montana" and after "hazard" inserted "or violate the laws governing the disposal of hazardous or deleterious substances"; inserted (1)(b) providing that this part does not apply to the operation of electric generating facility, to drilling, production, or refining of natural gas or petroleum, or to operation of mine, mill, smelter, or electrolytic reduction facility; and made minor changes in style. Amendment effective April 23, 1991.

Applicability: Section 4, Ch. 565, L. 1991, provided: "A person who disposed of solid waste under the exclusion provided in 75-10-214 before [the effective date of this act] [effective April 23, 1991] and who loses his exclusion by virtue of [this act] has until [1 year after the effective date of this act] [April 23, 1992] to comply with solid waste disposal regulations made applicable by the loss of the exclusion and is not subject to the civil penalty provisions of [section 2] [75-10-228] during that 1-year period. However, the person may not dispose of additional solid waste in violation of solid waste disposal regulations."

1989 Amendment: In (1), near middle, inserted "generated in Montana". Amendment effective May 22, 1989.

Severability: Section 15, Ch. 696, L. 1989, was a severability clause.

1981 Amendment: Deleted "except hazardous waste" after "solid waste" in (1); deleted former subsection (1)(b) relating to a person disposing of his own hazardous waste; deleted former subsection (2) which removed the transportation of marketable hazardous waste from licensing requirements.

Attorney General's Opinions

Exclusion — Limited to Personally Generated Waste: The exclusion provided by this section does not apply to waste generated by members of the general public but applies only to waste generated by the owner or lessee of the disposal site for such waste, to waste generated by persons in the family of such owner or lessee, or to business-related waste generated by persons in the employ of such owner or lessee. 41 A.G. Op. 14 (1985).

"Person" Not Subject to Part Definition: The word "person", as used in this section, is not subject to the definitional provisions of 75-10-203. The context of the word "person", as determined by legislative history and agency practice, requires that "person" be defined as an individual. 41 A.G. Op. 14 (1985).

75-10-215. Statewide household hazardous waste public education program.

Compiler's Comments

2007 Amendment: Chapter 156 inserted (2) concerning options for recycling electronic waste; and made minor changes in style. Amendment effective October 1, 2007.

75-10-216. Waste tire disposal sites — financial assurance required.

Compiler's Comments

1997 Statement of Intent: The statement of intent attached to Ch. 373, L. 1997, provided: "A statement of intent is required for this bill because it authorizes the department of environmental quality to adopt additional rules requiring that solid waste management systems that are licensed primarily for the management and disposal of waste tires provide financial assurance sufficient to cover the cost of transport, treatment, and disposal of the waste tires if the facility is not capable of proper management. It is the intent that the amount of financial assurance be adjusted as necessary if there are changing operational circumstances at the licensed facility and in the waste tire market. It is not the intent of the legislature to require licensing or financial assurance of retail facilities that store reusable tires for the purposes of recapping, retreading, or reuse as tires."

Waste Tire Study: Section 4, Ch. 373, L. 1997, provided: "(1) The environmental quality council shall study the issues associated with managing, processing, treating, transporting, and disposing of waste tires.

(2) The environmental quality council shall report the results of the study, including any recommendations for legislation, to the legislature no later than October 1, 1998."

Applicability: Section 6, Ch. 373, L. 1997, provided: "(1) [This act] applies to a facility that initially applied for or received a solid waste management system license pursuant to Title 75, chapter 10, part 2, after July 1, 1997.

(2) [This act] does not apply to a facility that was licensed pursuant to Title 75, chapter 10, part 2, prior to July 1, 1997."

Effective Date: Section 7, Ch. 373, L. 1997, provided: "[This act] is effective July 1, 1997."

75-10-221. License required — application.

Compiler's Comments

2021 Amendment: Chapter 324 in (6) near beginning of first sentence after "rules" deleted "for board adoption" and near beginning of last sentence after "adopted" deleted "by the board". Amendment effective July 1, 2021.

2001 Amendment: Chapter 170 deleted second sentence in (4) that read: "The department may provide exceptions to the 12-month requirement for a 2-year period following July 1, 1991"; in (6) at beginning of first sentence substituted "preparing rules for board adoption that establish fees" for "establishing fees", after "applications" inserted "pursuant to 75-10-104(2)", and substituted "consider the tonnage or volume of waste" for "consider the volume of waste" and in second sentence inserted "adopted by the board" and substituted "reduction in the tonnage or volume of waste" for "reduction in the volume of waste"; and made minor changes in style. Amendment effective March 30, 2001.

1991 Amendment: Inserted (4) providing license may not exceed 12 months unless renewed and authorizing Department to provide exceptions to 12-month requirement for 2-year period following July 1, 1991; inserted (5) authorizing Department to require new application upon determination that plan of operation, management of system, or geological or ground water conditions have changed since initial license approval; and inserted (6) requiring Department to consider volume of waste and size of management system in establishing license and application fees and requiring that fees be established to encourage reduction in volume and to cover Department cost of reviewing and annually licensing management system. Amendment effective July 1, 1991.

Retroactive Applicability: Section 10, Ch. 643, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all applications provided for in 75-10-221 received after January 1, 1990."

1981 Amendment: Deleted "hazardous waste" after "solid waste or" in (1); deleted "or transport hazardous waste" after "management system" in (1).

Administrative Rules

ARM 17.50.508 Application for solid waste management system license.

ARM 17.50.509 Operation and maintenance plan requirements.

ARM 17.50.513 Processing of solid waste management system license application.

Case Notes

Petition for Writ of Mandamus Properly Denied — No Clear Legal Duty to Issue License. Yellowstone Disposal, LLC v. Dept. of Environmental Quality, 2022 MT 26, 407 Mont. 316, 503 P.3d 1097.

Establishment of Refuse Disposal District by County With Self-Governing Power: Title 7, ch. 13, part 2 [now repealed], is not mandatory upon a county charter form of government when it establishes a refuse disposal district and system. That part applies to the establishment of a refuse disposal district by governments that are of general power status, not those with self-government status. Title 7, ch. 13, part 2 [now repealed], does not direct or require a local government to provide a service within the meaning of 7-1-114. Clopton v. Madison County Comm'n, 216 M 335, 701 P2d 347, 42 St. Rep. 851 (1985).

County Commission's Approval Power — Solid Waste — Withdrawal of Approval: A county refuse board contracted with an individual to operate a sanitary landfill. Difficulties arose from the failure of the operator to obtain an operator's license. The County Commissioners sued the operator and prevailed. On appeal, the operator questioned the power of the County Commission to withdraw its contract approval and thereby direct the refuse board to terminate the contract. The Supreme Court held that when a Board of County Commissioners was given an express power of approval, such power was to be complemented by the implied power to withhold approval upon a showing of adequate cause. A logical extension of an implied power to withhold approval was an implied power to withdraw approval. Here, the contract required the operator to satisfy state licensing requirements. The refuse board failed to enforce the provision and allowed the landfill to be operated in violation of law. The Department of Health Solid Waste Management Bureau began refusing to approve subdivisions in the area, exposing the County Commissioners to possible liability. The withdrawal of approval of the defendant's contract was an obvious necessity supported by adequate cause and should be considered proper under the circumstances, which virtually eliminated the propriety of the approval. Ryan v. Bd. of County Comm'rs, 190 M 273, 620 P2d 1203, 37 St. Rep. 1965 (1980).

Landfill Operator to Be Licensed: The appellant had contracted with the refuse board of his county to operate a sanitary landfill. The trial court found that the appellant was required by his contract to obtain a license to operate the landfill. The Supreme Court on review said that when read together, it is apparent that under 75-10-203 and 75-10-221, the County Commissioners, the refuse board, or the appellant could be proper applicants for the landfill license. Finding no exemption from the obligation to seek the required license, it was a question of the parties' contract requirements. The Supreme Court declined to find that 75-10-112 requires all local governments to obtain the requisite license for operation of a disposal site when the operations by contract are to be performed by another individual. Citing 28-3-301 and 28-3-303 and noting that the language in the contract here was clear and unambiguous, the Supreme Court found its duty to enforce the contract as made. The license requirement imposed by 75-1-221 was clearly applicable to the operation of the disposal site. Therefore, the appellant was required by the terms of the contract to obtain the operator's license. Ryan v. Bd. of County Comm'rs, 190 M 273, 620 P2d 1203, 37 St. Rep. 1965 (1980).

Rescission of Landfill Operation Contract — Operator Unlicensed: The county refuse board contracted with the appellant to operate a landfill. Because of his own fault and disregard, the appellant failed to comply with the statutory and contractual requirements to obtain a license to operate the landfill. As a result of this failure, the Department of Health Solid Waste Management Bureau began refusing to approve proposed subdivisions in the area. The refusal in effect prevented the approval of those subdivisions for solid waste disposal and thereby exposed the County Commissioners to potential liability. When the County Commissioners chose to terminate the appellant's contract, there was a failure of consideration through the fault of the defendant, resulting in an alteration of the Commissioners' position to their prejudice. Consequently, the trial court acted properly in rescinding the contract. Ryan v. Bd. of County Comm'rs, 190 M 273, 620 P2d 1203, 37 St. Rep. 1965 (1980).

75-10-223. Refusal by local health officer — appeal to board.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

75-10-224. Revocation or denial of license by department.

Administrative Rules

ARM 17.50.514 Appeal of denial or revocation.

75-10-227. Administrative enforcement.

Compiler's Comments

2005 Amendment: Chapter 443 in (1) in first sentence near beginning inserted "a violation of an order issued under this part" and at end of second sentence inserted "an order assessing an administrative penalty pursuant to 75-10-228, or both"; inserted (5) relating to contested case provisions; and made minor changes in style. Amendment effective April 28, 2005.

Saving Clause: Section 12, Ch. 443, L. 2005, was a saving clause.

Severability: Section 15, Ch. 696, L. 1989, was a severability clause.

Effective Date: Section 16, Ch. 696, L. 1989, provided that this section is effective May 22, 1989.

75-10-228. Civil penalties.

Compiler's Comments

2021 Amendment: Chapter 535 in (2) at end of second sentence after "in which the violation occurred" deleted "or, if mutually agreed upon by the parties, in the district court of the first judicial district, Lewis and Clark County". Amendment effective October 1, 2021.

2005 Amendment: Chapter 443 in (1) near beginning after "adopted" inserted "or an order issued" and near middle after "subject to" inserted "an administrative penalty not to exceed $250 or"; in (2) inserted second sentence relating to where the action must be brought; inserted (3) relating to determination of penalties based on penalty factors; in (4) near middle substituted "under this section" for "for violations of this part"; and made minor changes in style. Amendment effective April 28, 2005.

The amendments to this section made by sec. 2, Ch. 443, L. 2005, and sec. 13, Ch. 487, L. 2005, were rendered void by sec. 9, Ch. 443, L. 2005, a coordination section.

Saving Clauses: Section 12, Ch. 443, L. 2005, was a saving clause.

Section 29, Ch. 487, L. 2005, was a saving clause.

Subsections Not Codified: Subsections (1) and (2) of sec. 2, Ch. 565, L. 1991, were not codified because they are virtually identical to this section.

Applicability: Section 4, Ch. 565, L. 1991, provided: "A person who disposed of solid waste under the exclusion provided in 75-10-214 before [the effective date of this act] [effective April 23, 1991] and who loses his exclusion by virtue of [this act] has until [1 year after the effective date of this act] [April 23, 1992] to comply with solid waste disposal regulations made applicable by the loss of the exclusion and is not subject to the civil penalty provisions of [section 2] [75-10-228] during that 1-year period. However, the person may not dispose of additional solid waste in violation of solid waste disposal regulations."

Effective Date: Section 5, Ch. 565, L. 1991, provided that subsection (3) is effective on passage and approval. Approved April 23, 1991.

Severability: Section 15, Ch. 696, L. 1989, was a severability clause.

Effective Date: Section 16, Ch. 696, L. 1989, provided that this section is effective May 22, 1989.

75-10-231. Actions.

Compiler's Comments

2007 Amendment: Chapter 97 near middle after "enjoin" inserted "the transportation of solid waste or". Amendment effective October 1, 2007.

75-10-232. Penalty for violations.

Compiler's Comments

1981 Amendment: Deleted former subsection (1)(b) which provided a penalty for violations in storing, treating, transporting, or disposing of hazardous waste.

75-10-233. Dumping penalty — enforcement.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 77, L. 2023. Amendment effective October 1, 2023.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: Throughout section substituted "75-10-212" for "75-10-212(2)"; inserted (2) imposing a penalty not to exceed $5,000 for dumping solid waste on public property; in (3), after "public", deleted "recreational"; and made minor changes in style.

1989 Amendment: In second sentence changed "patrolmen" to "patrol officers".

75-10-234. Liability — defense and exclusions.

Compiler's Comments

Saving Clause: Section 7, Ch. 159, L. 2013, was a saving clause.

Severability: Section 8, Ch. 159, L. 2013, was a severability clause.

Effective Date: Section 10, Ch. 159, L. 2013, provided: "[This act] is effective on passage and approval." Approved April 5, 2013.

75-10-240. Disposal of coal combustion residues — cost benefit analysis required.

Compiler's Comments

Effective Date: Section 10, Ch. 553, L. 2021, provided: "[This act] is effective July 1, 2021."

Retroactive Applicability: Section 13, Ch. 553, L. 2021, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to certificates issued on or after January 1, 1976."

Severability: Section 11, Ch. 553, L. 2021, was a severability clause.

75-10-250. Baled waste tires prohibited — exception — department rules.

Compiler's Comments

Effective Date: Section 3, Ch. 580, L. 2003, provided: "[This act] is effective on passage and approval." Approved May 5, 2003.

Part 4
Hazardous Waste Management

Part Compiler's Comments

1989 Statement of Intent: For a text of the statement of intent attached to SB 321 (Ch. 384, L. 1989), see compiler's comments for 75-10-405.

Saving Clauses: Section 13, Ch. 384, L. 1989, and sec. 12, Ch. 386, L. 1989, were saving clauses.

Severability: Section 14, Ch. 384, L. 1989, and sec. 13, Ch. 386, L. 1989, were severability clauses.

1981 Statement of Intent: For a text of the statement of intent attached to SB 212 (Ch. 358, L. 1981), see compiler's comments for 75-10-405.

Existing Rules, Orders, Permits, Legal Proceedings: Section 29, Ch. 358, L. 1981, provided: "(1) All existing rules of the department not inconsistent with the provisions of this act relating to subjects embraced within this act remain in full force and effect until expressly repealed, amended, or superseded by the department.

(2) All orders entered, permits granted, and pending legal proceedings instituted by the department relating to subjects embraced within this act remain unimpaired and in full force and effect until superseded by actions taken by the department under this act."

Part Administrative Rules

Title 17, chapter 53, ARM Hazardous waste.

Part Law Review Articles

The Effect of Federal Legislation on Historical State Powers of Pollution Control: Has Congress Muddied State Waters?, Renz, 43 Mont. L. Rev. 197 (1982).

75-10-401. Short title.

Compiler's Comments

1997 Amendment: Chapter 112 after "Waste" deleted "and Underground Storage Tank".

Saving Clause: Section 38(1), Ch. 112, L. 1997, was a saving clause.

1989 Amendment: Inserted "and Underground Storage Tank". Amendment effective March 30, 1989.

75-10-402. Intent, findings, and purpose.

Compiler's Comments

2003 Amendment: Chapter 361 inserted (1) relating to constitutional obligations and legislative intent; and made minor changes in style. Amendment effective April 16, 2003.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Severability: Section 39, Ch. 361, L. 2003, was a severability clause.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

1997 Amendment: Chapter 112 deleted (3) that read: "(3) The legislature also finds that petroleum products and hazardous substances stored in underground tanks are a separate category of substances that are regulated under the federal Resource Conservation and Recovery Act of 1976, as amended, and must be addressed and controlled properly by the state under the Montana Hazardous Waste and Underground Storage Tank Act. It is the purpose of this part to authorize the department to establish, administer, and enforce an underground storage tank leak prevention program for these regulated substances. The department may use the authority provided in 75-10-413 through 75-10-417 and other appropriate authority provided by law to remedy violations of underground storage tank requirements established under this part"; and made minor changes in style.

Saving Clause: Section 38(1), Ch. 112, L. 1997, was a saving clause.

1995 Amendment: Chapter 28 in (1), after "wastes", inserted "and used oil"; and in (2), in three places, inserted reference to used oil. Amendment effective February 6, 1995.

1989 Amendments: Chapter 384 inserted (3) providing that petroleum products and hazardous substances stored in underground tanks will be subject to state regulation. Amendment effective March 30, 1989.

Chapter 386 in (1), after "facilities", inserted "are matters for statewide regulation and"; and made minor change in style. Amendment effective March 30, 1989.

Law Review Articles

Symposium—The Montana Constitution: Taking New Rights Seriously, Part I, Environmental Rights, 39 Mont. L. Rev. 221 (1978).

The Battle for the Environmental Provisions in Montana's 1972 Constitution, Cross, 51 Mont. L. Rev. 449 (1990).

The Montana Constitution and the Right to a Clean and Healthful Environment, Schmidt & Thompson, 51 Mont. L. Rev. 411 (1990).

The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: "They Mean Something", Wyatt-Shaw, 15 Pub. Land L. Rev. 219 (1994).

75-10-403. Definitions.

Compiler's Comments

2015 Amendment: Chapter 360 inserted definition of remediation waste; and made minor changes in style. Amendment effective April 29, 2015.

Retroactive Applicability: Section 4, Ch. 360, L. 2015, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to waste generated after January 1, 2014."

1997 Amendments: Chapter 112 in definition of dispose, in three places before "hazardous waste", deleted "regulated substance"; deleted definition of regulated substance that read: ""Regulated substance":

(a) means:

(i) a hazardous substance as defined in 75-10-602; or

(ii) petroleum, including crude oil or any fraction of crude oil, that is liquid at standard conditions of temperature and pressure (60 degrees F and 14.7 pounds per square inch absolute);

(b) does not include a substance regulated as a hazardous waste under this part"; in definition of storage, before "hazardous wastes", deleted "regulated substances" and after "hazardous wastes" deleted "or both"; deleted definition of underground storage tank that read: ""Underground storage tank":

(a) means, except as provided in subsections (18)(b)(i) through (18)(b)(xi):

(i) any one or a combination of tanks used to contain a regulated substance, the volume of which is 10% or more beneath the surface of the ground; and

(ii) any underground pipes used to contain or transport a regulated substance and connected to a storage tank, whether the storage tank is entirely aboveground, partially aboveground, or entirely underground;

(b) does not include:

(i) a farm or residential tank that was installed as of April 27, 1995, that has a capacity of 1,100 gallons or less, and that is used for storing motor fuel for noncommercial purposes;

(ii) a farm or residential tank that was installed as of April 27, 1995, that has a capacity of 1,100 gallons or less, and that is used for storing heating oil for consumptive use on the premises where it is stored;

(iii) farm or residential underground pipes that were installed as of April 27, 1995, and that are used to contain or to transport motor fuels for noncommercial purposes or heating oil for consumptive use on the premises where it is stored from an aboveground storage tank with a capacity of 1,100 gallons or less;

(iv) a septic tank;

(v) a pipeline facility, including gathering lines, regulated under:

(A) the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. 1671, et seq.;

(B) the Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. 2001, et seq.; or

(C) state law comparable to the provisions of law referred to in subsection (18)(b)(v)(A) or (18)(b)(v)(B), if the facility is intrastate;

(vi) a surface impoundment, pit, pond, or lagoon;

(vii) a storm water or wastewater collection system;

(viii) a flow-through process tank;

(ix) a liquid trap or associated gathering lines directly related to oil or gas production and gathering operations;

(x) a storage tank situated in an underground area, such as a basement, cellar, mine, draft, shaft, or tunnel, if the storage tank is situated upon or above the surface of the floor; or

(xi) any pipe connected to a tank described in subsections (18)(b)(i) through (18)(b)(ix)"; and made minor changes in style.

Chapter 156 in definition of underground storage tank inserted (b)(xii) excluding certain underground pipes. Amendment effective March 26, 1997.

Saving Clause: Section 38(1), Ch. 112, L. 1997, was a saving clause.

Coordination Instruction: Section 2, Ch. 156, L. 1997, a coordination section, provided that if House Bill No. 152 deletes the definition of "underground storage tank" from 75-10-403 and recodifies it in a different place, then the amendment made to the definition of "underground storage tank" in 75-10-403 is made to the definition in that recodified section. House Bill No.

152 was approved as Ch. 112, L. 1997. In accordance with the coordination instruction, the amendment to this section is made to sec. 3, Ch. 112, L. 1997.

1995 Amendments — Composite Section: Chapter 28 inserted definition of used oil; and made minor changes in style. Amendment effective February 6, 1995.

Chapter 218 inserted definition of environmental protection law; adjusted subsection references; and made minor changes in style.

Chapter 418 in definition of Board substituted "board of environmental review provided for in 2-15-3502" for "board of health and environmental sciences provided for in 2-15-2104"; in definition of Department substituted "department of environmental quality provided for in 2-15-3501" for "department of health and environmental sciences provided for in Title 2, chapter 15, part 21"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 deleted definition of Board that read: ""Board" means the board of health and environmental sciences provided for in 2-15-2104"; pursuant to sec. 568, Ch. 546, L. 1995, a coordination section, in definition of Department the Code Commissioner substituted "department of environmental quality" for "department of health and environmental sciences"; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 568 in definition of underground storage tank inserted (b)(i) providing that underground storage tank does not include farm or residential tank installed as of April 27, 1995, with capacity of 1,100 gallons or less that is used for storing noncommercial motor fuel, inserted (b)(ii) providing that underground storage tank does not include farm or residential tank installed as of April 27, 1995, with capacity of 1,100 gallons or less that is used for storing heating oil for consumptive use on storage premises, and inserted (b)(iii) providing that underground storage tank does not include farm or residential pipes installed as of April 27, 1995, used to contain or transport motor fuels for noncommercial purposes or heating oil for consumptive use on premises where stored from tank with 1,100 gallons or less capacity; adjusted subsection references; and made minor changes in style. Amendment effective April 27, 1995.

Because Ch. 418 inserted a reference to the Board of Environmental Review and Ch. 546 deleted a reference to the Board of Health and Environmental Sciences, the codifier has reflected both the insertion and the deletion.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1989 Amendment: In two places in (3) inserted reference to "regulated substance" and after "constituent of" deleted "it" and inserted "the regulated substance or hazardous waste"; in (13) substituted "regulated substances, hazardous wastes, or both" for "wastes"; in two places in (17)(a)(i) deleted reference to connected underground pipes; in (17)(b)(viii) changed reference to subsection (17)(b)(vii) to reference to subsection (17)(b)(vi); and made minor change in punctuation. Amendment effective March 30, 1989.

1987 Amendment: Inserted definition of hazardous waste transfer facility; and changed internal references accordingly.

1985 Amendment: Inserted (11) defining regulated substance; and inserted (16) defining underground storage tank.

Administrative Rules

ARM 17.53.202 and 17.53.301 Definitions.

Case Notes

Petroleum Release From Underground Disconnected Pipes — Eligibility for Cleanup Reimbursement — Portion of Administrative Rule Invalid: The former Department of Health and Environmental Sciences notified Safeway that its property had been identified as a source of petroleum contamination in the area where Safeway had previously removed some underground storage tanks and ordered Safeway to clean up the site pursuant to ARM 16.45.601 (renumbered ARM 17.56.601). Safeway discovered that the leakage was coming from pipes that were left underground during the tank removal. Safeway subsequently submitted to the Petroleum Tank Release Compensation Board an eligibility checklist and application for voluntary registration for reimbursement for costs of cleaning up the leak. The Board denied the request because the tank had been removed prior to the release detection and because ARM 16.47.314 (now repealed) required that the tank be in place when the release was discovered. The District Court held, and the Supreme Court affirmed, that the portion of ARM 16.47.314(1) that added additional requirements to the cleanup statutes was invalid and that Safeway should be compensated for cleanup costs. The Supreme Court analyzed the definition of underground storage tank in determining that nothing in the statutory language of this section (before 1997 amendment) required that the underground storage tank itself must be in place on the date on which a petroleum release is discovered. The court also examined whether it is permissible and fair for two state entities, the Department and the Board, to use one statutory definition to reach two opposite conclusions. Despite the fact that the Department and Board are separate entities and the petroleum release cleanup statutes are separate from the reimbursement statutes, Safeway was entitled to be treated uniformly by both entities. The Department treated Safeway as the tank owner for cleanup requirements, and the Board was required to also treat Safeway as the tank owner for reimbursement purposes. Safeway, Inc. v. Mont. Petroleum Release Comp. Bd., 281 M 189, 931 P2d 1327, 54 St. Rep. 129 (1997).

75-10-404. Powers of department.

Compiler's Comments

1997 Amendment: Chapter 112 at end of (1)(e) deleted "or regulated substance".

Saving Clause: Section 38(1), Ch. 112, L. 1997, was a saving clause.

1995 Amendment: Chapter 418 in (2), near middle of second sentence, substituted "department of environmental quality" for "department of state lands" and at end, after "Act", deleted "administered by the department of natural resources and conservation"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1989 Amendment: Inserted (1)(e) authorizing Department to abate public nuisances arising from hazardous waste or regulated substance; and made minor changes in style. Amendment effective March 30, 1989.

Administrative Rules

Title 17, chapter 53, ARM Hazardous waste.

75-10-405. Administrative rules.

Compiler's Comments

2015 Amendment: Chapter 360 in (1)(i)(iv) inserted second sentence concerning maximum fee of $25,000 annually for a remediation waste site; and made minor changes in style. Amendment effective April 29, 2015.

Retroactive Applicability: Section 4, Ch. 360, L. 2015, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to waste generated after January 1, 2014."

1997 Amendment: Chapter 112 deleted former (2)(c) that read: "may adopt requirements for the prevention and correction of leakage from underground storage tanks, including:

(i) reporting by owners and operators;

(ii) financial responsibility;

(iii) release detection, prevention, and corrective action;

(iv) standards for design, construction, installation, and closure;

(v) development of a schedule of fees, not to exceed $50 for a tank over 1,100 gallons and not to exceed $20 for a tank 1,100 gallons or less, per tank, for tank notification and permits to defray state and local costs of implementing an underground storage tank program;

(vi) a penalty schedule and a system for assessment of administrative penalties, notice, and appeals under 75-10-423; and

(vii) delegation of authority and funds to local agents for inspections and implementation. The delegation of authority to local agents must complement and may not duplicate existing authority for implementation of rules adopted by the department of justice that relate to underground storage tanks"; and made minor changes in style.

Saving Clause: Section 38(1), Ch. 112, L. 1997, was a saving clause.

Saving Clause — Rules: Section 38(2), Ch. 112, L. 1997, provided: "Rules adopted pursuant to 75-10-405 that are in effect on [the effective date of this act] [effective October 1, 1997] continue in effect until amended or repealed pursuant to 75-10-405 or [section 5] [75-11-505]."

1995 Amendments: Chapter 28 in introductory clause of (1), after "waste", inserted "and used oil"; inserted (1)(m) regarding identification and classification of used oil; inserted (1)(n) regarding requirements for management of used oil; in (2)(b), after "require", inserted "hazardous waste" and before "facilities" inserted "hazardous waste management"; and made minor changes in style. Amendment effective February 6, 1995.

Chapter 471 in (1) inserted "subject to the provisions of 75-10-107"; in (2), at beginning, inserted "Notwithstanding the provisions of 75-10-107"; and made minor changes in style. Amendment effective April 14, 1995.

1995 Statement of Intent: The statement of intent attached to Ch. 28, L. 1995, provided: "A statement of intent is required for this bill in order to provide guidance to the department of health and environmental sciences [now department of environmental quality] in promulgating rules. It is the intent of the legislature that the department of health and environmental sciences [now department of environmental quality] adopt rules governing the management of used oil that are consistent with the standards adopted by the U.S. environmental protection agency under section 3014 of the federal Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6935), as amended.

Applicability: Section 22(3), Ch. 471, L. 1995, provided: "(3) [This act] does not apply to the establishment of fees or public participation requirements."

1993 Amendments: Chapter 281 inserted (2)(c)(vi) relating to penalties, notice, and appeals. Amendment effective April 7, 1993.

Chapter 341 in (1)(d), after "denial", substituted "reissuance" for "renewal"; and substituted present (1)(i) concerning establishing schedule of fees and procedures for fee collection for former language that read: "a schedule of fees for hazardous waste management facility permits and registration of hazardous waste generators". Amendment effective April 13, 1993.

Chapter 509 inserted (1)(l) authorizing Department to adopt, amend, or repeal hazardous waste rules relating to procedures for assessment of administrative penalties as authorized by 75-10-424; and made minor changes in style.

1993 Statement of Intent: The statement of intent attached to Ch. 341, L. 1993, provided: "A statement of intent is required for this bill in order to provide guidance to the department of health and environmental sciences [now department of environmental quality] in promulgating rules. The intent of this bill is to clarify and extend the authority of the department to charge fees for the review and analysis of hazardous waste management permits and for ensuring compliance with hazardous waste laws, rules, and permit conditions.

The department may develop rules that establish the amount and procedure for collecting fees for:

(1) the filing and review of hazardous waste management facility permits;
(2) the management of hazardous waste, based upon the amount of waste managed;
(3) the reissuance and modification of hazardous waste management facility permits; and
(4) the registration of hazardous waste generators.

In adopting these rules, the department shall meet the criteria set forth in [sections 2 through 4] [75-10-431 through 75-10-433]. In addition, the rules adopted by the department must reflect a maximum fee amount of $10,000 for permit reissuance or permit modification, except when the department's actual costs exceed that amount."

Severability: Section 7, Ch. 341, L. 1993, was a severability clause.

1993 Statement of Intent: The statement of intent attached to Ch. 509, L. 1993, provided: "A statement of intent is required for this bill in order to provide guidance to the department of health and environmental sciences [now department of environmental quality] in promulgating rules. The legislature intends that the administrative penalty provided in this bill encourage compliance with the hazardous waste sections of the Montana Hazardous Waste and Underground Storage Tank Act [now Montana Hazardous Waste Act] and rules adopted pursuant to the hazardous waste sections of that Act by allowing more timely and efficient processing of enforcement actions without the need to seek penalties through the district court. To promote this goal, the department may adopt rules that prescribe procedures for assessing administrative penalties for violations of Title 75, chapter 10, part 4, and of rules adopted pursuant to Title 75, chapter 10, part 4. In doing so, the department shall ensure that its rules are consistent with the criteria set forth in [section 2] [75-10-424]."

1991 Amendment: Inserted (2)(f) allowing adoption of rules and performance standards for industrial furnaces and boilers that burn hazardous wastes. Amendment effective April 9, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 400, L. 1991, provided: "A statement of intent is required for this bill because it expands and clarifies rulemaking authority delegated to the department of health and environmental sciences [now department of environmental quality]. It is the intent of the legislature to provide the authority for the adoption of administrative rules for the operation and performance of industrial boilers and industrial furnaces that burn hazardous wastes. The department currently has two applications for interim status permits for such fuel-burning activities at cement plants operating in the state.

The United States environmental protection agency (EPA) was scheduled to have published performance regulations by the end of 1990 for industrial furnaces and industrial boilers, including cement kilns, but it has not published these regulations. The EPA has the authority and has been requested to approve two cement kilns that would burn hazardous wastes before the EPA regulations are in effect. It is the intent of the legislature to ensure that adequate state regulations are in place before any hazardous wastes are burned.

It is the additional intent of the legislature to allow the state regulations to be more restrictive than the federal regulations if needed to adequately protect the citizens and environment of Montana."

Name Change — Code Commissioner Correction: Section 1, Ch. 706, L. 1991, provided: "(1) The name of the state fire marshal is changed to the state fire prevention and investigation program of the department of justice.

(2) Unless inconsistent with [sections 1 through 36] [Ch. 706, L. 1991], wherever the term "state fire marshal" or "fire marshal" appears in the Montana Code Annotated, the code commissioner shall change the term to the "state fire prevention and investigation program of the department of justice", "fire prevention and investigation program" (of the department of justice), or "program", as appropriate. The code commissioner shall also conform internal references and grammar to these changes." As directed, the Code Commissioner has changed the term, as appropriate, wherever it appears in this section. Amendment effective April 29, 1991.

1989 Amendment: In (2)(c), after "prevention", inserted "and correction"; in (2)(c)(iii) substituted "corrective action" for "correction"; in (2)(c)(iv), at end, inserted "and closure"; inserted (2)(c)(v) authorizing development by rule of fee schedule for storage program; and inserted (2)(c)(vi) authorizing by rule delegation of authority to local agents. Amendment effective March 30, 1989.

1987 Amendments: Chapter 336 inserted (1)(e) authorizing Department to provide rules on requirements for corrective action within and outside waste facility boundaries; inserted (1)(k) authorizing rules on requirements for availability of public information on treatment, storage, and disposal of hazardous waste; and in (1)(g), after "operators", inserted "and for liability of guarantors providing financial assurance".

Chapter 340 inserted (2)(e) authorizing Department to adopt rules more restrictive than federal rules that require commercial hazardous waste facility owner or manager to conduct public hearing before operation; and made minor changes in phraseology.

Chapter 562 inserted (2)(d) authorizing Department to adopt rules more restrictive than federal rules relating to regulatory requirements for hazardous waste transfer facilities.

1987 Statement of Intent: The statement of intent attached to Ch. 336, L. 1987, provided: "In 1984, the United States congress amended the federal Resource Conservation and Recovery Act (RCRA) to:

(1) establish requirements for corrective action within and outside of facility boundaries and for financial assurance of that corrective action;

(2) establish liability requirements for guarantors providing financial assurance;

(3) make information on hazardous waste management facilities available to the public; and

(4) ensure that facility permits contain terms and conditions necessary to protect human health and the environment.

Rulemaking authority is provided in this bill to authorize the department of health and environmental sciences [now department of environmental quality] to adopt rules necessary to carry out these purposes and thus to maintain the equivalence of the Montana Hazardous Waste Act with RCRA, as amended."

1987 Statement of Intent: The statement of intent attached to Ch. 562, L. 1987, provided: "A statement of intent is required for this bill because it delegates rulemaking and regulatory authority to the department of health and environmental sciences [now department of environmental quality]. House Bill 789 adds transfer facilities operated by hazardous waste transporters to the category of facilities that require regulation under the Montana Hazardous Waste Act.

It is the intent of the legislature that the department adopt and implement administrative rules that will ensure that proposed hazardous waste transfer facilities are regulated to protect public health and the environment.

The legislature intends that the administrative rules developed by the department to implement House Bill 789 should be similar to those rules applicable to hazardous waste management facilities that store wastes for longer periods of time. The department may develop rules for transfer facilities that are less restrictive or less encompassing than those for long-term storage facilities, but may not adopt rules that are more restrictive or more encompassing than those for long-term storage facilities. The department may not adopt rules that are more restrictive or broader in scope than the comparable rules for hazardous waste management facilities that store wastes for longer periods of time.

The legislature understands and intends that the rules developed by the department to implement House Bill 789 must include the following:
(1) preparedness for hazardous waste emergencies;
(2) development of emergency contingency plans;
(3) training of transfer facility personnel;
(4) security provisions at transfer facilities; and
(5) hazardous waste drum handling, temporary storage methods, and containment requirements that minimize the possibilities of leaks, spills, off-site releases, or similar accidents.

The legislature intends that the enforcement authority granted to the department under 75-10-413 through 75-10-421 apply to the rules adopted under this act."

1985 Amendments: Chapter 107 inserted (1)(i) authorizing the Department to adopt, amend, or repeal rules for a schedule of fees to defray costs of establishing, operating, and maintaining any state hazardous waste management facility.

Chapter 109 in (2) after "as amended", inserted "except that the department may" through end of (2)(b) (see 1985 Session Law); and made minor changes in arrangement and phraseology.

Chapter 633 renumbered (1) through part of (9) as (1)(a) through (1)(h) and (1)(j) and made minor changes in phraseology; and in (2) (formerly part of (9)) after "as amended" inserted same introductory exception clause as Ch. 109, and inserted (2)(c) authorizing the Department to adopt rules more restrictive than those enacted by the federal government for the prevention of leakage from underground storage tanks.

1983 Amendment: At end of (4) deleted "and the assessment of permit fees for these facilities"; and inserted (8) authorizing the Department to adopt, amend, or repeal rules relating to a schedule of fees for hazardous waste management facility permits and registration of hazardous waste generators.

1983 Statement of Intent: The statement of intent attached to SB 56 (Ch. 255, L. 1983) read: "A statement of intent is required for Senate Bill 56 because it amends Section [75-10-405], MCA, of the Montana Hazardous Waste Act to allow the Department of Health and Environmental Sciences [now Department of Environmental Quality] to establish, by rule, fees for registration of hazardous waste generators. The Act, first enacted in 1981, presently contains authority for the Department to assess permit fees for hazardous waste management facilities. In the subsequent two years of its administration, it has become apparent that substantial administration costs are also associated with maintenance of the registry of hazardous waste generators. Therefore, it is the intent of the Legislature to give the Department the authority to set whatever fees are reasonable to offset a portion of the costs of maintenance of the registry, including the costs of inspection of generators, maintenance of files, communications between the Department and generators, and the preparation of program reports. It is further the intent of the Legislature that the fee system developed by the Department not apply to generators of household waste, farmers who generate hazardous waste, and small quantity hazardous waste generators. It is further the intent of the Legislature that fees for maintenance of registration of inactive or infrequent generators of hazardous waste must be $10 per year for the years in which that type generator does not generate hazardous waste."

1981 Statement of Intent: The statement of intent attached to SB 212 (Ch. 358, L. 1981) provided: "A statement of intent is required for this bill because it delegates rulemaking and licensing authority to the Department of Health and Environmental Sciences [now Department of Environmental Quality]. Senate Bill 212 is intended to separate from the existing Montana Solid Waste Management Act (Title 75, chapter 10, part 2) all references to the treatment, storage, disposal, generation, and transportation of hazardous wastes and place the statutes regulating hazardous wastes into a separate part of the code. The specific objective and intent of the bill is to clarify and extend state rulemaking authority in order to be totally authorized by the Administrator of the Environmental Protection Agency (EPA) to operate a hazardous waste program in Montana which is equivalent to and in lieu of the federal hazardous waste program established by Subtitle C of the Resource Conservation and Recovery Act (RCRA) of 1976, P.L. 94-580, as amended.

The rules promulgated and permitting procedures adopted under this bill shall meet minimum standards under RCRA and shall not be more restrictive than those analogous provisions in which EPA has adopted regulations under RCRA. In the limited situations in which no federal regulations have been adopted or the drafting of regulations has been purposefully left to the states, the Department must be guided and constrained by the purpose set forth in Section 9 [75-10-402], the powers of the Department noted in Section 11 [75-10-404], the rulemaking guidelines of Section 12 [75-10-405], and the minimum requirements of RCRA.

It should be noted that Montana has enacted regulatory provisions under existing Title 75, chapter 10, part 2, the Solid Waste Management Act, and has sufficient coverage of hazardous waste responsibilities enabling the state to qualify for interim authorization from EPA to carry out a program in lieu of the federal RCRA hazardous waste program. This bill grants the Department authority to make additional adjustments, through rulemaking, which will bring its program affecting generators and transporters of hazardous wastes, the universe of hazardous waste, inspection and sampling, definitions, enforcement alternatives and penalties into equivalency and consistency with federal requirements.

Senate Bill 212 intends that the Department of Health and Environmental Sciences [now Department of Environmental Quality] shall have authority to require by rule, in accordance with the Montana Administrative Procedure Act, that generators of hazardous wastes, prior to transporting hazardous wastes or offering them for transport offsite, must perform certain packaging, labeling, marking and placarding of the wastes in a manner equivalent to the provisions of federal regulations contained in 40 CFR 262.30 through 262.33. The Department shall have authority under the bill to adopt rules setting penalties or fines for generators of hazardous wastes that set upper limitations which are no less than the amount of $10,000 per day, as required for final authorization under the federal program. Furthermore, Senate Bill 212 allows additional rulemaking to clarify the Department's authority to make inspections of and take samples from generators of hazardous wastes in a manner equivalent to federal inspection authority provided in Section 3007 of RCRA and federal rules promulgated under RCRA.

Under existing law, the Department has promulgated rules which define a broad spectrum of hazardous wastes (the universe of hazardous wastes) by specific listing and by characteristics; which list exclusions from the definition of hazardous waste; which define terms necessary to implement the hazardous waste program; which establish manifest requirements specifying how a hazardous waste is documented from time of generation through transport to time of disposal by the operator of a treatment, storage or disposal facility; which set recordkeeping and emergency cleanup procedures for transporters of hazardous wastes; which establish licensure procedures and standards for operators of hazardous waste treatment storage and disposal systems; and which provide enforcement alternatives for treatment, storage and disposal facility licenses. All of the existing rules are equivalent to and consistent with the federal program established by RCRA; in many instances, EPA rules have been incorporated by reference.

Under Senate Bill 212, the Department will have authority to amend and revise these rules, and to adopt new rules, in accordance with the Montana Administrative Procedure Act, which may be needed to meet changing minimum federal standards for a hazardous waste program authorized for state control under RCRA, as amended. Thus, Montana will be able to continue to maintain federal authorization for an independent hazardous waste program, equivalent to the federal program, but operated by the Department."

Administrative Rules

Title 17, chapter 53, ARM Hazardous waste.

75-10-406. Permits.

Compiler's Comments

1989 Amendment: In (7), after "facility", inserted clause authorizing off-site corrective action to protect health or environment; and made minor changes in phraseology. Amendment effective March 30, 1989.

1987 Amendment: Inserted (7) requiring permit to include plans for corrective action; and inserted (8) requiring permit to contain terms and conditions necessary to protect health and environment.

1987 Statement of Intent: The statement of intent attached to Ch. 336, L. 1987, provided: "In 1984, the United States congress amended the federal Resource Conservation and Recovery Act (RCRA) to:

(1) establish requirements for corrective action within and outside of facility boundaries and for financial assurance of that corrective action;

(2) establish liability requirements for guarantors providing financial assurance;

(3) make information on hazardous waste management facilities available to the public; and

(4) ensure that facility permits contain terms and conditions necessary to protect human health and the environment.

Rulemaking authority is provided in this bill to authorize the department of health and environmental sciences [now department of environmental quality] to adopt rules necessary to carry out these purposes and thus to maintain the equivalence of the Montana Hazardous Waste Act with RCRA, as amended."

75-10-408. Variances — renewals.

Collateral References

Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901, et seq.

75-10-409. Compliance monitoring and reporting.

Compiler's Comments

1997 Amendment: Chapter 112 deleted (3) that read: "(3) If an owner or operator of an underground storage tank discovers or is provided with evidence that the tank may have leaked, he must immediately notify the department that a leak may exist"; and made minor changes in style.

Saving Clause: Section 38(1), Ch. 112, L. 1997, was a saving clause.

1985 Amendment: Inserted (3) requiring owner or operator of an underground storage tank to immediately notify the Department upon discovery of a leak.

75-10-410. Inspections — sampling.

Compiler's Comments

1997 Amendment: Chapter 112 deleted former (1)(a)(i) that read: "regulated substances are or have been stored in underground storage tanks if the department has reason to suspect that the tanks are not in compliance with the provisions of this part or rules adopted under this part"; in (1)(a)(iii) and (1)(b), before "used oil", deleted "regulated substances"; and made minor changes in style.

Saving Clause: Section 38(1), Ch. 112, L. 1997, was a saving clause.

1995 Amendment: Chapter 28 inserted (1)(a)(iii) regarding inspection of property where used oil is or has been present; in (1)(a)(iv), after "substances", inserted "used oil"; in (1)(b), after "substances", inserted "used oil"; in (2), in first sentence in three places, inserted reference to used oil and near beginning of second sentence, after "sample of any", inserted "used oil"; and made minor changes in style. Amendment effective February 6, 1995.

1989 Amendment: Inserted (1)(a)(i) authorizing Department agent or employee to enter and inspect property upon suspicion of noncompliance with storage regulations; at end of (1)(a)(ii) deleted "any property, premises, or place at which"; in (1)(a)(iii) and (1)(b) inserted "the regulated substances or"; in two places in (2) inserted "substances or" and before "vehicle" inserted "soil or groundwater or from any"; and made minor changes in phraseology and form. Amendment effective March 30, 1989.

75-10-411. Hazardous waste site inventory.

Compiler's Comments

1997 Amendment: Chapter 112 in (1), after "state where", deleted "regulated substances"; in (2), near beginning after "presence of a" and after "release of the", deleted "regulated substance or"; and made minor changes in style.

Saving Clause: Section 38(1), Ch. 112, L. 1997, was a saving clause.

1989 Amendments: Chapter 384 in three places inserted "regulated substance(s) or"; and in (2), after "constituent", deleted "at any such site". Amendment effective March 30, 1989.

Chapter 386 inserted (3) authorizing Department to order previous owner or operator to monitor, test, analyze, and report nature and extent of hazard if facility is not in operation when determination of safety hazard is made; in (4) inserted reference to subsection (3); in (5) inserted "referred to in subsection (2) or (3)"; and made minor changes in style and grammar. Amendment effective March 30, 1989.

75-10-412. State hazardous waste management facilities.

Compiler's Comments

1985 Amendment: In (1) inserted (d) authorizing the Department to collect reasonable fees to defray costs of establishing, maintaining, and operating a state hazardous waste facility and made minor changes in phraseology.

75-10-413. Administrative enforcement.

Compiler's Comments

1997 Amendment: Chapter 112 in (2), at end of first sentence, deleted "previously issued"; deleted (3)(c) that read: "(c) for underground storage tank violations, assess administrative penalties and issue corrective action orders under 75-10-423"; and made minor changes in style.

Saving Clause: Section 38(1), Ch. 112, L. 1997, was a saving clause.

1993 Amendment: Chapter 281 in (1), in first sentence before "by certified mail", inserted "personally or"; in (3), at beginning, inserted "In addition to or"; inserted (3)(c) relating to penalties and corrective orders for underground storage tank violations; and made minor changes in style. Amendment effective April 7, 1993.

Applicability: Section 6, Ch. 281, L. 1993, provided: "[This act] applies to all department of health and environmental sciences' [now department of environmental quality] notices served on alleged violators pursuant to [section 3] [75-11-525] beginning October 1, 1993, or on the date of adoption of the department's rules under 75-10-405(2)(c)(vi), whichever is earlier."

1989 Amendment: In (3)(a), after "board", inserted "or department, by subpoena or subpoena duces tecum" and after "complained of" inserted language authorizing Department to require violator to provide information on violation or impact on health or the environment; inserted (4) authorizing Board or Department to apply for court order compelling compliance with subpoena; and made minor change in phraseology. Amendment effective March 30, 1989.

75-10-414. Injunctions.

Compiler's Comments

1985 Amendment: Inserted (3) authorizing the Department to institute an injunction to enforce hazardous waste management statutes, a department rule or order, or a permit provision relating to hazardous waste management.

75-10-415. Imminent hazard.

Compiler's Comments

1997 Amendment: Chapter 112 near beginning of first sentence, after "disposal of any", deleted "regulated substance"; and made minor changes in style.

Saving Clause: Section 38(1), Ch. 112, L. 1997, was a saving clause.

1995 Amendment: Chapter 28 near beginning of first sentence, after "substance", inserted "used oil"; and made minor changes in style. Amendment effective February 6, 1995.

1989 Amendments: Chapter 384 near beginning, after "of any", inserted "regulated substance or". Amendment effective March 30, 1989.

Chapter 386 after "any person" inserted clause authorizing legal action against past or present generator, transporter, or owner or operator of a facility, after "activities" inserted language concerning order for any other necessary action, and in second sentence, after "take", substituted "appropriate" for "such other" and after "necessary" inserted language authorizing Department to issue orders necessary to protect health and environment; and made minor change in style. Amendment effective March 30, 1989.

75-10-416. Cleanup orders.

Compiler's Comments

1997 Amendment: Chapter 112 in four places, before "used oil", deleted "regulated substance"; and made minor changes in style.

Saving Clause: Section 38(1), Ch. 112, L. 1997, was a saving clause.

1995 Amendment: Chapter 28 throughout section, after "regulated substance", inserted "used oil"; and made minor changes in style. Amendment effective February 6, 1995.

1989 Amendment: In first sentence, after "spilled any", inserted "regulated substance or", after "unapproved" inserted "disposal of a regulated substance or", after "waste" deleted "disposal", and in two places in second sentence inserted reference to regulated substance or hazardous waste; and made minor change in phraseology. Amendment effective March 30, 1989.

75-10-417. Civil penalties.

Compiler's Comments

2021 Amendment: Chapter 535 in (2) at end deleted "or, if mutually agreed on by the parties in the action, in the district court of the first judicial district, Lewis and Clark County". Amendment effective October 1, 2021.

2005 Amendment: Chapter 487 in (1) inserted last sentence relating to penalty assessment factors; in (2) inserted last sentence relating to venue for actions for recovery of penalties; and made minor changes in style. Amendment effective January 1, 2006.

Saving Clause: Section 29, Ch. 487, L. 2005, was a saving clause.

1989 Amendment: In (1), after "$10,000", inserted "per violation". Amendment effective March 30, 1989.

1985 Amendment: At end of (2) deleted "Any civil penalty collected under this section is in lieu of the criminal penalty provided for in 75-10-418"; and inserted (3)(b) allowing the imposition of criminal penalties in addition to civil penalties for violation of the Montana Hazardous Waste Act.

Section Not Codified — Saving Clause: Section 2, Ch. 150, L. 1985, was a saving clause.

75-10-418. Criminal penalties.

Compiler's Comments

1995 Amendment: Chapter 28 near beginning of (1)(d), after "handles any", inserted "used oil or"; and made minor changes in style. Amendment effective February 6, 1995.

1989 Amendment: In (1) inserted "is guilty of an offense under this section if he"; in (1)(b), after "waste", inserted language concerning regulation or rules adopted under part and after "permit" inserted "or contrary to a material permit condition"; at beginning of (1)(c) inserted "omits material information", after "maintained" substituted language referring to compliance under this part pertaining to handling of waste for "as required by the provisions of this part or rules made under this part", and deleted language enumerating criminal penalties for false statement for first and subsequent offenses; inserted (1)(d) concerning knowingly destroying, altering, concealing, or failing to file document required to be maintained or filed; inserted (1)(e) concerning transporting hazardous waste without a manifest; inserted (2) establishing maximum criminal penalty for violation of subsection (1); inserted (3) establishing criminal penalty for violation of rule or permit condition issued under this part; inserted (4) providing that the maximum penalty is doubled upon second conviction; and made minor changes in style and form. Amendment effective March 30, 1989.

1987 Amendment: In (3), after "section", inserted "except money collected in a justice's court".

75-10-420. Venue for legal actions.

Compiler's Comments

2003 Amendment: Chapter 361 at end inserted "or is proposed to be located". Amendment effective April 16, 2003.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA;

the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Severability: Section 39, Ch. 361, L. 2003, was a severability clause.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

1997 Amendment: Chapter 112 deleted second sentence that read: "All legal actions affecting underground storage tanks or the disposal of regulated substances must be brought in the county where the underground storage tank is located or, if mutually agreed upon by the affected parties, in the first judicial district, Lewis and Clark County."

Saving Clause: Section 38(1), Ch. 112, L. 1997, was a saving clause.

1989 Amendment: Near beginning substituted "actions" for "proceedings" and inserted second sentence requiring legal action either in county where storage tank is located or upon agreement of parties in Lewis and Clark County; and made minor changes in grammar. Amendment effective March 30, 1989.

75-10-422. Unlawful disposal.

Compiler's Comments

1995 Amendment: Chapter 28 near beginning, after "dispose of", inserted "used oil or"; and made minor changes in style. Amendment effective February 6, 1995.

Effective Date: Section 14, Ch. 386, L. 1989, provided that this section is effective March 30, 1989.

75-10-424. Administrative penalty.

Compiler's Comments

2021 Amendment: Chapter 535 in (4) at end deleted "or, if mutually agreed on by the parties in the action, in the district court of the first judicial district, Lewis and Clark County". Amendment effective October 1, 2021.

2005 Amendment: Chapter 487 in (3) at end substituted "the penalty factors in 75-1-1001" for "(a) the gravity and the number of violations;

(b) the degree of care exercised by the alleged violator;

(c) whether significant harm resulted to the public health or the environment; and

(d) the degree of potential significant harm to the public health or the environment"; in (4) in first sentence at end substituted "file an action to recover the amount not paid" for "seek to recover the amount in an appropriate district court" and inserted last sentence relating to venue for an action in district court; and made minor changes in style. Amendment effective January 1, 2006.

Saving Clause: Section 29, Ch. 487, L. 2005, was a saving clause.

1997 Amendment: Chapter 112 in (1), in first sentence before "provision" and before "rule", deleted "used oil or hazardous waste"; and made minor changes in style.

Saving Clause: Section 38(1), Ch. 112, L. 1997, was a saving clause.

1995 Amendment: Chapter 28 in first sentence of (1), in two places, inserted reference to used oil; and made minor changes in style. Amendment effective February 6, 1995.

1993 Statement of Intent: The statement of intent attached to Ch. 509, L. 1993, provided: "A statement of intent is required for this bill in order to provide guidance to the department of health and environmental sciences [now department of environmental quality] in promulgating rules. The legislature intends that the administrative penalty provided in this bill encourage compliance with the hazardous waste sections of the Montana Hazardous Waste and Underground Storage Tank Act [now Montana Hazardous Waste Act] and rules adopted pursuant to the hazardous waste sections of that Act by allowing more timely and efficient processing of enforcement actions without the need to seek penalties through the district court. To promote this goal, the department may adopt rules that prescribe procedures for assessing administrative penalties for violations of Title 75, chapter 10, part 4, and of rules adopted pursuant to Title 75, chapter 10, part 4. In doing so, the department shall ensure that its rules are consistent with the criteria set forth in [section 2] [75-10-424]."

Administrative Rules

ARM 17.53.104 Administrative penalty.

75-10-425. Corrective action orders — judicial action.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

75-10-428. Liability — defense and exclusions.

Compiler's Comments

Saving Clause: Section 7, Ch. 159, L. 2013, was a saving clause.

Severability: Section 8, Ch. 159, L. 2013, was a severability clause.

Effective Date: Section 10, Ch. 159, L. 2013, provided: "[This act] is effective on passage and approval." Approved April 5, 2013.

75-10-431. Definitions.

Compiler's Comments

1993 Statement of Intent: The statement of intent attached to Ch. 341, L. 1993, provided: "A statement of intent is required for this bill in order to provide guidance to the department of health and environmental sciences [now department of environmental quality] in promulgating rules. The intent of this bill is to clarify and extend the authority of the department to charge fees for the review and analysis of hazardous waste management permits and for ensuring compliance with hazardous waste laws, rules, and permit conditions.

The department may develop rules that establish the amount and procedure for collecting fees for:

(1) the filing and review of hazardous waste management facility permits;
(2) the management of hazardous waste, based upon the amount of waste managed;
(3) the reissuance and modification of hazardous waste management facility permits; and
(4) the registration of hazardous waste generators.

In adopting these rules, the department shall meet the criteria set forth in [sections 2 through 4] [75-10-431 through 75-10-433]. In addition, the rules adopted by the department must reflect a maximum fee amount of $10,000 for permit reissuance or permit modification, except when the department's actual costs exceed that amount."

Severability: Section 7, Ch. 341, L. 1993, was a severability clause.

Effective Date: Section 9, Ch. 341, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 13, 1993.

75-10-432. Hazardous waste management facility filing and review fees.

Compiler's Comments

1993 Statement of Intent: The statement of intent attached to Ch. 341, L. 1993, provided: "A statement of intent is required for this bill in order to provide guidance to the department of health and environmental sciences [now department of environmental quality] in promulgating rules. The intent of this bill is to clarify and extend the authority of the department to charge fees for the review and analysis of hazardous waste management permits and for ensuring compliance with hazardous waste laws, rules, and permit conditions.

The department may develop rules that establish the amount and procedure for collecting fees for:

(1) the filing and review of hazardous waste management facility permits;
(2) the management of hazardous waste, based upon the amount of waste managed;
(3) the reissuance and modification of hazardous waste management facility permits; and
(4) the registration of hazardous waste generators.

In adopting these rules, the department shall meet the criteria set forth in [sections 2 through 4] [75-10-431 through 75-10-433]. In addition, the rules adopted by the department must reflect a maximum fee amount of $10,000 for permit reissuance or permit modification, except when the department's actual costs exceed that amount."

Severability: Section 7, Ch. 341, L. 1993, was a severability clause.

Retroactive Applicability: Section 8, Ch. 341, L. 1993, provided: "[Section 3] [75-10-432] applies retroactively, within the meaning of 1-2-109, to applications for hazardous waste management facility permits received on or after January 1, 1993."

Effective Date: Section 9, Ch. 341, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 13, 1993.

75-10-433. Hazardous waste management fees.

Compiler's Comments

1993 Statement of Intent: The statement of intent attached to Ch. 341, L. 1993, provided: "A statement of intent is required for this bill in order to provide guidance to the department of health and environmental sciences [now department of environmental quality] in promulgating rules. The intent of this bill is to clarify and extend the authority of the department to charge fees for the review and analysis of hazardous waste management permits and for ensuring compliance with hazardous waste laws, rules, and permit conditions.

The department may develop rules that establish the amount and procedure for collecting fees for:

(1) the filing and review of hazardous waste management facility permits;
(2) the management of hazardous waste, based upon the amount of waste managed;
(3) the reissuance and modification of hazardous waste management facility permits; and
(4) the registration of hazardous waste generators.

In adopting these rules, the department shall meet the criteria set forth in [sections 2 through 4] [75-10-431 through 75-10-433]. In addition, the rules adopted by the department must reflect a maximum fee amount of $10,000 for permit reissuance or permit modification, except when the department's actual costs exceed that amount."

Severability: Section 7, Ch. 341, L. 1993, was a severability clause.

Effective Date: Section 9, Ch. 341, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 13, 1993.

75-10-434. Deposit of hazardous waste management fees.

Compiler's Comments

1997 Amendment: Chapter 84 inserted (1)(c) concerning fees collected for the registration of hazardous waste generators; inserted (1)(d) concerning fees collected for the reissuance or modification of hazardous waste management facility permits; and made minor changes in style. Amendment effective July 1, 1997.

1993 Statement of Intent: The statement of intent attached to Ch. 341, L. 1993, provided: "A statement of intent is required for this bill in order to provide guidance to the department of health and environmental sciences [now department of environmental quality] in promulgating rules. The intent of this bill is to clarify and extend the authority of the department to charge fees for the review and analysis of hazardous waste management permits and for ensuring compliance with hazardous waste laws, rules, and permit conditions.

The department may develop rules that establish the amount and procedure for collecting fees for:

(1) the filing and review of hazardous waste management facility permits;
(2) the management of hazardous waste, based upon the amount of waste managed;
(3) the reissuance and modification of hazardous waste management facility permits; and
(4) the registration of hazardous waste generators.

In adopting these rules, the department shall meet the criteria set forth in [sections 2 through 4] [75-10-431 through 75-10-433]. In addition, the rules adopted by the department must reflect a maximum fee amount of $10,000 for permit reissuance or permit modification, except when the department's actual costs exceed that amount."

Severability: Section 7, Ch. 341, L. 1993, was a severability clause.

Effective Date: Section 9, Ch. 341, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 13, 1993.

75-10-441. Hazardous waste site — public hearing required before operation.

Compiler's Comments

1987 Statement of Intent: The statement of intent attached to Ch. 340, L. 1987, provided: "It is the intent of the legislature that the department of health and environmental sciences [now department of environmental quality] adopt rules to specify that the public hearing requirements provided for in section 1 [75-10-441] apply to the owner or manager of a proposed commercial facility for the storage, collection, or transfer of hazardous waste. It is the intent of the legislature that the rules apply equally to facilities subject to permitting under 75-10-406 and to facilities exempt from permitting by virtue of operational characteristics."

75-10-442. Moratorium on certain hazardous waste facility permits.

Compiler's Comments

Preamble: The preamble attached to Ch. 16, Sp. L. July 1992, provided: "WHEREAS, efforts are underway to locate facilities in Montana that would incinerate solid wastes or hazardous wastes and to locate other facilities that burn hazardous waste-derived fuels; and

WHEREAS, the Legislature is concerned that current state law does not provide adequate protection for the human and physical environment, including impacts to public health, safety, and welfare and property values, from the impacts of solid waste or hazardous waste incinerator facilities or other facilities that burn hazardous waste-derived fuels; and

WHEREAS, the Legislature desires to fully consider the impacts of solid waste and hazardous waste incinerators or other facilities that burn hazardous waste-derived fuels during the 53rd Regular Session."

Severability: Section 5, Ch. 16, Sp. L. July 1992, was a severability clause.

Effective Date: Section 6, Ch. 16, Sp. L. July 1992, provided that this act is effective on passage and approval. The act became effective pursuant to Article VI, sec. 10, of the Montana Constitution due to the passage of 25 days after delivery without gubernatorial action on the bill. Effective August 14, 1992.

Part 5

Motor Vehicle Recycling and Disposal

Part Administrative Rules

Title 17, chapter 50, subchapter 2, ARM Motor vehicle recycling and disposal.

75-10-501. Definitions.

Compiler's Comments

Termination Provision Repealed: Section 1, Ch. 454, L. 2023, repealed sec. 5, Ch. 427, L. 2019, and sec. 1, Ch. 72, L. 2021, which terminated the 2019 amendments to this section June 30, 2023. Effective May 8, 2023.

Extension of Termination Date: Section 1, Ch. 72, L. 2021, amended sec. 5, Ch. 427, L. 2019, by extending the termination date imposed by Ch. 427 to June 30, 2023. Effective March 23, 2021.

2019 Amendment: Chapter 427 inserted definitions of junk mobile home and junk nonmotorized vehicle; and made minor changes in style. Amendment effective July 1, 2019, and terminates June 30, 2021.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

2007 Amendment: Chapter 265 in definition of junk vehicle in (a) inserted "motor vehicle, including component parts", in (a)(i) after "dismantled" deleted "motor vehicle, including component parts", in (a)(ii) inserted exception clause, and inserted (b) allowing permanently registered vehicle to be determined to be junk vehicle if it meets all other criteria for determining junk vehicle status; and made minor changes in style. Amendment effective October 1, 2007.

1995 Amendments — Composite Section: Chapter 418 in definition of Board substituted "board of environmental review provided for in 2-15-3502" for "board of health and environmental sciences provided for in 2-15-2104"; in definition of Department substituted "department of environmental quality provided for in 2-15-3501" for "department of health and environmental sciences provided for in Title 2, chapter 15, part 21"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 deleted definition of Board that read: ""Board" means the board of health and environmental sciences provided for in 2-15-2104"; pursuant to sec. 568, Ch. 546, L. 1995, a coordination section, in definition of Department the Code Commissioner substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Because Ch. 418 inserted a reference to the Board of Environmental Review and Ch. 546 deleted a reference to the Board of Health and Environmental Sciences, the codifier has reflected both the insertion and the deletion.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment: Inserted definition of component part; in definition of motor vehicle wrecking facility, in two places in (b) after "sells", substituted "component parts" for reference to integral secondhand parts or component material; and made minor changes in style. Amendment effective July 1, 1991.

1983 Amendment: In (3), before "vehicle" inserted "motor" and after "component parts" deleted "or a vehicle substantially changed in form by removal of parts or component materials and".

Case Notes

Lack of Efforts to Notify Vehicle Owner After Vehicle Towed — Not Abandoned or Junk Vehicle — Summary Judgment Proper: Springer owned a van that he parked on a Bozeman street. A parking control officer placed a notice of abandoned vehicle specifying a September 25 tow date on the van. On the tow date, Springer moved the van to the other side of the street. Three days later, the van was towed and subsequently destroyed. Springer was never notified of the towing. Springer brought an action against the officer and the city to recover damages for destruction of the van. The District Court determined that the van was neither an abandoned vehicle under 61-12-401 nor a junk vehicle under this section and that the city did not take reasonable efforts to notify Springer that the van had been towed, as required by 61-12-402. Summary judgment awarding damages to Springer was proper. Springer v. Becker, 284 M 267, 949 P2d 641, 54 St. Rep. 876 (1997).

75-10-502. Possession of junk vehicles as prima facie evidence of motor vehicle wrecking facility.

Case Notes

Presumption of Wrecking Facility — Permissible in Civil Action for Failure to License: The presumption raised by 75-10-702 is permissible in a civil action for failure to license a wrecking facility under 75-10-511, with penalties as provided in 75-10-542. The District Court found that the defendant operated a wrecking facility and based its findings upon the defendant's failure to overcome the presumption in this section. State ex rel. Dept. of Health and Environmental Sciences v. Bernhard, 208 M 53, 675 P2d 390, 41 St. Rep. 167 (1984).

75-10-503. Adoption of rules.

Compiler's Comments

1999 Amendment: Chapter 513 inserted (3) concerning rules for reimbursements; and made minor changes in style. Amendment effective July 1, 1999.

1995 Amendment: Chapter 418 near beginning of (2), after "department", deleted "of health and environmental sciences" and deleted second sentence that read: "The department shall adopt these rules no later than July 1, 1992"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1991 Amendment: In (2), in first sentence after "shall", deleted "after seeking input from counties, licensed motor vehicle wrecking facilities, and the general public" and after "rules" substituted "authorizing the sale of junk vehicles by county motor vehicle graveyards to licensed motor vehicle wrecking facilities" for "pertaining to the reuse and restoration of junk vehicles"; and in (2), in second sentence, substituted "1992" for "1990". Amendment effective July 1, 1991.

1989 Statement of Intent: The statement of intent attached to Ch. 698, L. 1989, provided: "A statement of intent is required for this bill because [section 1] [75-10-503(2)] grants rulemaking authority to the department of health and environmental sciences [now department of environmental quality] to implement the provisions of [this act]. It is the intent of the legislature that the department of health and environmental sciences [now department of environmental quality] adopt rules pertaining to the reuse and restoration of junk vehicles. The department shall adopt rules after consultation with counties, licensed motor vehicle wrecking facilities, and the general public."

Effective Date: Section 2, Ch. 698, L. 1989, provided that subsection (2) is effective May 22, 1989.

1983 Amendment: In (6), inserted the language making the subsection apply only to facilities existing prior to July 1973 that have been in continuous use.

Relationship of Part to New Section: See compiler's comment to 75-10-520.

Administrative Rules

Title 17, chapter 50, subchapter 2, ARM Motor vehicle recycling and disposal.

75-10-504. Shielding — new facility.

Compiler's Comments

1983 Amendment: In first sentence, deleted "new" before "motor vehicle" and inserted "established or proposed on or after July 1, 1973" after "graveyard site"; inserted final phrase of first sentence beginning "on the date"; and substituted last sentence relating to facilities licensed within preceding 18 months for "The prohibition concerning approval of a new motor vehicle wrecking facility site does not apply to a facility site that has been used as such within the preceding 18 months."

Case Notes

Vehicle Wrecking Facility in Public View — Shielding Required: The District Court erred in finding that a junk vehicle wrecking facility could be noticed from two public highways but was not within "public view", precluding shielding. In ordering that shielding regulations be followed, the Supreme Court found by a preponderance of the evidence that the facility was in public view, was one of the largest facilities in the state, and that the owner knew of shielding regulations for several years but failed to comply. State ex rel. Dept. of Health and Environmental Sciences v. Green, 227 M 299, 739 P2d 469, 44 St. Rep. 1099 (1987).

Responsibility to Maintain Shield — Penalty: Appellant, owner of a motor vehicle wrecking facility, was fined $50 a day when the fence he had erected in compliance with a previous court order was destroyed by cattle and wind and he refused to replace it. The Supreme Court found there was substantial credible evidence to support the District Court's finding that appellant was not in compliance with the court's earlier order to shield the wrecking facility. Appellant is responsible for installing a fence which adequately shields the wrecking facility and for repairing or replacing that fence when necessary. The Supreme Court further found that appellant knowingly waived his right to counsel at the District Court hearing and that he was competent to represent himself at the hearing. State ex rel. Dept. of Health and Environmental Sciences v. Bernhard, 220 M 275, 714 P2d 558, 43 St. Rep. 357 (1986).

State Not Responsible for Shielding Recent Wrecking Facilities: The State was not responsible for shielding a wrecking facility that was not a licensed wrecking facility before 1967. Because the defendant's wrecking facility was not a licensed operating wrecking facility at that time, the defendant was responsible for the shielding. State ex rel. Dept. of Health and Environmental Sciences v. Bernhard, 208 M 53, 675 P2d 390, 41 St. Rep. 167 (1984).

License for Junkyard Despite Lack of Shield: Although applicant's facility did not have the required shielding, when this was due to no fault of his own and when the applicant had no legal duty himself to build the shield, the Department of Health and Environmental Sciences (now Department of Environmental Quality) may properly be mandated to issue a license for the facility. Cain v. Dept. of Health and Environmental Sciences, 177 M 448, 582 P2d 332, 35 St. Rep. 1056 (1978).

75-10-505. Shielding and removal of junk vehicles generally.

Compiler's Comments

Effective Date: Section 8, Ch. 572, L. 1991, provided that this section is effective July 1, 1991.

Case Notes

Default Judgment Proper in Civil Action for Failure to License and Shield Vehicle Wrecking Facility Absent Meritorious Defense: For an entire year, the Department of Environmental Quality (DEQ) attempted to bring Robinsons' vehicle wrecking facility into compliance by informally soliciting application information and making the Robinsons aware of shielding requirements. The Robinsons never responded to the request for an application nor erected any shielding. DEQ filed an enforcement action and application for permanent injunction but continued for another year to work with Robinsons informally to achieve compliance. Robinsons eventually submitted an incomplete application but did not address the shielding problem. Finally, after nearly 2 years, the District Court entered default judgment against Robinsons in the amount of $68,400 as a civil penalty pursuant to 75-10-542(2). Robinsons appealed. After hearing the Robinsons' numerous procedural arguments, the Supreme Court found no grounds to set aside the default judgment on grounds of mistake or excusable neglect, holding that Robinsons had offered no defense at all, let alone a meritorious defense, to the charges in the complaint, nor had they presented any evidence to dispute the charges. Default judgment was affirmed. State ex rel. Dept. of Environmental Quality v. Robinson, 1998 MT 185, 290 M 137, 962 P2d 1212, 55 St. Rep. 745 (1998).

75-10-511. Motor vehicle wrecking facility and motor vehicle graveyard licenses.

Compiler's Comments

2001 Amendment: Chapter 317 in (3) increased annual fee from $50 to $100; and made minor changes in style. Amendment effective January 1, 2002.

Preamble: The preamble attached to Ch. 317, L. 2001, provided: "WHEREAS, at the end of fiscal year 2000, the junk vehicle fund administered by the department of environmental quality was reduced to its lowest level since 1980 and was only 65% of its 1998 value; and

WHEREAS, a declining international market price for scrap steel has reduced revenues that the department received for vehicles recycled through the program by 63% over the last 2 years; and

WHEREAS, almost $900,000 of the $1.1 million dollar junk vehicle program budget is provided to counties for the control and removal of junk vehicles in their jurisdictions; and

WHEREAS, without increases in the junk vehicle disposal fees and the annual license fees for motor vehicle wrecking facilities, the department will have insufficient revenue to fully support county program grants, resulting in the counties' decreased ability to pay for the control and removal of junk vehicles; and

WHEREAS, insufficient funding to allow the counties to control and remove junk vehicles is likely to cause impairment of scenic values and an increased risk of contamination to the environment."

Administrative Rules

ARM 17.50.210 Motor vehicle graveyards.

Case Notes

Default Judgment Proper in Civil Action for Failure to License and Shield Vehicle Wrecking Facility Absent Meritorious Defense: For an entire year, the Department of Environmental Quality (DEQ) attempted to bring Robinsons' vehicle wrecking facility into compliance by informally soliciting application information and making the Robinsons aware of shielding requirements. The Robinsons never responded to the request for an application nor erected any shielding. DEQ filed an enforcement action and application for permanent injunction but continued for another year to work with Robinsons informally to achieve compliance. Robinsons eventually submitted an incomplete application but did not address the shielding problem. Finally, after nearly 2 years, the District Court entered default judgment against Robinsons in the amount of $68,400 as a civil penalty pursuant to 75-10-542(2). Robinsons appealed. After hearing the Robinsons' numerous procedural arguments, the Supreme Court found no grounds to set aside the default judgment on grounds of mistake or excusable neglect, holding that Robinsons had offered no defense at all, let alone a meritorious defense, to the charges in the complaint, nor had they presented any evidence to dispute the charges. Default judgment was affirmed. State ex rel. Dept. of Environmental Quality v. Robinson, 1998 MT 185, 290 M 137, 962 P2d 1212, 55 St. Rep. 745 (1998).

Junk Vehicles Not Purchased From Insurance Companies — License Required: The operator of a junk vehicle wrecking facility contended that since he did not purchase junk cars from insurance companies, he was not required to obtain a license for the facility. In holding that a license was required, the Supreme Court held that the insurance company disposal statute and the junk vehicle licensing statute are separate and independent requirements that may be independently enforced. State ex rel. Dept. of Health and Environmental Sciences v. Green, 227 M 299, 739 P2d 469, 44 St. Rep. 1099 (1987).

Responsibility to Maintain Shield — Penalty: Appellant, owner of a motor vehicle wrecking facility, was fined $50 a day when the fence he had erected in compliance with a previous court order was destroyed by cattle and wind and he refused to replace it. The Supreme Court found there was substantial credible evidence to support the District Court's finding that appellant was not in compliance with the court's earlier order to shield the wrecking facility. Appellant is responsible for installing a fence which adequately shields the wrecking facility and for repairing or replacing that fence when necessary. The Supreme Court further found that appellant knowingly waived his right to counsel at the District Court hearing and that he was competent to represent himself at the hearing. State ex rel. Dept. of Health and Environmental Sciences v. Bernhard, 220 M 275, 714 P2d 558, 43 St. Rep. 357 (1986).

Presumption of Wrecking Facility — Permissible in Civil Action for Failure to License: The presumption raised by 75-10-702 is permissible in a civil action for failure to license a wrecking facility under this section, with penalties as provided in 75-10-542. The District Court found that the defendant operated a wrecking facility and based its findings upon the defendant's failure to overcome the presumption in 75-10-502. State ex rel. Dept. of Health and Environmental Sciences v. Bernhard, 208 M 53, 675 P2d 390, 41 St. Rep. 167 (1984).

Constitutionality: This section is not unconstitutional, an ex post facto violation, or violative of due process requirements but a valid exercise of police power broad enough to include aesthetic considerations underlying the shielding requirement. St. v. Bernhard, 173 M 464, 568 P2d 136 (1977), followed in State ex rel. Dept. of Health and Environmental Sciences v. Green, 227 M 299, 739 P2d 469, 44 St. Rep. 1099 (1987).

75-10-512. Records required of facilities.

Compiler's Comments

2003 Amendment: Chapter 477 in (2)(a) substituted "certificate of title" for "certificate of ownership". Amendment effective January 1, 2004.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

1993 Amendment: Chapter 10 in (2)(d) inserted reference to vehicle identification number as defined in 61-3-210; and made minor changes in style.

1991 Amendment: In (2)(a), after "owner", inserted "or person selling the vehicle, release of ownership or interest in the motor vehicle"; and inserted (3) concerning an authorized representative of Department.

1985 Amendment: In (1) after "name", inserted "and address"; in (2)(a) substituted "ownership" for "title", and "notarized bill of sale from the former owner, or sheriff's release" for "or a written release from the former owner"; deleted former (2)(c) that read: "the number of the last license plate"; and in (2)(f) substituted "the vehicle" for "motor and chassis".

Administrative Rules

ARM 17.50.207 Inspections.

75-10-513. Disposal of junk vehicles — records.

Compiler's Comments

2007 Amendment: Chapter 53 in (1) at beginning after "a" inserted "person owning or operating a"; deleted former (2) that read: "(2) Quarterly, each motor vehicle wrecking facility shall mail to the department of justice, on a form approved by the department of justice, a list of all junk vehicles received by the motor vehicle wrecking facility during the quarter, stating the year, make, and complete identification number of each vehicle. If a certificate of title is received for a junk vehicle on the list, that certificate of title must accompany the list. The department of justice shall issue a receipt for the certificate of title if requested by the licensed facility, and the receipt may serve as an instrument for reclaiming the certificate of title if the vehicle is rebuilt"; in (2) at beginning after "A" inserted "person owning or operating a"; and made minor changes in style. Amendment effective October 1, 2007.

2003 Amendments — Composite Section: Chapter 281 in (1) after "program" deleted "it shall pay a disposal fee of $2 for each vehicle submitted, and". Amendment effective April 10, 2003.

Chapter 477 throughout (2) substituted "certificate of title" for "certificate of ownership". Amendment effective January 1, 2004.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

1995 Amendment: Chapter 18 in third sentence of (2), after "a receipt", deleted "of" and deleted brackets around "for"; and made minor changes in style.

1985 Amendments: Chapter 427 in (1) after "vehicle submitted" deleted "and it shall surrender to the department all records maintained as required in 75-10-512"; inserted (2) requiring each wrecking facility to mail to the Department each quarter a list of all junk vehicles received and any certificates of ownership available; and inserted (3) requiring a motor vehicle graveyard to submit to the Department the records, documents, and other information on junk vehicles as required by rule.

Chapter 503 in (2) substituted reference to department of justice for reference to division of motor vehicles in three places.

Administrative Rules

ARM 17.50.215 Disposal of junk vehicles through state disposal program.

75-10-514. Denial, suspension, or revocation of license — grounds.

Compiler's Comments

1997 Amendment: Chapter 213 at beginning of (1)(a), (1)(b), (1)(c), (1)(d), and (1)(e) inserted reference to applicant or licensee; in (1), after "suspend", deleted "or revoke" and at end substituted "on any of the following grounds" for "when it proves the business"; inserted (2) relating to revocation of a license; and made minor changes in style. Amendment effective April 8, 1997.

Saving Clause: Section 4, Ch. 213, L. 1997, was a saving clause.

75-10-516. Motor vehicle wrecking facilities and motor vehicle graveyards — licensing process — decision criteria.

Compiler's Comments

Saving Clause: Section 3, Ch. 607, L. 1991, was a saving clause.

75-10-520. Disposal of damaged vehicle when insurance company settles at total loss.

Compiler's Comments

Relationship of Part to New Section: The words "except 75-10-520" were added to 75-10-503, 75-10-533, and 75-10-542 in 1979 by the Code Commissioner to make it clear that 75-10-520 is not intended as an integral part of Title 75, ch. 10, part 5. Section 75-10-520 was enacted by sec. 1, Ch. 244, L. 1979, without a codification instruction. It is codified in Title 75, ch. 10, part 5, for code user convenience. Penalty provisions and provisions relating to powers and duties of the Department of Health and Environmental Sciences (now Department of Environmental Quality) have no application to 75-10-520.

Case Notes

Junk Vehicles Not Purchased From Insurance Companies — License Required: The operator of a junk vehicle wrecking facility contended that since he did not purchase junk cars from insurance companies, he was not required to obtain a license for the facility. In holding that a license was required, the Supreme Court held that the insurance company disposal statute and the junk vehicle licensing statute are separate and independent requirements that may be independently enforced. State ex rel. Dept. of Health and Environmental Sciences v. Green, 227 M 299, 739 P2d 469, 44 St. Rep. 1099 (1987).

75-10-521. Powers and duties of county motor vehicle recycling and disposal programs.

Compiler's Comments

Termination Provision Repealed: Section 1, Ch. 454, L. 2023, repealed sec. 5, Ch. 427, L. 2019, and sec. 1, Ch. 72, L. 2021, which terminated the 2019 amendments to this section June 30, 2023. Effective May 8, 2023.

Extension of Termination Date: Section 1, Ch. 72, L. 2021, amended sec. 5, Ch. 427, L. 2019, by extending the termination date imposed by Ch. 427 to June 30, 2023. Effective March 23, 2021.

2019 Amendment: Chapter 427 inserted (8)(d) regarding budget limits for disposal of junk nonmotorized vehicles and junk mobile homes; inserted (10) regarding counties accepting junk nonmotorized vehicles and junk mobile homes for recycling; and made minor changes in style. Amendment effective July 1, 2019, and terminates June 30, 2021.

2017 Amendment: Chapter 88 in (8)(b) inserted reference to motor vehicle recycling and disposal capital improvement fund; inserted (8)(c) concerning designating up to 10% of budget to motor vehicle recycling and disposal capital improvement fund; inserted (8)(d) concerning transferral of unspent money to motor vehicle recycling and disposal capital improvement fund; inserted (8)(e) concerning prohibition on allocations if a county's motor vehicle recycling and disposal capital improvement fund balance exceeds $200,000; inserted (9) concerning establishment of motor vehicle recycling and disposal capital improvement fund and allowable expenditures from the fund; and made minor changes in style. Amendment effective March 23, 2017.

1991 Amendment: Inserted (4) requiring County Commissioners to designate a representative to implement part; inserted (5) requiring each county, through a representative, to inspect each licensed motor vehicle wrecking facility within county; inserted (6) authorizing each county to sell junk vehicles from graveyard to licensed motor vehicle wrecking facilities with sales conducted pursuant to a departmentally approved plan; at beginning of (8) deleted "Prior to June 15" and after "graveyard" inserted "and for other duties relating to implementation of this part"; and made minor changes in style. Amendment effective July 1, 1991.

75-10-532. Disposition of money collected.

Compiler's Comments

2011 Amendment: Chapter 312 at beginning of second sentence inserted "Subject to legislative fund transfers"; and made minor changes in style. Amendment effective May 4, 2011.

Severability: Section 18, Ch. 312, L. 2011, was a severability clause.

2005 Amendment: Chapter 542 near end of first sentence substituted "state" for "department of revenue". Amendment effective January 1, 2006.

2003 Amendment: Chapter 281 near middle of first sentence after "fees" deleted "and fees collected as motor vehicle disposal fees"; and made minor changes in style. Amendment effective April 10, 2003.

2001 Amendments — Composite Section: Chapter 257 substituted "department of revenue, as provided in 15-1-504" for "state treasurer"; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 317 near end after "component parts and" deleted "to the extent the legislature appropriates funds expressly and solely for this purpose". Amendment effective January 1, 2002.

Preamble: The preamble attached to Ch. 317, L. 2001, provided: "WHEREAS, at the end of fiscal year 2000, the junk vehicle fund administered by the department of environmental quality was reduced to its lowest level since 1980 and was only 65% of its 1998 value; and

WHEREAS, a declining international market price for scrap steel has reduced revenues that the department received for vehicles recycled through the program by 63% over the last 2 years; and

WHEREAS, almost $900,000 of the $1.1 million dollar junk vehicle program budget is provided to counties for the control and removal of junk vehicles in their jurisdictions; and

WHEREAS, without increases in the junk vehicle disposal fees and the annual license fees for motor vehicle wrecking facilities, the department will have insufficient revenue to fully support county program grants, resulting in the counties' decreased ability to pay for the control and removal of junk vehicles; and

WHEREAS, insufficient funding to allow the counties to control and remove junk vehicles is likely to cause impairment of scenic values and an increased risk of contamination to the environment."

Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

1999 Amendment: Chapter 513 at end inserted "and, to the extent the legislature appropriates funds expressly and solely for this purpose, for the removal of abandoned vehicles". Amendment effective July 1, 1999.

1995 Amendment: Chapter 418 deleted (2) that read: "(2) implementation by the department of health and environmental sciences during the 1987 biennium of the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 in accordance with 75-10-601 through 75-10-604, and the Montana Hazardous Waste Act in accordance with 75-10-401 through 75-10-421, up to an amount not exceeding $58,690"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1985 Amendments — Session Law Reference — Effective Date and Termination: Chapter 633 inserted (2) relating to implementation procedures.

Chapter 718 at beginning, inserted exception clause relating to disposition of moneys collected from sale of junk vehicles; deleted former (2) that read: "implementation by the department of health and environmental sciences during the 1985 biennium of the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 in accordance with Title 75, chapter 10, part 6, up to an amount not exceeding $220,000"; and made minor changes in style.

The reference to sec. 1, Ch. 718, L. 1985, is left as a session law citation because sec. 1, Ch. 718, L. 1985, was an appropriation of $500,000 from the junk vehicle state special revenue fund to the general fund and was not codified.

Section 3, Ch. 718, L. 1985, provided: "(1) This act is effective July 1, 1985.

(2) That portion of section 2 adding an exception clause to 75-10-532 terminates on July 1, 1987."

1983 Amendment: Inserted (2) (see 1985 Ch. 718 amendment note for text).

75-10-533. Department to report fees.

Compiler's Comments

2001 Amendment: Chapter 574 near middle after "part" deleted "and 61-3-508"; and made minor changes in style. Amendment effective July 1, 2001.

1993 Amendment: Chapter 349 near beginning, after "shall", substituted "report to the office of budget and program planning, as a part of the information required by 17-7-111" for "as provided in 5-11-210, report to each legislature".

1991 Amendment: Near beginning inserted reference to 5-11-210. Amendment effective March 20, 1991.

Relationship of Part to New Section: See compiler's comment to 75-10-520.

75-10-534. Department to pay approved county budget.

Compiler's Comments

2007 Amendment: Chapter 408 in second sentence increased junk vehicle yearly payment from maximum of $1.25 to $1.40 and in third sentence increased department payment from $6,250 to $7,500. Amendment effective July 1, 2007.

2003 Amendment: Chapter 200 in second sentence increased per vehicle payment from $1 to $1.25; in third sentence increased total payment from $5,000 to $6,250; and made minor changes in style. Amendment effective July 1, 2003.

1991 Amendment: Inserted fourth, fifth, and sixth sentences requiring counties to return from junk vehicle sales to state junk vehicle program revenue account money equal to salvage value of each vehicle sold, requiring salvage value to be the average contract value of crushed ton of junk vehicle as determined by statewide salvage bids, and authorizing county to retain additional realized revenue from junk vehicle sales for use in county junk vehicle program. Amendment effective July 1, 1991.

75-10-540. Administrative enforcement.

Compiler's Comments

2005 Amendment: Chapter 443 in (1) near middle of first sentence after "adopted" inserted "or an order issued" and at end of second sentence inserted "an order assessing an administrative penalty pursuant to 75-10-542, or both"; inserted (4) relating to contested case provisions; and made minor changes in style. Amendment effective April 28, 2005.

Saving Clause: Section 12, Ch. 443, L. 2005, was a saving clause.

Saving Clause: Section 4, Ch. 213, L. 1997, was a saving clause.

Effective Date: Section 5, Ch. 213, L. 1997, provided: "[This act] is effective on passage and approval." Approved April 8, 1997.

75-10-541. Injunction — action to collect civil penalty — authority of department of justice.

Compiler's Comments

2007 Amendment: Chapter 53 in (4) near end after "75-10-512" deleted "or 75-10-513(2)". Amendment effective October 1, 2007.

1991 Amendments: Chapter 572 in (1), after "department", deleted "through the attorney general or the county attorney of the county in which a facility is located"; in (2), after "department", deleted "through the attorney general or the county attorney of the county in which a motor vehicle wrecking facility or graveyard is located"; and inserted (3) authorizing, upon Department request, Attorney General or the County Attorney of the county in which a wrecking facility or graveyard is located to petition District Court to enjoin facility or graveyard or to impose, assess, and recover civil penalty. Amendment effective July 1, 1991.

Chapter 725 inserted (4) authorizing suit for collection of civil penalty for certain recordkeeping violations.

75-10-542. Penalties.

Compiler's Comments

2021 Amendment: Chapter 535 in (3) at end deleted "or, if mutually agreed on by the parties in the action, in the district court of the first judicial district, Lewis and Clark County". Amendment effective October 1, 2021.

2005 Amendment: Chapter 443 in (1) near beginning substituted "purposely or knowingly" for "willfully"; in (2) in first sentence near beginning inserted "a provision of", near middle after "subject to" inserted "an administrative penalty of not more than $50 or", and at end substituted "$250" for "$50"; inserted (3) relating to determination of penalties based on penalty factors and venue; and made minor changes in style. Amendment effective April 28, 2005.

The amendments to this section made by sec. 4, Ch. 443, L. 2005, and sec. 16, Ch. 487, L. 2005, were rendered void by sec. 10, Ch. 443, L. 2005, a coordination section.

Saving Clause: Section 12, Ch. 443, L. 2005, was a saving clause.

Section 29, Ch. 487, L. 2005, was a saving clause.

Relationship of Part to New Section: See compiler's comment to 75-10-520.

Case Notes

Responsibility to Maintain Shield — Penalty: Appellant, owner of a motor vehicle wrecking facility, was fined $50 a day when the fence he had erected in compliance with a previous court order was destroyed by cattle and wind and he refused to replace it. (See 2005 amendment.) The Supreme Court found there was substantial credible evidence to support the District Court's finding that appellant was not in compliance with the court's earlier order to shield the wrecking facility. Appellant is responsible for installing a fence which adequately shields the wrecking facility and for repairing or replacing that fence when necessary. The Supreme Court further found that appellant knowingly waived his right to counsel at the District Court hearing and that he was competent to represent himself at the hearing. State ex rel. Dept. of Health and Environmental Sciences v. Bernhard, 220 M 275, 714 P2d 558, 43 St. Rep. 357 (1986).

Presumption of Wrecking Facility — Permissible in Civil Action for Failure to License: The presumption raised by 75-10-702 is permissible in a civil action for failure to license a wrecking facility under 75-10-511, with penalties as provided in this section. The District Court found that the defendant operated a wrecking facility and based its findings upon the defendant's failure to overcome the presumption in 75-10-502. State ex rel. Dept. of Health and Environmental Sciences v. Bernhard, 208 M 53, 675 P2d 390, 41 St. Rep. 167 (1984).

Part 6
State Participation in CERCLA

Part Compiler's Comments

Source: This part is based on Title 25, Article 16, Colorado Revised Statutes of 1973.

Part Case Notes

Restoration Damages Claim Arises Under State Common Law — No Implication of Federal Law or Cleanup Standards: The property owners did not seek to compel the Environmental Protection Agency (EPA) to do, or refrain from doing, anything, and their claim for restoration damages would not impact or impede the EPA's work in any way. Further, federal law did not expressly or impliedly preempt the property owners' claim for common law restoration damages. Atlantic Richfield Co. v. 2nd Judicial District Court, 2017 MT 324, 390 Mont. 76, 408 P.3d 515. However, the United States Supreme Court vacated this portion of the ruling in Atl. Richfield Co. v. Christian, __ US __, 206 L Ed 2d 516, 140 S Ct 1335 (2020), holding that the Montana Supreme Court erred in ruling that the landowners were not potentially responsible parties under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and therefore did not need to seek EPA approval. The United States Supreme Court also held that restoration action cannot be taken in the absence of EPA approval.

Part Collateral References

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601, et seq.

75-10-601. Purpose.

Collateral References

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 26 U.S.C. §§ 4611, 4612, 4661, 4662, 4681, 4682; 33 U.S.C. § 1364; 42 U.S.C. §§ 6911, 6911a, 9601 through 9615, 9631 through 9633, 9641, 9651, 9657; 49 U.S.C. § 11901.

75-10-602. Definitions.

Compiler's Comments

1995 Amendment: Chapter 418 in definition of Department substituted "department of environmental quality provided for in 2-15-3501" for "department of health and environmental sciences provided for in Title 2, chapter 15, part 21"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

75-10-603. Cooperative agreement — authority of department.

Compiler's Comments

1995 Amendment: Chapter 471 in (1), at end, inserted "subject to the provisions of 75-10-107"; and made minor changes in style. Amendment effective April 14, 1995.

Applicability: Section 22(3), Ch. 471, L. 1995, provided: "(3) [This act] does not apply to the establishment of fees or public participation requirements."

1993 Amendment: Chapter 10 in (2), in introductory clause, substituted "may" for "must"; and made minor changes in style.

Collateral References

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 26 U.S.C. §§ 4611, 4612, 4661, 4662, 4681, 4682; 33 U.S.C. § 1364; 42 U.S.C. §§ 6911, 6911a, 9601 through 9615, 9631 through 9633, 9641, 9651, 9657; 49 U.S.C. § 11901.

Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq.

75-10-621. Hazardous waste/CERCLA special revenue account.

Compiler's Comments

2007 Amendment: Chapter 432 inserted (2)(a) relating to proceeds from the resource indemnity and ground water assessment tax; in (5) at beginning of second sentence deleted "Except as provided in subsection (6)"; deleted former (6) that read: "(6) (a) If funds are transferred from the orphan share fund to the hazardous waste/CERCLA account pursuant to 75-10-743(9), the department shall, subject to the limitations in subsections (6)(b) and (6)(c) of this section, at the end of the fiscal year in which the transfer is made and in each subsequent fiscal year, transfer from the hazardous waste/CERCLA account to the orphan share fund the unencumbered amount remaining in the hazardous waste/CERCLA account at the end of the fiscal year that is in excess of the amount appropriated for the next fiscal year from the hazardous waste/CERCLA account.

(b) The total amount transferred pursuant to subsection (6)(a) may not exceed the total amount transferred to the hazardous waste/CERCLA account pursuant to 75-10-743(9).

(c) Subsection (6)(a) does not apply to the proceeds of bonds or notes sold pursuant to 75-10-623, to interest on the proceeds of those bonds or notes, or to appropriations of those proceeds or interest"; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendment: Chapter 425 in (6)(a) and (6)(b) substituted "75-10-743(9)" for "75-10-743(10)". Amendment effective July 1, 2005.

2003 Amendments — Composite Section: Chapter 199 in (5) at beginning of second sentence inserted exception clause; inserted (6) concerning funds transferred from orphan share fund; and made minor changes in style. Amendment effective July 1, 2003.

Chapter 496 deleted former (3)(a) that read: "(a) funds are statutorily appropriated, as provided in 17-7-502(4), to the CERCLA match debt service account necessary to make principal, interest, and premium payments due on CERCLA bonds"; in (3)(b) substituted "subsection (3)(a)" for "subsections (3)(a) and (3)(b)"; and made minor changes in style. Amendment effective July 1, 2003.

Contingent Termination Ineffective: Section 6, Ch. 199, L. 2003, provided: "If 75-10-743 terminates June 30, 2005, then [sections 1 and 2] [75-10-621 and 75-10-704] terminate June 30, 2005." However, sec. 2, Ch. 368, L. 2003, repealed sec. 30, Ch. 415, L. 1997, which would have terminated 75-10-743 June 30, 2005; therefore, the contingent termination is ineffective.

1993 Special Session Amendment: Chapter 16 in (3)(b)(iii), after "expenses of the", deleted "administration of the environmental sciences division of the"; and made minor changes in style. Amendment effective December 23, 1993.

1991 Amendment: In (4) substituted "17-7-102" for "17-7-401". Amendment effective July 1, 1991.

Severability: Section 6, Ch. 408, L. 1987, was a severability section.

Code Placement: This section was enacted without a codification instruction. The Code Commissioner has codified this section in this part because there is no substantive conflict between the provisions of this part and this section. Codification in this part is for the convenience of the code user.

75-10-622. CERCLA match debt service fund.

Compiler's Comments

2009 Amendment: Chapter 426 deleted former (3) that read: "(3) Money in the CERCLA match debt service fund is statutorily appropriated, as provided in 17-7-502(4)." Amendment effective July 1, 2009.

2003 Amendment: Chapter 496 in (2) at end substituted "money from the resource indemnity and ground water assessment tax, as provided in 15-38-106, and from the CERCLA cost recovery account, as provided in 75-10-631" for "as received an amount necessary to satisfy principal and interest payments due on outstanding CERCLA bonds"; and inserted (3) statutorily appropriating money. Amendment effective July 1, 2003.

Code Placement: This section was enacted without a codification instruction. The Code Commissioner has codified this section in this part because there is no substantive conflict between the provisions of this part and this section. Codification in this part is for the convenience of the code user.

75-10-623. CERCLA bonds.

Compiler's Comments

2003 Amendment: Chapter 496 in (1) in first sentence near middle after "proper to" substituted "fund state participation in remedial action" for "finance the match requirements", substituted "as amended, state costs for maintenance of sites at which remedial action under CERCLA has been completed, the state share required to obtain matching federal funds" for "and to finance the match requirements for federal money", and at end inserted "and costs of issuing the bonds or notes". Amendment effective July 1, 2003.

1999 Amendment Void: The amendment to this section made by sec. 9, Ch. 3, L. 1999, was rendered void by sec. 16, Ch. 3, L. 1999, a contingent voidness section, which provided that if Constitutional Initiative No. 75, enacting Article VIII, section 17, of the Montana constitution, was declared invalid, then [this act] was void. The initiative was declared invalid February 24, 1999.

1995 Amendment: Chapter 418 in (2), near beginning, substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Code Placement: This section was enacted without a codification instruction. The Code Commissioner has codified this section in this part because there is no substantive conflict between the provisions of this part and this section. Codification in this part is for the convenience of the code user.

75-10-625. Authorization for sale of CERCLA bonds.

Compiler's Comments

2009 Amendment: Chapter 10 in second sentence near beginning after "notes" substituted "must be deposited in" for "are appropriated to". Amendment effective October 1, 2009.

1995 Amendment: Chapter 418 in first sentence substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

75-10-626. Agreement with department of environmental quality.

Compiler's Comments

2009 Amendment: Chapter 10 in first sentence near beginning after "authorized" deleted "and appropriated", and near end after "notes" deleted "from which the appropriation was made". Amendment effective October 1, 2009.

1995 Amendment: Chapter 418 in first sentence substituted "department of environmental quality" for "department of health and environmental sciences"; in second sentence substituted "75-10-625" for "section 1"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

75-10-627. Benefit of state.

Compiler's Comments

1989 Amendment: Substituted "75-10-626" for "section 2".

75-10-631. CERCLA cost recovery account.

Compiler's Comments

Effective Date: Section 7, Ch. 496, L. 2003, provided: "[This act] is effective July 1, 2003."

Part 7
Remedial Action Upon Release of Hazardous Substance

Part Compiler's Comments

Preamble: The preamble attached to Ch. 454, L. 2007, provided: "WHEREAS, mining and related operations and the release of hazardous substances at the Mike Horse Mine and Dam site near Lincoln, Montana, and in surrounding areas have resulted in significant contamination of lands in those areas, including the Blackfoot River and its flood plain, and as a consequence, have resulted in injuries to the state's natural resources, including its fishery resources; and

WHEREAS, the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 authorizes the state, as trustee, to pursue litigation in order to recover damages for the restoration of state natural resources that have been injured by the release of hazardous substances; and

WHEREAS, the state's Comprehensive Environmental Cleanup and Responsibility Act allows the state to file claims and actions in order to recover damages for the restoration of natural resources located within the state that have been injured by the release of hazardous substances; and

WHEREAS, a state natural resource damage program exists within the department of justice and is charged with pursuing litigation in order to recover damages to be used to restore natural resources that have been injured by the release of hazardous substances; and

WHEREAS, a natural resource damage program policy committee consisting of the attorney general and four other members that have been appointed by the governor exists to oversee natural resource damage litigation in the state and to make policy recommendations regarding this type of litigation and should be statutorily established to continue this work."

Authorization of Natural Resource Damage Litigation: Section 1, Ch. 454, L. 2007, provided: "Subject to appropriation, the department of justice is authorized to file on behalf of the state of Montana litigation seeking damages for injuries caused by the release of hazardous substances from the Upper Blackfoot mining complex, including the Mike Horse mine and dam, for the purpose of restoring the state's natural resources in and around these areas." Effective May 8, 2007.

Natural Resource Damage Program Policy Committee: Section 2, Ch. 454, L. 2007, provided: "(1) There is a natural resource damage program policy committee.

(2) The committee membership consists of the governor's chief of staff, the directors of the departments of environmental quality, natural resources and conservation, and fish, wildlife, and parks, and the attorney general.

(3) The purpose of this committee is to oversee the litigation authorized in [section 1] [not codified] and other natural resource damage litigation." Effective May 8, 2007.

Legislative Oversight: Section 3, Ch. 454, L. 2007, provided: "The speaker of the house and the president of the senate shall each appoint two members of their respective bodies, one from the majority party and one from the minority party, to a committee that shall meet twice a year for briefings on the progress of the natural resource damages litigation pursuant to [section 1] [not codified] and any related settlement negotiations. The department of justice shall provide staff assistance for the committee." Effective May 8, 2007.

1997 Natural Resource Damage Litigation Program Appropriation: Section 1, Ch. 154, L. 1997, provided: "Subject to [section 4(2)] [not codified], there is appropriated to the department of justice from the state special revenue fund $2.5 million for the remainder of the current fiscal year and for the biennium ending June 30, 1999, for the purpose of conducting the litigation and pursuing the state of Montana's natural resource damage claims, and any appeals, against the atlantic richfield company through the natural resource damage litigation program. Any recovery in the litigation up to the amount of the loans extended in [section 2] [not codified] must be deposited in the coal severance tax permanent fund. Any additional amount recovered in the litigation up to the amount appropriated in this section must be deposited in the general fund."

1997 Natural Resource Damage Litigation Program Extension of Previous Loans: Section 2, Ch. 154, L. 1997, provided: "Repayment of principal and interest on all loans authorized from the coal severance tax permanent fund under Chapter 354, Laws of 1993, and Chapter 411, Laws of 1995, is extended through the end of the 1999 biennium in accordance with 17-2-107(8)."

1997 Natural Resource Damage Litigation Program Rate of Interest: Section 3, Ch. 154, L. 1997, provided: "The interest to be paid on the previous loans extended under [section 2] [not codified] must be the highest rates allowable for interest recoverable under 42 U.S.C. 9607(a), which are based on the rates specified for interest on investments of the hazardous substance superfund established under 26 U.S.C. 9507. The interest is payable as of the date on which the loan proceeds were or are transferred from the coal severance tax permanent fund."

1997 Natural Resource Damage Litigation Program Contracts: Section 4, Ch. 154, L. 1997, provided: "(1) In order to extend the previous loans authorized in Chapter 354, Laws of 1993, and Chapter 411, Laws of 1995, the board of investments shall enter into a revised contract with the department of justice, pledging the amount recovered in the litigation to the repayment of the loans to the full extent allowable under law. The contract must provide that loan repayments must be deposited in the coal severance tax permanent fund. To the extent possible, the board shall make the loan from the portion of the coal severance tax permanent fund invested in the short-term pool.

(2) The appropriation in [section 1] [not codified] is not effective until the department of justice enters into a contract with the state treasurer implementing the redeposit provisions of [section 1]."

1997 Natural Resource Damage Litigation Program Fund Balance Transfer and Reconciliation: Section 5, Ch. 154, L. 1997, provided: "There is transferred from the social services block grant account $680,000 and from the public welfare account $1,820,000 to the state special revenue fund to the credit of the department of justice. The department of public health and human services may use any of its general fund appropriation to pay federal claims attributable to the funds transferred from these accounts that are related to activity prior to fiscal year 1996."

1997 Natural Resource Damage Litigation Program Use of Recovered Funds: Section 6, Ch. 154, L. 1997, provided: "Any funds recovered by the state on the natural resource damage claims against the atlantic richfield company and any interest that accumulates on the funds after their receipt by the state must be used, to the extent consistent with state and federal law, to recoup the expenses of the natural resource damage assessment and the costs of litigating the state's claim and to restore, replace, rehabilitate, or acquire the equivalent of the damaged natural resources that are the subject of the litigation."

Effective Date: Section 7, Ch. 154, L. 1997, provided: "[This act] is effective on passage and approval." Approved March 26, 1997.

Preamble: The preamble attached to Ch. 354, L. 1993, provided: "WHEREAS, the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 authorizes the state, as trustee, to collect damages for state natural resources injured by the release of hazardous substances; and

WHEREAS, Chapter 711, Laws of 1985, as amended by Chapter 709, Laws of 1989, and Chapter 752, Laws of 1991, established the state proceedings for claims and actions for damages to natural resources from releases of hazardous substances, known as the Comprehensive Environmental Cleanup and Responsibility Act; and

WHEREAS, the State of Montana filed suit in United States District Court on December 22, 1983, against Atlantic Richfield Company for damages to natural resources in the Clark Fork River Basin; and

WHEREAS, a natural resource damage litigation program policy committee has been formed to oversee the litigation and the expenditure of the funds; and

WHEREAS, the court-ordered schedule requires the parties to complete discovery by September 27, 1994, and be prepared for trial in this matter by July 14, 1995."

Natural Resource Damage Program Authorization and Appropriation of Loan Proceeds: Section 1, Ch. 354, L. 1993, provided: "There is authorized to the department of health and environmental sciences [now department of environmental quality] from the coal severance tax permanent fund for fiscal years 1994 and 1995 a loan in the amount of $2,619,076, the proceeds of which are appropriated for the biennium ending June 30, 1995, for the purpose of conducting the litigation and natural resource damage claim against the atlantic richfield company (ARCO). Repayment of this loan is extended through the end of the 1995 biennium in accordance with 17-2-107. The repayment must include interest on the amount loaned at a rate commensurate with rates earned in the long-term investment pool."

Natural Resource Damage Program Reauthorization: Section 2, Ch. 354, L. 1993, provided: "(1) There is authorized to the department of health and environmental sciences [now department of environmental quality] from the coal severance tax permanent fund for fiscal years 1994 and 1995 a loan that was authorized for fiscal years 1992 and 1993 from the general fund in the amount of $4,928,894, for the purpose of conducting the natural resource damage assessment and the litigation of the natural resource damage claim against the atlantic richfield company (ARCO). There is also authorized to the department for fiscal year 1994 a loan from the coal severance tax permanent fund in the amount of $246,135, which represents the interest lost by the general fund because of the $4,928,894 loan for fiscal years 1992 and 1993.

(2) The department shall repay to the general fund the amount of $4,928,894, plus interest in the amount of $246,135 that was lost by the general fund because of the loan, from the proceeds of the loans authorized in subsection (1). The repayment to the general fund must be made upon receipt of the loans authorized by subsection (1)."

Legislative Oversight: Section 7, Ch. 354, L. 1993, provided: "The speaker of the house and the president of the senate shall each appoint two members of their respective bodies, one from each party, to meet quarterly for briefings on the progress of the Montana-ARCO litigation and negotiations. The committee shall also consider plans for appropriate utilization of any money received by the state as a result of the litigation. Staff assistance for the committee must be provided by the department of health and environmental sciences [now department of environmental quality]. Committee expenses must be paid from the appropriation in [section 1] [not codified, see 1993 compiler's comment]."

Saving Clause: Section 20, Ch. 709, L. 1989, was a saving clause.

Severability: Section 21, Ch. 709, L. 1989, was a severability clause.

Section Not Codified — Saving Clause: Section 8, Ch. 711, L. 1985, was a saving clause.

Part Administrative Rules

Title 17, chapter 55, ARM CECRA remediation.

Part Case Notes

Arranger Liability — Intent Not Required: Although intentional acts are required to prove arranger joint and several liability under a similar federal law relating to disposal of hazardous substances, the provisions of 75-10-715 do not mention intent — the section uses broader terms. Title 75, chapter 10, part 7, must be read as a whole, and both the statutory analysis and the policy rationale espoused under Art. II, sec. 3, of the Montana Constitution, 75-10-701, and 75-10-706 provide for broad arranger liability. A showing of intent to dispose of a hazardous substance is not necessary. State ex rel. Dept. of Environmental Quality v. BNSF Ry. Co., 2010 MT 267, 358 Mont. 368, 246 P.3d 1037.

Part Attorney General's Opinions

Designation of Fire Service Organization as First Responder to Hazardous Materials Incident: The designation of a fire service organization as first responder to a hazardous materials incident is a matter to be included in the state and local disaster and emergency plans. 42 A.G. Op. 104 (1988).

Part Collateral References

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601, et seq.

75-10-701. Definitions.

Compiler's Comments

2009 Amendment: Chapter 395 in definition of release near end after "80-8-102" deleted reference to subsection (30) and after "80-10-101" deleted reference to subsection (2); and made minor changes in style. Amendment effective July 1, 2009.

1999 Amendment: Chapter 437 inserted definition of institutional control; at end of definition of orphan share inserted "unless affiliated by stock ownership"; and made minor changes in style. Amendment effective April 23, 1999.

1997 Amendment: Chapter 415 in definition of fiduciary, in (b), substituted "75-10-715(9)" for "75-10-715(7)"; inserted definitions of household, household refuse, orphan share, and orphan share fund; and made minor changes in style. Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 415, L. 1997, provided: "WHEREAS, the 1995 Legislature, in Chapter 584, Laws of 1995, directed the Department of Environmental Quality to institute a collaborative process involving all affected and interested persons to analyze the elimination of joint and several liability with respect to the cleanup of state Comprehensive Environmental Cleanup and Responsibility Act (CECRA) facilities and to submit any legislative proposals that collaboratively resulted from that process to the 55th Legislature; and

WHEREAS, the Department instituted this collaborative process with industry and business representatives; state, federal, and local government representatives; and public interest and environmental interest group representatives; and

WHEREAS, through a contract with the Department, the Montana Consensus Council designed the study process, facilitated the organization of the collaborative process, and conducted the numerous meetings of the study committees and interest group caucuses through which the parties to the collaborative process reached consensus on legislative proposals that are contained in this bill."

1995 Amendments: Chapter 418 in definition of Department substituted "department of environmental quality provided for in 2-15-3501" for "department of health and environmental sciences provided for in Title 2, chapter 15, part 21"; in definition of Director, after "department", deleted "of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 490 inserted definitions of fiduciary and foreclosure; and made minor changes in style. Amendment effective April 14, 1995.

Chapter 584 inserted definition of reasonably anticipated future uses; and adjusted subsection references. Amendment effective May 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1995 Statement of Intent: The statement of intent attached to Ch. 490, L. 1995, provided: "A statement of intent is included with this bill because of the authorization granted to the department in 75-10-702 to adopt rules to implement Title 75, chapter 10, part 7, including implementation of the exemption from liability for persons holding indicia of ownership primarily to protect a security interest. To date, the department has not adopted rules under this section.

The legislature finds that existing state law related to the liability of persons holding security interests for environmental contamination is unclear and that this lack of clarity has created uncertainty on the part of security interest holders as to whether they are liable for environmental contamination caused by their borrowers or other third parties. The uncertainty has negatively affected the availability of credit in Montana.

In enacting Montana's Comprehensive Environmental Cleanup and Responsibility Act (CECRA), the legislature modeled the statute after and borrowed many terms from the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). The legislature specifically borrowed the term "own or operate", which excludes from liability those persons who, without participating in the management of the facility, hold indicia of ownership merely to protect a security interest.

When significant questions arose under CERCLA as to the scope of the terms "indicia of ownership" and "participating in the management of the facility", the federal government devoted substantial effort to developing a federal policy and a rule that employ a framework of specific tests to provide clearer articulation of a lender's scope of liability under CERCLA, both to governmental agencies and to third parties. The April 1992 rule, which appears at 40 CFR 300.1100, et seq., was preceded by many public hearings and public comment periods. Although the rule was recently judged to be technically beyond EPA's rulemaking authority, the contents of the rule still constitute EPA policy on the scope of the secured creditor exemption under CERCLA and the legislature finds that the rule in its current form provides a well-reasoned basis for interpreting the identical language in CECRA.

Therefore the legislature finds that the clarification of potential liability in a manner consistent with federal statutes, current EPA policy, and the regulations at 40 CFR 300.1100, et seq., is desirable in order to provide certainty for security interest holders, including persons engaged in lease financing, to enhance the availability of credit, and to encourage responsible practices by those security interest holders and borrowers to protect the public health and environment.

The legislature also finds that uncertainty exists in state law regarding the potential liability of certain fiduciaries for environmental contamination on property held in their fiduciary capacity and determines that a limited exemption from liability, comparable to the one being proposed for action by congress under CERCLA, should apply to fiduciaries and that it is necessary to add language concerning fiduciaries to Title 75, chapter 10, part 7.

Therefore, in adopting rules under 75-10-702 to implement the exemption under 75-10-701(10)(b) for holders of "the indicia of ownership", the department of health and environmental sciences [now department of environmental quality] shall adopt rules consistent with the revisions to

CECRA contained in this bill, including rules that address fiduciaries within the exemption. The rules also must be consistent with the federal regulations set forth at 40 CFR 300.1100, et seq.

Finally, the legislature intends that the limited exemptions for secured creditors and fiduciaries that are clarified and granted by this legislation extend not only to liability asserted by governmental entities but also extend to claims by any third parties for cleanup or for cost recovery or contribution."

Applicability: Section 6, Ch. 490, L. 1995, provided: "[This act] does not apply to civil actions commenced prior to the [effective date of this act] or to the claims upon which such civil actions are based." Effective April 14, 1995.

Section 25(1), Ch. 584, L. 1995, provided: "(1) [This act] does not apply to civil actions commenced or begun prior to [the effective date of this act] [May 1, 1995] or to claims based on those actions."

Severability: Section 23, Ch. 584, L. 1995, was a severability clause.

1991 Amendment: Near middle of (13), after "potentially", substituted "liable person" for "responsible party"; and made minor changes in style.

1989 Amendments: Chapter 274 in definition of remedial action inserted "acquisition".

Chapter 709 inserted definitions of Director, environment, facility, natural resources, owns or operates, person, petroleum product, remedial action contract, remedial action contractor, and remedial action costs; substituted definition of hazardous or deleterious substance as one posing threat to public health, safety, or welfare or environment and defined as hazardous under section 101(14) of CERCLA, identified by the administrator of U.S. Environmental Protection Agency as hazardous under section 102 of CERCLA, or defined as hazardous waste under section 1004(5) of Resource Conservation and Recovery Act of 1976 or any petroleum product for "a substance that poses an imminent and substantial threat to public health and that is either a petroleum product or listed as a hazardous substance in volume 50, Federal Register, pages 13474 through 13513"; near middle of definition of release, after "the environment", deleted "or in a manner in which the substance can reasonably be expected to enter the environment if not contained, removed, or abated" and inserted "(including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous or deleterious substance)"; and in definition of remedial action substituted "all notification, investigation, administration, monitoring, cleanup, restoration, mitigation, abatement, removal, replacement, enforcement, legal action, health studies, feasibility studies, and other actions necessary or appropriate to respond to a release or threatened release" for "all investigation, monitoring, cleanup, restoration, abatement, removal, replacement, and other actions necessary or appropriate to respond to a release". Amendment effective May 22, 1989.

Case Notes

Arranger Liability — Intent Not Required: Although intentional acts are required to prove arranger joint and several liability under a similar federal law relating to disposal of hazardous substances, the provisions of 75-10-715 do not mention intent — the section uses broader terms. Title 75, chapter 10, part 7, must be read as a whole, and both the statutory analysis and the policy rationale espoused under Art. II, sec. 3, of the Montana Constitution, 75-10-701, and 75-10-706 provide for broad arranger liability. A showing of intent to dispose of a hazardous substance is not necessary. State ex rel. Dept. of Environmental Quality v. BNSF Ry. Co., 2010 MT 267, 358 Mont. 368, 246 P.3d 1037.

75-10-702. Rulemaking authority.

Compiler's Comments

1997 Amendment — Enactment: Chapter 415 in (1), at end, inserted "including but not limited to"; inserted (1)(a) and (1)(b) concerning rules for listing and delisting facilities on the priority list and rules for prioritizing facilities; inserted (2) concerning rules implementing subsection (1); and made minor changes in style. Amendment effective April 28, 1997.

Chapter 539 enacted (3) requiring the Department to adopt, amend, or repeal rules to allow for the joint selection of remedial action contractors. Enactment effective May 5, 1997.

Preamble: The preamble attached to Ch. 415, L. 1997, provided: "WHEREAS, the 1995 Legislature, in Chapter 584, Laws of 1995, directed the Department of Environmental Quality to institute a collaborative process involving all affected and interested persons to analyze the elimination of joint and several liability with respect to the cleanup of state Comprehensive Environmental Cleanup and Responsibility Act (CECRA) facilities and to submit any legislative proposals that collaboratively resulted from that process to the 55th Legislature; and

WHEREAS, the Department instituted this collaborative process with industry and business representatives; state, federal, and local government representatives; and public interest and environmental interest group representatives; and

WHEREAS, through a contract with the Department, the Montana Consensus Council designed the study process, facilitated the organization of the collaborative process, and conducted the numerous meetings of the study committees and interest group caucuses through which the parties to the collaborative process reached consensus on legislative proposals that are contained in this bill."

1997 Statement of Intent: The statement of intent attached to Ch. 415, L. 1997, provided: "It is the intent of this bill to provide an option to the concept of joint and several liability for potentially liable persons to have their proportionate share of liability for a state Comprehensive Environmental Cleanup and Responsibility Act (CECRA) facility determined through an expedited process while ensuring that the concurrent cleanup of the facility occurs. The bill clarifies defenses to liability and creates exclusions from liability. The bill also provides rulemaking authority to the department for developing guidance and criteria and involving the public and the liable parties in the decisionmaking process for listing and delisting sites on a CECRA priority list. The department will be required to provide written justification for its decisions to list, delist, and prioritize sites needing remediation. The written criteria for listing and delisting represent the legislature's intent for this rulemaking."

Applicability: Section 7, Ch. 539, L. 1997, provided: "[This act] does not apply to any facility for which an administrative order has been issued pursuant to 75-10-711 prior to [the effective date of this act] [effective May 5, 1997] or to any facility for which the department of environmental quality and a liable or potentially liable person have, prior to [the effective date of this act] [effective May 5, 1997], entered into an agreement regarding the performance of remedial action for that facility."

1985 Statement of Intent: The statement of intent attached to Ch. 711, L. 1985, provided: "This bill establishes a special fund and authorizes the department of health and environmental sciences [now department of environmental quality] to spend money from that fund for the purpose of taking emergency, remedial action in cases of release of hazardous or deleterious substances into the environment. Rulemaking is required for the implementation of these provisions. It is the intent of the legislature that the department be authorized to adopt rules clarifying and setting forth more detailed procedures and criteria in such areas as:

(1) definition of remedial actions to include such things as cleanup and restoration of water resources, provisions of alternate sources of supply, relocation of persons and property in imminent danger of injury or damage, and investigation and monitoring of releases of hazardous and deleterious substances;

(2) procedures for identifying responsible parties and notifying them of the department's intent to take remedial action;

(3) criteria for taking emergency actions in cases where prior notification to the responsible party is not possible;

(4) procedures for retaining consultants to perform remedial actions under the department's direction;

(5) procedures for accounting for funds expended in performing remedial actions; and

(6) procedures for coordination of remedial actions with the activities of other state or local government agencies with relevant expertise or authority."

Administrative Rules

Title 17, chapter 55, ARM CECRA remediation.

75-10-704. Environmental quality protection fund.

Compiler's Comments

2017 Amendments — Composite Section: Chapter 317 in (4)(j)(i) at end inserted "and allocated pursuant to 75-10-1603 and 75-10-1604". Amendment effective July 1, 2017.

Chapter 320 inserted (4)(i) concerning certain costs and penalties; and made minor changes in style. Amendment effective May 4, 2017.

Retroactive Applicability: Section 18, Ch. 320, L. 2017, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to a coal-fired generating unit retired on or after January 1, 2017."

Saving Clause: Section 15, Ch. 320, L. 2017, was a saving clause.

Severability: Section 16, Ch. 320, L. 2017, was a severability clause.

2015 Amendment — Coordination: Chapter 387 inserted (4)(i) concerning funds transferred from orphan share account; and made minor changes in style. Amendment effective July 1, 2016, pursuant to sec. 10, Ch. 438, L. 2015, a coordination instruction, and terminates June 30, 2027.

2009 Amendment: Chapter 486 in (1) at beginning of first sentence inserted "Subject to legislative fund transfers"; and made minor changes in style. Amendment effective July 1, 2009.

2007 Amendment: Chapter 432 in (2) at beginning deleted "Except as provided in subsection (9)"; in (4)(c) after "funds" substituted "allocated" for "appropriated"; inserted (4)(d) relating to proceeds from resource indemnity and ground water assessment tax; deleted former (9) that read: "(9) (a) If funds are transferred from the orphan share fund to the environmental quality protection fund pursuant to 75-10-743(9), the department shall, subject to the limitation in subsection (9)(b) of this section, at the end of the fiscal year in which the transfer is made and in each subsequent fiscal year, transfer from the environmental quality protection fund to the orphan share fund the unencumbered amount remaining in the environmental quality protection fund at the end of the fiscal year that is in excess of the amount appropriated for the next fiscal year from the environmental quality protection fund.

(b) The total transferred pursuant to subsection (9)(a) may not exceed the total amount transferred to the environmental quality protection fund pursuant to 75-10-743(9)"; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendments — Composite Section: Chapter 355 in (9)(a) near beginning after "pursuant to" and in (9)(b) at end substituted "75-10-743(9)" for "75-10-743(10)". Amendment effective July 1, 2005.

Chapter 425 in (9)(a) and (9)(b) substituted "75-10-743(9)" for "75-10-743(10)". Amendment effective July 1, 2005.

2003 Amendment: Chapter 199 in (2) at beginning inserted exception clause; inserted (9) concerning funds transferred from orphan share fund; and made minor changes in style. Amendment effective July 1, 2003.

Contingent Termination Ineffective: Section 6, Ch. 199, L. 2003, provided: "If 75-10-743 terminates June 30, 2005, then [sections 1 and 2] [75-10-621 and 75-10-704] terminate June 30, 2005." However, sec. 2, Ch. 368, L. 2003, repealed sec. 30, Ch. 415, L. 1997, which would have terminated 75-10-743 June 30, 2005; therefore, the contingent termination is ineffective.

2001 Amendment: Chapter 326 inserted (4)(g) requiring deposit of interest into environmental quality protection fund; and made minor changes in style. Amendment effective April 21, 2001.

Saving Clause: Section 3, Ch. 326, L. 2001, was a saving clause.

Applicability: Section 5, Ch. 326, L. 2001, provided: "The requirement to assess and collect interest in [section 2], amending 75-10-722, applies to interest accrued after [the effective date of this act]." Effective April 21, 2001.

1997 Amendments: Chapter 86 in (7)(e), after "intended", inserted "to delay" and deleted last sentence that read: "Subsections (7) and (8) do not pertain to facilities where the department has initiated actions under this part"; in (8)(d) substituted language prohibiting a person from avoiding liability or responsibility for costs or damages incurred from the release or threatened release of a hazardous or deleterious substance by subsequently donating money or in-kind services for former language that read: "This subsection does not minimize the liability, lessen the standard of liability, or otherwise shield from liability a potentially liable person under 75-10-715 or section 107 of CERCLA for costs or damages incurred as a result of a release or threatened release of a hazardous or deleterious substance"; and made minor changes in style. Amendment effective March 19, 1997.

Chapter 415 in (3)(a), near middle, inserted "including the preparation of a priority list"; inserted (4)(e) and (4)(f) concerning funds received from interest income and funds received from settlements; and made minor changes in style. Amendment effective July 1, 1997.

Retroactive Applicability: Section 3, Ch. 86, L. 1997, provided: "[This act] [75-10-704] applies retroactively, within the meaning of 1-2-109, to private funds or in-kind services donated after April 14, 1995."

Preamble: The preamble attached to Ch. 415, L. 1997, provided: "WHEREAS, the 1995 Legislature, in Chapter 584, Laws of 1995, directed the Department of Environmental Quality to institute a collaborative process involving all affected and interested persons to analyze the elimination of joint and several liability with respect to the cleanup of state Comprehensive Environmental Cleanup and Responsibility Act (CECRA) facilities and to submit any legislative proposals that collaboratively resulted from that process to the 55th Legislature; and

WHEREAS, the Department instituted this collaborative process with industry and business representatives; state, federal, and local government representatives; and public interest and environmental interest group representatives; and

WHEREAS, through a contract with the Department, the Montana Consensus Council designed the study process, facilitated the organization of the collaborative process, and conducted the numerous meetings of the study committees and interest group caucuses through which the parties to the collaborative process reached consensus on legislative proposals that are contained in this bill."

1995 Amendment: Chapter 452 in (3)(a), at beginning, inserted exception clause; inserted (7) creating state special revenue account for donated funds and providing for operation of account; and inserted (8) regarding donation of in-kind services. Amendment effective April 14, 1995.

1993 Amendment: Chapter 349 deleted (7) that read: "(7) The department shall, as provided in 5-11-210, submit to the legislature a complete financial report on the fund, including a description of all expenditures made since the preceding report"; and made minor changes in style.

1991 Amendments: Chapter 16 in two places in (3)(b) substituted "liable persons" for "responsible parties".

Chapter 112 near beginning of (7) inserted reference to 5-11-210 and after "legislature" deleted "at the beginning of each regular session". Amendment effective March 20, 1991.

Chapter 752 in (4)(a) inserted "forfeited financial assurance".

Severability: Section 6, Ch. 752, L. 1991, was a severability clause.

Retroactive Applicability: Section 7, Ch. 752, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to occurrences after June 30, 1985."

1989 Amendments: Chapter 675 near beginning of (2) substituted "the fund may be used by the department only" for "the fund may only be used"; inserted (5) relating to budget amendments; and inserted (7) relating to financial report to Legislature. Amendment effective July 1, 1989.

Chapter 709 in (2) deleted second sentence providing that fund uses must include conduct of hazardous waste site remedial action program at sites where release has occurred and where EPA, under CERCLA, has conducted study and judged site not eligible for inclusion on national priority list or EPA has no authority or plan to assess site; in (3) substituted "The department shall" for "The department's program for remedial action under subsection (2) must include"; in (3)(a), at beginning, inserted "establish and implement"; in (4)(a) inserted "natural resource" and substituted "remedial action costs" for "department expenditures"; inserted (4)(b) requiring deposit of administrative penalties assessed under 75-10-714 and civil penalties under 75-10-711(5); and made minor changes in form and phraseology. Amendment effective May 22, 1989.

1987 Amendment: At beginning of (2), after "may", inserted "only" and after first sentence inserted remainder of subsection relating to fund uses (see 1987 Session Law for text); inserted (3) establishing requirements for hazardous waste site remedial action program; in (4)(a), after "all", inserted "penalties, damages, and"; in (4)(c) substituted "interest income of the resource indemnity trust fund pursuant to 15-38-202" for "environmental contingency account within the state special revenue fund established pursuant to 75-1-1101"; and in (5), after "account", deleted "within the state special revenue fund".

75-10-705. Short title.

Compiler's Comments

Effective Date: Section 22, Ch. 709, L. 1989, provided that this section is effective May 22, 1989.

75-10-706. Purpose — intent.

Compiler's Comments

2013 Amendment: Chapter 342 deleted former (3) that read: "(3) A person who is not subject to an administrative or judicial order may not conduct any remedial action at any facility that is subject to an administrative or judicial order issued pursuant to this part without the written permission of the department. Remedial action performed in accordance with this part is intended to provide for the protection of the environmental life support system from degradation and to prevent unreasonable depletion and degradation of natural resources." Amendment effective October 1, 2013.

2003 Amendment: Chapter 361 inserted (2) relating to constitutional obligations and legislative intent; inserted (3) relating to remedial action not subject to an administrative or judicial order; and made minor changes in style. Amendment effective April 16, 2003.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Severability: Section 39, Ch. 361, L. 2003, was a severability clause.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

Effective Date: Section 22, Ch. 709, L. 1989, provided that this section is effective May 22, 1989.

Case Notes

Arranger Liability — Intent Not Required: Although intentional acts are required to prove arranger joint and several liability under a similar federal law relating to disposal of hazardous substances, the provisions of 75-10-715 do not mention intent — the section uses broader terms. Title 75, chapter 10, part 7, must be read as a whole, and both the statutory analysis and the policy rationale espoused under Art. II, sec. 3, of the Montana Constitution, 75-10-701, and 75-10-706 provide for broad arranger liability. A showing of intent to dispose of a hazardous substance is not necessary. State ex rel. Dept. of Environmental Quality v. BNSF Ry. Co., 2010 MT 267, 358 Mont. 368, 246 P.3d 1037.

75-10-707. Information gathering and access.

Compiler's Comments

1997 Amendment: Chapter 42 in (4), in first sentence, substituted "subsections (2)(a) through (2)(d)" for "75-10-707(2)(a) through (2)(d)"; and made minor changes in style. Amendment effective March 12, 1997.

Effective Date: Section 22, Ch. 709, L. 1989, provided that this section is effective May 22, 1989.

75-10-711. Remedial action — orders — penalties — judicial proceedings.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 127, L. 2023. Amendment effective April 18, 2023.

2021 Amendments — Composite Section: Chapter 535 in (8) near middle after "release or threatened release occurred" deleted "or in the first judicial district". Amendment effective October 1, 2021.

Chapter 572 in (9) at end of second sentence substituted " the probative value is not substantially outweighed by the danger of unfair prejudice" for "more probative than prejudicial". Amendment effective May 14, 2021.

Saving Clause: Section 4, Ch. 572, L. 2021, was a saving clause.

2015 Amendment: Chapter 119 in (6)(c) after "failure" inserted "or refusal"; inserted (11) regarding remedial action under 75-10-743(12); and made minor changes in style. Amendment effective March 25, 2015.

2013 Amendment: Chapter 342 inserted (9) concerning prohibited remedial action and evidence in civil actions; and made minor changes in style. Amendment effective October 1, 2013.

2001 Amendment: Chapter 383 in (1)(b) at beginning of first sentence substituted "none of the persons who are liable" for "the appropriate remedial action will not be done properly and expeditiously by any person liable under 75-10-715(1) and each person that is liable" and at end after "appropriate remedial action" inserted "will properly and expeditiously perform the appropriate remedial action"; in (3)(b) near beginning after "determined by the department to be" inserted "liable or potentially"; in (3)(c) at beginning after "the written notice" deleted "to each person"; and made minor changes in style. Amendment effective April 28, 2001.

1997 Amendment: Chapter 539 in first sentence of (1)(b), after "person liable under 75-10-715(1)", inserted "and each person that is liable or potentially liable under 75-10-715(1) has been given the opportunity by letter to properly and expeditiously perform the appropriate remedial action" and inserted second sentence requiring liable persons to take immediate action concerning the release; deleted former first sentence in (3) that read: "Any person liable under 75-10-715(1) must take immediate action to contain, remove, and abate the release"; in (4), near beginning after "subsection (1)", deleted "or has reason to believe that a release that may pose an imminent and substantial threat to the public health, safety, or welfare or the environment has occurred or is about to occur"; and made minor changes in style. Amendment effective May 5, 1997.

1997 Statement of Intent: The statement of intent attached to Ch. 539, L. 1997, provided: "It is the intent of this bill to provide potentially liable persons the opportunity to take the necessary remedial action before the state takes action and to authorize the department of environmental quality to adopt rules that allow for the joint and mutual selection of remedial action contractors by the department and the potentially liable persons responsible for taking remedial action at sites."

Applicability: Section 7, Ch. 539, L. 1997, provided: "[This act] does not apply to any facility for which an administrative order has been issued pursuant to 75-10-711 prior to [the effective date of this act] [effective May 5, 1997] or to any facility for which the department of environmental quality and a liable or potentially liable person have, prior to [the effective date of this act] [effective May 5, 1997], entered into an agreement regarding the performance of remedial action for that facility."

1995 Amendment: Chapter 490 in (3)(c), at end, substituted "this part" for "75-10-715(3)"; adjusted subsection references; and made minor changes in style. Amendment effective April 14, 1995.

1995 Statement of Intent: The statement of intent attached to Ch. 490, L. 1995, provided: "A statement of intent is included with this bill because of the authorization granted to the department in 75-10-702 to adopt rules to implement Title 75, chapter 10, part 7, including implementation of the exemption from liability for persons holding indicia of ownership primarily to protect a security interest. To date, the department has not adopted rules under this section.

The legislature finds that existing state law related to the liability of persons holding security interests for environmental contamination is unclear and that this lack of clarity has created uncertainty on the part of security interest holders as to whether they are liable for environmental contamination caused by their borrowers or other third parties. The uncertainty has negatively affected the availability of credit in Montana.

In enacting Montana's Comprehensive Environmental Cleanup and Responsibility Act (CECRA), the legislature modeled the statute after and borrowed many terms from the federal

Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). The legislature specifically borrowed the term "own or operate", which excludes from liability those persons who, without participating in the management of the facility, hold indicia of ownership merely to protect a security interest.

When significant questions arose under CERCLA as to the scope of the terms "indicia of ownership" and "participating in the management of the facility", the federal government devoted substantial effort to developing a federal policy and a rule that employ a framework of specific tests to provide clearer articulation of a lender's scope of liability under CERCLA, both to governmental agencies and to third parties. The April 1992 rule, which appears at 40 CFR 300.1100, et seq., was preceded by many public hearings and public comment periods. Although the rule was recently judged to be technically beyond EPA's rulemaking authority, the contents of the rule still constitute EPA policy on the scope of the secured creditor exemption under CERCLA and the legislature finds that the rule in its current form provides a well-reasoned basis for interpreting the identical language in CECRA.

Therefore the legislature finds that the clarification of potential liability in a manner consistent with federal statutes, current EPA policy, and the regulations at 40 CFR 300.1100, et seq., is desirable in order to provide certainty for security interest holders, including persons engaged in lease financing, to enhance the availability of credit, and to encourage responsible practices by those security interest holders and borrowers to protect the public health and environment.

The legislature also finds that uncertainty exists in state law regarding the potential liability of certain fiduciaries for environmental contamination on property held in their fiduciary capacity and determines that a limited exemption from liability, comparable to the one being proposed for action by congress under CERCLA, should apply to fiduciaries and that it is necessary to add language concerning fiduciaries to Title 75, chapter 10, part 7.

Therefore, in adopting rules under 75-10-702 to implement the exemption under 75-10-701(10)(b) for holders of "the indicia of ownership", the department of health and environmental sciences [now department of environmental quality] shall adopt rules consistent with the revisions to CECRA contained in this bill, including rules that address fiduciaries within the exemption. The rules also must be consistent with the federal regulations set forth at 40 CFR 300.1100, et seq.

Finally, the legislature intends that the limited exemptions for secured creditors and fiduciaries that are clarified and granted by this legislation extend not only to liability asserted by governmental entities but also extend to claims by any third parties for cleanup or for cost recovery or contribution."

Applicability: Section 6, Ch. 490, L. 1995, provided: "[This act] does not apply to civil actions commenced prior to the [effective date of this act] or to the claims upon which such civil actions are based." Effective April 14, 1995.

1991 Amendment: Inserted (9) authorizing Department to take remedial action at sites regulated by CERCLA.

Severability: Section 6, Ch. 752, L. 1991, was a severability clause.

Retroactive Applicability: Section 7, Ch. 752, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to occurrences after June 30, 1985."

1989 Amendment: In (1), in introductory clause after "action", deleted "necessary and appropriate to protect the public health, public welfare, or the environment"; in (1)(a), after "release", inserted "into the environment that may present an imminent and substantial endangerment to the public health, welfare, or safety of the environment"; in (1)(b), after "expeditiously by", substituted "any person liable under 75-10-715" for "the owner or operator of the vessel, vehicle, or facility from which the release emanates or by any other responsible party"; in (2), near middle, inserted "remedial action in the form of" and "as authorized by 75-10-707" and near end, before "welfare", inserted "safety"; in (3), in introductory clause near beginning of first sentence, substituted "liable under 75-10-715(1)" for "responsible for the release", near middle deleted reference to subsection (2), and near end substituted "person or persons liable" for "party or parties responsible"; in (3)(a) substituted "liable person or persons" for "responsible party"; in (3)(b), at beginning, substituted "the person or persons determined by the department to be liable under 75-10-715(1)" for "the party or parties determined by the department to be responsible for the release or threatened release"; in (3)(c) substituted "the written notice to each person informs him that if he is subsequently found liable pursuant to 75-10-715(1), he may be required to reimburse the fund for the state's remedial action costs and may be subject to penalties pursuant to 75-10-715(3)" for "The written notice to a responsible party must inform the responsible party that if that party is subsequently found liable pursuant to 75-10-715, he may be required to reimburse the fund for the costs of the remedial action taken by the department and may be subject to punitive damages"; inserted (4) allowing Department to issue cease and desist, remedial, or other orders as necessary or appropriate to protect public and environment; inserted (5) providing civil penalty of no more than $10,000 for each day a violation occurs or a failure or refusal to comply continues, allowing court to take into account, in determining penalty, circumstances of noncompliance, ability to pay, and prior history, and requiring deposit of penalties in environmental protection fund; inserted (6) stating circumstances of court's jurisdiction to review administrative order; inserted (7) placing burden of proof on objecting party to show Department's order was arbitrary and capricious or otherwise unlawful; inserted (8) allowing Department, as alternative to issuing administrative notice or order, to bring equitable action in court; and made minor changes in form and phraseology. Amendment effective May 22, 1989.

Case Notes

District Court Has Equitable Power to Require Abatement: The District Court did not err when it ordered the defendant railway company to abate contamination at a site without ordering that the abatement be conducted in compliance with the record of decision, which was being independently appealed. Under this section, the District Court has equitable powers to require that an abatement begin independent of the record of decision. State ex rel. Dept. of Environmental Quality v. BNSF Ry. Co., 2010 MT 267, 358 Mont. 368, 246 P.3d 1037.

75-10-712. Emergency action.

Compiler's Comments

2001 Amendment: Chapter 383 in second sentence after "written notice to" substituted "a person who is liable or potentially liable under 75-10-715(1) within 30 days" for "the person liable under 75-10-715(1) within 5 days"; and made minor changes in style. Amendment effective April 28, 2001.

1989 Amendment: In first sentence, near middle before "welfare", inserted "safety" and near end deleted references to 75-10-711(2) and subsection (b) of 75-10-711(3); in second sentence substituted "person liable under 75-10-715(1)" for "responsible party"; and made minor changes in phraseology. Amendment effective May 22, 1989.

75-10-713. Public notice of remedial action, administrative order, or consent decree — comments — meeting — response.

Compiler's Comments

1991 Amendment: In (1)(a)(iii) inserted "and respond to relevant"; inserted (1)(b) relating to content of administrative record; in (2), at beginning, inserted exception clause, after "proposed" inserted "remedial action", and before "approved" inserted "final decision on the"; inserted (3) relating to notice to County Commissioners and conduct of public meeting; and made minor changes in style.

Severability: Section 6, Ch. 752, L. 1991, was a severability clause.

Retroactive Applicability: Section 7, Ch. 752, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to occurrences after June 30, 1985."

Effective Date: Section 22, Ch. 709, L. 1989, provided that this section is effective May 22, 1989.

75-10-714. Administrative penalties.

Compiler's Comments

2001 Amendment: Chapter 79 in (3) substituted second and third sentences regarding a hearing before the board of environmental review for former language that read: "The notice and opportunity for a hearing must conform to the requirements of Title 2, chapter 4, part 6"; in (4) substituted language applying the contested case provisions of the Montana Administrative Procedure Act to the hearing for former language that read: "A person against whom a penalty is assessed under this section may obtain judicial review of the penalty as provided for in Title 2, chapter 4, part 7"; in (5) after "penalties" substituted "collected" for "payable"; and made minor changes in style. Amendment effective March 20, 2001.

Preamble: The preamble attached to Ch. 79, L. 2001, provided: "WHEREAS, certain environmental statutes administered by the Montana Department of Environmental Quality provide that a person aggrieved by a decision of the Department may appeal that decision to the Director of the Department; and

WHEREAS, the possibility of an appeal prevents the Director from becoming involved in certain Department decisions that are subject to appeal to the Director; and

WHEREAS, section 82-4-427, MCA, states that a contested case hearing requested under The Opencut Mining Act must be held within 30 days after the hearing is requested; and

WHEREAS, it is difficult for the Department to conduct a contested case hearing under that Act within 30 days after the hearing is requested; and

WHEREAS, certain revisions to statutes administered by the Department are necessary for clarity and consistency and to conform the statutes to current drafting style."

Saving Clause: Section 18, Ch. 79, L. 2001, was a saving clause.

Effective Date: Section 22, Ch. 709, L. 1989, provided that this section is effective May 22, 1989.

75-10-715. Liability — reimbursement and penalties — proceedings — defenses and exclusions.

Compiler's Comments

2021 Amendment: Chapter 535 in (4) at end deleted "or in the district court of the first judicial district". Amendment effective October 1, 2021.

2001 Amendments — Composite Section: Chapter 113 near beginning of exception clause in (1) inserted "70-30-323 and". Amendment effective March 22, 2001.

Chapter 125 in (6)(a)(ii) at end inserted reference to Title 70, chapter 30; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 383 in (5)(a) at beginning after "department failed to" substituted "provide notice to the person claiming the defense when required by 75-10-711" for "follow the notice provisions of 75-10-711 when required" and inserted second sentence providing that establishment of the defense only prohibits the department from collecting those costs incurred or encumbered prior to providing notice and does not provide a defense to any other liability; and made minor changes in style. Amendment effective April 28, 2001.

1999 Amendment: Chapter 437 in (10) substituted "75-10-701(15)(b)" for "75-10-701(14)(b)". Amendment effective April 23, 1999.

1997 Amendment: Chapter 415 in (1), at beginning, inserted exception clause and near middle inserted "and the exclusions set forth in subsection (7)"; in (5), near beginning, inserted "has a defense"; in (5)(g), near beginning, substituted "transported" for "accepted" and after "only household refuse" deleted "(garbage, trash, or septic tank sanitary wastes generated by single or multiple residences, hotels, motels, restaurants, or similar facilities) for transport to a solid waste disposal facility"; inserted (7) concerning reasons for exclusion from liability; inserted (8) concerning liability for failure to satisfy elements for each exclusion in subsection (7); in (10), near end, substituted "75-10-701(14)(b)" for "75-10-701(10)(b)"; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 415, L. 1997, provided: "WHEREAS, the 1995 Legislature, in Chapter 584, Laws of 1995, directed the Department of Environmental Quality to institute a collaborative process involving all affected and interested persons to analyze the elimination of joint and several liability with respect to the cleanup of state Comprehensive Environmental Cleanup and Responsibility Act (CECRA) facilities and to submit any legislative proposals that collaboratively resulted from that process to the 55th Legislature; and

WHEREAS, the Department instituted this collaborative process with industry and business representatives; state, federal, and local government representatives; and public interest and environmental interest group representatives; and

WHEREAS, through a contract with the Department, the Montana Consensus Council designed the study process, facilitated the organization of the collaborative process, and conducted the numerous meetings of the study committees and interest group caucuses through which the parties to the collaborative process reached consensus on legislative proposals that are contained in this bill."

1997 Statement of Intent: The statement of intent attached to Ch. 415, L. 1997, provided: "It is the intent of this bill to provide an option to the concept of joint and several liability for potentially liable persons to have their proportionate share of liability for a state Comprehensive Environmental Cleanup and Responsibility Act (CECRA) facility determined through an expedited process while ensuring that the concurrent cleanup of the facility occurs. The bill clarifies defenses to liability and creates exclusions from liability. The bill also provides rulemaking authority to the department for developing guidance and criteria and involving the public and the liable parties in the decisionmaking process for listing and delisting sites on a CECRA priority list. The department will be required to provide written justification for its decisions to list, delist, and prioritize sites needing remediation. The written criteria for listing and delisting represent the legislature's intent for this rulemaking."

1995 Amendment: Chapter 490 inserted (7) through (9) regarding fiduciary and security interest liability; and made minor changes in style. Amendment effective April 14, 1995.

1995 Statement of Intent: The statement of intent attached to Ch. 490, L. 1995, provided: "A statement of intent is included with this bill because of the authorization granted to the department in 75-10-702 to adopt rules to implement Title 75, chapter 10, part 7, including implementation of the exemption from liability for persons holding indicia of ownership primarily to protect a security interest. To date, the department has not adopted rules under this section.

The legislature finds that existing state law related to the liability of persons holding security interests for environmental contamination is unclear and that this lack of clarity has created uncertainty on the part of security interest holders as to whether they are liable for environmental contamination caused by their borrowers or other third parties. The uncertainty has negatively affected the availability of credit in Montana.

In enacting Montana's Comprehensive Environmental Cleanup and Responsibility Act (CECRA), the legislature modeled the statute after and borrowed many terms from the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). The legislature specifically borrowed the term "own or operate", which excludes from liability those persons who, without participating in the management of the facility, hold indicia of ownership merely to protect a security interest.

When significant questions arose under CERCLA as to the scope of the terms "indicia of ownership" and "participating in the management of the facility", the federal government devoted substantial effort to developing a federal policy and a rule that employ a framework of specific tests to provide clearer articulation of a lender's scope of liability under CERCLA, both to governmental agencies and to third parties. The April 1992 rule, which appears at 40 CFR 300.1100, et seq., was preceded by many public hearings and public comment periods. Although the rule was recently judged to be technically beyond EPA's rulemaking authority, the contents of the rule still constitute EPA policy on the scope of the secured creditor exemption under CERCLA and the legislature finds that the rule in its current form provides a well-reasoned basis for interpreting the identical language in CECRA.

Therefore the legislature finds that the clarification of potential liability in a manner consistent with federal statutes, current EPA policy, and the regulations at 40 CFR 300.1100, et seq., is desirable in order to provide certainty for security interest holders, including persons engaged in lease financing, to enhance the availability of credit, and to encourage responsible practices by those security interest holders and borrowers to protect the public health and environment.

The legislature also finds that uncertainty exists in state law regarding the potential liability of certain fiduciaries for environmental contamination on property held in their fiduciary capacity and determines that a limited exemption from liability, comparable to the one being proposed for action by congress under CERCLA, should apply to fiduciaries and that it is necessary to add language concerning fiduciaries to Title 75, chapter 10, part 7.

Therefore, in adopting rules under 75-10-702 to implement the exemption under 75-10-701(10)(b) for holders of "the indicia of ownership", the department of health and environmental sciences [now department of environmental quality] shall adopt rules consistent with the revisions to CECRA contained in this bill, including rules that address fiduciaries within the exemption. The rules also must be consistent with the federal regulations set forth at 40 CFR 300.1100, et seq.

Finally, the legislature intends that the limited exemptions for secured creditors and fiduciaries that are clarified and granted by this legislation extend not only to liability asserted by governmental entities but also extend to claims by any third parties for cleanup or for cost recovery or contribution."

Applicability: Section 6, Ch. 490, L. 1995, provided: "[This act] does not apply to civil actions commenced prior to the [effective date of this act] or to the claims upon which such civil actions are based." Effective April 14, 1995.

1989 Amendment: Rewrote entire section (see 1987 MCA for former text) to amend language relating to reimbursement and include provisions relating to liability (see 1989 Session Law for text). Amendment effective May 22, 1989.

1987 Amendment: Deleted former (5) that read: "(5) (a) Costs of remedial action recovered pursuant to subsection (1)(a) must be deposited in the fund.

(b) Damages and penalties recovered pursuant to subsections (1)(b) and (2) must be deposited in the environmental contingency account within the state special revenue fund established pursuant to 75-1-1101."

Case Notes

Arranger Liability — Intent Not Required: Although intentional acts are required to prove arranger joint and several liability under a similar federal law relating to the disposal of hazardous substances, the provisions of this section do not mention intent — the section uses broader terms. Title 75, chapter 10, part 7, must be read as a whole, and both the statutory analysis and the policy rationale espoused under Art. II, sec. 3, of the Montana Constitution, 75-10-701, 75-10-706, and this section provide for broad arranger liability. A showing of intent to dispose of a hazardous substance is not necessary. State ex rel. Dept. of Environmental Quality v. BNSF Ry. Co., 2010 MT 267, 358 Mont. 368, 246 P.3d 1037.

Bank Loan for Purchase of Contaminated Real Property — Negligent Misrepresentation, Constructive Fraud, and Punitive Damages — Summary Judgment Reversed: After the Department of Health and Environmental Sciences (now Department of Environmental Quality) discovered that soil had been contaminated with gasoline leaking from Habets' and other service station gas tanks in violation of this section, Habets entered into a buy-sell agreement for sale of his service station to Mattingly. Mattingly then met with First Bank Vice President Joe Dolan to secure financing. Dolan conducted a physical inspection of the service station property in order to obtain an impression of the value of the property and to determine whether First Bank would be secure in its loan. At the time of his inspection, Dolan was aware of the contamination caused by the service station gas tanks. The loan was approved by the First Bank loan committee made up of Dolan, Susan Hemmer, the bank president, and John Mulcare, an owner of another service station, all three of whom were aware of the contamination but did not discuss it with Mattingly or the loan committee. Mattingly learned of the contamination much later when he tried to sell the station. He then brought an action against Habets, Habets' realtor, and First Bank, alleging constructive fraud, negligence, and negligent misrepresentation by First Bank and seeking punitive damages. The District Court granted summary judgment to First Bank on all issues. The Supreme Court, following Kitchen Krafters, Inc. v. Eastside Bank of Mont., 242 M 155, 789 P2d 567 (1990), which was overruled, with regard to the elements for a claim of negligent misrepresentation against a financial institution, in Morrow v. Bank of America, N.A., 2014 MT 117, 375 Mont. 38, 324 P.3d 1167, stated that a threshold issue in a claim of negligent misrepresentation is whether the defendant made a representation as to a past or existing material fact upon which the claim is based. The Supreme Court pointed out that except for some basic facts involving the existence of the contamination, Dolan's visit to the gas station, and the action of the loan committee, the parties disagreed over the nature, scope, and import of the valuation of the property; disagreed whether First Bank's appraisal of the property and approval of the Mattingly loan constituted a representation as to the value of the property; and, if it was a representation, disagreed over whether Mattingly relied upon that representation. Citing McGregor v. Cushman/Mommer, 220 M 98, 714 P2d 536 (1986), the Supreme Court also stated that special circumstances may support a claim for constructive fraud when a party makes misleading statements concerning the physical condition or commercial value of real estate and pointed out that a jury might find that representations by First Bank with regard to the property would constitute these "special circumstances". Concerning the requirement of 28-2-406 that in a claim for constructive fraud one party must gain an advantage over the other, the Supreme Court cited the fact that upon closing the sale of the station to Mattingly, First Bank was able to pay off a loan for the property made to Habets and that in making the loan to Mattingly, First Bank was able to collect interest income from the loan. Because there were facts in dispute as to the foregoing issues, the Supreme Court held that summary judgment was not appropriate and that the District Court erred in granting summary judgment in favor of First Bank. Because 27-1-221 allows punitive damages against a party guilty of actual fraud or malice, the Supreme Court also reversed the District Court on the issue of punitive damages. Mattingly v. First Bank of Lincoln, 285 M 209, 947 P2d 66, 54 St. Rep. 1116 (1997).

75-10-718. Liability of remedial action contractor.

Compiler's Comments

1995 Amendment: Chapter 490 in (4), near middle after "scope of", substituted "the entity's or individual's" for "its or his"; and made minor changes in style. Amendment effective April 14, 1995.

1995 Statement of Intent: The statement of intent attached to Ch. 490, L. 1995, provided: "A statement of intent is included with this bill because of the authorization granted to the department in 75-10-702 to adopt rules to implement Title 75, chapter 10, part 7, including implementation of the exemption from liability for persons holding indicia of ownership primarily to protect a security interest. To date, the department has not adopted rules under this section.

The legislature finds that existing state law related to the liability of persons holding security interests for environmental contamination is unclear and that this lack of clarity has created uncertainty on the part of security interest holders as to whether they are liable for environmental contamination caused by their borrowers or other third parties. The uncertainty has negatively affected the availability of credit in Montana.

In enacting Montana's Comprehensive Environmental Cleanup and Responsibility Act (CECRA), the legislature modeled the statute after and borrowed many terms from the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). The legislature specifically borrowed the term "own or operate", which excludes from liability those persons who, without participating in the management of the facility, hold indicia of ownership merely to protect a security interest.

When significant questions arose under CERCLA as to the scope of the terms "indicia of ownership" and "participating in the management of the facility", the federal government devoted substantial effort to developing a federal policy and a rule that employ a framework of specific tests to provide clearer articulation of a lender's scope of liability under CERCLA, both to governmental agencies and to third parties. The April 1992 rule, which appears at 40 CFR 300.1100, et seq., was preceded by many public hearings and public comment periods. Although the rule was recently judged to be technically beyond EPA's rulemaking authority, the contents of the rule still constitute EPA policy on the scope of the secured creditor exemption under CERCLA and the legislature finds that the rule in its current form provides a well-reasoned basis for interpreting the identical language in CECRA.

Therefore the legislature finds that the clarification of potential liability in a manner consistent with federal statutes, current EPA policy, and the regulations at 40 CFR 300.1100, et seq., is desirable in order to provide certainty for security interest holders, including persons engaged in lease financing, to enhance the availability of credit, and to encourage responsible practices by those security interest holders and borrowers to protect the public health and environment.

The legislature also finds that uncertainty exists in state law regarding the potential liability of certain fiduciaries for environmental contamination on property held in their fiduciary capacity and determines that a limited exemption from liability, comparable to the one being proposed for action by congress under CERCLA, should apply to fiduciaries and that it is necessary to add language concerning fiduciaries to Title 75, chapter 10, part 7.

Therefore, in adopting rules under 75-10-702 to implement the exemption under 75-10-701(10)(b) for holders of "the indicia of ownership", the department of health and environmental sciences [now department of environmental quality] shall adopt rules consistent with the revisions to CECRA contained in this bill, including rules that address fiduciaries within the exemption. The rules also must be consistent with the federal regulations set forth at 40 CFR 300.1100, et seq.

Finally, the legislature intends that the limited exemptions for secured creditors and fiduciaries that are clarified and granted by this legislation extend not only to liability asserted by governmental entities but also extend to claims by any third parties for cleanup or for cost recovery or contribution."

Applicability: Section 6, Ch. 490, L. 1995, provided: "[This act] does not apply to civil actions commenced prior to the [effective date of this act] or to the claims upon which such civil actions are based." Effective April 14, 1995.

1991 Amendment: In (8) substituted "liable person" for "responsible party".

Effective Date: Section 22, Ch. 709, L. 1989, provided that this section is effective May 22, 1989.

75-10-719. Settlement — bar to contribution liability.

Compiler's Comments

1997 Amendment: Chapter 415 in (4), after "reach a final settlement with a", substituted "potentially liable or liable person" for "person liable", near middle substituted "remedial action" for "response", inserted "taking into account the toxicity of the hazardous or deleterious substances involved and the person's contribution of hazardous or deleterious substances in relation to the total volume of hazardous or deleterious substances at the facility", and substituted "through (4)(d)" for "or (4)(b)"; in (4)(a) substituted current text concerning liability based on 75-10-715, contribution of less than 0.002%, and prohibition of requirement for payment of remedial action costs for "Both of the following are minimal in comparison to other hazardous or deleterious substances at the facility:

(i) the amount of the hazardous or deleterious substances contributed by that person to the facility;

(ii) the toxic or other hazardous effects of the substances contributed by that person to the facility"; inserted (4)(b) concerning liability based upon 75-10-715(1)(c) or (1)(d), proof of disposal or treatment of less than 5% of the hazardous or deleterious substances disposed of, and definition of solid waste; inserted (4)(d) concerning substantial credible evidence of a defense; inserted (5) concerning settlement; inserted (6) concerning agreement to liability settlement avoiding reservation of rights; inserted (7) concerning priority for payment of settlement funds; inserted (8) concerning settlement prohibiting application of allocation process; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 415, L. 1997, provided: "WHEREAS, the 1995 Legislature, in Chapter 584, Laws of 1995, directed the Department of Environmental Quality to institute a collaborative process involving all affected and interested persons to analyze the elimination of joint and several liability with respect to the cleanup of state Comprehensive Environmental Cleanup and Responsibility Act (CECRA) facilities and to submit any legislative proposals that collaboratively resulted from that process to the 55th Legislature; and

WHEREAS, the Department instituted this collaborative process with industry and business representatives; state, federal, and local government representatives; and public interest and environmental interest group representatives; and

WHEREAS, through a contract with the Department, the Montana Consensus Council designed the study process, facilitated the organization of the collaborative process, and conducted the numerous meetings of the study committees and interest group caucuses through which the parties to the collaborative process reached consensus on legislative proposals that are contained in this bill."

1997 Statement of Intent: The statement of intent attached to Ch. 415, L. 1997, provided: "It is the intent of this bill to provide an option to the concept of joint and several liability for potentially liable persons to have their proportionate share of liability for a state Comprehensive Environmental Cleanup and Responsibility Act (CECRA) facility determined through an expedited process while ensuring that the concurrent cleanup of the facility occurs. The bill clarifies defenses to liability and creates exclusions from liability. The bill also provides rulemaking authority to the department for developing guidance and criteria and involving the public and the liable parties in the decisionmaking process for listing and delisting sites on a CECRA priority list. The department will be required to provide written justification for its decisions to list, delist, and prioritize sites needing remediation. The written criteria for listing and delisting represent the legislature's intent for this rulemaking."

1991 Amendment: Inserted (5) authorizing Department to require financial assurance; and made minor changes in style.

1991 Statement of Intent: The statement of intent attached to Ch. 752, L. 1991, provided: "A statement of intent is required for this bill to provide guidance to the department of health and environmental sciences [now department of environmental quality] concerning rulemaking to establish the specific terms and conditions of financial assurance that a liable person is required to provide pursuant to 75-10-719 and 75-10-721. The department shall consult and to the greatest extent practicable rely upon financial assurance concepts and requirements contained in federal regulations that implement the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended."

Severability: Section 6, Ch. 752, L. 1991, was a severability clause.

Retroactive Applicability: Section 7, Ch. 752, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to occurrences after June 30, 1985."

Effective Date: Section 22, Ch. 709, L. 1989, provided that this section is effective May 22, 1989.

Case Notes

Consent Decrees — Departmental Judgment: This section promotes the use of consent decrees, and the Department of Environmental Quality is directed to use its judgment in entering into consent decrees. Based upon the record, including consideration of legitimate factors such as the settling party's lack of financial resources, the defendant failed to show that the District Court abused its discretion in approving a consent decree. State ex rel. Dept. of Environmental Quality v. BNSF Ry. Co., 2010 MT 267, 358 Mont. 368, 246 P.3d 1037.

District Court Discretion to Reduce Liability Based on Consent Decrees: This section authorizes but does not require the Department of Environmental Quality to reduce potential liability based upon settlement under consent decrees with other parties. State ex rel. Dept. of Environmental Quality v. BNSF Ry. Co., 2010 MT 267, 358 Mont. 368, 246 P.3d 1037.

75-10-720. Condemnation — creation of state lien.

Compiler's Comments

2001 Amendment: Chapter 125 in (1) at end of last sentence deleted "parts 1 through 3". Amendment effective October 1, 2001.

1997 Amendment: Chapter 415 inserted (6) concerning expenditure of money for orphan share remedial action and state's lien following expenditure; inserted (7) regarding deposit of payment of liens; and made minor changes in style. Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 415, L. 1997, provided: "WHEREAS, the 1995 Legislature, in Chapter 584, Laws of 1995, directed the Department of Environmental Quality to institute a collaborative process involving all affected and interested persons to analyze the elimination of joint and several liability with respect to the cleanup of state Comprehensive Environmental Cleanup and Responsibility Act (CECRA) facilities and to submit any legislative proposals that collaboratively resulted from that process to the 55th Legislature; and

WHEREAS, the Department instituted this collaborative process with industry and business representatives; state, federal, and local government representatives; and public interest and environmental interest group representatives; and

WHEREAS, through a contract with the Department, the Montana Consensus Council designed the study process, facilitated the organization of the collaborative process, and conducted the numerous meetings of the study committees and interest group caucuses through which the parties to the collaborative process reached consensus on legislative proposals that are contained in this bill."

Effective Date: Section 22, Ch. 709, L. 1989, provided that this section is effective May 22, 1989.

75-10-721. Degree of cleanup required — permit exemption — financial assurance.

Compiler's Comments

1999 Amendment: Chapter 437 at end of (2)(c) inserted "giving due consideration to institutional controls"; and in (2)(c)(iv) before "engineering" deleted "institutional and". Amendment effective April 23, 1999.

1995 Amendment: Chapter 584 in (1), after "part", inserted "or a voluntary cleanup under 75-10-730 through 75-10-738" and after "assures" deleted "present and future"; in (2)(a), at beginning, inserted exception clause; in (2)(b), at beginning, substituted "may consider" for "shall consider and may require cleanup consistent with" and substituted "relevant" for "well-suited"; substituted (2)(c) concerning type of remedial actions for former (2)(c) that read: "(c) shall select remedial actions that, at a minimum, protect public health, safety, and welfare and the environment and that:

(i) use permanent solutions;

(ii) use alternative treatment technologies or resource recovery technologies to the maximum extent practicable; and

(iii) are cost-effective, taking into account the total short- and long-term costs of the actions, including the cost of operation and maintenance activities for the entire period during which the activities will be required"; inserted (3) concerning acceptability to community; inserted (4) concerning circumstances for selecting remedial action that does not meet state environmental standards; inserted (5) concerning determination of cost-effectiveness; in (6), near end, substituted "this section" for "subsection (1)"; and made minor changes in style. Amendment effective May 1, 1995.

Severability: Section 23, Ch. 584, L. 1995, was a severability clause.

Applicability: Section 25(1), Ch. 584, L. 1995, provided: "(1) [This act] does not apply to civil actions commenced or begun prior to [the effective date of this act] [May 1, 1995] or to claims based on those actions."

1991 Amendment: Inserted (4) authorizing Department to require financial assurance.

1991 Statement of Intent: The statement of intent attached to Ch. 752, L. 1991, provided: "A statement of intent is required for this bill to provide guidance to the department of health and environmental sciences [now department of environmental quality] concerning rulemaking to establish the specific terms and conditions of financial assurance that a liable person is required to provide pursuant to 75-10-719 and 75-10-721. The department shall consult and to the greatest extent practicable rely upon financial assurance concepts and requirements contained in federal regulations that implement the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended."

Severability: Section 6, Ch. 752, L. 1991, was a severability clause.

Retroactive Applicability: Section 7, Ch. 752, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to occurrences after June 30, 1985."

Effective Date: Section 22, Ch. 709, L. 1989, provided that this section is effective May 22, 1989.

Case Notes

Common-Law Action Not Usurped by Statutory Scheme for Environmental Remediation and Cleanup: Plaintiffs brought a common-law action against defendant for restoration damages related to environmental damage caused by defendant's refinery. Defendant asserted that the action would interfere with the statutory plan in the Comprehensive Environmental Cleanup and Responsibility Act (CECRA), Title 75, ch. 10, part 7, and contended that the common-law action was preempted by the statutory provisions. The Supreme Court disagreed. As set out in Brewington v. Employers Fire Ins. Co., 1999 MT 312, 297 M 243, 992 P2d 237 (1999), statutory preemption of common-law claims is limited to situations in which there are a direct conflict between statutes and a common-law claim. However, nothing in CECRA preempts a common-law claim that seeks to recover restoration damages beyond the statutes' health-based standards, and the court declined to add to CECRA a prohibition against common-law claims when the Legislature declined to do so. Sunburst School District No. 2 v. Texaco, Inc., 2007 MT 183, 338 M 259, 165 P3d 1079 (2007).

75-10-722. Payment of state costs and penalties.

Compiler's Comments

2011 Amendment: Chapter 257 in (3) before "after receipt" deleted "within 60 days" and substituted "may bring" for "shall bring"; inserted (4)(a) regarding time period of 1 month or less; in (4)(b) substituted "more than 1 month and not more than 3 months" for "one-quarter of a year or less"; and made minor changes in style. Amendment effective July 1, 2011.

2001 Amendment: Chapter 326 in (2) after "costs" inserted "including interest"; inserted (4) requiring assessment and collection of interest on past-due remedial action costs; in (5) in four places in first sentence after "costs" inserted "and interest" and inserted last sentence allowing court to disallow interest if costs are not reasonable; in (7) after "costs" inserted "interest"; and made minor changes in style. Amendment effective April 21, 2001.

Saving Clause: Section 3, Ch. 326, L. 2001, was a saving clause.

Applicability: Section 5, Ch. 326, L. 2001, provided: "The requirement to assess and collect interest in [section 2], amending 75-10-722, applies to interest accrued after [the effective date of this act]." Effective April 21, 2001.

1995 Amendments: Chapter 490 in (5), near beginning after "action", substituted "brought under 75-10-715(4) or a contribution action for costs incurred under this part" for "for recovery of remedial action costs" and at end substituted "final permanent remedy" for "remedial action". Amendment effective April 14, 1995.

Chapter 584 in (2), after "department", substituted "may" for "shall". Amendment effective May 1, 1995.

1995 Statement of Intent: The statement of intent attached to Ch. 490, L. 1995, provided: "A statement of intent is included with this bill because of the authorization granted to the department in 75-10-702 to adopt rules to implement Title 75, chapter 10, part 7, including implementation of the exemption from liability for persons holding indicia of ownership primarily to protect a security interest. To date, the department has not adopted rules under this section.

The legislature finds that existing state law related to the liability of persons holding security interests for environmental contamination is unclear and that this lack of clarity has created uncertainty on the part of security interest holders as to whether they are liable for environmental contamination caused by their borrowers or other third parties. The uncertainty has negatively affected the availability of credit in Montana.

In enacting Montana's Comprehensive Environmental Cleanup and Responsibility Act (CECRA), the legislature modeled the statute after and borrowed many terms from the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). The legislature specifically borrowed the term "own or operate", which excludes from liability those persons who, without participating in the management of the facility, hold indicia of ownership merely to protect a security interest.

When significant questions arose under CERCLA as to the scope of the terms "indicia of ownership" and "participating in the management of the facility", the federal government devoted substantial effort to developing a federal policy and a rule that employ a framework of specific tests to provide clearer articulation of a lender's scope of liability under CERCLA, both to governmental agencies and to third parties. The April 1992 rule, which appears at 40 CFR 300.1100, et seq., was preceded by many public hearings and public comment periods. Although the rule was recently judged to be technically beyond EPA's rulemaking authority, the contents of the rule still constitute EPA policy on the scope of the secured creditor exemption under CERCLA and the legislature finds that the rule in its current form provides a well-reasoned basis for interpreting the identical language in CECRA.

Therefore the legislature finds that the clarification of potential liability in a manner consistent with federal statutes, current EPA policy, and the regulations at 40 CFR 300.1100, et seq., is desirable in order to provide certainty for security interest holders, including persons engaged in lease financing, to enhance the availability of credit, and to encourage responsible practices by those security interest holders and borrowers to protect the public health and environment.

The legislature also finds that uncertainty exists in state law regarding the potential liability of certain fiduciaries for environmental contamination on property held in their fiduciary capacity and determines that a limited exemption from liability, comparable to the one being proposed for action by congress under CERCLA, should apply to fiduciaries and that it is necessary to add language concerning fiduciaries to Title 75, chapter 10, part 7.

Therefore, in adopting rules under 75-10-702 to implement the exemption under 75-10-701(10)(b) for holders of "the indicia of ownership", the department of health and environmental sciences [now department of environmental quality] shall adopt rules consistent with the revisions to CECRA contained in this bill, including rules that address fiduciaries within the exemption. The rules also must be consistent with the federal regulations set forth at 40 CFR 300.1100, et seq.

Finally, the legislature intends that the limited exemptions for secured creditors and fiduciaries that are clarified and granted by this legislation extend not only to liability asserted by governmental entities but also extend to claims by any third parties for cleanup or for cost recovery or contribution."

Applicability: Section 6, Ch. 490, L. 1995, provided: "[This act] does not apply to civil actions commenced prior to the [effective date of this act] or to the claims upon which such civil actions are based." Effective April 14, 1995.

Section 25(1), Ch. 584, L. 1995, provided: "(1) [This act] does not apply to civil actions commenced or begun prior to [the effective date of this act] [May 1, 1995] or to claims based on those actions."

Severability: Section 23, Ch. 584, L. 1995, was a severability clause.

Effective Date: Section 22, Ch. 709, L. 1989, provided that this section is effective May 22, 1989.

75-10-723. Agreements and administrative orders on consent to perform remedial action.

Compiler's Comments

1997 Amendment: Chapter 539 in (1), near middle of first sentence after "agreement", inserted "or an administrative order on consent"; in (2), near beginning after "enters into", substituted "an administrative order on consent" for "an agreement" and near middle, after "damages", substituted "that administrative order on consent" for "the agreement must be filed in an appropriate district court as a consent decree and"; and in (3), after "agreements", inserted "or administrative orders on consent". Amendment effective May 5, 1997.

1997 Statement of Intent: The statement of intent attached to Ch. 539, L. 1997, provided: "It is the intent of this bill to provide potentially liable persons the opportunity to take the necessary remedial action before the state takes action and to authorize the department of environmental quality to adopt rules that allow for the joint and mutual selection of remedial action contractors by the department and the potentially liable persons responsible for taking remedial action at sites."

Applicability: Section 7, Ch. 539, L. 1997, provided: "[This act] does not apply to any facility for which an administrative order has been issued pursuant to 75-10-711 prior to [the effective date of this act] [effective May 5, 1997] or to any facility for which the department of environmental quality and a liable or potentially liable person have, prior to [the effective date of this act] [effective May 5, 1997], entered into an agreement regarding the performance of remedial action for that facility."

Effective Date: Section 22, Ch. 709, L. 1989, provided that this section is effective May 22, 1989.

75-10-724. Private right of action.

Compiler's Comments

1997 Amendment: Chapter 415 near beginning inserted "who receives notice under 75-10-711" and substituted "or who initiates a voluntary cleanup under the provisions of 75-10-730 through 75-10-738 may bring a private right of action, including a claim for contribution or declaratory relief, against any other person who is liable or potentially liable under 75-10-715 for the recovery of remedial action costs. In resolving contribution claims, the court shall allocate remedial action costs among the liable persons based on the factors set out in 75-10-750" for (1) and (2) granting right to apportionment of liability, considerations affecting apportionment, and right to contribution (see 1997 Session Law for former text). Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 415, L. 1997, provided: "WHEREAS, the 1995 Legislature, in Chapter 584, Laws of 1995, directed the Department of Environmental Quality to institute a collaborative process involving all affected and interested persons to analyze the elimination of joint and several liability with respect to the cleanup of state Comprehensive Environmental Cleanup and Responsibility Act (CECRA) facilities and to submit any legislative proposals that collaboratively resulted from that process to the 55th Legislature; and

WHEREAS, the Department instituted this collaborative process with industry and business representatives; state, federal, and local government representatives; and public interest and environmental interest group representatives; and

WHEREAS, through a contract with the Department, the Montana Consensus Council designed the study process, facilitated the organization of the collaborative process, and conducted the numerous meetings of the study committees and interest group caucuses through which the parties to the collaborative process reached consensus on legislative proposals that are contained in this bill."

Effective Date: Section 22, Ch. 709, L. 1989, provided that this section is effective May 22, 1989.

Case Notes

Common-Law Action Not Usurped by Statutory Scheme for Environmental Remediation and Cleanup: Plaintiffs brought a common-law action against defendant for restoration damages related to environmental damage caused by defendant's refinery. Defendant asserted that the action would interfere with the statutory plan in the Comprehensive Environmental Cleanup and Responsibility Act (CECRA), Title 75, ch. 10, part 7, and contended that the common-law action was preempted by the statutory provisions. The Supreme Court disagreed. As set out in Brewington v. Employers Fire Ins. Co., 1999 MT 312, 297 M 243, 992 P2d 237 (1999), statutory preemption of common-law claims is limited to situations in which there are a direct conflict between statutes and a common-law claim. However, nothing in CECRA preempts a common-law claim that seeks to recover restoration damages beyond the statutes' health-based standards, and the court declined to add to CECRA a prohibition against common-law claims when the Legislature declined to do so. Sunburst School District No. 2 v. Texaco, Inc., 2007 MT 183, 338 M 259, 165 P3d 1079 (2007).

75-10-725. Immunity of fire agency and employees for hazardous or deleterious substance cleanup.

Compiler's Comments

2007 Amendment: Chapter 449 at beginning after "A" substituted "governmental fire agency organized under Title 7, chapter 33" for "volunteer fire company or department that is organized by a municipality, county, rural fire district, fire service area, or other entity" and after "employees of the" substituted "agency" for "company or department"; and made minor changes in style. Amendment effective June 1, 2007.

75-10-726. Citizens suit.

Compiler's Comments

Preamble: The preamble attached to Ch. 415, L. 1997, provided: "WHEREAS, the 1995 Legislature, in Chapter 584, Laws of 1995, directed the Department of Environmental Quality to institute a collaborative process involving all affected and interested persons to analyze the elimination of joint and several liability with respect to the cleanup of state Comprehensive Environmental Cleanup and Responsibility Act (CECRA) facilities and to submit any legislative proposals that collaboratively resulted from that process to the 55th Legislature; and

WHEREAS, the Department instituted this collaborative process with industry and business representatives; state, federal, and local government representatives; and public interest and environmental interest group representatives; and

WHEREAS, through a contract with the Department, the Montana Consensus Council designed the study process, facilitated the organization of the collaborative process, and conducted the numerous meetings of the study committees and interest group caucuses through which the parties to the collaborative process reached consensus on legislative proposals that are contained in this bill."

Severability: Section 28, Ch. 415, L. 1997, was a severability clause.

Effective Date: Section 29(1), Ch. 415, L. 1997, provided: "Except as provided in subsections (2) and (3), [this act] is effective July 1, 1997."

75-10-727. Institutional controls.

Compiler's Comments

Effective Date: Section 8, Ch. 437, L. 1999 provided that this section is effective April 23, 1999.

75-10-728. Remedial action costs.

Compiler's Comments

Effective Date: Section 8, Ch. 437, L. 1999 provided that this section is effective April 23, 1999.

75-10-729. Restoration damages.

Compiler's Comments

Effective Date: Section 5, Ch. 572, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 14, 2021.

Saving Clause: Section 4, Ch. 572, L. 2021, was a saving clause.

75-10-730. Short title.

Compiler's Comments

Termination Provision Repealed: Section 6, Ch. 437, L. 1999, repealed sec. 27, Ch. 584, L. 1995, which terminated this section January 1, 2001. Effective April 23, 1999.

1997 Amendments: (1) Section 23, Ch. 415, L. 1997, amended sec. 16, Ch. 584, L. 1995, in (1) by substituting "the Joslyn street tailings facility, the Corbin flats facility, and the block P mill facility" for "three sites from the department of state lands' abandoned hard-rock mine priority list. The three sites must be selected from the top ten priority sites on that list as of April 1, 1995"; in (2)(c), at end, by inserting "by June 30, 1997"; by deleting (4) that read: "(4) If more than three applicants submit voluntary cleanup plans for the highest priority sites on the department of state lands' abandoned hard-rock mine priority list and the department approves more than three plans, the department shall select three plans to incorporate into the pilot program on a priority basis as determined by the date of submittal of a complete application"; and by making minor changes in style.

(2) Section 24, Ch. 415, L. 1997, also amended sec. 18(2), Ch. 584, L. 1995, by inserting at end "and the 1998-99 biennium".

1997 Extension of Termination: Section 25, Ch. 415, L. 1997, amended sec. 27(2), Ch. 584, L. 1995, by extending the termination date imposed by Ch. 584 for [sections 14 through 20] (not codified) of Ch. 584 to June 30, 1999.

Mixed Funding Pilot Program: Sections 13 through 20, Ch. 584, L. 1995, provided: "Section 13. Study process. The department of health and environmental sciences [now department of environmental quality], with legislative oversight from the environmental quality council, shall institute a collaborative process involving all affected and interested parties that specifically analyzes the elimination of joint and several liability with respect to cleanup of state CECRA sites and any related funding necessary to clean up state CECRA sites as a result of eliminating joint and several liability. The department of health and environmental sciences [now department of environmental quality] shall submit a report and legislative proposals that collaboratively resulted from that process to the 55th legislature.

Section 14. Short title. [Sections 14 through 20] [not codified] may be cited as the "Mixed Funding Pilot Program".

Section 15. Purpose — legislative declaration. (1) The purposes of [sections 14 through 20] [not codified] are to establish a pilot remediation program to operate in conjunction with the voluntary cleanup program provided for in [sections 4 through 12] [75-10-730 through 75-10-738] and to provide information during the 2-year study process in [section 13] [not codified].

(2) The legislature further intends that the pilot program provide necessary data related to:

(a) actual costs incurred in the remediation of facilities;

(b) the costs associated with the elimination of joint and several liability;

(c) the potential use of resource indemnity trust fund money in remediating facilities;

(d) the feasibility of voluntary cleanup plans; and

(e) the coordination between an applicant and the department in the use of voluntary cleanup programs.

Section 16. Criteria. (1) The pilot program ~~must consist~~ consists of remediation of ~~three sites from the department of state lands' abandoned hard-rock mine priority list. The three sites must be selected from the top ten priority sites on that list as of April 1, 1995~~ the Joslyn street tailings facility, the Corbin flats facility, and the block P mill facility [changes made by sec. 23, Ch. 415, L. 1997].

(2) Any site remediated under this pilot program must meet the following criteria:

(a) The owner of the property has, prior to May 22, 1989, purchased or entered into a lease purchase agreement or an option to purchase property where the facility is located.

(b) The applicant has submitted a voluntary cleanup plan in accordance with the provisions of [sections 7 and 8] [75-10-733 and 75-10-734].

(c) The department has accepted and approved the application for a voluntary cleanup plan in accordance with the provisions of [sections 6 through 10] [75-10-732 through 75-10-736] by June 30, 1997 [underlined language added by sec. 23, Ch. 415, L. 1997].

(3) The department and the applicant shall negotiate an apportionment of the applicant's liability pursuant to [section 17] [not codified]. The department, as a trier of fact, shall make the final determination of the applicant's apportioned liability. If the applicant disagrees with the department's determination of the applicant's proportionate share of liability, the applicant may appeal the department's decision in accordance with the requirements of [section 6(4)] [75-10-732(4)].

~~(4) If more than three applicants submit voluntary cleanup plans for the highest priority sites on the department of state lands' [now department of environmental quality's] abandoned hard-rock mine priority list and the department approves more than three plans, the department shall select three plans to incorporate into the pilot program on a priority basis as determined by the date of submittal of a complete application.~~ [Stricken language deleted by sec. 23, Ch. 415, L. 1997.]

Section 17. Mixed funding — determination of liability. (1) An applicant who satisfies the requirements of [section 16(2)] [not codified] shall meet with the department within 30 days of approval of the voluntary cleanup plan to negotiate an apportionment of liability for the site. The burden is on the applicant to show how the applicant's liability should be apportioned. In apportioning the liability of the applicant under this section, the department shall balance all of the following factors:

(a) the extent to which the applicant caused the release of the hazardous or deleterious substance;

(b) the extent to which an applicant's contribution to the release of a hazardous or deleterious substance can be diminished;

(c) the amount of the hazardous or deleterious substance involved;

(d) the degree of toxicity of the hazardous or deleterious substance involved;

(e) the degree of involvement of and care exercised by the applicant in manufacturing, treating, transporting, or disposing of the hazardous or deleterious substance;

(f) the degree of cooperation by the applicant with state or local officials to prevent any harm to the public health, safety, or welfare or to the environment; and

(g) the applicant's knowledge of the hazardous nature of the substance.

(2) Once the department and the applicant have negotiated an apportionment of the applicant's liability, the applicant has a right of reimbursement subject to the requirements and limitations of [section 18] [not codified].

Section 18. Claims for and limitations on reimbursement. (1) After completion of the voluntary cleanup plan approved by the department, the applicant may apply to and must, in accordance with this section, receive reimbursement from the abandoned mines state special revenue account. Reimbursement must be subject to the following requirements and limitations:

(a) The applicant shall complete remediation prior to making a claim for reimbursement.

(b) The reimbursement may not exceed 90% of eligible costs up to a maximum of $300,000 per facility.

(c) The claim for reimbursement may not include legal fees or department costs incurred in the oversight of the voluntary cleanup plan.

(2) For purposes of this section, "eligible costs" means costs in excess of an applicant's proportionate share of total costs incurred in the remediation of the site during the 1996-97 biennium and the 1998-99 biennium [underlined language added by sec. 24, Ch. 415, L. 1997].

(3) If costs are reimbursed out of the abandoned mines state special revenue account, nothing in [sections 14 through 20] [not codified] prohibits the department from pursuing an action against other potentially liable parties to recover those costs.

(4) If the abandoned mines state special revenue account does not contain sufficient money to pay received claims for reimbursement, the abandoned mines state special revenue account and the department are not liable for making any reimbursement at that time. All claims are subject to appropriations to the abandoned mines state special revenue account.

Section 19. Abandoned mines state special revenue account created. (1) There is an abandoned mines state special revenue account within the state special revenue account fund established in 17-2-102.

(2) There must be paid into the abandoned mines state special revenue account money allocated from the metalliferous mines license tax pursuant to 15-37-117.

(3) Deposits to the abandoned mines state special revenue account must be placed in short-term investments. The interest on short-term investments must be deposited in the abandoned mines state special revenue account.

(4) The purpose of the abandoned mines state special revenue account is to provide the funding to the department of health and environmental sciences [now department of environmental quality] for the cleanup and reclamation of sites eligible for the pilot program in [sections 14 through 20] [not codified].

Section 20. Incorporation into study process — report to legislature. The department of health and environmental sciences [now department of environmental quality] and applicants participating in the pilot program shall submit reports to the 55th legislature detailing the success of and difficulties with the operation of the pilot program." Effective May 1, 1995.

Severability: Section 23, Ch. 584, L. 1995, was a severability clause.

Applicability: Section 25, Ch. 584, L. 1995, provided: "(1) [This act] does not apply to civil actions commenced or begun prior to [the effective date of this act] [May 1, 1995] or to claims based on those actions.

(2) [Sections 4 through 12] [75-10-730 through 75-10-738] apply after January 1, 2001, to voluntary cleanup plans approved by the department of health and environmental sciences [now department of environmental quality] between [the effective date of this act] [May 1, 1995] and January 1, 2001."

Effective Date: Section 26, Ch. 584, L. 1995, provided that this section is effective May 1, 1995.

Termination: Section 27, Ch. 584, L. 1995, provided: "(1) [Sections 4 through 12] [75-10-730 through 75-10-738] terminate January 1, 2001.

(2) [Sections 14 through 21] terminate June 30, 1997."

75-10-731. Purpose — legislative declaration.

Compiler's Comments

Termination Provision Repealed: Section 6, Ch. 437, L. 1999, repealed sec. 27, Ch. 584, L. 1995, which terminated this section January 1, 2001. Effective April 23, 1999.

Severability: Section 23, Ch. 584, L. 1995, was a severability clause.

Applicability: Section 25, Ch. 584, L. 1995, provided: "(1) [This act] does not apply to civil actions commenced or begun prior to [the effective date of this act] [May 1, 1995] or to claims based on those actions.

(2) [Sections 4 through 12] [75-10-730 through 75-10-738] apply after January 1, 2001, to voluntary cleanup plans approved by the department of health and environmental sciences [now department of environmental quality] between [the effective date of this act] [May 1, 1995] and January 1, 2001."

Effective Date: Section 26, Ch. 584, L. 1995, provided that this section is effective May 1, 1995.

Termination: Section 27(1), Ch. 584, L. 1995, provided: "(1) [Sections 4 through 12] [75-10-730 through 75-10-738] terminate January 1, 2001."

75-10-732. Eligibility.

Compiler's Comments

2001 Amendment: Chapter 7 in (1)(d) substituted "Montana Hazardous Waste Act" for "Montana Hazardous Waste and Underground Storage Tank Act". Amendment effective October 1, 2001.

Termination Provision Repealed: Section 6, Ch. 437, L. 1999, repealed sec. 27, Ch. 584, L. 1995, which terminated this section January 1, 2001. Effective April 23, 1999.

1997 Amendment: Chapter 539 in (4), in first sentence near beginning after "subsection (1) or (3)", inserted "or disagrees with the department's decision to disapprove the voluntary cleanup plan submitted pursuant to 75-10-736" and in second sentence, near beginning after "subsection (1) or (3)", inserted "or to disapprove a voluntary cleanup plan submitted pursuant to 75-10-736"; and made minor changes in style. Amendment effective May 5, 1997.

1997 Statement of Intent: The statement of intent attached to Ch. 539, L. 1997, provided: "It is the intent of this bill to provide potentially liable persons the opportunity to take the necessary remedial action before the state takes action and to authorize the department of environmental quality to adopt rules that allow for the joint and mutual selection of remedial action contractors by the department and the potentially liable persons responsible for taking remedial action at sites."

Applicability: Section 7, Ch. 539, L. 1997, provided: "[This act] does not apply to any facility for which an administrative order has been issued pursuant to 75-10-711 prior to [the effective date of this act] [effective May 5, 1997] or to any facility for which the department of environmental quality and a liable or potentially liable person have, prior to [the effective date of this act] [effective May 5, 1997], entered into an agreement regarding the performance of remedial action for that facility."

Code Commissioner Change: Pursuant to sec. 3 and sec. 568, Ch. 546, L. 1995, in (4), the Code Commissioner substituted Board of Environmental Review for Board of Health and Environmental Sciences.

Severability: Section 23, Ch. 584, L. 1995, was a severability clause.

Applicability: Section 25, Ch. 584, L. 1995, provided: "(1) [This act] does not apply to civil actions commenced or begun prior to [the effective date of this act] [May 1, 1995] or to claims based on those actions.

(2) [Sections 4 through 12] [75-10-730 through 75-10-738] apply after January 1, 2001, to voluntary cleanup plans approved by the department of health and environmental sciences [now department of environmental quality] between [the effective date of this act] [May 1, 1995] and January 1, 2001."

Effective Date: Section 26, Ch. 584, L. 1995, provided that this section is effective May 1, 1995.

Termination: Section 27(1), Ch. 584, L. 1995, provided: "(1) [Sections 4 through 12] [75-10-730 through 75-10-738] terminate January 1, 2001."

75-10-733. Voluntary cleanup plan and reimbursement of remedial action costs.

Compiler's Comments

2019 Amendment: Chapter 58 in (2)(c) after "the facility or property to" deleted "both the implementation of the voluntary cleanup plan and access to the facility by the applicant and its agents and the department" and inserted "allow"; inserted (2)(c)(i) regarding access by the applicant, agents, and the department"; inserted (2)(c)(ii) regarding implementation of the voluntary cleanup plan with a remediation proposal; and made minor changes in style. Amendment effective March 18, 2019.

Applicability: Section 4, Ch. 58, L. 2019, provided: "[This act] applies to voluntary cleanup plans submitted to the department on or after [the effective date of this act]." Effective March 18, 2019.

2009 Amendment: Chapter 117 inserted (3)(b) authorizing discontinuance of review or approval process or voiding of cleanup plan approval; and made minor changes in style. Amendment effective October 1, 2009.

Termination Provision Repealed: Section 6, Ch. 437, L. 1999, repealed sec. 27, Ch. 584, L. 1995, which terminated this section January 1, 2001. Effective April 23, 1999.

Severability: Section 23, Ch. 584, L. 1995, was a severability clause.

Applicability: Section 25, Ch. 584, L. 1995, provided: "(1) [This act] does not apply to civil actions commenced or begun prior to [the effective date of this act] [May 1, 1995] or to claims based on those actions.

(2) [Sections 4 through 12] [75-10-730 through 75-10-738] apply after January 1, 2001, to voluntary cleanup plans approved by the department of health and environmental sciences [now department of environmental quality] between [the effective date of this act] [May 1, 1995] and January 1, 2001."

Effective Date: Section 26, Ch. 584, L. 1995, provided that this section is effective May 1, 1995.

Termination: Section 27(1), Ch. 584, L. 1995, provided: "(1) [Sections 4 through 12] [75-10-730 through 75-10-738] terminate January 1, 2001."

75-10-734. Voluntary cleanup plans — requirements.

Compiler's Comments

Termination Provision Repealed: Section 6, Ch. 437, L. 1999, repealed sec. 27, Ch. 584, L. 1995, which terminated this section January 1, 2001. Effective April 23, 1999.

Severability: Section 23, Ch. 584, L. 1995, was a severability clause.

Applicability: Section 25, Ch. 584, L. 1995, provided: "(1) [This act] does not apply to civil actions commenced or begun prior to [the effective date of this act] [May 1, 1995] or to claims based on those actions.

(2) [Sections 4 through 12] [75-10-730 through 75-10-738] apply after January 1, 2001, to voluntary cleanup plans approved by the department of health and environmental sciences [now department of environmental quality] between [the effective date of this act] [May 1, 1995] and January 1, 2001."

Effective Date: Section 26, Ch. 584, L. 1995, provided that this section is effective May 1, 1995.

Termination: Section 27(1), Ch. 584, L. 1995, provided: "(1) [Sections 4 through 12] [75-10-730 through 75-10-738] terminate January 1, 2001."

75-10-735. Public participation.

Compiler's Comments

2009 Amendment: Chapter 117 in (1) in introductory clause at end inserted reference to subsection (2) of 75-10-736; in (2) in last sentence after "of" inserted "the date that written notice of", after "determination" inserted "is provided to the applicant", and at end substituted "75-10-736(2)" for "75-10-736(1)"; and made minor changes in style. Amendment effective October 1, 2009.

Termination Provision Repealed: Section 6, Ch. 437, L. 1999, repealed sec. 27, Ch. 584, L. 1995, which terminated this section January 1, 2001. Effective April 23, 1999.

Severability: Section 23, Ch. 584, L. 1995, was a severability clause.

Applicability: Section 25, Ch. 584, L. 1995, provided: "(1) [This act] does not apply to civil actions commenced or begun prior to [the effective date of this act] [May 1, 1995] or to claims based on those actions.

(2) [Sections 4 through 12] [75-10-730 through 75-10-738] apply after January 1, 2001, to voluntary cleanup plans approved by the department of health and environmental sciences [now department of environmental quality] between [the effective date of this act] [May 1, 1995] and January 1, 2001."

Effective Date: Section 26, Ch. 584, L. 1995, provided that this section is effective May 1, 1995.

Termination: Section 27(1), Ch. 584, L. 1995, provided: "(1) [Sections 4 through 12] [75-10-730 through 75-10-738] terminate January 1, 2001."

75-10-736. Approval of voluntary cleanup plan — time limits — content of notice — expiration of approval.

Compiler's Comments

2019 Amendment: Chapter 58 in (6)(b)(i) substituted "achieve the cleanup levels proposed by the applicant under 75-10-734(3)(a)(i) and approved by the department; or" for "complete"; inserted (6)(b)(ii) regarding remediation proposals that take longer than 120 months after department approval to achieve proposed cleanup levels, including relevant state or federal environmental requirements, criteria, or limitations; and made minor changes in style. Amendment effective March 18, 2019.

Applicability: Section 4, Ch. 58, L. 2019, provided: "[This act] applies to voluntary cleanup plans submitted to the department on or after [the effective date of this act]." Effective March 18, 2019.

2009 Amendment: Chapter 117 in (1) in first sentence near beginning inserted reference to 75-10-734, substituted reference to environmental assessment component of voluntary cleanup plan for "an application for a voluntary cleanup plan", and near middle after "applicant" substituted "within 30 days of receipt" for "within 30 days after receipt of an application for a plan that would take 24 months or less to complete and within 60 days for a plan that would take more than 24 months to complete"; inserted (2) relating to submission of remediation proposal component of plan; in (3) in first sentence at beginning substituted "Once the department determines that the application for a voluntary cleanup plan is complete pursuant to subsections (1) and (2)" for "For a voluntary cleanup plan that is considered complete by the department pursuant to subsection (1)", and after "notification" substituted "of approval or disapproval within 60 days" for "that the voluntary cleanup plan has been approved or disapproved no more than 60 days for a plan that would take 24 months or less to complete and within 75 days for a plan that would take more than 24 months to complete after the department's determination that an application is complete"; in (4)(a) in first sentence inserted "either component of", in second sentence near beginning increased review period from 30 days to 60 days, and near middle after "applications" deleted "pursuant to subsection (1)"; in (4)(b) near beginning inserted "either component of"; in (4)(c) near beginning after "multiple" deleted "cleanup"; in (5) near middle inserted "either component of"; in (9) in first sentence near beginning after "If" deleted "reasonably unforeseeable", after "plan that" inserted reference to conditions not identified in environmental assessment component, before "affect" deleted "substantially", after "environment" substituted "and change" for "or substantially change", before "notify" deleted "promptly", and at end inserted "within 10 days of discovery", and in second sentence before "conditions" deleted "unforeseen"; deleted former (9) that read: "(9) Written notification by the department that a voluntary cleanup plan is not approved must state the basis for disapproval of the voluntary cleanup plan"; in (10) inserted introductory phrase; in (10)(a) at beginning substituted "fail" for "Failure of the applicant or the applicant's agents", and at end after "plan" deleted "approved by the department pursuant to this section renders the approval void"; in (10)(b) after "information" deleted "by the applicant or the applicant's agents", and after "plan" deleted "renders the department approval void"; inserted (10)(c) relating to failure to report new information; and made minor changes in style. Amendment effective October 1, 2009.

Termination Provision Repealed: Section 6, Ch. 437, L. 1999, repealed sec. 27, Ch. 584, L. 1995, which terminated this section January 1, 2001. Effective April 23, 1999.

1997 Amendment: Chapter 539 in (1), at end of first sentence, inserted "for a plan that would take 24 months or less to complete and within 60 days for a plan that would take more than 24 months to complete"; in (2), near middle of first sentence after "60 days", inserted "for a plan that would take 24 months or less to complete and within 75 days for a plan that would take more than 24 months to complete"; in (5) and (7) substituted "60 months" for "24 months"; in (6) inserted second sentence allowing a denial to be appealed to the Board of Environmental Review; and made minor changes in style. Amendment effective May 5, 1997.

1997 Statement of Intent: The statement of intent attached to Ch. 539, L. 1997, provided: "It is the intent of this bill to provide potentially liable persons the opportunity to take the necessary remedial action before the state takes action and to authorize the department of environmental quality to adopt rules that allow for the joint and mutual selection of remedial action contractors by the department and the potentially liable persons responsible for taking remedial action at sites."

Applicability: Section 7, Ch. 539, L. 1997, provided: "[This act] does not apply to any facility for which an administrative order has been issued pursuant to 75-10-711 prior to [the effective date of this act] [effective May 5, 1997] or to any facility for which the department of environmental quality and a liable or potentially liable person have, prior to [the effective date of this act] [effective May 5, 1997], entered into an agreement regarding the performance of remedial action for that facility."

Severability: Section 23, Ch. 584, L. 1995, was a severability clause.

Applicability: Section 25, Ch. 584, L. 1995, provided: "(1) [This act] does not apply to civil actions commenced or begun prior to [the effective date of this act] [May 1, 1995] or to claims based on those actions.

(2) [Sections 4 through 12] [75-10-730 through 75-10-738] apply after January 1, 2001, to voluntary cleanup plans approved by the department of health and environmental sciences [now department of environmental quality] between [the effective date of this act] [May 1, 1995] and January 1, 2001."

Effective Date: Section 26, Ch. 584, L. 1995, provided that this section is effective May 1, 1995.

Termination: Section 27(1), Ch. 584, L. 1995, provided: "(1) [Sections 4 through 12] [75-10-730 through 75-10-738] terminate January 1, 2001."

75-10-737. Voluntary action to preclude remedial action by department.

Compiler's Comments

Termination Provision Repealed: Section 6, Ch. 437, L. 1999, repealed sec. 27, Ch. 584, L. 1995, which terminated this section January 1, 2001. Effective April 23, 1999.

Severability: Section 23, Ch. 584, L. 1995, was a severability clause.

Applicability: Section 25, Ch. 584, L. 1995, provided: "(1) [This act] does not apply to civil actions commenced or begun prior to [the effective date of this act] [May 1, 1995] or to claims based on those actions.

(2) [Sections 4 through 12] [75-10-730 through 75-10-738] apply after January 1, 2001, to voluntary cleanup plans approved by the department of health and environmental sciences [now department of environmental quality] between [the effective date of this act] [May 1, 1995] and January 1, 2001."

Effective Date: Section 26, Ch. 584, L. 1995, provided that this section is effective May 1, 1995.

Termination: Section 27(1), Ch. 584, L. 1995, provided: "(1) [Sections 4 through 12] [75-10-730 through 75-10-738] terminate January 1, 2001."

75-10-738. Closure.

Compiler's Comments

Termination Provision Repealed: Section 6, Ch. 437, L. 1999, repealed sec. 27, Ch. 584, L. 1995, which terminated this section January 1, 2001. Effective April 23, 1999.

Code Commissioner Change: Pursuant to sec. 568, Ch. 546, L. 1995, the Code Commissioner substituted Department of Environmental Quality for Department of Health and Environmental Sciences.

Severability: Section 23, Ch. 584, L. 1995, was a severability clause.

Applicability: Section 25, Ch. 584, L. 1995, provided: "(1) [This act] does not apply to civil actions commenced or begun prior to [the effective date of this act] [May 1, 1995] or to claims based on those actions.

(2) [Sections 4 through 12] [75-10-730 through 75-10-738] apply after January 1, 2001, to voluntary cleanup plans approved by the department of health and environmental sciences [now department of environmental quality] between [the effective date of this act] [May 1, 1995] and January 1, 2001."

Effective Date: Section 26, Ch. 584, L. 1995, provided that this section is effective May 1, 1995.

Termination: Section 27(1), Ch. 584, L. 1995, provided: "(1) [Sections 4 through 12] [75-10-730 through 75-10-738] terminate January 1, 2001."

75-10-742. Short title.

Compiler's Comments

Termination Provision Repealed: Section 2, Ch. 368, L. 2003, repealed sec. 30, Ch. 415, L. 1997, which terminated this section June 30, 2005. Effective April 17, 2003.

Preamble: The preamble attached to Ch. 415, L. 1997, provided: "WHEREAS, the 1995 Legislature, in Chapter 584, Laws of 1995, directed the Department of Environmental Quality to institute a collaborative process involving all affected and interested persons to analyze the elimination of joint and several liability with respect to the cleanup of state Comprehensive Environmental Cleanup and Responsibility Act (CECRA) facilities and to submit any legislative proposals that collaboratively resulted from that process to the 55th Legislature; and

WHEREAS, the Department instituted this collaborative process with industry and business representatives; state, federal, and local government representatives; and public interest and environmental interest group representatives; and

WHEREAS, through a contract with the Department, the Montana Consensus Council designed the study process, facilitated the organization of the collaborative process, and conducted the numerous meetings of the study committees and interest group caucuses through which the parties to the collaborative process reached consensus on legislative proposals that are contained in this bill."

Severability: Section 28, Ch. 415, L. 1997, was a severability clause.

Effective Date: Section 29(1), Ch. 415, L. 1997, provided: "Except as provided in subsections (2) and (3), [this act] is effective July 1, 1997."

Termination: Section 30, Ch. 415, L. 1997, provided: "[Sections 12 through 22] [75-10-742 through 75-10-752] terminate June 30, 2005."

75-10-743. Orphan share state special revenue account — reimbursement of claims — payment of department costs.

Compiler's Comments

2021 Amendment: See 2021 Session Law for amendment made by sec. 102, Ch. 261, L. 2021. Amendment effective April 20, 2021.

2017 Amendment: Chapter 351 in (1) near middle inserted "to provide funding for the department of justice for investigations pursuant to its natural resource damage program" and inserted last sentence concerning returning settlement proceeds from claims made under the natural resource damage program to the account; and made minor changes in style. Amendment effective July 1, 2017.

Severability: Section 19, Ch. 351, L. 2017, was a severability clause.

2015 Amendments — Composite Section — Coordination: Chapter 119 throughout section changed "orphan share fund" to "orphan share account"; in (1) at end after "orphan share" inserted provision regarding payment of remedial action costs; inserted (12) regarding uses of orphan share account funds; inserted (13) regarding usage restriction for appropriated funds; inserted (14) regarding yearly reporting to environmental quality council; and made minor changes in style. Amendment effective March 25, 2015.

Chapter 387 inserted (10)(c) concerning transfer of funds to environmental quality protection fund. Amendment effective July 1, 2016, pursuant to sec. 10, Ch. 438, L. 2015, a coordination instruction, and terminates June 30, 2027.

2011 Amendment: Chapter 312 in (1) in second sentence inserted reference to (11); inserted (11) providing that the orphan share account is subject to legislative fund transfers; and made minor changes in style. Amendment effective May 4, 2011.

Severability: Section 18, Ch. 312, L. 2011, was a severability clause.

2009 Amendment: Chapter 266 inserted (7)(b) allowing reimbursement of claims from a lead liable person upon completion and department approval of certain reports; deleted former (9)(c) through (9)(h) that read: "(c) The department shall consult with the noticed potentially liable persons regarding contractor selection and determination of the scope of the work for contract tasks. The department shall also provide the noticed potentially liable persons with contract performance updates and shall consult with the noticed potentially liable persons regarding expenses and progress on contract tasks.

(d) The department shall contract for the compilation, assessment, and summarization of the existing data pertaining to the complex described in subsection (9)(a), for recommendations for and conducting of additional investigations and studies necessary to develop remediation alternatives, and for development and assessment of remediation alternatives.

(e) Unless the department is delayed by a challenge to a contracting action, multiple contractor selection processes, or other unanticipated circumstances, the activities authorized under subsection (9)(a) must meet the following schedule:

(i) Contracts for investigations and studies must be in place by August 31, 2005.

(ii) A summary of existing data must be prepared by December 31, 2005.

(iii) The contract or contract task order for investigations, studies, and development and evaluation of final remediation alternatives must be in place by April 30, 2006.

(iv) All intended field work must be completed by November 30, 2006, and to the extent that this field work indicates that followup is necessary, the followup field work must be completed as soon as possible or addressed in the report that must be submitted pursuant to subsection (9)(g).

(v) The contractor shall submit evaluations of the extent of contamination by October 31, 2006.

(vi) The contractor shall submit final remediation alternatives by July 31, 2007.

(f) The department shall report to the environmental quality council quarterly during calendar years 2005, 2006, and 2007 regarding the progress being made to meet the requirements of subsection (9)(e). The report must include information on expenditures.

(g) If investigations completed under this subsection (9) indicate the need for additional information or for pilot tests and other related remedial action process activities, the department shall prepare a report identifying the rationale and estimated costs for additional work and present it to the environmental quality council during the spring of 2007.

(h) The department shall provide to the environmental quality council copies of investigations and reports completed pursuant to subsection (9)(d)"; in (10)(a) at beginning deleted "Beginning in the fiscal year that commences July 1, 2005"; deleted former (11) that read: "(11) For the biennium beginning July 1, 2007, the department shall transfer from the orphan share fund:

(a) $600,000 to the hazardous waste/CERCLA account provided for in 75-10-621 to provide for a positive account balance;

(b) $50,000 to the oil and gas production damage mitigation account pursuant to the conditions of 82-11-161 to provide for a positive account balance;

(c) $2 million to the environmental quality protection fund established in 75-10-704 to be used by the department to expedite the cleanup of the burlington northern Santa Fe Livingston site;

(d) $200,000 to the natural resources operations state special revenue account established in 15-38-301 to provide for a positive account balance; and

(e) $800,000 to the natural resources projects state special revenue account established in 15-38-302 to provide for a positive account balance"; and made minor changes in style. Amendment effective October 1, 2009.

2007 Amendment: Chapter 432 in (1) in second sentence in exception clause substituted "subsections (9) and (10)" for "subsections (9) through (11)"; deleted former (2)(b) and (2)(c) that read: "(b) funds received from the interest income of the resource indemnity trust fund pursuant to 15-38-202;

(c) funds allocated from the resource indemnity and ground water assessment tax proceeds provided for in 15-38-106"; in (4) in exception clause inserted reference to subsection (6); in (5) at beginning inserted exception clause; inserted (6)(c) relating to reimbursement to state agencies for remedial action costs from orphan share fund; deleted former (9) that read: "(9) For the biennium beginning July 1, 2005, and subject to the provisions of section 3, Chapter 355, Laws of 2005, the department may transfer funds from the orphan share fund to the environmental quality protection fund established in 75-10-704, the hazardous waste/CERCLA account established in 75-10-621, or both. The total amount transferred pursuant to this subsection may not exceed $600,000"; inserted (11) relating to transfers from orphan share fund for biennium beginning July 1, 2007; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendments — Composite Section: Chapter 278 in (1) in second sentence near end in exception clause inserted reference to subsection (11); inserted (11) relating to financing for the long-term or perpetual water treatment permanent trust fund provided for in 82-4-367; and made minor changes in style. Amendment effective July 1, 2005.

Chapter 355 in (1) in second sentence after "appropriation and" inserted "except as provided in subsection (9)" and after "75-10-751 and" deleted "except as provided in subsection (10)"; deleted former (7) that read: "(7) If sufficient money remains in the orphan share fund on June 29, 2003, $999,000 must be transferred to the general fund"; in (9) near beginning after "July 1" substituted "2005" for "2003" and after "provisions of" substituted "section 3, Chapter 355, Laws of 2005" for "section 4, Chapter 199, Laws of 2003"; and made minor changes in style. Amendment effective July 1, 2005.

Chapter 425 in (1) inserted reference to subsection (10); deleted former (7) that read: "(7) If sufficient money remains in the orphan share fund on June 29, 2003, $999,000 must be transferred to the general fund"; and inserted (10) authorizing use of funds for evaluating extent of contamination and formulating remediation alternatives for releases at Kalispell pole and timber, reliance refinery company, and Yale oil corporation facility complex; and made minor changes in style. Amendment effective July 1, 2005.

Contingent Transfer of Orphan Share Funds — Appropriation: Section 3, Ch. 355, L. 2005, provided: "(1) Subject to the limitation in subsection (3), there is transferred from the orphan share account established in 75-10-743 to the environmental quality protection fund established in 75-10-704 an amount not to exceed $600,000 during the biennium beginning July 1, 2005, if the expenditures from the environmental quality fund exceed revenue available to the fund. The money transferred pursuant to this subsection may be appropriated to the department of environmental quality subject to the appropriation from the environmental quality protection fund in [House Bill No. 2]. The total expenditures in each fiscal year of the biennium may not exceed the appropriation made in [House Bill No. 2].

(2) Subject to the limitation in subsection (3), there is transferred from the orphan share account established in 75-10-743 to the hazardous waste/CERCLA special revenue account established in 75-10-621 an amount not to exceed $600,000 during the biennium beginning July 1, 2005, if the expenditures from the hazardous waste/CERCLA account exceed revenue available to the account. The money transferred pursuant to this subsection may be appropriated to the department of environmental quality subject to the appropriation from the hazardous waste/CERCLA account in [House Bill No. 2]. The total expenditures in each fiscal year of the biennium may not exceed the appropriation made in [House Bill No. 2].

(3) The total of the amounts transferred and appropriated pursuant to subsections (1) and (2) may not exceed $600,000."

2003 Amendments — Composite Section: Chapter 199 in (1) near end of second sentence after "75-10-751 and" inserted exception clause; in (7)(a) deleted former first sentence that read: "On August 21, 2002, $1,000 is transferred from the orphan share fund to the general fund"; in (7)(b) near middle after "2005" inserted reference to transfer pursuant to subsection (10) (amendment rendered void by Ch. 368 amendment); inserted (10) providing for fund transfers and limiting total amount transferred; and made minor changes in style. Amendment effective July 1, 2003.

Chapter 368 deleted former (7)(b) that read: "(b) If any money remains in the orphan share fund after June 30, 2005, and after outstanding claims are paid, the money must be deposited in the general fund"; and made minor changes in style. Amendment effective April 17, 2003.

Chapter 522 inserted (2)(d) relating to funds received from distribution of oil and natural gas production taxes; and in (7)(a) deleted former first sentence that read: "On August 21, 2002, $1,000 is transferred from the orphan share fund to the general fund"; and made minor changes in style. Amendment effective April 26, 2003.

Contingent Appropriation of Orphan Share Funds: Section 4, Ch. 199, L. 2003, provided: "(1) Subject to the limitation in subsection (3), there is transferred from the orphan share account established in 75-10-743 to the environmental quality protection fund established in 75-10-704 an amount not to exceed $600,000 during the biennium beginning July 1, 2003, if the expenditures from the environmental quality fund exceed revenue available to the fund. The money transferred pursuant to this subsection may be appropriated to the department of environmental quality subject to the appropriation from the environmental quality protection fund in [House Bill No. 2] [Ch. 612, L. 2003]. The total expenditures in each fiscal year of the biennium may not exceed the appropriation made in [House Bill No. 2] [Ch. 612, L. 2003].

(2) Subject to the limitation in subsection (3), there is transferred from the orphan share account established in 75-10-743 to the hazardous waste/CERCLA special revenue account established in 75-10-621 an amount not to exceed $600,000 during the biennium beginning July 1, 2003, if the expenditures from the hazardous waste/CERCLA account exceed revenue available to the account. The money transferred pursuant to this subsection may be appropriated to the department of environmental quality subject to the appropriation from the hazardous waste/CERCLA account in [House Bill No. 2] [Ch. 612, L. 2003]. The total expenditures in each fiscal year of the biennium may not exceed the appropriation made in [House Bill No. 2] [Ch. 612, L. 2003].

(3) The total of the amounts transferred and appropriated pursuant to subsections (1) and (2) may not exceed $600,000."

Termination Provision Repealed: Section 2, Ch. 368, L. 2003, repealed sec. 30, Ch. 415, L. 1997, which terminated this section June 30, 2005. Effective April 17, 2003.

Saving Clause: Section 19, Ch. 522, L. 2003, was a saving clause.

Retroactive Applicability: Section 21, Ch. 522, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to tax revenue derived from oil and natural gas production occurring after December 31, 2002."

2002 Amendment: Chapter 20 inserted (7)(a) concerning transfer from orphan share fund to general fund; and made minor changes in style. Amendment effective August 21, 2002.

2001 Amendment: Chapter 460 deleted former (2)(a) that read: "(a) money allocated from the metalliferous mines license tax pursuant to 15-37-117"; and made minor changes in style. Amendment effective July 1, 2002.

1999 Amendment: Chapter 51 in (2)(e) at end deleted "provided in section 19, Chapter 584, Laws of 1995, as of [the termination date of section 19, Chapter 584, Laws of 1995, as may be amended]". Amendment effective March 15, 1999.

Preamble: The preamble attached to Ch. 415, L. 1997, provided: "WHEREAS, the 1995 Legislature, in Chapter 584, Laws of 1995, directed the Department of Environmental Quality to institute a collaborative process involving all affected and interested persons to analyze the elimination of joint and several liability with respect to the cleanup of state Comprehensive Environmental Cleanup and Responsibility Act (CECRA) facilities and to submit any legislative proposals that collaboratively resulted from that process to the 55th Legislature; and

WHEREAS, the Department instituted this collaborative process with industry and business representatives; state, federal, and local government representatives; and public interest and environmental interest group representatives; and

WHEREAS, through a contract with the Department, the Montana Consensus Council designed the study process, facilitated the organization of the collaborative process, and conducted the numerous meetings of the study committees and interest group caucuses through which the parties to the collaborative process reached consensus on legislative proposals that are contained in this bill."

Severability: Section 28, Ch. 415, L. 1997, was a severability clause.

Effective Date: Section 29(1), Ch. 415, L. 1997, provided: "Except as provided in subsections (2) and (3), [this act] is effective July 1, 1997."

Termination: Section 30, Ch. 415, L. 1997, provided: "[Sections 12 through 22] [75-10-742 through 75-10-752] terminate June 30, 2005."

75-10-744. Eligibility — statute of limitations.

Compiler's Comments

Termination Provision Repealed: Section 2, Ch. 368, L. 2003, repealed sec. 30, Ch. 415, L. 1997, which terminated this section June 30, 2005. Effective April 17, 2003.

Preamble: The preamble attached to Ch. 415, L. 1997, provided: "WHEREAS, the 1995 Legislature, in Chapter 584, Laws of 1995, directed the Department of Environmental Quality to institute a collaborative process involving all affected and interested persons to analyze the elimination of joint and several liability with respect to the cleanup of state Comprehensive Environmental Cleanup and Responsibility Act (CECRA) facilities and to submit any legislative proposals that collaboratively resulted from that process to the 55th Legislature; and

WHEREAS, the Department instituted this collaborative process with industry and business representatives; state, federal, and local government representatives; and public interest and environmental interest group representatives; and

WHEREAS, through a contract with the Department, the Montana Consensus Council designed the study process, facilitated the organization of the collaborative process, and conducted the numerous meetings of the study committees and interest group caucuses through which the parties to the collaborative process reached consensus on legislative proposals that are contained in this bill."

Severability: Section 28, Ch. 415, L. 1997, was a severability clause.

Effective Date: Section 29(1), Ch. 415, L. 1997, provided: "Except as provided in subsections (2) and (3), [this act] is effective July 1, 1997."

Termination: Section 30, Ch. 415, L. 1997, provided: "[Sections 12 through 22] [75-10-742 through 75-10-752] terminate June 30, 2005."

75-10-745. Allocation of liability — process initiation.

Compiler's Comments

2009 Amendment: Chapter 266 in (7)(a) substituted language requiring the department to make a good faith effort to identify persons liable for a release or threatened release for "conduct a good faith investigation and may use its authority in 75-10-707 to identify persons who may be liable under 75-10-715". Amendment effective October 1, 2009.

Termination Provision Repealed: Section 2, Ch. 368, L. 2003, repealed sec. 30, Ch. 415, L. 1997, which terminated this section June 30, 2005. Effective April 17, 2003.

2001 Amendment: Chapter 383 in (7)(b) near beginning of first sentence after "letters to" inserted "one or more of" and inserted second sentence requiring the issuance of notice letters or nomination letters to potentially liable persons who were not previously given notice; in (9) at end of first sentence after "75-10-715" inserted "or to a person whom the department identified in subsection (7) and who was not previously given notice"; and made minor changes in style. Amendment effective April 28, 2001.

Preamble: The preamble attached to Ch. 415, L. 1997, provided: "WHEREAS, the 1995 Legislature, in Chapter 584, Laws of 1995, directed the Department of Environmental Quality to institute a collaborative process involving all affected and interested persons to analyze the elimination of joint and several liability with respect to the cleanup of state Comprehensive Environmental Cleanup and Responsibility Act (CECRA) facilities and to submit any legislative proposals that collaboratively resulted from that process to the 55th Legislature; and

WHEREAS, the Department instituted this collaborative process with industry and business representatives; state, federal, and local government representatives; and public interest and environmental interest group representatives; and

WHEREAS, through a contract with the Department, the Montana Consensus Council designed the study process, facilitated the organization of the collaborative process, and conducted the numerous meetings of the study committees and interest group caucuses through which the parties to the collaborative process reached consensus on legislative proposals that are contained in this bill."

Severability: Section 28, Ch. 415, L. 1997, was a severability clause.

Effective Date: Section 29(1), Ch. 415, L. 1997, provided: "Except as provided in subsections (2) and (3), [this act] is effective July 1, 1997."

Termination: Section 30, Ch. 415, L. 1997, provided: "[Sections 12 through 22] [75-10-742 through 75-10-752] terminate June 30, 2005."

75-10-746. Emergency actions — remedial action requirements — designation of lead person — enforcement.

Compiler's Comments

Termination Provision Repealed: Section 2, Ch. 368, L. 2003, repealed sec. 30, Ch. 415, L. 1997, which terminated this section June 30, 2005. Effective April 17, 2003.

Preamble: The preamble attached to Ch. 415, L. 1997, provided: "WHEREAS, the 1995 Legislature, in Chapter 584, Laws of 1995, directed the Department of Environmental Quality to institute a collaborative process involving all affected and interested persons to analyze the elimination of joint and several liability with respect to the cleanup of state Comprehensive Environmental Cleanup and Responsibility Act (CECRA) facilities and to submit any legislative proposals that collaboratively resulted from that process to the 55th Legislature; and

WHEREAS, the Department instituted this collaborative process with industry and business representatives; state, federal, and local government representatives; and public interest and environmental interest group representatives; and

WHEREAS, through a contract with the Department, the Montana Consensus Council designed the study process, facilitated the organization of the collaborative process, and conducted the numerous meetings of the study committees and interest group caucuses through which the parties to the collaborative process reached consensus on legislative proposals that are contained in this bill."

Severability: Section 28, Ch. 415, L. 1997, was a severability clause.

Effective Date: Section 29(1), Ch. 415, L. 1997, provided: "Except as provided in subsections (2) and (3), [this act] is effective July 1, 1997."

Termination: Section 30, Ch. 415, L. 1997, provided: "[Sections 12 through 22] [75-10-742 through 75-10-752] terminate June 30, 2005."

75-10-747. Discovery.

Compiler's Comments

Termination Provision Repealed: Section 2, Ch. 368, L. 2003, repealed sec. 30, Ch. 415, L. 1997, which terminated this section June 30, 2005. Effective April 17, 2003.

Preamble: The preamble attached to Ch. 415, L. 1997, provided: "WHEREAS, the 1995 Legislature, in Chapter 584, Laws of 1995, directed the Department of Environmental Quality to institute a collaborative process involving all affected and interested persons to analyze the elimination of joint and several liability with respect to the cleanup of state Comprehensive Environmental Cleanup and Responsibility Act (CECRA) facilities and to submit any legislative proposals that collaboratively resulted from that process to the 55th Legislature; and

WHEREAS, the Department instituted this collaborative process with industry and business representatives; state, federal, and local government representatives; and public interest and environmental interest group representatives; and

WHEREAS, through a contract with the Department, the Montana Consensus Council designed the study process, facilitated the organization of the collaborative process, and conducted the numerous meetings of the study committees and interest group caucuses through which the parties to the collaborative process reached consensus on legislative proposals that are contained in this bill."

Severability: Section 28, Ch. 415, L. 1997, was a severability clause.

Effective Date: Section 29(1), Ch. 415, L. 1997, provided: "Except as provided in subsections (2) and (3), [this act] is effective July 1, 1997."

Termination: Section 30, Ch. 415, L. 1997, provided: "[Sections 12 through 22] [75-10-742 through 75-10-752] terminate June 30, 2005."

75-10-748. Preallocation negotiations.

Compiler's Comments

Termination Provision Repealed: Section 2, Ch. 368, L. 2003, repealed sec. 30, Ch. 415, L. 1997, which terminated this section June 30, 2005. Effective April 17, 2003.

Preamble: The preamble attached to Ch. 415, L. 1997, provided: "WHEREAS, the 1995 Legislature, in Chapter 584, Laws of 1995, directed the Department of Environmental Quality to institute a collaborative process involving all affected and interested persons to analyze the elimination of joint and several liability with respect to the cleanup of state Comprehensive Environmental Cleanup and Responsibility Act (CECRA) facilities and to submit any legislative proposals that collaboratively resulted from that process to the 55th Legislature; and

WHEREAS, the Department instituted this collaborative process with industry and business representatives; state, federal, and local government representatives; and public interest and environmental interest group representatives; and

WHEREAS, through a contract with the Department, the Montana Consensus Council designed the study process, facilitated the organization of the collaborative process, and conducted the numerous meetings of the study committees and interest group caucuses through which the parties to the collaborative process reached consensus on legislative proposals that are contained in this bill."

Severability: Section 28, Ch. 415, L. 1997, was a severability clause.

Effective Date: Section 29(1), Ch. 415, L. 1997, provided: "Except as provided in subsections (2) and (3), [this act] is effective July 1, 1997."

Termination: Section 30, Ch. 415, L. 1997, provided: "[Sections 12 through 22] [75-10-742 through 75-10-752] terminate June 30, 2005."

75-10-749. Allocator selection — payment of fees.

Compiler's Comments

Termination Provision Repealed: Section 2, Ch. 368, L. 2003, repealed sec. 30, Ch. 415, L. 1997, which terminated this section June 30, 2005. Effective April 17, 2003.

Preamble: The preamble attached to Ch. 415, L. 1997, provided: "WHEREAS, the 1995 Legislature, in Chapter 584, Laws of 1995, directed the Department of Environmental Quality to institute a collaborative process involving all affected and interested persons to analyze the elimination of joint and several liability with respect to the cleanup of state Comprehensive Environmental Cleanup and Responsibility Act (CECRA) facilities and to submit any legislative proposals that collaboratively resulted from that process to the 55th Legislature; and

WHEREAS, the Department instituted this collaborative process with industry and business representatives; state, federal, and local government representatives; and public interest and environmental interest group representatives; and

WHEREAS, through a contract with the Department, the Montana Consensus Council designed the study process, facilitated the organization of the collaborative process, and conducted the numerous meetings of the study committees and interest group caucuses through which the parties to the collaborative process reached consensus on legislative proposals that are contained in this bill."

Severability: Section 28, Ch. 415, L. 1997, was a severability clause.

Effective Date: Section 29(1), Ch. 415, L. 1997, provided: "Except as provided in subsections (2) and (3), [this act] is effective July 1, 1997."

Termination: Section 30, Ch. 415, L. 1997, provided: "[Sections 12 through 22] [75-10-742 through 75-10-752] terminate June 30, 2005."

75-10-750. Allocating liability.

Compiler's Comments

Termination Provision Repealed: Section 2, Ch. 368, L. 2003, repealed sec. 30, Ch. 415, L. 1997, which terminated this section June 30, 2005. Effective April 17, 2003.

Preamble: The preamble attached to Ch. 415, L. 1997, provided: "WHEREAS, the 1995 Legislature, in Chapter 584, Laws of 1995, directed the Department of Environmental Quality to institute a collaborative process involving all affected and interested persons to analyze the elimination of joint and several liability with respect to the cleanup of state Comprehensive Environmental Cleanup and Responsibility Act (CECRA) facilities and to submit any legislative proposals that collaboratively resulted from that process to the 55th Legislature; and

WHEREAS, the Department instituted this collaborative process with industry and business representatives; state, federal, and local government representatives; and public interest and environmental interest group representatives; and

WHEREAS, through a contract with the Department, the Montana Consensus Council designed the study process, facilitated the organization of the collaborative process, and conducted the numerous meetings of the study committees and interest group caucuses through which the parties to the collaborative process reached consensus on legislative proposals that are contained in this bill."

Severability: Section 28, Ch. 415, L. 1997, was a severability clause.

Effective Date: Section 29(1), Ch. 415, L. 1997, provided: "Except as provided in subsections (2) and (3), [this act] is effective July 1, 1997."

Termination: Section 30, Ch. 415, L. 1997, provided: "[Sections 12 through 22] [75-10-742 through 75-10-752] terminate June 30, 2005."

75-10-751. Appeal of allocator's decision.

Compiler's Comments

Termination Provision Repealed: Section 2, Ch. 368, L. 2003, repealed sec. 30, Ch. 415, L. 1997, which terminated this section June 30, 2005. Effective April 17, 2003.

Preamble: The preamble attached to Ch. 415, L. 1997, provided: "WHEREAS, the 1995 Legislature, in Chapter 584, Laws of 1995, directed the Department of Environmental Quality to institute a collaborative process involving all affected and interested persons to analyze the elimination of joint and several liability with respect to the cleanup of state Comprehensive Environmental Cleanup and Responsibility Act (CECRA) facilities and to submit any legislative proposals that collaboratively resulted from that process to the 55th Legislature; and

WHEREAS, the Department instituted this collaborative process with industry and business representatives; state, federal, and local government representatives; and public interest and environmental interest group representatives; and

WHEREAS, through a contract with the Department, the Montana Consensus Council designed the study process, facilitated the organization of the collaborative process, and conducted the numerous meetings of the study committees and interest group caucuses through which the parties to the collaborative process reached consensus on legislative proposals that are contained in this bill."

Severability: Section 28, Ch. 415, L. 1997, was a severability clause.

Effective Date: Section 29(1), Ch. 415, L. 1997, provided: "Except as provided in subsections (2) and (3), [this act] is effective July 1, 1997."

Termination: Section 30, Ch. 415, L. 1997, provided: "[Sections 12 through 22] [75-10-742 through 75-10-752] terminate June 30, 2005."

75-10-756. Prohibition of covenant not to sue — exceptions.

Compiler's Comments

Effective Date: Section 4, Ch. 368, L. 2009, provided: "[This act] is effective July 1, 2009."

Applicability: Section 5, Ch. 368, L. 2009, provided: "[This act] applies to covenants and agreements entered into on or after [the effective date of this act]." Effective July 1, 2009.

75-10-757. Civil penalty.

Compiler's Comments

Effective Date: Section 4, Ch. 368, L. 2009, provided: "[This act] is effective July 1, 2009."

Applicability: Section 5, Ch. 368, L. 2009, provided: "[This act] applies to covenants and agreements entered into on or after [the effective date of this act]." Effective July 1, 2009.

Part 8
Integrated Waste Management

Part Compiler's Comments

1991 Statement of Intent: The statement of intent attached to Ch. 222, L. 1991, provided: "A statement of intent is required for this bill because the department of health and environmental sciences [now department of environmental quality] will need to promulgate rules in order to implement this bill. It is the intent of the legislature that these regulations reflect an emphasis on integrated waste management and achieving the 25% waste reduction goal by 1996. In addition, the regulations must be designed to protect the public health, safety, and welfare and the environment. It is also the intent of the legislature that state government assume a leadership role in the development and implementation of source reduction and recycling programs and in the establishment of markets for the purchase and use of recyclable materials."

75-10-802. Definitions.

Compiler's Comments

2005 Amendment: Chapter 62 in definition of integrated waste management after "methods" deleted "including waste prevention"; inserted definitions of reuse and source reduction; in definition of waste reduction at end after "stream" deleted "after consumer or commercial use but prior to incineration or disposal"; and made minor changes in style. Amendment effective March 24, 2005.

1995 Amendment: Chapter 418 in definition of Department substituted “department of environmental quality provided for in 2-15-3501” for “department of health and environmental sciences provided for in 2-15-2101”. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: “The provisions of 2-15-131 through 2-15-137 apply to [this act].”

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

75-10-803. Solid waste reduction goal and targets.

Compiler’s Comments

2005 Amendment: Chapter 62 in (1) at beginning after “state” substituted “to reduce, through source reduction, reuse, recycling, and composting, the amount of solid waste that is generated by households, businesses, and governments and that is either disposed of in landfills or burned in an incinerator, as defined in 75-2-103” for “by January 1, 1996, to reduce by at least 25% the volume of solid waste that is either disposed of in a landfill or incinerated”; inserted (2) establishing recycling and composting targets; and made minor changes in style. Amendment effective March 24, 2005.

75-10-804. Integrated waste management priorities.

Compiler’s Comments

2005 Amendment: Chapter 62 in (1) at beginning inserted “source” and at end deleted “of waste generated at the source”; in (2) after “reuse” deleted “of waste”; in (3) after “recycling” deleted “of waste”; and in (4) after “composting” deleted “of biodegradable waste”. Amendment effective March 24, 2005.

75-10-805. State government waste reduction and recycling program.

Compiler’s Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 29, Ch. 365, L. 2023. Amendment effective October 1, 2023.

2005 Amendment: Chapter 62 in (1)(a) at beginning of first sentence after “prepare a” substituted “waste” for “source” and near middle after “plan” deleted “by January 1, 1992” and near end of second sentence after “motor oil” inserted “used oil filters”; in (1)(b) after “implement a” substituted “waste” for “source” and after “program” deleted “by July 1, 1992”; and made minor changes in style. Amendment effective March 24, 2005.

1997 Amendment: Chapter 440 in (1)(c)(i) substituted “electronic access systems” for “electronic bulletin boards”.

75-10-806. State government procurement of recycled supplies and materials.

Compiler’s Comments

1997 Amendment: Chapter 42 in (1), at beginning of second sentence, deleted “By January 1, 1992”; and in (2), near beginning, and in (3), at beginning, deleted references to January 1, 1996. Amendment effective March 12, 1997.

75-10-807. Requirement to prepare and implement state solid waste management and resource recovery plan.

Compiler’s Comments

2007 Amendment: Chapter 54 in (1) near middle after “prepare” inserted “adopt”, after “management” inserted “and resource recovery” and after “accordance with” inserted “75-10-111 and”; deleted former (3) and (4) that read: “(3) The plan must be developed with the involvement of local officials, citizens, solid waste and recycling industries, environmental organizations, and others involved in the management of solid waste.

(4) The department shall conduct hearings as provided in 75-10-111”; and made minor changes in style. Amendment effective October 1, 2007.

2005 Amendment: Chapter 62 in (2)(c) at end after “75-10-804” deleted “in meeting the solid waste reduction target in 75-10-803”. Amendment effective March 24, 2005.

Administrative Rules

ARM 17.50.301 State solid waste management and resource recovery plan.

Part 10
Infectious Waste Management Act

75-10-1003. Definitions.

Compiler's Comments

2007 Amendment: Chapter 97 inserted definitions of disposal, generate, intermediate point, and person; deleted definition of department that read: ""Department" means the department of environmental quality established in 2-15-3501"; deleted definition of generator that read: ""Generator" means an individual, firm, facility, or company that produces infectious waste"; in definition of storage at beginning added "or "store"" and after "means" substituted "to hold for a temporary period" for "the actual or intended containment of wastes on either a temporary basis or a long-term basis"; in definition of transportation at beginning inserted ""Transport" or"; in definition of treatment at beginning inserted ""Treat" or"; and made minor changes in style. Amendment effective October 1, 2007.

1995 Amendment: Chapter 418 in definition of Department substituted "department of environmental quality established in 2-15-3501" for "department of health and environmental sciences established in 2-15-2101"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

75-10-1004. Prohibition.

Compiler's Comments

2007 Amendment: Chapter 97 in (1) at beginning inserted exception clause and after "may not" inserted "generate"; inserted (2) providing that the prohibition does not apply to generation of infectious waste associated with household operations; and made minor changes in style. Amendment effective October 1, 2007.

75-10-1006. Generation licensing and regulation — rulemaking authority.

Compiler's Comments

2007 Amendment: Chapter 97 in (1) at beginning after "A" inserted "person that is required to obtain a license from a" and after "state" inserted "to operate a health care facility, as defined in 50-5-101, or to engage in a profession or occupation"; inserted (1)(a) prohibiting generation, storage, and transportation of infectious waste from the point of generation to an intermediate point without a license; in (1)(b) substituted "shall comply with the rules adopted under this part by the board or department responsible for licensing that person" for "that licenses a profession, occupation, or health care facility that generates infectious waste shall require each licensee to comply with this part as a condition of licensure"; in (2) in introductory clause after "department" inserted "of the state that issues a license to a person that generates infectious waste"; in (2)(a) after "part" inserted "governing the following activities by a licensee:

(i) generation of infectious waste;

(ii) storage of infectious waste at a place where infectious waste is generated;

(iii) transportation of infectious waste from the place of generation to an intermediate point"; deleted former (2) that read: "(2) A profession, occupation, or health care facility that generates or transports infectious waste or that operates treatment, storage, or disposal facilities regulated by this part that is not already licensed by a board or department under subsection (1) must obtain a permit annually from the department. The department shall adopt rules to implement this part and may establish an annual fee commensurate with the costs of regulation. Fees collected under the provisions of this part must be deposited in the solid waste management account established in 75-10-117"; and made minor changes in style. Amendment effective October 1, 2007.

1991 Statement of Intent: The statement of intent attached to Ch. 483, L. 1991, provided: "A statement of intent is required for this bill because [section 6] [75-10-1006] grants rulemaking authority to the department of health and environmental sciences [now department of environmental quality] and to professional licensing boards. It is the intent of the legislature that these regulations be designed to protect the public health, safety, and welfare and the environment and that they be developed in consideration of the needs of Montana's medical service community and with the best current technical information.

It is also the intent of the legislature that [sections 1 through 6] [75-10-1001 through 75-10-1006] be implemented with minimum fiscal impact. The department and professional licensing boards shall ensure compliance with [sections 1 through 6] [75-10-1001 through

75-10-1006] through the course of normal inspections, the existing licensing process, and the investigation of complaints. The department and professional licensing boards may impose and adjust annual fees commensurate with the costs of regulation and inspection."

75-10-1007. Criminal penalty.

Compiler's Comments

2009 Amendment: Chapter 2 at end of second sentence after "this" substituted "part or rule adopted under this part" for "section". Amendment effective October 1, 2009.

Effective Date: This section is effective October 1, 2007.

Part 11
Notice of Motor Oil Recycling Center

75-10-1101. Waste oil notice.

Compiler's Comments

1995 Amendment: Chapter 418 in (2) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Preamble: The preamble attached to Ch. 623, L. 1991, provided: "WHEREAS, under new federal regulations, most crankcase oil is expected to be classified as hazardous; and

WHEREAS, the use of waste oil, used oil, or other material that is contaminated with dioxin or any hazardous material is prohibited for use as a dust suppressant under 40 CFR 266.23; and

WHEREAS, other means of management are available, including rerefining and use as a substitute fuel."

1991 Statement of Intent: The statement of intent attached to Ch. 623, L. 1991, provided: "A statement of intent is required for this bill in order for the department of health and environmental sciences [now department of environmental quality] to adopt rules to implement [section 1] [75-10-1101]. The department shall design an oil recycling sign to be displayed in retail stores and wholesale outlets and shall distribute the signs to oil retailers."

Part 12
Septage Disposal — Licensure

75-10-1201. Definitions.

Compiler's Comments

Effective Date: Section 14(1), Ch. 378, L. 1999, provided that this section is effective on passage and approval. Approved April 20, 1999.

75-10-1202. Department rulemaking authority.

Compiler's Comments

Effective Date: Section 14(1), Ch. 378, L. 1999, provided that this section is effective on passage and approval. Approved April 20, 1999.

75-10-1203. Special revenue account.

Compiler's Comments

2005 Amendment: Chapter 18 inserted third sentence requiring the department to use $50 of each license fee to provide training and education for licensees. Amendment effective July 1, 2005.

Saving Clause: Section 3, Ch. 18, L. 2005, was a saving clause.

Transfer of Funds: Section 11, Ch. 378, L. 1999, provided: "Money in the account established in 37-41-205 on December 31, 1999, must be transferred to the account established in [section 10] [75-10-1203]." Section 14(1), Ch. 378, L. 1999, provided that sec. 11 is effective on passage and approval. Approved April 20, 1999.

Effective Date: Section 14(1), Ch. 378, L. 1999, provided that this section is effective on passage and approval. Approved April 20, 1999.

75-10-1210. License required — exception.

Compiler's Comments

Effective Date: Section 14(2), Ch. 378, L. 1999, provided that this section is effective January 1, 2000.

75-10-1211. Application for license.

Compiler's Comments

Effective Date: Section 14(1), Ch. 378, L. 1999, provided that this section is effective on passage and approval. Approved April 20, 1999.

75-10-1212. License term, renewal, and fees.

Compiler's Comments

2005 Amendment: Chapter 18 in (3) near middle of first sentence increased license fee from $125 to $300 and in fourth sentence after "return" substituted "$50 of each license fee" for "40% of the fees"; and made minor changes in style. Amendment effective July 1, 2005.

Saving Clause: Section 3, Ch. 18, L. 2005, was a saving clause.

Effective Date: Section 14(1), Ch. 378, L. 1999, provided that this section is effective on passage and approval. Approved April 20, 1999.

75-10-1220. Injunction.

Compiler's Comments

Effective Date: Section 14(2), Ch. 378, L. 1999, provided that this section is effective January 1, 2000.

75-10-1221. Department revocation or denial of license.

Compiler's Comments

Effective Date: Section 14(1), Ch. 378, L. 1999, provided that this section is effective on passage and approval. Approved April 20, 1999.

75-10-1222. Administrative enforcement.

Compiler's Comments

2005 Amendment: Chapter 487 inserted (5)(b) relating to penalty factors; and made minor changes in style. Amendment effective January 1, 2006.

Saving Clause: Section 29, Ch. 487, L. 2005, was a saving clause.

Effective Date: Section 14(2), Ch. 378, L. 1999, provided that this section is effective January 1, 2000.

75-10-1223. Penalties and fines.

Compiler's Comments

2021 Amendment: Chapter 535 in (2)(b) at end deleted "or, if mutually agreed on by the parties in the action, in the district court of the first judicial district, Lewis and Clark County". Amendment effective October 1, 2021.

2005 Amendment: Chapter 487 inserted (2)(b) relating to penalty factors, actions to recover penalties, and venue for the actions; and made minor changes in style. Amendment effective January 1, 2006.

Saving Clause: Section 29, Ch. 487, L. 2005, was a saving clause.

2001 Amendment: Chapter 338 in (3) at end of first sentence substituted "environmental rehabilitation and response account in the state special revenue fund provided for in 75-1-110" for "account provided for in 75-10-1203"; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 8, Ch. 338, L. 2001, was a severability clause.

Effective Date: Section 14(2), Ch. 378, L. 1999, provided that this section is effective January 1, 2000.

Part 13

Methamphetamine Contamination — Indoor Property Decontamination Standards

Part Compiler's Comments

Effective Date: This part is effective October 1, 2005.

75-10-1301. Finding and purpose.

Compiler's Comments

2021 Amendment: Chapter 93 at end of first sentence after "manufacture of methamphetamine" inserted "or the smoke from the use of methamphetamine". Amendment effective October 1, 2021.

75-10-1302. Definitions.

Compiler's Comments

2021 Amendment: Chapter 93 in definition of inhabitable property in (a) after "drug lab" inserted "or that has been contaminated from smoke from the use of methamphetamine". Amendment effective October 1, 2021.

75-10-1303. Decontamination standards — rulemaking authority — samples.

Compiler's Comments

2021 Amendment: Chapter 93 in (1) in middle of first sentence substituted "1.5 micrograms" for "0.1 micrograms". Amendment effective October 1, 2021.

Administrative Rules

ARM 17.74.519 Sampling procedures.

75-10-1305. Occupant notice by owner of inhabitable property — immunity.

Compiler's Comments

2021 Amendment: Chapter 93 in (1) in middle after "drug lab" inserted "or that has been contaminated from smoke from the use of methamphetamine"; and deleted former (5) that read: "(5) The immunity provided for in subsection (4) does not apply to an owner or an owner's agent who caused the methamphetamine contamination." Amendment effective October 1, 2021.

75-10-1306. Reporting requirements.

Administrative Rules

ARM 17.74.520 Recordkeeping, reports, and submittals.
ARM 17.74.521 Incorporation by reference.

Case Notes

Failure to Raise Purely Legal Question to District Court — Argument Not Considered on Appeal: A family sued Lewis and Clark County for negligence after learning the county had not reported to the health department that their home was a former meth lab as required by 75-10-1306. At the end of a 3-day trial, a jury awarded the family over a half million dollars. The county appealed, arguing that it did not have a duty to report under 75-10-1306. On appeal, the Supreme Court noted that the county had neither filed any pretrial motions on the question of duty nor sought a motion for judgment as a matter of law. Because the county had failed to raise to the trial court the purely legal question of whether a duty existed under the statute, the Supreme Court would not consider the issue on appeal, and affirmed. Slack v. The Landmark Co., 2011 MT 292, 362 Mont. 514, 267 P.3d 6.

Part 14

Mine and Smelter Waste Remediation

Part Compiler's Comments

Saving Clause: Section 10, Ch. 200, L. 2009, was a saving clause.

Effective Date: Section 11, Ch. 200, L. 2009, provided: "[This act] is effective on passage and approval." Approved April 9, 2009.

Part 15

Mercury-Added Thermostat Collection

Part Compiler's Comments

Preamble: The preamble attached to Ch. 296, L. 2009, provided: "WHEREAS, mercury that is released into the atmosphere can be transported long distances and deposited in aquatic ecosystems where it is methylated to methylmercury, the organic and most toxic form of mercury; and

WHEREAS, mercury-added thermostats represent the largest amount of mercury in ordinary household products; and

WHEREAS, a single mercury-added thermostat contains 3 to 5 grams of mercury; and

WHEREAS, according to the U.S. Environmental Protection Agency's 2002 estimates, each year about 6 to 8 tons of mercury from discarded thermostats end up in solid waste facilities and between 1 and 2 tons are released into the air; and

WHEREAS, according to a 2004 study by the U.S. Environmental Protection Agency, more than 10% of the estimated mercury reservoir still currently in use in the United States resides in mercury-added thermostats; and

WHEREAS, methylmercury bioaccumulates and biomagnifies in animals, including fish and humans; and

WHEREAS, according to the Montana Department of Public Health and Human Services, mercury has been found in fish in at least 28 water bodies in Montana, including Canyon Ferry Reservoir, Cooney Reservoir, Flathead Lake, Fort Peck Reservoir, Hebgen Lake, Lake Koocanusa, Seeley Lake, Swan Lake, Tongue River Reservoir, and Whitefish Lake; and

WHEREAS, methylmercury is a known neurotoxin to which the human fetus is very sensitive; and

WHEREAS, the federal Centers for Disease Control and Prevention estimate that between 300,000 and 630,000 infants are born in the United States each year with mercury levels that are associated, at later ages, with the loss of IQ; and

WHEREAS, new evidence indicates that methylmercury exposure may increase the risk of cardiovascular disease in humans, especially adult men; and

WHEREAS, decreases in local and regional sources of mercury emissions have been shown to lead to decreases in mercury levels in fish and wildlife; and

WHEREAS, in 1998, thermostat makers General Electric, Honeywell, and White-Rodgers established the Thermostat Recycling Corporation to implement a program for collecting used mercury-added thermostats under which thermostat wholesalers and contractors, as well as household hazardous waste facilities, volunteer to collect thermostats from heating, ventilating, and air-conditioning contractors and the general public."

Effective Date: Section 12, Ch. 296, L. 2009, provided: "[This act] is effective on passage and approval." Approved April 17, 2009.

Part 16
Libby Asbestos Cleanup Operation

Part Compiler's Comments

Transfer of Funds: Section 6, Ch. 317, L. 2017, provided: "The department of environmental quality is authorized to transfer money as required in [sections 3 and 4] [75-10-1603 and 75-10-1604]."

Effective Date: Section 9, Ch. 317, L. 2017, provided that this part is effective July 1, 2017.

75-10-1601. Libby asbestos superfund oversight committee — duties.

Compiler's Comments

2021 Amendment: See 2021 Session Law for amendment made by sec. 103, Ch. 261, L. 2021. Amendment effective April 20, 2021.

2019 Amendment: Chapter 76 throughout section substituted "oversight committee" for "advisory team"; in (5) substituted current text for former text that read: "(5) Duties of the advisory team include to:

(a) advise the department of environmental quality regarding the administration of the Libby asbestos cleanup trust fund provided for in 75-10-1603;

(b) advise the department of environmental quality regarding the administration of the Libby asbestos cleanup operation and maintenance account provided for in 75-10-1604; and

(c) recommend tasks and work priorities for the Libby asbestos superfund liaison"; and made minor changes in style. Amendment effective March 20, 2019.

75-10-1604. Libby asbestos cleanup operation and maintenance account.

Compiler's Comments

2019 Amendment: Chapter 76 in (1)(b) substituted "oversight committee" for "advisory team and the Libby asbestos superfund liaison". Amendment effective March 20, 2019.

CHAPTER 11
UNDERGROUND STORAGE TANKS

Chapter Administrative Rules

Title 17, chapter 56, ARM Underground storage tanks — petroleum and chemical substances.

Chapter Case Notes

Authority of Petroleum Tank Release Compensation Board to Require Subrogation: This chapter provides the Montana Petroleum Tank Release Compensation Board with authority to seek reimbursement of corrective action expenses through subrogation, and by virtue of the right to statutory subrogation and pursuant to 75-11-318, the Board is authorized to adopt an administrative rule requiring tank owners to subrogate their claims against insurers. Mont. Petroleum Tank Release Comp. Bd. v. Crumleys, Inc., 2008 MT 2, 341 M 33, 174 P3d 948 (2008).

Part 2

Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act

Part Compiler's Comments

1989 Statement of Intent: The statement of intent attached to Ch. 594, L. 1989, provided: "It is the intent of the legislature that the department of health and environmental sciences (now department of environmental quality) adopt rules necessary to govern the installation and closure of underground storage tanks, including rules governing:

(1) permits for installations and closures;
(2) licenses and requirements for tank installers;
(3) inspections and inspectors;
(4) fees for licenses, permits, and inspections; and
(5) distribution of funds to local governments."

Appropriation: Section 19, Ch. 594, L. 1989, provided an appropriation to the Department of Health and Environmental Sciences (now Department of Environmental Quality) and a loan to the underground storage tank license and permit account to administer the licensing of underground storage tank installers. See 1989 Session Law for text of the appropriation.

Sunrise Exemption: Section 20, Ch. 594, L. 1989, provided: "[This act] is exempt from the legislative audit committee report provided for in 2-8-203 [now repealed]." Effective April 20, 1989.

Part Administrative Rules

Title 17, chapter 56, subchapters 13 and 14, ARM Underground storage tank — permitting and licensing.

75-11-201. Short title.

Compiler's Comments

1999 Amendment: Chapter 506 after "Installer" inserted "and Inspector". Amendment effective April 28, 1999.

Effective Date: Section 21(3), Ch. 594, L. 1989, provided that this section is effective April 1, 1990.

75-11-202. Intent, findings, and purpose.

Compiler's Comments

2003 Amendment: Chapter 361 inserted (1) relating to constitutional obligations and legislative intent; and made minor changes in style. Amendment effective April 16, 2003.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title

50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Severability: Section 39, Ch. 361, L. 2003, was a severability clause.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

1999 Amendment: Chapter 506 in third sentence in (1) after "closure" inserted "and inspection"; near end of (2) after "to" substituted "provide for" for "assess fees to support state and local administration of"; and made minor changes in style. Amendment effective April 28, 1999.

1993 Amendment: Chapter 200 in (1) and (2) substituted "tank systems" for "tanks". Amendment effective March 26, 1993.

Applicability: Section 13, Ch. 200, L. 1993, provided: "[This act] applies to installations, closures, and all other activities described in Title 75, chapter 11, part 2, that require either a permit or a license beginning on October 1, 1993."

Effective Date: Section 21(3), Ch. 594, L. 1989, provided that this section is effective April 1, 1990.

75-11-203. Definitions.

Compiler's Comments

1999 Amendment: Chapter 506 inserted definitions of inspection, inspector, and licensed inspector; in definition of license after "under" inserted "75-11-204 or", before "installation" inserted "inspection", and after "systems" deleted "and the installation of leak detection devices or cathodic protection systems"; in definition of underground storage tank after "includes" substituted "ancillary equipment designed to prevent, detect, or contain a release from" for "a leak detection device that is external to and not attached to"; and made minor changes in style. Amendment effective April 28, 1999.

1997 Amendment: Chapter 112 in definitions of regulated substance and underground storage tank substituted "75-11-503" for "75-10-403".

Saving Clause: Section 38(1), Ch. 112, L. 1997, was a saving clause.

1995 Amendments — Composite Section: Chapter 418 in definition of Board substituted "board of environmental review provided for in 2-15-3502" for "board of health and environmental sciences provided for in 2-15-2104"; and in definition of Department substituted "department of environmental quality provided for in 2-15-3501" for "department of health and environmental sciences provided for in Title 2, chapter 15, part 21". Amendment effective July 1, 1995.

Chapter 546 deleted definition of Board that read: ""Board" means the board of health and environmental sciences provided for in 2-15-2104"; pursuant to sec. 568, Ch. 546, L. 1995, a coordination section, in definition of Department the Code Commissioner substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Because Ch. 418 inserted a reference to the Board of Environmental Review and Ch. 546 deleted a reference to the Board of Health and Environmental Sciences, the codifier has reflected both the insertion and the deletion.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 200 throughout section substituted "tank system" or "tank systems" for "tank" or "tanks"; in definition of installation inserted last sentence regarding leak detection devices and deleted from the definition former (4)(b)(ii) and (4)(b)(iii) that read: "(ii) the installation of a leak detection device that is external to and not attached to the underground storage tank; or (iii) the installation and maintenance of a cathodic protection system"; in definition of installer substituted "installs or closes" for "is engaged in the business of installation or closure of"; in definition of license inserted last phrase regarding leak detection devices and cathodic systems; in definition of underground storage tank inserted "or "underground storage tank system"" and last phrase referring to external leak detection devices; and made minor changes in style. Amendment effective March 26, 1993.

Applicability: Section 13, Ch. 200, L. 1993, provided: "[This act] applies to installations, closures, and all other activities described in Title 75, chapter 11, part 2, that require either a permit or a license beginning on October 1, 1993."

Effective Date: Section 21(3), Ch. 594, L. 1989, provided that this section is effective April 1, 1990.

75-11-204. Rulemaking authority.

Compiler's Comments

1999 Amendment: Chapter 506 at end of first sentence in (1) inserted "and rules providing for the inspection of underground storage tank systems"; at end of first sentence in (1)(b), (1)(c), and (1)(e) inserted "and inspectors"; inserted second sentence in (1)(b) requiring separate licenses for inspectors and installers; inserted second sentence in (1)(d) requiring adoption of separate qualifications for installers and inspectors; inserted (2) exempting licensed inspectors employed by designated local government unit from licensing fees; and made minor changes in style. Amendment effective April 28, 1999.

1993 Amendment: Chapter 200 throughout section substituted "tank system" or "tank systems" for "tank" or "tanks". Amendment effective March 26, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 200, L. 1993, provided: "A statement of intent is required for this bill because the bill gives the department of health and environmental sciences [now department of environmental quality] authority to adopt rules for all components of underground tank systems and because it delegates authority to the department to license persons who install, repair, or modify leak detection devices that are external to and not attached to underground storage tank systems, including persons who install, repair, or modify cathodic protection systems. The legislature intends that the department use this authority to require compliance with the department's rules for the proper installation and management of all components of underground storage tank systems.

The definition of underground storage tank is expanded to include the word "system", which will serve to make it clearer to the regulated community that all parts of underground storage tank systems, including piping, are subject to regulation.

The legislature intends to require licensed workers for installation, repair, modification, and closure work performed on all components of underground storage tank systems. The legislature also intends to extend the permitting requirements to all individuals who perform installation, repair, or modification of underground storage tank systems and to not limit compliance responsibility solely to owners and operators."

Applicability: Section 13, Ch. 200, L. 1993, provided: "[This act] applies to installations, closures, and all other activities described in Title 75, chapter 11, part 2, that require either a permit or a license beginning on October 1, 1993."

Effective Date: Section 21(1), Ch. 594, L. 1989, provided that this section is effective April 20, 1989.

Administrative Rules

Title 17, chapter 56, subchapters 13 and 14, ARM Underground storage tank — permitting and licensing.

75-11-209. Permits — requirement for licensed installer.

Compiler's Comments

1995 Amendment: Chapter 568 deleted (2)(b) that required services of licensed installer unless installation or closure is "exempt from the requirement for a licensed installer, as provided in 75-11-217"; and made minor changes in style. Amendment effective April 27, 1995.

1993 Amendments: Chapter 200 in (1) and (2) substituted "tank system" for "tank"; and in (1), at beginning, substituted "A person" for "An owner or operator of an underground storage tank". Amendment effective March 26, 1993.

Chapter 641 in (1), at beginning, inserted exception clause. Amendment effective May 20, 1993, and terminates January 1, 1994.

Applicability: Section 13, Ch. 200, L. 1993, provided: "[This act] applies to installations, closures, and all other activities described in Title 75, chapter 11, part 2, that require either a permit or a license beginning on October 1, 1993."

Effective Date: Section 21(3), Ch. 594, L. 1989, provided that this section is effective April 1, 1990.

75-11-210. Licensing — interim licenses — regular licenses.

Compiler's Comments

1993 Amendment: Chapter 200 throughout section substituted "tank system" or "tank systems" for "tank" or "tanks"; deleted former (2) requiring the Department to grant interim licenses to tank installers from April 1, 1990, through September 30, 1990, upon a demonstration of competency and providing for the expiration of those interim licenses on October 1, 1990; in (2), after "regular license", deleted "beginning October 1, 1990"; and made minor changes in style. Amendment effective March 26, 1993.

Applicability: Section 13, Ch. 200, L. 1993, provided: "[This act] applies to installations, closures, and all other activities described in Title 75, chapter 11, part 2, that require either a permit or a license beginning on October 1, 1993."

Effective Date: Section 21(3), Ch. 594, L. 1989, provided, that this section is effective April 1, 1990.

75-11-211. Denial, modification, suspension, or revocation of installer or inspector license — grounds.

Compiler's Comments

1999 Amendment: Chapter 506 at end of (1) inserted "or inspector"; at end of (1)(b) substituted "the license fee imposed under this part" for "a license fee"; in (1)(c) after "license" inserted "or permit" and at end inserted "or an inspection report submitted to the department"; in (1)(d) inserted "suspended or revoked"; inserted (1)(d)(i) regarding suspended or revoked license issued under this part; in (1)(d)(ii) after "license" deleted "suspended or revoked"; at beginning of second sentence in (2) substituted "applicant or license holder" for "installer"; and made minor changes in style. Amendment effective April 28, 1999.

1993 Amendment: Chapter 200 in (1)(e) substituted "tank system" for "tank". Amendment effective March 26, 1993.

Applicability: Section 13, Ch. 200, L. 1993, provided: "[This act] applies to installations, closures, and all other activities described in Title 75, chapter 11, part 2, that require either a permit or a license beginning on October 1, 1993."

Effective Date: Section 21(3), Ch. 594, L. 1989, provided, that this section is effective April 1, 1990.

75-11-212. Permits — application procedure — issuance.

Compiler's Comments

1999 Amendment: Chapter 506 in (3) substituted "75-11-204" for "75-11-204(1)". Amendment effective April 28, 1999.

1993 Amendments: Chapter 200 in (1) and (2)(e), in two places, substituted "tank system" for "tank"; in (1), in first sentence, inserted reference to the designated tank installer or remover; and in (2)(a), (2)(b), (2)(c), and (2)(d) substituted "underground storage tank system" for "tank". Amendment effective March 26, 1993.

Chapter 641 in (1), at beginning, inserted exception clause. Amendment effective May 20, 1993, and terminates January 1, 1994.

Applicability: Section 13, Ch. 200, L. 1993, provided: "[This act] applies to installations, closures, and all other activities described in Title 75, chapter 11, part 2, that require either a permit or a license beginning on October 1, 1993."

Effective Date: Section 21(3), Ch. 594, L. 1989, provided, that this section is effective April 1, 1990.

75-11-213. Inspection of installations and closures — fee.

Compiler's Comments

1993 Amendment: Chapter 200 in (1), (5), and (7) substituted "tank system" or "tank systems" for "tank" or "tanks". Amendment effective March 26, 1993.

Applicability: Section 13, Ch. 200, L. 1993, provided: "[This act] applies to installations, closures, and all other activities described in Title 75, chapter 11, part 2, that require either a permit or a license beginning on October 1, 1993."

Effective Date: Section 21(3), Ch. 594, L. 1989, provided that this section is effective April 1, 1990.

75-11-214. Licensing of inspectors — interim licenses — regular licenses.

Compiler's Comments

Effective Date: Section 16(1), Ch. 506, L. 1999, provided that this section is effective on passage and approval. Approved April 28, 1999.

75-11-218. Administrative enforcement.

Compiler's Comments

2005 Amendment: Chapter 443 in (1) at end of third sentence inserted "or an order assessing an administrative penalty pursuant to 75-11-223" and in fourth sentence near middle substituted "designee" for "deputy"; inserted (5) relating to applicability of contested case provisions; and made minor changes in style. Amendment effective April 28, 2005.

Saving Clause: Section 12, Ch. 443, L. 2005, was a saving clause.

1999 Amendment: Chapter 506 in third sentence in (1) after "closure" inserted "or inspection", deleted former fourth sentence that read: "The notice and order may be signed and served by a department inspector if it is personally given to the person or the person's agent", and in fourth sentence after "served" inserted "personally or"; and made minor changes in style. Amendment effective April 28, 1999.

1993 Amendment: Chapter 200 in (3), at beginning, inserted "In addition to or"; and made minor changes in style. Amendment effective March 26, 1993.

Applicability: Section 13, Ch. 200, L. 1993, provided: "[This act] applies to installations, closures, and all other activities described in Title 75, chapter 11, part 2, that require either a permit or a license beginning on October 1, 1993."

Effective Date: Section 21(3), Ch. 594, L. 1989, provided that this section is effective April 1, 1990.

75-11-219. Injunctions.

Compiler's Comments

Effective Date: Section 21(3), Ch. 594, L. 1989, provided that this section is effective April 1, 1990.

75-11-220. Imminent hazard.

Compiler's Comments

1993 Amendment: Chapter 200 near middle of first sentence substituted "tank system" for "tank". Amendment effective March 26, 1993.

Applicability: Section 13, Ch. 200, L. 1993, provided: "[This act] applies to installations, closures, and all other activities described in Title 75, chapter 11, part 2, that require either a permit or a license beginning on October 1, 1993."

Effective Date: Section 21(3), Ch. 594, L. 1989, provided that this section is effective April 1, 1990.

75-11-223. Civil and administrative penalties.

Compiler's Comments

2021 Amendment: Chapter 535 in (2) at end of second sentence deleted "or, if mutually agreed upon by the parties, in the district court of the first judicial district, Lewis and Clark County". Amendment effective October 1, 2021.

2005 Amendments — Composite Section: Chapter 443 in (1)(a) in first sentence near middle after "subject to" inserted "an administrative penalty not to exceed $500 for each violation or"; in (2) inserted second sentence relating to venue; and made minor changes in style. Amendment effective April 28, 2005.

Chapter 487 inserted (1)(b) relating to penalty factors; and made minor changes in style. Amendment effective January 1, 2006.

Section 11, Ch. 443, L. 2005, a coordination section, provided: "If House Bill No. 429 and [this act] are passed and approved, then [section 19(2)] [75-11-223(2)] of House Bill No. 429 is void." House Bill No. 429 was passed and approved as Ch. 487, L. 2005.

Saving Clause: Section 12, Ch. 443, L. 2005, was a saving clause.

Section 29, Ch. 487, L. 2005, was a saving clause.

1999 Amendment: Chapter 506 at beginning of second sentence in (1) after "an installer" inserted "or an inspector" and after "that installer" inserted "or that inspector". Amendment effective April 28, 1999.

1991 Amendment: In (1) inserted second sentence relating to an employee who is a violator.

Retroactive Applicability: Section 2, Ch. 433, L. 1991, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to proceedings beginning after March 31, 1990."

Effective Date: Section 21(3), Ch. 594, L. 1989, provided that this section is effective April 1, 1990.

75-11-224. Criminal penalties.

Compiler's Comments

1993 Amendment: Chapter 200 in (1), in two places, substituted "tank system" for "tank". Amendment effective March 26, 1993.

Applicability: Section 13, Ch. 200, L. 1993, provided: "[This act] applies to installations, closures, and all other activities described in Title 75, chapter 11, part 2, that require either a permit or a license beginning on October 1, 1993."

Effective Date: Section 21(3), Ch. 594, L. 1989, provided that this section is effective April 1, 1990.

75-11-225. Compliance with other laws — limitation on local ordinances.

Compiler's Comments

Effective Date: Section 21(3), Ch. 594, L. 1989, provided that this section is effective April 1, 1990.

75-11-226. Application of other law.

Compiler's Comments

Effective Date: Section 21(3), Ch. 594, L. 1989, provided that this section is effective April 1, 1990.

75-11-227. Underground storage tank license and permit account.

Compiler's Comments

Effective Date: Section 21(2), Ch. 594, L. 1989, provided that this section is effective July 1, 1989.

Part 3
Petroleum Storage Tank Cleanup

Part Compiler's Comments

1989 Statement of Intent: The statement of intent attached to Ch. 528, L. 1989, provided:

"(1) It is the intent of the legislature that the petroleum tank release compensation board enact rules that:

(a) govern submission of claims by owners or operators to the department and board;

(b) provide procedures for determining owners or operators who are eligible for reimbursement and determining the validity of claims;

(c) provide procedures for the review and approval of corrective action plans;

(d) provide procedures for conducting board meetings, hearings, and other business that are necessary for the implementation of [sections 1 through 7 and 9 through 12] [Title 75, chapter 11, part 3]; and

(e) are necessary for the administration of [sections 1 through 7 and 9 through 12] [Title 75, chapter 11, part 3], provided that the rules do not alter or conflict with the eligibility requirements and procedures provided in [sections 1 through 7 and 9 through 12] [Title 75, chapter 11, part 3] or with the laws, rules, or procedures of the federal government or the department of health and environmental sciences [now department of environmental quality] that govern releases from petroleum storage tanks.

(2) The department of health and environmental sciences [now department of environmental quality] may adopt rules necessary to administer its responsibilities under [sections 1 through 7

and 9 through 12] [Title 75, chapter 11, part 3], including requirements for approval of corrective action plans.

(3) The department of revenue [function now transferred to department of transportation] shall adopt rules governing the collection of the petroleum storage tank cleanup fee provided for in [section 7] [75-11-314]. The rules may include reporting and recordkeeping requirements, method and timing of payment, examination of records, and other provisions necessary to ensure that fees are properly and efficiently collected. The rules must be generally consistent with procedures governing the collection of the gasoline license tax provided for in Title 15, chapter 70, so that gasoline distributors experience minimum additional requirements or responsibilities."

Severability: Section 15, Ch. 528, L. 1989, was a severability clause.

Part Administrative Rules

Title 17, chapter 56, subchapter 6, ARM Release response and corrective action for tanks containing petroleum or hazardous substances.

Title 17, chapter 58, ARM Montana Petroleum Tank Release Compensation Board.

Part Case Notes

Generally Applicable Statute of Limitations Not Applicable to Claims for Petroleum Spill Reimbursement — Specific Limitations Identified in Statute: The Montana Petroleum Tank Release Compensation Board found that Cascade County's claims for reimbursement for costs incurred remediating petroleum contamination were time-barred pursuant to the 5-year statute of limitations in 27-2-231. On initial appeal, the District Court disagreed. The Supreme Court affirmed, finding that 75-11-307 and 75-11-309 both specifically address the relevant action for relief by providing specific time limitations during which reimbursement compensation must be claimed. Therefore, 27-2-231 did not apply. Cascade County v. Mont. Petroleum Tank Release Comp. Bd., 2021 MT 28, 403 Mont. 195, 480 P.3d 815.

75-11-301. Intent, findings, and purposes.

Compiler's Comments

2017 Amendment: Chapter 267 in (5) at end inserted "or 15-70-126". Amendment effective July 1, 2017.

2003 Amendment: Chapter 361 inserted (1) relating to constitutional obligations and legislative intent; at end of (5) deleted former last sentence that read: "The fee is intended to implement the legislature's duty to provide for the administration and enforcement of maintaining and improving a clean and healthful environment for present and future generations, as required by Article IX, section 1, of the Montana constitution"; and made minor changes in style. Amendment effective April 16, 2003.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75,

chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Severability: Section 39, Ch. 361, L. 2003, was a severability clause.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

1993 Amendment: Chapter 339 inserted (5)(d) regarding incentives to improve tank facilities and minimize accidental releases. Amendment effective April 13, 1993.

Preamble: The preamble attached to Ch. 339, L. 1993, provided: "WHEREAS, the 1993 Legislature found that petroleum storage tanks and associated pipes connected to petroleum storage tanks must be regulated in order to protect public health and safety, the health of living organisms, and the environment; and

WHEREAS, the Department of Health and Environmental Sciences [now Department of Environmental Quality] adopted rules in 1989 that included design and construction requirements for petroleum storage tanks and associated pipes; and

WHEREAS, double-walled construction of petroleum storage tanks and associated pipes should be encouraged because it provides superior prevention of releases of regulated substances to the environment over the operational life of a petroleum storage tank system as well as superior containment of regulated substances that are released from the interior vessel until the substances can be detected and removed."

Applicability: Section 6, Ch. 339, L. 1993, provided: "[This act] applies to releases discovered on or after October 1, 1993, from properly designed and installed double-walled petroleum storage tank systems."

1991 Amendment: In (5)(c), after "assist", inserted "certain". Amendment effective May 15, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 763, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the petroleum tank release compensation board, the department of health and environmental sciences [now department of environmental quality], and the department of revenue for the adoption of rules authorized by the bill. The petroleum tank release compensation board shall adopt rules that:

(1) govern submission of claims from owners and operators to the board and to the department of health and environmental sciences [now department of environmental quality] for reimbursement from the petroleum tank release cleanup fund;

(2) establish procedures for determining eligibility of tank owners and operators for reimbursement from the petroleum tank release cleanup fund and the validity of claims; and

(3) are necessary for administration of the petroleum tank release cleanup fund and other provisions of this bill, provided that the rules may not conflict with the eligibility requirements and procedures provided for in this bill and Title 75, chapter 11, part 3; rules previously adopted under that part; and laws, rules, and procedures of the federal government or the department of health and environmental sciences [now department of environmental quality] pertaining to petroleum storage tank releases eligible for reimbursement from the petroleum tank release cleanup fund.

The department of health and environmental sciences [now department of environmental quality] may adopt rules or revise existing rules as necessary to implement and incorporate the provisions of this bill into the department's existing procedures and its requirements pertaining to releases from underground storage tanks.

The department of revenue shall adopt rules governing the collection of the petroleum storage tank cleanup fee, including reporting and recordkeeping requirements, the method and timing of payments from distributors, examination of records, and other provisions necessary to ensure that the petroleum storage tank cleanup fee is properly and efficiently collected."

Severability: Section 6, Ch. 763, L. 1991, was a severability clause.

Effective Date: Section 16, Ch. 528, L. 1989, provided that this section is effective April 13, 1989.

Case Notes

Authority of Petroleum Tank Release Compensation Board to Require Subrogation: This chapter provides the Montana Petroleum Tank Release Compensation Board with authority to seek reimbursement of corrective action expenses through subrogation, and by virtue of the right to statutory subrogation and pursuant to 75-11-318, the Board is authorized to adopt an administrative rule requiring tank owners to subrogate their claims against insurers. Mont. Petroleum Tank Release Comp. Bd. v. Crumleys, Inc., 2008 MT 2, 341 M 33, 174 P3d 948 (2008).

Petroleum Release From Underground Disconnected Pipes — Eligibility for Cleanup Reimbursement — Portion of Administrative Rule Invalid: The former Department of Health and Environmental Sciences notified Safeway that its property had been identified as a source of petroleum contamination in the area where Safeway had previously removed some underground storage tanks and ordered Safeway to clean up the site pursuant to ARM 16.45.601 (renumbered ARM 17.56.601). Safeway discovered that the leakage was coming from pipes that were left underground during the tank removal. Safeway subsequently submitted to the Petroleum Tank Release Compensation Board an eligibility checklist and application for voluntary registration for reimbursement for costs of cleaning up the leak. The Board denied the request because the tank had been removed prior to the release detection and because ARM 16.47.314 (now repealed) required that the tank be in place when the release was discovered. The District Court held, and the Supreme Court affirmed, that the portion of ARM 16.47.314(1) that added additional requirements to the cleanup statutes was invalid and that Safeway should be compensated for cleanup costs. The Supreme Court analyzed the definition of underground storage tank in determining that nothing in the statutory language of 75-10-403 (before 1997 amendment) required that the underground storage tank itself must be in place on the date on which a petroleum release is discovered. The court also examined whether it is permissible and fair for two state entities, the Department and the Board, to use one statutory definition to reach two opposite conclusions. Despite the fact that the Department and Board are separate entities and the petroleum release cleanup statutes are separate from the reimbursement statutes, Safeway was entitled to be treated uniformly by both entities. The Department treated Safeway as the tank owner for cleanup requirements, and the Board was required to also treat Safeway as the tank owner for reimbursement purposes. Safeway, Inc. v. Mont. Petroleum Release Comp. Bd., 281 M 189, 931 P2d 1327, 54 St. Rep. 129 (1997).

Attorney General's Opinions

Loss of Reimbursement Eligibility When Tank No Longer Complies With Applicable Law: The plain language of 75-11-308(1)(e) renders ineligible for reimbursement any owner or operator whose tank falls out of compliance with applicable state and federal laws and rules, and eligibility is not restored even if the tank is subsequently brought back into compliance with applicable law. The statutory use of the phrase "remained in compliance" requires that a tank be in an ongoing state of compliance in order for it to be eligible for reimbursement. 48 A.G. Op. 9 (2000).

75-11-302. Definitions.

Compiler's Comments

2015 Amendment: Chapter 220 in definition of aviation gasoline and in definition of gasoline substituted "15-70-301 [renumbered 15-70-401]" for "15-70-201"; in definition of distributor after "gasoline" inserted "or special fuel" and substituted "15-70-341 [renumbered 15-70-402]" for "15-70-202"; and made minor changes in style. Amendment effective October 1, 2015.

2009 Amendment: Chapter 396 deleted definition of double-walled tank system that read: ""Double-walled tank system" means a petroleum storage tank and associated product piping that is designed and constructed with rigid inner and outer walls separated by an interstitial space and that is capable of being monitored for leakage. The design and construction of these tank systems must meet standards of the department and the department of justice fire prevention and investigation bureau. The material used in construction must be compatible with the liquid to be stored in the system, and the system must be designed to prevent the release of any stored liquid"; inserted definition of properly designed and installed double-walled tank system; and made minor changes in style. Amendment effective October 1, 2009.

2007 Amendment: Chapter 100 in definition of distributor in (f) substituted "ethanol" for "alcohol"; and in definition of petroleum near middle after "such as" substituted "ethanol-blended gasoline" for "gasohol". Amendment effective March 30, 2007.

2003 Amendment: Chapter 114 in definition of aviation gasoline substituted "aviation fuel" for "aviation gasoline"; and in definition of "owner" in (b) after "interest in a" inserted "storage". Amendment effective October 1, 2003.

1999 Amendment: Chapter 420 in definition of owner inserted (a)(ii) expanding definition to include person that owns property on which petroleum storage tank from which release occurred was located; and made minor changes in style. Amendment effective April 23, 1999.

Saving Clause: Section 3, Ch. 420, L. 1999, was a saving clause.

1997 Amendment: Chapter 112 in definition of petroleum storage tank, in (a), substituted "75-11-503" for "75-10-403".

Saving Clause: Section 38(1), Ch. 112, L. 1997, was a saving clause.

1995 Amendment: Chapter 418 in definition of Department substituted "department of environmental quality provided for in 2-15-3501" for "department of health and environmental sciences provided for in Title 2, chapter 15, part 21"; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1993 Amendments: Chapter 298 at beginning inserted exception clause; inserted definitions of aviation gasoline, export, exporter, heating oil, import, and special fuel; substituted definition of distributor for former definition that read: ""Distributor" means a distributor as defined in 15-70-201"; in definition of petroleum storage tank, in (d), substituted "subsections (22)(b) and (22)(c)" for "subsections (16)(b) and (16)(c)" and in (d)(iii) substituted "subsections (22)(d)(i) and (22)(d)(ii)" for "subsections (16)(d)(i) and (16)(d)(ii)"; and made minor changes in style. Amendment effective July 1, 1993.

Chapter 339 inserted definition of double-walled tank system; in definition of petroleum storage tank, in (d), substituted "subsections (22)(b) and (22)(c)" for "subsections (16)(b) and (16)(c)" and in (d)(iii) substituted "subsections (22)(d)(i) and (22)(d)(ii)" for "subsections (16)(d)(i) and (16)(d)(ii)"; and made minor changes in style. Amendment effective April 13, 1993.

Preamble: The preamble attached to Ch. 339, L. 1993, provided: "WHEREAS, the 1993 Legislature found that petroleum storage tanks and associated pipes connected to petroleum storage tanks must be regulated in order to protect public health and safety, the health of living organisms, and the environment; and

WHEREAS, the Department of Health and Environmental Sciences [now Department of Environmental Quality] adopted rules in 1989 that included design and construction requirements for petroleum storage tanks and associated pipes; and

WHEREAS, double-walled construction of petroleum storage tanks and associated pipes should be encouraged because it provides superior prevention of releases of regulated substances to the environment over the operational life of a petroleum storage tank system as well as superior containment of regulated substances that are released from the interior vessel until the substances can be detected and removed."

1993 Statement of Intent: The statement of intent attached to Ch. 339, L. 1993, provided: "A statement of intent is required for this bill to provide guidance to the department of health and environmental sciences [now department of environmental quality] concerning the adoption of rules to govern double-walled petroleum storage tank systems as defined in 75-11-302(8) [now 75-11-302(9)]. Double-walled construction is to be encouraged because it provides superior prevention of releases of regulated substances to the environment over the operational life of a petroleum storage tank system as well as superior containment of regulated substances that are released from the interior vessel until the substances can be detected and removed. The department is directed to adopt rules that specify the types of materials or combination of materials that must be used to appropriately construct double-walled tank systems and that specify necessary design, construction, and installation techniques."

Effective Date — Applicability: Section 3, Ch. 298, L. 1993, provided: "[This act] is effective July 1, 1993, and applies to all tax revenue recorded on or after July 1, 1993."

Applicability: Section 6, Ch. 339, L. 1993, provided: "[This act] applies to releases discovered on or after October 1, 1993, from properly designed and installed double-walled petroleum storage tank systems."

1991 Amendments: Chapter 389 in definition of petroleum, at end, inserted reference to motor fuel blend; in definition of petroleum storage tank, near beginning after "contains", inserted "or contained" and in (b) substituted "drift" for "draft"; and in definition of release, near beginning after "means", substituted "any spilling, leaking, emitting, discharging, escaping, leaching, or disposing" for "a release, as defined in 75-10-701" and after "tank" inserted "into ground water, surface water, surface soils, or subsurface soils". Amendment effective July 1, 1991.

Chapter 763 in definition of gasoline inserted second sentence excluding JP-4 jet fuel sold to the federal defense fuel supply center. Amendment effective May 15, 1991.

Saving Clause: Section 5, Ch. 389, L. 1991, provided: "Nothing in [this act] applies to alter a claim for reimbursement that was filed before [the effective date of this act] or that arose pursuant to a corrective action plan approved by the department before [the effective date of this act]." Effective July 1, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 763, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the petroleum tank release compensation board, the department of health and environmental sciences [now department of environmental quality], and the department of revenue for the adoption of rules authorized by the bill. The petroleum tank release compensation board shall adopt rules that:

(1) govern submission of claims from owners and operators to the board and to the department of health and environmental sciences [now department of environmental quality] for reimbursement from the petroleum tank release cleanup fund;

(2) establish procedures for determining eligibility of tank owners and operators for reimbursement from the petroleum tank release cleanup fund and the validity of claims; and

(3) are necessary for administration of the petroleum tank release cleanup fund and other provisions of this bill, provided that the rules may not conflict with the eligibility requirements and procedures provided for in this bill and Title 75, chapter 11, part 3; rules previously adopted under that part; and laws, rules, and procedures of the federal government or the department of health and environmental sciences [now department of environmental quality] pertaining to petroleum storage tank releases eligible for reimbursement from the petroleum tank release cleanup fund.

The department of health and environmental sciences [now department of environmental quality] may adopt rules or revise existing rules as necessary to implement and incorporate the provisions of this bill into the department's existing procedures and its requirements pertaining to releases from underground storage tanks.

The department of revenue shall adopt rules governing the collection of the petroleum storage tank cleanup fee, including reporting and recordkeeping requirements, the method and timing of payments from distributors, examination of records, and other provisions necessary to ensure that the petroleum storage tank cleanup fee is properly and efficiently collected."

Severability: Section 6, Ch. 763, L. 1991, was a severability clause.

Effective Date: Section 16, Ch. 528, L. 1989, provided that this section is effective April 13, 1989.

Case Notes

Contamination Originating From Separate Tanks at Same Site Qualifies as Multiple Releases: Cascade County and the Petroleum Tank Release Compensation Board stipulated that petroleum contamination discovered by the county consisted of contamination from at least four separate tanks at a storage site. Cascade County requested that the Department of Environmental Quality (DEQ) designate the site as a multiple-release site, but DEQ elected to treat the contamination as a single release for the purpose of reimbursement. The cost of remediation exceeded the statutory maximum of $982,500 for a single site. The hearings examiner in the contested case agreed with Cascade County that there were four separate releases, but the Board rejected this conclusion and the District Court declined to address the matter. On appeal, the Supreme Court agreed with Cascade County and the hearings examiner that under the definition of "release" and the stipulated facts, four releases occurred at the storage site. Cascade County v. Mont. Petroleum Tank Release Comp. Bd., 2021 MT 28, 403 Mont. 195, 480 P.3d 815.

75-11-307. Reimbursement for expenses caused by release.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 754, L. 2023. Amendment effective May 22, 2023.

Saving Clause: Section 5, Ch. 754, L. 2023, was a saving clause.

2015 Amendments — Composite Section: Chapter 107 in (1)(a)(ii) at end substituted "75-11-508" for "75-11-508(3)(a)". Amendment effective March 23, 2015.

Chapter 296 in (2)(h) at end inserted "including a grantor"; inserted (2)(j) regarding costs responding to release and implementing corrective action plan; in (3) after "a person" inserted "including a grantor" and after "reimbursement" inserted "for eligible costs incurred by the person"; in (5) in two places after "insurer" inserted "or grantor"; in (5)(b) after "fund" inserted "unless the grantor is designated by the owner or operator as an agent to receive the reimbursement for eligible costs incurred by the grantor"; and made minor changes in style. Amendment effective April 24, 2015.

Saving Clause: Section 10, Ch. 296, L. 2015, was a saving clause.

Severability: Section 11, Ch. 296, L. 2015, was a severability clause.

2011 Amendment: Chapter 189 inserted (1)(a)(ii) regarding establishment of petroleum mixing zone; and made minor changes in style. Amendment effective April 15, 2011.

2009 Amendment: Chapter 396 inserted (2)(h) prohibiting reimbursement of expenses to an owner or operator who has received reimbursement; in (4)(a) near beginning before "fund" deleted "petroleum tank release cleanup"; deleted former (4)(a)(i) that read: "(i) 50% of the first $10,000 of eligible costs and 100% of subsequent eligible costs, up to a maximum total reimbursement of $495,000:

(A) for single-walled tank system releases; and

(B) for double-walled tank system releases for which the release date was prior to October 1, 1993"; in (4)(a)(i) before "releases" deleted "accidental" and at end inserted "and before October 1, 2009"; inserted (4)(a)(ii) concerning total of eligible costs and maximum reimbursement; in (4)(b) near beginning before "fund" deleted "petroleum tank release cleanup"; deleted former (4)(b)(i) that read: "(i) 50% of the first $35,000 of eligible costs and 100% of subsequent eligible costs, up to a maximum total reimbursement of $982,500:

(A) for single-walled tank system releases; and

(B) for double-walled tank system releases for which the release date was prior to October 1, 1993"; in (4)(b)(i) before "releases" deleted "accidental" and at end inserted "and before October 1, 2009"; inserted (4)(b)(ii) concerning total of eligible costs and maximum reimbursement; inserted (5) concerning eligible costs paid or reimbursed by the insurer; and made minor changes in style. Amendment effective October 1, 2009.

Applicability: Section 5, Ch. 396, L. 2009, provided "[Section 2(5)(a) and (5)(c)] [75-11-307(5)(a) and (5)(c)] apply to requests for reimbursement submitted to the petroleum tank release cleanup fund after [the effective date of this act]." Effective October 1, 2009.

2003 Amendments — Composite Section: Chapters 137 and 245 in (2)(h) near middle of first sentence substituted "5 years" for "2 years" and inserted third, fourth, and fifth sentences relating to suspension of the limitation period; and made minor changes in style. Chapter 137 amendment effective March 26, 2003, and Ch. 245 amendment effective October 1, 2003.

Saving Clause: Section 5, Ch. 137, L. 2003, was a saving clause.

Section 8, Ch. 245, L. 2003, was a saving clause.

Applicability: Section 7, Ch. 137, L. 2003, provided: "[Section 1] [75-11-307] applies to all claims for reimbursement of expenses on file with the department of environmental quality on [the effective date of this act]." Effective March 26, 2003.

Section 9, Ch. 245, L. 2003, provided that the amendments to this section apply "to all claims for reimbursement of expenses on file with the department of environmental quality on [the effective date of this act]". Effective October 1, 2003.

1997 Amendment: Chapter 115 in (1)(a), after "costs", inserted remainder of subsection concerning corrective action plan; in (1)(b) inserted second sentence concerning corrective action plan; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 55 inserted (2)(h) disallowing reimbursement for expenses for work completed more than 2 years prior to a request for reimbursement, except for certain third-party claims; and made minor changes in style. Amendment effective September 30, 1995.

1993 Amendment: Chapter 339 inserted (4)(a) establishing reimbursement levels for heating oil or noncommercial motor fuel releases eligible under the petroleum tank release cleanup fund; in (4)(b)(i) and (4)(b)(ii) substituted language establishing reimbursement levels for other releases eligible under the petroleum tank release cleanup fund for former language that read: "except for a tank storing heating oil for consumptive use on the premises where it is stored or a farm or residential tank with a capacity of 1,100 gallons or less that is used for storing motor fuel for noncommercial purposes; and

(b) for releases eligible for reimbursement from the petroleum tank release cleanup fund that are discovered and reported on or after April 13, 1989, the board shall reimburse an owner or operator for 50% of the first $10,000 of eligible costs and 100% of subsequent eligible costs, up to a maximum total reimbursement of $495,000, for a tank storing heating oil for consumptive use on the premises where it is stored or a farm or residential tank with a capacity of 1,100 gallons or less that is used for storing motor fuel for noncommercial purposes"; and made minor changes in style. Amendment effective April 13, 1993.

Preamble: The preamble attached to Ch. 339, L. 1993, provided: "WHEREAS, the 1993 Legislature found that petroleum storage tanks and associated pipes connected to petroleum storage tanks must be regulated in order to protect public health and safety, the health of living organisms, and the environment; and

WHEREAS, the Department of Health and Environmental Sciences [now Department of Environmental Quality] adopted rules in 1989 that included design and construction requirements for petroleum storage tanks and associated pipes; and

WHEREAS, double-walled construction of petroleum storage tanks and associated pipes should be encouraged because it provides superior prevention of releases of regulated substances to the environment over the operational life of a petroleum storage tank system as well as superior containment of regulated substances that are released from the interior vessel until the substances can be detected and removed."

Applicability: Section 6, Ch. 339, L. 1993, provided: "[This act] applies to releases discovered on or after October 1, 1993, from properly designed and installed double-walled petroleum storage tank systems."

1991 Amendments: Chapter 389 at end of (3) inserted provision that owner or operator retain legal responsibility for costs and liabilities incurred as a result of a release, as a condition of designating an agent for reimbursement. Amendment effective July 1, 1991.

Chapter 763 in (2)(f) inserted "for owners or operators seeking reimbursement from the petroleum tank release cleanup fund and expenses incurred before May 15, 1991, for owners or operators seeking reimbursement from the petroleum tank release cleanup fund for a tank storing heating oil for consumptive use on the premises where it is stored or a farm or residential tank with a capacity of 1,100 gallons or less that is used for storing motor fuel for noncommercial purposes"; in (4)(a), after "releases", inserted "eligible for reimbursement from the petroleum tank release cleanup fund" and after "$982,500" inserted "except for a tank storing heating oil for consumptive use on the premises where it is stored or a farm or residential tank with a capacity of 1,100 gallons or less that is used for storing motor fuel for noncommercial purposes"; inserted (4)(b) requiring that subject to the availability of funds under subsection (5), for eligible releases for reimbursement from fund that are discovered and reported on or after April 13, 1989, Board shall reimburse owner or operator for 50% of first $10,000 of eligible costs and 100% of subsequent eligible costs, up to $495,000, for heating oil tank for consumptive use on premises where stored or for farm or residential tank with capacity of 1,100 gallons or less used for storing motor fuel for noncommercial purposes; and made minor changes in style. Amendment effective May 15, 1991.

Saving Clause: Section 5, Ch. 389, L. 1991, provided: "Nothing in [this act] applies to alter a claim for reimbursement that was filed before [the effective date of this act] or that arose pursuant to a corrective action plan approved by the department before [the effective date of this act]." Effective July 1, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 763, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the petroleum tank release compensation board, the department of health and environmental sciences [now department of environmental quality], and the department of revenue for the adoption of rules authorized by the bill. The petroleum tank release compensation board shall adopt rules that:

(1) govern submission of claims from owners and operators to the board and to the department of health and environmental sciences [now department of environmental quality] for reimbursement from the petroleum tank release cleanup fund;

(2) establish procedures for determining eligibility of tank owners and operators for reimbursement from the petroleum tank release cleanup fund and the validity of claims; and

(3) are necessary for administration of the petroleum tank release cleanup fund and other provisions of this bill, provided that the rules may not conflict with the eligibility requirements and procedures provided for in this bill and Title 75, chapter 11, part 3; rules previously adopted under that part; and laws, rules, and procedures of the federal government or the department of health and environmental sciences [now department of environmental quality] pertaining to

petroleum storage tank releases eligible for reimbursement from the petroleum tank release cleanup fund.

The department of health and environmental sciences [now department of environmental quality] may adopt rules or revise existing rules as necessary to implement and incorporate the provisions of this bill into the department's existing procedures and its requirements pertaining to releases from underground storage tanks.

The department of revenue shall adopt rules governing the collection of the petroleum storage tank cleanup fee, including reporting and recordkeeping requirements, the method and timing of payments from distributors, examination of records, and other provisions necessary to ensure that the petroleum storage tank cleanup fee is properly and efficiently collected."

Severability: Section 6, Ch. 763, L. 1991, was a severability clause.

Case Notes

Statute Clear — Attorney Fees, Costs, Interest, and Unjust Enrichment Damages Not Recoverable. Cascade County v. Mont. Petroleum Tank Release Comp. Bd., 2022 MT 202, 410 Mont. 325, 518 P.3d 1280.

Contamination Originating From Separate Tanks at Same Site Qualifies as Multiple Releases: Cascade County and the Petroleum Tank Release Compensation Board stipulated that petroleum contamination discovered by the county consisted of contamination from at least four separate tanks at a storage site. Cascade County requested that the Department of Environmental Quality (DEQ) designate the site as a multiple-release site, but DEQ elected to treat the contamination as a single release for the purpose of reimbursement. The cost of remediation exceeded the statutory maximum of $982,500 for a single site. The hearings examiner in the contested case agreed with Cascade County that there were four separate releases, but the Board rejected this conclusion and the District Court declined to address the matter. On appeal, the Supreme Court agreed with Cascade County and the hearings examiner that under the definition of "release" and the stipulated facts, four releases occurred at the storage site. Cascade County v. Mont. Petroleum Tank Release Comp. Bd., 2021 MT 28, 403 Mont. 195, 480 P.3d 815.

Generally Applicable Statute of Limitations Not Applicable to Claims for Petroleum Spill Reimbursement — Specific Limitations Identified in Statute: The Montana Petroleum Tank Release Compensation Board found that Cascade County's claims for reimbursement for costs incurred remediating petroleum contamination were time-barred pursuant to the 5-year statute of limitations in 27-2-231. On initial appeal, the District Court disagreed. The Supreme Court affirmed, finding that 75-11-307 and 75-11-309 both specifically address the relevant action for relief by providing specific time limitations during which reimbursement compensation must be claimed. Therefore, 27-2-231 did not apply. Cascade County v. Mont. Petroleum Tank Release Comp. Bd., 2021 MT 28, 403 Mont. 195, 480 P.3d 815.

Diesel Fuel Properly Considered Pollutant for Purposes of Commercial Liability Insurance Policy Exclusion: A petroleum company held commercial liability and property insurance policies that contained a standard absolute pollution exclusion clause disclaiming coverage for spills resulting from pollutants, which were defined to include liquid irritants or contaminants. The company also held a coverage extension that provided coverage for expenses to extract pollutants from land or water. When a diesel fuel spill occurred on the company's property, the company sought insurance reimbursement under the policies and also submitted claims to the Montana Petroleum Tank Release Compensation Board for reimbursement for corrective action costs. The insurer denied the claim, and after the company subrogated the claim to the Board, the Board sought reimbursement from the insurer, but the insurer denied all reimbursement requests, so the Board sued to recover corrective costs from the insurer. The District Court concluded that diesel fuel was a pollutant and that coverage was therefore excluded under the commercial general liability portion of the policy. On appeal, the Board asserted that the court erred in denying coverage, but the Supreme Court affirmed. The terms of the pollution exclusion clause were not ambiguous, and when viewed from the objective perspective of the average consumer, diesel fuel was properly included in the definition of pollutant. The District Court correctly denied coverage under the commercial general liability portion of the policy disclaiming coverage for spills resulting from pollutants. Mont. Petroleum Tank Release Comp. Bd. v. Crumleys, Inc., 2008 MT 2, 341 M 33, 174 P3d 948 (2008), distinguished in High Country Paving, Inc. v. United Fire & Cas. Co., 2022 MT 72, 408 Mont. 202, 507 P.3d 1165, holding that a technical violation of the Property and Casualty Insurance Policy Language Simplification Act, 33-15-333 through 33-15-340, may not be used to invalidate unambiguous policy exclusions that would result in an increase of the risk assumed.

Attorney General's Opinions

Loss of Reimbursement Eligibility When Tank No Longer Complies With Applicable Law: The plain language of 75-11-308(1)(e) (now (1)(a)) renders ineligible for reimbursement any owner or operator whose tank falls out of compliance with applicable state and federal laws and rules, and eligibility is not restored even if the tank is subsequently brought back into compliance with applicable law. The statutory use of the phrase "remained in compliance" requires that a tank be in an ongoing state of compliance in order for it to be eligible for reimbursement. 48 A.G. Op. 9 (2000).

Limited Board Reimbursement Review Authority: The Petroleum Tank Release Compensation Board does not have discretion to deny a claim for reimbursement from the petroleum tank release cleanup fund for expenses actually, necessarily, and reasonably incurred in preparation or implementation of a corrective action plan approved by the Department of Health and Environmental Sciences [now Department of Environmental Quality], assuming the reimbursement criteria of 75-11-309(2) are met. 44 A.G. Op. 46 (1992).

75-11-308. Eligibility.

Compiler's Comments

2005 Amendment: Chapter 356 in (1)(b)(iii) near beginning after "that the" substituted "board determines was unknown to both the property owner and the department prior to its discovery if the owner applies to the department for a closure permit in accordance with 75-11-212 within 30 days of the date upon which the owner first had knowledge of the tank and closes the tank in accordance with the requirements of the permit before the permit expires" for "property owner had no previous knowledge of if the tank was in compliance with the applicable state and federal laws and rules that the board determines pertain to the prevention and mitigation of a petroleum release at the time that the release was discovered"; deleted former (1)(c) and (1)(d) that read: "(c) following the discovery of the release, the underground storage tank from which the release occurred was removed or had a valid permit pursuant to 75-11-509 and the petroleum storage tank remained in compliance with applicable state and federal laws and rules that the board determines pertain to prevention and mitigation of petroleum releases; and

(d) the owner or operator undertakes corrective action to respond to the release and the corrective action is undertaken, in accordance with a corrective action plan approved by the department, from the time of discovery until the release is resolved"; deleted former (3) that read: "(3) When, subsequent to the discovery of a release, an owner or operator fails to remain in compliance as required by subsection (1)(c) or fails to conduct corrective action as required by subsection (1)(d) and is issued a violation letter by the department, all reimbursement of claims submitted after the date of the violation letter must be suspended. Upon a determination by the department that all violations identified in the violation letter have been corrected, all suspended and future claims may be reimbursed according to criteria established by the board. In determining the amount of reimbursement, if any, the board may consider the effect and duration of the noncompliance"; and made minor changes in style. Amendment effective July 1, 2005.

Saving Clause: Section 6, Ch. 356, L. 2005, was a saving clause.

2003 Amendment: Chapter 245 in (1)(a) inserted conditions for eligibility for reimbursement; deleted former (1)(b) and (1)(c) that read: "(b) the department is notified of the release in the manner and within the time provided by law or rule;

(c) the department has been notified of the existence of the tank in the manner required by department rule or has waived the requirement for notification"; in (1)(c) at beginning substituted "following the discovery" for "with the exception", after "of the release" substituted "the underground storage tank from which the release occurred was removed or had a valid permit pursuant to 75-11-509 and the petroleum storage tank remained in compliance" for "the operation and management of the tank complied", and at end deleted "when the release was discovered and remained in compliance following discovery of the release"; and made minor changes in style. Amendment effective October 1, 2003.

Saving Clause: Section 8, Ch. 245, L. 2003, was a saving clause.

2001 Amendment: Chapter 112 inserted (3) requiring suspension of all claim reimbursements submitted after date of violation letter when owner or operator fails to maintain compliance or to conduct corrective action subsequent to release discovery, providing for reimbursement of suspended and future claims upon determination of violation corrections, and authorizing board to consider noncompliance effect and duration in determining reimbursements. Amendment effective October 1, 2001.

Saving Clause: Section 3, Ch. 112, L. 2001, was a saving clause.

Severability: Section 4, Ch. 112, L. 2001, was a severability clause.

1999 Amendment: Chapter 420 in middle of (1))(e) after "rules" inserted "that the board determines pertain to prevention and mitigation of petroleum releases", after "release" substituted "was discovered" for "occurred", and after "following" substituted "discovery" for "detection"; inserted (1)(f) providing owner or operator is eligible for reimbursement if corrective action undertaken to respond to release according to approved plan from time of discovery until release is resolved; at end of (2)(c) inserted exception clause; and made minor changes in style. Amendment effective April 23, 1999.

Saving Clause: Section 3, Ch. 420, L. 1999, was a saving clause.

Applicability: Section 5, Ch. 420, L. 1999, provided: "[Section 2] [75-11-308] applies to claims for reimbursement initially filed with the petroleum tank release compensation board on or after [the effective date of this act]." Effective April 23, 1999.

1993 Amendment: Chapter 339 near middle of (1), before "eligible costs", inserted "the applicable percentage as provided in 75-11-307(4)(a) and (4)(b)". Amendment effective April 13, 1993.

Preamble: The preamble attached to Ch. 339, L. 1993, provided: "WHEREAS, the 1993 Legislature found that petroleum storage tanks and associated pipes connected to petroleum storage tanks must be regulated in order to protect public health and safety, the health of living organisms, and the environment; and

WHEREAS, the Department of Health and Environmental Sciences [now Department of Environmental Quality] adopted rules in 1989 that included design and construction requirements for petroleum storage tanks and associated pipes; and

WHEREAS, double-walled construction of petroleum storage tanks and associated pipes should be encouraged because it provides superior prevention of releases of regulated substances to the environment over the operational life of a petroleum storage tank system as well as superior containment of regulated substances that are released from the interior vessel until the substances can be detected and removed."

Applicability: Section 6, Ch. 339, L. 1993, provided: "[This act] applies to releases discovered on or after October 1, 1993, from properly designed and installed double-walled petroleum storage tank systems."

1991 Amendments: Chapter 389 at end of (1)(c) inserted "or has waived the requirement for notification". Amendment effective July 1, 1991.

Chapter 763 in (2) inserted "from the petroleum tank release cleanup fund"; and deleted former (2)(e) that read: "(e) a farm or residential tank with a capacity of 1,100 gallons or less that is used for storing motor fuel for noncommercial purposes or a tank used for storing heating oil for consumptive use on the premises where stored". Amendment effective May 15, 1991.

Saving Clause: Section 5, Ch. 389, L. 1991, provided: "Nothing in [this act] applies to alter a claim for reimbursement that was filed before [the effective date of this act] or that arose pursuant to a corrective action plan approved by the department before [the effective date of this act]." Effective July 1, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 763, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the petroleum tank release compensation board, the department of health and environmental sciences [now department of environmental quality], and the department of revenue for the adoption of rules authorized by the bill. The petroleum tank release compensation board shall adopt rules that:

(1) govern submission of claims from owners and operators to the board and to the department of health and environmental sciences [now department of environmental quality] for reimbursement from the petroleum tank release cleanup fund;

(2) establish procedures for determining eligibility of tank owners and operators for reimbursement from the petroleum tank release cleanup fund and the validity of claims; and

(3) are necessary for administration of the petroleum tank release cleanup fund and other provisions of this bill, provided that the rules may not conflict with the eligibility requirements and procedures provided for in this bill and Title 75, chapter 11, part 3; rules previously adopted under that part; and laws, rules, and procedures of the federal government or the department of health and environmental sciences [now department of environmental quality] pertaining to petroleum storage tank releases eligible for reimbursement from the petroleum tank release cleanup fund.

The department of health and environmental sciences [now department of environmental quality] may adopt rules or revise existing rules as necessary to implement and incorporate the provisions of this bill into the department's existing procedures and its requirements pertaining to releases from underground storage tanks.

The department of revenue shall adopt rules governing the collection of the petroleum storage tank cleanup fee, including reporting and recordkeeping requirements, the method and timing of payments from distributors, examination of records, and other provisions necessary to ensure that the petroleum storage tank cleanup fee is properly and efficiently collected."

Severability: Section 6, Ch. 763, L. 1991, was a severability clause.

Administrative Rules

ARM 17.56.508 Numbering petroleum releases.

Case Notes

Notification Requirement of Underground Tank Release Not Retroactive —Compensation Properly Denied: Plaintiff discovered a possible leak in an underground tank in 2002. Even though the 2001 version of this section and related administrative rules required notice to the Department of Environmental Quality within 24 hours of the occurrence of unusual operating conditions, plaintiff waited until after the 2003 amendment of this section, which eliminated the 24-hour notice provision, to report the possible leak. Plaintiff then sought reimbursement for the cleanup. The Petroleum Tank Release Compensation Board denied the request because plaintiff did not report the unusual operating conditions within 24 hours pursuant to the 2001 law in effect at the time that plaintiff noticed the possible spill. Plaintiff appealed denial of the compensation claim, but the District Court affirmed the Board's decision, so plaintiff appealed to the Supreme Court, which affirmed. Plaintiff asserted that the 2003 amendments to this section were to be applied retroactively. However, the retroactive applicability section in the 2003 bill did not include a reference to this section, so amendments to this section were not retroactive, and the savings clause provided that the amendments to this section did not affect duties that matured prior to the 2003 amendments. Thus, the 2001 version applied, and plaintiff's failure to report the spill within 24 hours rendered plaintiff ineligible for compensation. Town Pump, Inc. v. Petroleum Tank Release Comp. Bd., 2008 MT 15, 341 M 139, 176 P3d 1017 (2008).

Petroleum Release From Underground Disconnected Pipes — Eligibility for Cleanup Reimbursement — Portion of Administrative Rule Invalid: The former Department of Health and Environmental Sciences notified Safeway that its property had been identified as a source of petroleum contamination in the area where Safeway had previously removed some underground storage tanks and ordered Safeway to clean up the site pursuant to ARM 16.45.601 (renumbered ARM 17.56.601). Safeway discovered that the leakage was coming from pipes that were left underground during the tank removal. Safeway subsequently submitted to the Petroleum Tank Release Compensation Board an eligibility checklist and application for voluntary registration for reimbursement for costs of cleaning up the leak. The Board denied the request because the tank had been removed prior to the release detection and because ARM 16.47.314 (now repealed) required that the tank be in place when the release was discovered. The District Court held, and the Supreme Court affirmed, that the portion of ARM 16.47.314(1) that added additional requirements to the cleanup statutes was invalid and that Safeway should be compensated for cleanup costs. The Supreme Court analyzed the definition of underground storage tank in determining that nothing in the statutory language of 75-10-403 (before 1997 amendment) required that the underground storage tank itself must be in place on the date on which a petroleum release is discovered. The court also examined whether it is permissible and fair for two state entities, the Department and the Board, to use one statutory definition to reach two opposite conclusions. Despite the fact that the Department and Board are separate entities and the petroleum release cleanup statutes are separate from the reimbursement statutes, Safeway was entitled to be treated uniformly by both entities. The Department treated Safeway as the tank owner for cleanup requirements, and the Board was required to also treat Safeway as the tank owner for reimbursement purposes. Safeway, Inc. v. Mont. Petroleum Release Comp. Bd., 281 M 189, 931 P2d 1327, 54 St. Rep. 129 (1997).

Attorney General's Opinions

Loss of Reimbursement Eligibility When Tank No Longer Complies With Applicable Law: The plain language of subsection (1)(e) (now (1)a)) of this section renders ineligible for reimbursement any owner or operator whose tank falls out of compliance with applicable state and federal laws and rules, and eligibility is not restored even if the tank is subsequently brought back into compliance with applicable law. The statutory use of the phrase "remained in compliance" requires that a tank be in an ongoing state of compliance in order for it to be eligible for reimbursement. (See 2001 amendment.) 48 A.G. Op. 9 (2000).

75-11-309. Procedures for reimbursement of eligible costs — corrective action plans.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 754, L. 2023. Amendment effective May 22, 2023.

Saving Clause: Section 5, Ch. 754, L. 2023, was a saving clause.

2015 Amendment: Chapter 296 in (1)(d)(ii) in first sentence inserted "subject to 75-11-408(4)(b)". Amendment effective April 24, 2015.

Saving Clause: Section 10, Ch. 296, L. 2015, was a saving clause.

Severability: Section 11, Ch. 296, L. 2015, was a severability clause.

2011 Amendment: Chapter 189 inserted (1)(e) regarding petroleum mixing zone; in (1)(f) inserted second and third sentences regarding amendment of plan for petroleum mixing zone; and made minor changes in style. Amendment effective April 15, 2011.

2009 Amendment: Chapter 396 in (1)(i) and in (1)(i)(ii) inserted "properly designed and installed"; in (1)(i)(ii) at end deleted "as defined in 75-11-302"; deleted former (1)(i)(iii) that read: "(iii) that the double-walled tank system was properly installed and made of materials and constructed in accordance with applicable department regulations"; inserted (4)(b) requiring that a written request for a hearing be received by the board within 120 days; in (4)(c) at beginning inserted "If a written request is received within 120 days"; inserted (4)(d) providing that if a written request is not received within 120 days, the determination of the board is final; and made minor changes in style. Amendment effective October 1, 2009.

2005 Amendment: Chapter 356 inserted (1)(b) requiring continuing tank compliance following discovery of a release except for a tank for which a permit is sought under 75-11-308(1)(b)(iii) and that is closed within 120 days of discovery of the release; in (1)(f) near beginning after "implement the" substituted "corrective action plan or plans approved by the department until the release is resolved" for "approved plan"; inserted (2) regarding reimbursement of suspended and future claims; in (3)(b)(ii) inserted second through fourth sentences regarding suspension of reimbursement of certain pending and future claims; and made minor changes in style. Amendment effective July 1, 2005.

Saving Clause: Section 6, Ch. 356, L. 2005, was a saving clause.

2003 Amendment: Chapter 245 in (1)(d) after "the owner or operator" deleted "and the board" and at end inserted "and shall promptly submit a copy of the approved corrective action plan to the board"; at end of (1)(f)(i) deleted "The board shall forward each claim and appropriate documentation to the department. The department shall notify the board of any costs that the department considers not reimbursable because of any failure to meet the requirements of subsection (2). The department shall inform the owner or operator of any notification given to the board"; inserted (1)(f)(ii) and (1)(f)(iii) requiring board review of a claim to determine if it is for actual, reasonable, and necessary costs of responding to the release and implementing corrective action and allowing board to request comment from the department and the owner or operator if the board requires additional information; inserted (1)(f)(iv) requiring the department to notify the board if the department determines that an owner or operator is failing to properly implement a corrective action plan; and made minor changes in style. Amendment effective October 1, 2003.

Saving Clause: Section 8, Ch. 245, L. 2003, was a saving clause.

1997 Amendment: Chapter 112 near end of second sentence of (1)(e) deleted reference to Title 75, chapter 10, part 4, and inserted reference to Title 75, chapter 11, part 5; and made minor changes in style.

Saving Clause: Section 38(1), Ch. 112, L. 1997, was a saving clause.

1993 Amendments — Composite Section: Chapter 339 inserted (1)(h) regarding documentation when the release is claimed to have originated from a double-walled tank system; and made minor changes in style. Amendment effective April 13, 1993.

Chapter 355 in second sentence of (3), after "of the board", inserted "or as otherwise permitted under the Montana Administrative Procedure Act"; and made minor changes in style.

A style change in (1)(a) was slightly different in the two chapters. The codifier chose the more appropriate of the two.

Preamble: The preamble attached to Ch. 339, L. 1993, provided: "WHEREAS, the 1993 Legislature found that petroleum storage tanks and associated pipes connected to petroleum storage tanks must be regulated in order to protect public health and safety, the health of living organisms, and the environment; and

WHEREAS, the Department of Health and Environmental Sciences [now Department of Environmental Quality] adopted rules in 1989 that included design and construction requirements for petroleum storage tanks and associated pipes; and

WHEREAS, double-walled construction of petroleum storage tanks and associated pipes should be encouraged because it provides superior prevention of releases of regulated substances to the environment over the operational life of a petroleum storage tank system as well as superior containment of regulated substances that are released from the interior vessel until the substances can be detected and removed."

Applicability: Section 6, Ch. 339, L. 1993, provided: "[This act] applies to releases discovered on or after October 1, 1993, from properly designed and installed double-walled petroleum storage tank systems."

1991 Amendment: In (1)(b), (1)(c)(i), in two places, (1)(c)(ii), and (1)(c)(iii) inserted references to tribal review of cleanup plans proposed within a tribal jurisdiction; in (1)(f), in second sentence, substituted "board" for "department", in third sentence, before "shall", substituted "board" for "department" and at end substituted "department" for "board", and at beginning of fourth sentence inserted "The department shall"; and made minor changes in style. Amendment effective July 1, 1991.

Saving Clause: Section 5, Ch. 389, L. 1991, provided: "Nothing in [this act] applies to alter a claim for reimbursement that was filed before [the effective date of this act] or that arose pursuant to a corrective action plan approved by the department before [the effective date of this act]." Effective July 1, 1991.

Case Notes

Generally Applicable Statute of Limitations Not Applicable to Claims for Petroleum Spill Reimbursement — Specific Limitations Identified in Statute: The Montana Petroleum Tank Release Compensation Board found that Cascade County's claims for reimbursement for costs incurred remediating petroleum contamination were time-barred pursuant to the 5-year statute of limitations in 27-2-231. On initial appeal, the District Court disagreed. The Supreme Court affirmed, finding that 75-11-307 and 75-11-309 both specifically address the relevant action for relief by providing specific time limitations during which reimbursement compensation must be claimed. Therefore, 27-2-231 did not apply. Cascade County v. Mont. Petroleum Tank Release Comp. Bd., 2021 MT 28, 403 Mont. 195, 480 P.3d 815.

Administrative Costs of Environmental Corrective Action Recoverable as Consequential Damages: A petroleum company held commercial liability and property insurance policies that contained a standard absolute pollution exclusion clause disclaiming coverage for spills resulting from pollutants. When a diesel fuel spill occurred on the company's property, the company sought insurance reimbursement under the policies and also submitted claims to the Montana Petroleum Tank Release Compensation Board for reimbursement for corrective action costs. The insurer denied the claim, and after the company subrogated the claim to the Board, the Board sought reimbursement from the insurer, but the insurer denied all reimbursement requests, so the Board sued to recover corrective costs from the insurer, including administrative costs of the corrective action. The District Court granted the Board's request for administrative costs, and on appeal, the Supreme Court affirmed. Because the Board, as subrogee, stood in the shoes of the company, as subrogor, and thus could not stand in a better position than the company, the court first considered what the company was entitled to recover for the insurer's breach of contract, noting that damages could be proximate or consequential. Pursuant to Safeco Ins. Co. v. Munroe, 165 M 185, 527 P2d 64 (1974), the company was entitled to recover its administrative costs as consequential damages if those costs were contemplated by both parties at the time that the contract was entered into and if administrative costs might naturally be expected to result from the insurer's refusal to indemnify. In this case, administrative costs were both anticipated and a natural result of the insurer's breach, so the company, and in turn the Board as subrogee, were entitled to administrative costs as consequential damages. Mont. Petroleum Tank Release Comp. Bd. v. Crumleys, Inc., 2008 MT 2, 341 M 33, 174 P3d 948 (2008).

Attorney General's Opinions

Invalidity of Rule Allowing Board to Approve and Modify Department-Approved Corrective Action Plans: The Petroleum Tank Release Compensation Board adopted ARM 16.47.342 (renumbered ARM 17.58.338 in 1996 and repealed in 1999), pursuant to rulemaking authority granted under 75-11-318(5), that arguably granted the Board authority to approve and modify corrective action plans previously approved by the Department of Health and Environmental Sciences (now Department of Environmental Quality). The rule was invalid because it granted the Board a substantive power of dual review and approval that conflicted with the Department's authority to administer the corrective action plan, as established in this section. 44 A.G. Op. 46 (1992).

Limited Board Reimbursement Review Authority: The Petroleum Tank Release Compensation Board does not have discretion to deny a claim for reimbursement from the petroleum tank release cleanup fund for expenses actually, necessarily, and reasonably incurred in preparation or implementation of a corrective action plan approved by the Department of Health and Environmental Sciences (now Department of Environmental Quality), assuming the reimbursement criteria of subsection (2) of this section are met. 44 A.G. Op. 46 (1992).

75-11-312. Review of corrective action plans and claims.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 3, Ch. 754, L. 2023. Amendment effective May 22, 2023.

Saving Clause: Section 5, Ch. 754, L. 2023, was a saving clause.

2005 Amendment: Chapter 356 in (3) near middle after "75-11-309" substituted "(3)(a)" for "(2)(a)" and at end after "75-11-309" substituted "(4)" for "(3)"; and made minor changes in style. Amendment effective July 1, 2005.

Saving Clause: Section 6, Ch. 356, L. 2005, was a saving clause.

Saving Clause: Section 8, Ch. 245, L. 2003, was a saving clause.

Effective Date: This section is effective October 1, 2003.

75-11-313. Petroleum tank release cleanup fund.

Compiler's Comments

2003 Amendment: Chapter 245 in (1) in third sentence inserted reference to subsection (3)(b); in (3) in introductory clause inserted "As provided in 75-11-318"; in (3)(a) after "board" deleted "and department"; inserted (3)(b) relating to payment of actual and necessary department expenses associated with administration; and made minor changes in style. Amendment effective October 1, 2003.

Saving Clause: Section 8, Ch. 245, L. 2003, was a saving clause.

1997 Amendments: Chapter 42 deleted (4) that read: "(4)(a) The legislature may appropriate to the fund repayable advances as necessary to carry out the purposes of this part. The outstanding total of repayable advances may not exceed the amount the board estimates will be received by the fund from the petroleum storage tank cleanup fee during the next 24 months.

(b) Advances to the fund must be repaid and interest earned on advances must be paid to the general fund when determined appropriate by the board. However, all advances to the fund plus the interest earned must be repaid on or before December 31, 1995." Amendment effective March 12, 1997.

Chapter 115 inserted (2)(d) concerning loans from Board of Investments; in (3)(c), after "(4)", inserted "and any loan made pursuant to 17-6-225" and at end inserted "or loan"; at end of (4)(b) substituted "by the board within 24 months of receipt of the advance" for "on or before December 31, 1995" (voided by Ch. 42 amendment); inserted (4) concerning loans from Board of Investments; and made minor changes in style. Amendment effective July 1, 1997.

Code Commissioner Correction: Pursuant to sec. 314, Ch. 42, L. 1997, in (3)(c), after "advance", the Code Commissioner deleted "made under subsection (4)" to eliminate the reference to subsection (4) that was deleted by sec. 272, Ch. 42, L. 1997.

1993 Amendment: Chapter 543 in second sentence of (1), after "17-7-502", inserted remainder of second sentence and third sentence that read: "for the purposes provided for under subsections (3)(b) and (3)(c). Administrative costs under subsection (3)(a) must be paid pursuant to a legislative appropriation." Amendment effective July 1, 1993.

Effective Date: Section 16, Ch. 528, L. 1989, provided that this section is effective July 1, 1989.

Case Notes

No Separate Period of Limitations Following Each Payment for Petroleum Cleanup Costs: The Montana Petroleum Tank Release Compensation Board asserted that a separate period of limitations occurs after each payment made by the Board to the owner of a petroleum facility to pay cleanup costs. The Supreme Court disagreed. The statute of limitations in these cases is not based on payment, request for payment, or denial of payment, but rather on when the claim accrues. Thus, the statute of limitations begins to run upon discovery of a leak and the occurrence of the subsequent obligation on the part of the owner to clean up the spilled petroleum, which triggers the owner's right to maintain an action under the applicable insurance policy. Mont. Petroleum Tank Release Comp. Bd. v. Federated Serv. Ins. Co., 2008 MT 194, 344 M 45, 185 P3d 998 (2008), distinguishing St. Paul Fire & Marine Co. v. Thompson, 152 M 396, 451 P2d 98 (1969), and Fulton v. Fulton, 2004 MT 240, 322 M 516, 97 P3d 573 (2004). See also Mont.

Petroleum Tank Release Comp. Bd. v. Empire Fire & Marine Ins. Co., 2008 MT 195, 344 M 54, 185 P3d 1021 (2008).

Authority of Petroleum Tank Release Compensation Board to Require Subrogation: This chapter provides the Montana Petroleum Tank Release Compensation Board with authority to seek reimbursement of corrective action expenses through subrogation, and by virtue of the right to statutory subrogation and pursuant to 75-11-318, the Board is authorized to adopt an administrative rule requiring tank owners to subrogate their claims against insurers. Mont. Petroleum Tank Release Comp. Bd. v. Crumleys, Inc., 2008 MT 2, 341 M 33, 174 P3d 948 (2008).

No Right to Subrogation From Insurance Loss Payee — Summary Judgment Proper: The Montana Petroleum Tank Release Compensation Board reimbursed a gas station owner $254,842 for expenses incurred in an environmental remediation, and the Board then sought to exercise subrogation rights against the owner's insurer and a lessee for reimbursement. The District Court granted summary judgment to the insurer after finding that the Board had no right of subrogation through the gas station owner, and the Board appealed. The Supreme Court noted that the gas station owner was at most a loss payee under its insurance policy, so the Board had no right of subrogation through the owner or through the corporation established to run the gas station, which had no part in funding the remediation or obligation to pay for any part of the remediation. The Board could not show that the owner's insurer was unjustly enriched by failing to pay a claim that the insurer did not owe, so subrogation did not apply. Thus, the Board had no right to subrogation through either the owner or the lessee to recover damages from the owner's insurer, and summary judgment was proper. Mont. Petroleum Tank Release Comp. Bd. v. Capitol Indem. Co., 2006 MT 133, 332 M 352, 137 P3d 522 (2006), distinguishing Swingley v. Riechoff, 112 M 59, 112 P2d 1075 (1941).

Subrogation Claim for Environmental Remediation Costs Barred by Statute of Limitations: The Montana Petroleum Tank Release Compensation Board submitted a claim to a gas station owner's insurer for reimbursement of environmental remediation expenses. The claim was denied, and the Board filed an action against the owner's insurer and the insurer of a subsequent lessee. In its denial letter, one insurer asserted that because 12 years elapsed before the Board brought its claim, the statute of limitations had run on the claim. The District Court granted summary judgment to both insurers, and the Board appealed. The Supreme Court noted that even if the Board had a claim against the lessee's insurer through subrogation of the owner's insurer's rights, the statute of limitations began to run from the time that all the elements accrued for the owner's insurer to file a claim with the lessee's insurer. The longest possible statute of limitations that could apply was 8 years, so the lessee's insurer was correct that any claim that the Board may have had against it was barred by the statute of limitations. Mont. Petroleum Tank Release Comp. Bd. v. Capitol Indem. Co., 2006 MT 133, 332 M 352, 137 P3d 522 (2006), affirmed in Mont. Petroleum Tank Release Comp. Bd. v. Federated Serv. Ins. Co., 2008 MT 194, 344 M 45, 185 P3d 998 (2008), and followed in Mont. Petroleum Tank Release Comp. Bd. v. Empire Fire & Marine Ins. Co., 2008 MT 195, 344 M 54, 185 P3d 1021 (2008).

75-11-314. Petroleum storage tank cleanup fee — collection — penalties — warrant for distraint — statute of limitations.

Compiler's Comments

2015 Amendment: Chapter 220 in (5) substituted "gasoline tax and special fuel tax" for "basic gasoline license tax", substituted "part 3 [renumbered into Title 15, chapter 70, part 4]" for "part 2", and substituted last two sentences for previous language that read: "The provisions of 15-70-103, 15-70-111, 15-70-202, 15-70-205, 15-70-206, 15-70-208 through 15-70-212, 15-70-221(2), and 15-70-232 apply to the fee. The provisions of 15-70-204, 15-70-207, 15-70-221(1), and 15-70-222 through 15-70-224 do not apply to the fee"; and made minor changes in style. Amendment effective October 1, 2015.

2009 Amendment: Chapter 396 deleted former (1)(a) that read: "(a) 1 cent for each gallon of gasoline distributed from July 1, 1989, through June 30, 1991"; in (1)(a) at end deleted "distributed after July 1, 1991"; in (1)(b), (1)(c), and (1)(d) at end deleted "distibuted after July 1, 1993"; in (4) in first and third sentences substituted "$10 million" for "$8 million" and in second sentence substituted "$6 million" for "$4 million"; and made minor changes in style. Amendment effective October 1, 2009.

2007 Amendment: Chapter 100 in (3) at beginning substituted "Ethanol" for "Alcohol" and after "sold as" substituted "ethanol-blended gasoline" for "gasohol". Amendment effective March 30, 2007.

1999 Amendment: Chapter 37 in (5) near beginning of last sentence after "provisions of" deleted "15-70-203"; and made minor changes in style. Amendment effective February 24, 1999.

Retroactive Applicability: Section 7, Ch. 37, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to the license year after December 31, 1998."

1993 Amendment: Chapter 298 in (1), near middle of first sentence, inserted "aviation gasoline, special fuel, or heating oil"; inserted (1)(c) setting fee for aviation gasoline; inserted (1)(d) setting fee for special fuel; inserted (1)(e) setting fee for heating oil; at beginning of (2), after "Gasoline", inserted "aviation gasoline, special fuel, and heating oil"; in (4), near beginning of second sentence after "balance", inserted "less claims anticipated for board approval within the next 90 days"; and made minor changes in style. Amendment effective July 1, 1993.

Effective Date — Applicability: Section 3, Ch. 298, L. 1993, provided: "[This act] is effective July 1, 1993, and applies to all tax revenue recorded on or after July 1, 1993."

Code Commissioner Correction: Substituted references to Department of Transportation for references to Department of Revenue, pursuant to the authority of sec. 62, Ch. 16, L. 1991, which allows the Code Commissioner to correct erroneous references. Amendment effective July 1, 1991.

Effective Date: Section 16, Ch. 528, L. 1989, provided that this section is effective July 1, 1989.

75-11-315. Nonimpairment by state.

Compiler's Comments

Effective Date: Section 7, Ch. 115, L. 1997, provided: "[This act] is effective July 1, 1997."

75-11-318. Powers and duties of board.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 4, Ch. 754, L. 2023. Amendment effective May 22, 2023.

Saving Clause: Section 5, Ch. 754, L. 2023, was a saving clause.

2005 Amendment: Chapter 356 in (2) near beginning after "75-11-309" substituted "(3)" for "(2)"; and inserted (7) requiring the board to conduct an analysis of the short-term and long-term viability of the fund and report its findings to the director of the department and the legislative auditor. Amendment effective July 1, 2005.

Saving Clause: Section 6, Ch. 356, L. 2005, was a saving clause.

2003 Amendment: Chapter 245 in (1) at end inserted sentence allowing board to hire its own staff to assist in the implementation of this part; in (4) at beginning deleted "The department shall provide staff support to the board as the department determines it is able"; in (4)(a) substituted language relating to payment for department expenses for providing assistance to the board and board review of department administrative budget proposals assessed against the fund for "department staff used"; in (4)(a)(iii) substituted "the actual and necessary administrative support provided to the board" for "the review and processing of claims for reimbursement submitted by owners and operators under this part"; in (4)(b) after "staff" inserted "expenses"; inserted (4)(c) through (4)(e) relating to third-party review of corrective action plans or claims, board staff expenses, and expenses of implementing board duties; and made minor changes in style. Amendment effective October 1, 2003.

Saving Clause: Section 8, Ch. 245, L. 2003, was a saving clause.

2001 Amendment: Chapter 112 inserted (5)(e) requiring board to adopt rules for criteria and reimbursement rates for owners and operators complying with violation letter; and made minor changes in style. Amendment effective March 23, 2001.

Saving Clause: Section 3, Ch. 112, L. 2001, was a saving clause.

Severability: Section 4, Ch. 112, L. 2001, was a severability clause.

1999 Amendment: Chapter 259 near beginning of (4) deleted "board may hire staff" and near end deleted "to pay its staff expenses"; inserted (4)(a)(iii) concerning claim reimbursement; and made minor changes in style. Amendment effective July 1, 1999.

1997 Amendment: Chapter 115 inserted (6) concerning loans from Board of Investments. Amendment effective July 1, 1997.

1991 Amendment: At end of (4) inserted "and to pay for department of transportation staff utilized for the collection of the petroleum storage tank cleanup fee"; and made minor change in style. Amendment effective May 15, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 763, L. 1991, provided: "A statement of intent is required for this bill in order to provide guidance to the petroleum tank release compensation board, the department of health and environmental sciences [now department of environmental quality], and the department of revenue for the adoption of rules authorized by the bill. The petroleum tank release compensation board shall adopt rules that:

(1) govern submission of claims from owners and operators to the board and to the department of health and environmental sciences [now department of environmental quality] for reimbursement from the petroleum tank release cleanup fund;

(2) establish procedures for determining eligibility of tank owners and operators for reimbursement from the petroleum tank release cleanup fund and the validity of claims; and

(3) are necessary for administration of the petroleum tank release cleanup fund and other provisions of this bill, provided that the rules may not conflict with the eligibility requirements and procedures provided for in this bill and Title 75, chapter 11, part 3; rules previously adopted under that part; and laws, rules, and procedures of the federal government or the department of health and environmental sciences [now department of environmental quality] pertaining to petroleum storage tank releases eligible for reimbursement from the petroleum tank release cleanup fund.

The department of health and environmental sciences [now department of environmental quality] may adopt rules or revise existing rules as necessary to implement and incorporate the provisions of this bill into the department's existing procedures and its requirements pertaining to releases from underground storage tanks.

The department of revenue shall adopt rules governing the collection of the petroleum storage tank cleanup fee, including reporting and recordkeeping requirements, the method and timing of payments from distributors, examination of records, and other provisions necessary to ensure that the petroleum storage tank cleanup fee is properly and efficiently collected."

Severability: Section 6, Ch. 763, L. 1991, was a severability clause.

Effective Date: Section 16, Ch. 528, L. 1989, provided that this section is effective April 13, 1989.

Administrative Rules

Title 17, chapter 58, ARM Montana Petroleum Tank Release Compensation Board.

Case Notes

Authority of Petroleum Tank Release Compensation Board to Require Subrogation: This chapter provides the Montana Petroleum Tank Release Compensation Board with authority to seek reimbursement of corrective action expenses through subrogation, and by virtue of the right to statutory subrogation and pursuant to this section, the Board is authorized to adopt an administrative rule requiring tank owners to subrogate their claims against insurers. Mont. Petroleum Tank Release Comp. Bd. v. Crumleys, Inc., 2008 MT 2, 341 M 33, 174 P3d 948 (2008).

Attorney General's Opinions

Invalidity of Rule Allowing Board to Approve and Modify Department-Approved Corrective Action Plans: The Petroleum Tank Release Compensation Board adopted ARM 16.47.342 (renumbered ARM 17.58.338 in 1996 and repealed in 1999), pursuant to rulemaking authority granted under subsection (5) of this section, that arguably granted the Board authority to approve and modify corrective action plans previously approved by the Department of Health and Environmental Sciences (now Department of Environmental Quality). The rule was invalid because it granted the Board a substantive power of dual review and approval that conflicted with the Department's authority to administer the corrective action plan, as established in 75-11-309. 44 A.G. Op. 46 (1992).

75-11-319. Rulemaking authority — department and department of transportation.

Compiler's Comments

Code Commissioner Correction: In (2) the code commissioner substituted "gasoline tax" for "gasoline license tax" to reflect the changes made by Ch. 220, L. 2015.

Code Commissioner Correction: Substituted references to Department of Transportation for references to Department of Revenue, pursuant to the authority of sec. 62, Ch. 16, L. 1991, which allows the Code Commissioner to correct erroneous references. Amendment effective July 1, 1991.

Effective Date: Section 16, Ch. 528, L. 1989, provided that this section is effective April 13, 1989.

Administrative Rules

Title 17, chapter 56, subchapter 5, ARM Underground storage tanks — release reporting, investigation, and confirmation.

Title 17, chapter 56, subchapter 6, ARM Underground storage tanks — release response and corrective action for tanks containing petroleum or hazardous substances.

75-11-322. Liability — defense and exclusions.

Compiler's Comments

Saving Clause: Section 7, Ch. 159, L. 2013, was a saving clause.

Severability: Section 8, Ch. 159, L. 2013, was a severability clause.

Effective Date: Section 10, Ch. 159, L. 2013, provided: "[This act] is effective on passage and approval." Approved April 5, 2013.

Part 4

Montana Petroleum Brownfields Revitalization Act

Part Compiler's Comments

Saving Clause: Section 10, Ch. 296, L. 2015, was a saving clause.

Severability: Section 11, Ch. 296, L. 2015, was a severability clause.

Effective Date: Section 12, Ch. 296, L. 2015, provided that this part is effective April 24, 2015.

75-11-403. Definitions — application.

Compiler's Comments

2023 Amendment: See 2023 Session Law amendment made by sec. 1, Ch. 57, L. 2023. Amendment effective March 16, 2023.

Saving Clause: Section 3, Ch. 57, L. 2023, was a saving clause.

75-11-408. Brownfields site eligibility at petroleum tank release sites — determinations and limitations.

Compiler's Comments

2023 Amendment: See 2023 Session Law amendment made by sec. 2, Ch. 57, L. 2023. Amendment effective March 16, 2023.

Saving Clause: Section 3, Ch. 57, L. 2023, was a saving clause.

Part 5

Montana Underground Storage Tank Act

Part Compiler's Comments

Saving Clause: Section 38(1), Ch. 112, L. 1997, was a saving clause.

Source: Chapter 112, L. 1997, amended the Montana Hazardous Waste and Underground Storage Tank Act codified in Title 75, ch. 10, part 4, to remove references to underground storage tanks and enacted the Montana Underground Storage Tank Act, codified in Title 75, ch. 11, part 5. In most instances, the amendment and enactment effectively transferred the identical provision between the two titles, chapters, and parts. Annotations, except amendment notes, concerning only underground storage tanks and not hazardous wastes have also been transferred between the two titles, chapters, and parts. For a history of the enactment and amendment of the Montana Hazardous Waste and Underground Storage Tank Act, the reader is referred to the amendment notes annotated under Title 75, ch. 10, part 4.

Part Attorney General's Opinions

Delegation of Enforcement Duties to Local Agents — Scope of Letters of Designation: Use of the nonrestrictive term "implementation" in 75-10-405(2)(c)(vi) (now in 75-11-505(8)) allows the Department of Health and Environmental Sciences (now Department of Environmental Quality) to delegate to properly designated local agents enforcement of the statutes and rules governing the underground storage tank program, and local agents may use any enforcement methods available to the Department. Letters of designation issued by the Department delegating authority to local agents are an appropriate method for delegation as long as the letters clearly define the rights, duties, and responsibilities of the Department and local agents. 43 A.G. Op. 65 (1990).

75-11-502. Intent, findings, and purpose.

Compiler's Comments

2003 Amendment: Chapter 361 inserted (1) relating to constitutional obligations and legislative intent; and made minor changes in style. Amendment effective April 16, 2003.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Severability: Section 39, Ch. 361, L. 2003, was a severability clause.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

75-11-503. Definitions.

Compiler's Comments

2013 Amendment: Chapter 141 in definition of underground storage tank in (a) substituted "(8)(b)(xii)" for "(8)(b)(xi)" and inserted (b)(xii)(B) regarding a facilitywide corrective action order; and made minor changes in style. Amendment effective April 3, 2013.

2011 Amendment: Chapter 189 inserted definition of petroleum mixing zone; and made minor changes in style. Amendment effective April 15, 2011.

2003 Amendment: Chapter 137 in definition of underground storage tank or tank inserted (a)(iii) to include ancillary equipment; and made minor changes in style. Amendment effective March 26, 2003.

Saving Clause: Section 5, Ch. 137, L. 2003, was a saving clause.

1997 Amendment — Coordination: Pursuant to sec. 2, Ch. 156, L. 1997, a coordination section, inserted in definition of underground storage tank, in (b), subsection (xii) relating to underground pipes connected to an aboveground storage tank.

Case Notes

Petroleum Release From Underground Disconnected Pipes — Eligibility for Cleanup Reimbursement — Portion of Administrative Rule Invalid: The former Department of Health and Environmental Sciences notified Safeway that its property had been identified as a source of petroleum contamination in the area where Safeway had previously removed some underground storage tanks and ordered Safeway to clean up the site pursuant to ARM 16.45.601 (renumbered ARM 17.56.601). Safeway discovered that the leakage was coming from pipes that were left underground during the tank removal. Safeway subsequently submitted to the Petroleum Tank Release Compensation Board an eligibility checklist and application for voluntary registration for reimbursement for costs of cleaning up the leak. The Board denied the request because the tank had been removed prior to the release detection and because ARM 16.47.314 (now repealed) required that the tank be in place when the release was discovered. The District Court held, and the Supreme Court affirmed, that the portion of ARM 16.47.314(1) that added additional requirements to the cleanup statutes was invalid and that Safeway should be compensated for cleanup costs. The Supreme Court analyzed the definition of underground storage tank in determining that nothing in the statutory language of 75-10-403 (before 1997 amendment) required that the underground storage tank itself must be in place on the date on which a petroleum release is discovered. The court also examined whether it is permissible and fair for two state entities, the Department and the Board, to use one statutory definition to reach two opposite conclusions. Despite the fact that the Department and Board are separate entities and the petroleum release cleanup statutes are separate from the reimbursement statutes, Safeway was entitled to be treated uniformly by both entities. The Department treated Safeway as the tank owner for cleanup requirements, and the Board was required to also treat Safeway as the tank owner for reimbursement purposes. Safeway, Inc. v. Mont. Petroleum Release Comp. Bd., 281 M 189, 931 P2d 1327, 54 St. Rep. 129 (1997).

75-11-504. Powers of department.

Compiler's Comments

1999 Amendment: Chapter 506 inserted (1)(d) authorizing department to enter property and permanently close underground storage tank in use after November 22, 1989, not permanently closed before December 23, 1998, and not initially installed pursuant to design requirements or upgraded pursuant to adopted rules; and made minor changes in style. Amendment effective April 28, 1999.

75-11-505. Administrative rules — underground storage tanks — petroleum mixing zones.

Compiler's Comments

2021 Amendment: Chapter 324 in (2)(b) in middle after "adopted" deleted "by the board of environmental review". Amendment effective July 1, 2021.

2011 Amendment: Chapter 189 inserted (2) regarding rules governing petroleum mixing zones; and made minor changes in style. Amendment effective April 15, 2011.

2007 Amendment: Chapter 51 in (7) at beginning after "a" deleted "penalty schedule and a". Amendment effective March 27, 2007.

Saving Clause: Section 4, Ch. 51, L. 2007, was a saving clause.

2003 Amendment: Chapter 137 in (4) after "issuance" inserted "nonissuance, renewal, nonrenewal, modification, revocation, suspension"; and in (6) near beginning of introductory clause after "annual fees" substituted "not to exceed $108 for a tank over 1,100 gallons and not to exceed $36 for a tank 1,100 gallons or less, for each tank, for tank registration" for "not to exceed $70 for a tank over 1,100 gallons and not to exceed $20 for a tank 1,100 gallons or less, per tank, for tank registration". Amendment effective March 26, 2003.

Saving Clause: Section 5, Ch. 137, L. 2003, was a saving clause.

1999 Amendment: Chapter 506 inserted (4) authorizing department to adopt, amend, or repeal rules related to procedures and standards for issuance and enforcement of permits authorizing underground storage tank operation; in first sentence in (6) substituted "annual fees, not to exceed $70" for "fees, not to exceed $50" and after "for tank" substituted "registration" for "notification and permits" and inserted second sentence authorizing department to prorate fees over 12 months for scheduling staggered renewal dates; and made minor changes in style. Amendment effective April 28, 1999.

Saving Clause — Rules: Section 38(2), Ch. 112, L. 1997, provided: "Rules adopted pursuant to 75-10-405 that are in effect on [the effective date of this act] [effective October 1, 1997] continue in effect until amended or repealed pursuant to 75-10-405 or [section 5] [75-11-505]."

1993 Statement of Intent: The statement of intent attached to Ch. 281, L. 1993, provided: "A statement of intent is required for this bill because the bill gives the department of health and environmental sciences [now department of environmental quality] authority to adopt administrative rules. The legislature intends that the administrative penalties provided by this bill be used to encourage compliance with the Montana underground storage tank laws and rules by allowing more timely and efficient processing of enforcement actions without the need for seeking a higher penalty through district court. To promote these goals, the department should develop rules that provide for a range of penalties for specific violations, the form for notice of violation, an expedited appeal, and a penalty mitigation process. In doing so, the department shall ensure that its rules and penalty schedule are consistent with the criteria set forth in [section 3] [75-11-525]. The department shall ensure that the rules, the penalty schedule, and a statement of the department's enforcement policy are disseminated to the regulated community."

Applicability: Section 6, Ch. 281, L. 1993, provided: "[This act] applies to all department of health and environmental sciences' [now department of environmental quality] notices served on alleged violators pursuant to [section 3] [75-11-525] beginning October 1, 1993, or on the date of adoption of the department's rules under 75-10-405(2)(c)(vi) [75-11-505(6)], whichever is earlier."

1989 Statement of Intent: The statement of intent attached to Ch. 384, L. 1989, provided: "It is the intent of the legislature that the department of health and environmental sciences [now department of environmental quality] adopt rules setting forth corrective action requirements for releases from underground storage tanks and standards for tank closures.

It is the intent of the legislature that the department have the authority to develop and implement a schedule of fees to be collected for underground storage tank notifications and permits. The fees should be set at a level to defray state and local costs of implementing an underground storage tank program.

It is the intent of the legislature that the department be able to delegate authority and funds to local agents for inspections and for other duties related to the underground storage tank program.

It is the intent of the legislature that the underground storage tank program be implemented in a manner consistent with rules adopted by the state fire marshal [now state fire prevention and investigation program of the department of justice] as they relate to underground storage tanks; that the program not duplicate inspections and existing regulatory efforts conducted under the uniform fire code; and that the department and local health and fire officials work together cooperatively in implementing a program for the prevention of leakage from underground storage tanks."

1985 Statement of Intent: The statement of intent attached to Ch. 633, L. 1985, provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the department of health and environmental sciences (DHES) [now department of environmental quality (DEQ)]. House Bill 676 [Ch. 633, L. 1985] adds petroleum products and certain hazardous substances stored in underground tanks as a new category of materials which may be regulated under the Montana Hazardous Waste Act (MHWA).

The DHES [now DEQ] has been increasingly involved in the cleanup of ground water problems caused by leaking underground tanks. At the national level, congress amended the federal Resource Conservation and Recovery Act of 1976 (RCRA) in November 1984 to include regulation of underground storage tanks and required the environmental protection agency (EPA) to develop a regulatory program for tanks. Since the DHES [now DEQ] now administers the existing RCRA program in Montana, it is likely that the state (through DHES) [now DEQ] will want to assume the RCRA program for underground tanks as well. Moreover, in the event that the EPA does not adopt a program adequate for Montana or fails to develop a program in a timely fashion, the DHES [now DEQ] should have the authority to establish the state's own program to meet the needs of Montana. House Bill 676 will grant the DHES [now DEQ] the authority to assume the EPA tank program to be developed under RCRA or to establish a state program independent of RCRA.

Whether DHES [now DEQ] follows the federal RCRA program or develops its own state program, it is the intent of the legislature that administrative rules that DHES [now DEQ] may adopt for underground storage tanks need not be equivalent to the comparable federal regulations to be developed by the EPA under RCRA. Rather, in view of the growing number and severity of environmental problems related to underground storage tanks in Montana, the legislature intends to grant DHES [now DEQ] the authority to establish a regulatory program for underground tanks whether or not it may include elements more stringent than any federal requirements and whether or not the EPA has established a tank program under RCRA.

The legislature intends that the rules developed by DHES [now DEQ] include requirements for:

(1) the design, construction, and installation of underground tanks in a manner that will prevent tank leakage;

(2) reporting by tank owners and operators;

(3) leak prevention and detection;

(4) corrective actions by tank owners and operators if tank leakage does occur; and

(5) financial responsibility of tank owners and operators for corrective action and compensation to third parties for damages resulting from release of regulated substances from underground tanks." (The substance of Ch. 633, L. 1985, was deleted from 75-10-405 and enacted as this section by Ch. 112, L. 1997.)

Administrative Rules

Title 17, chapter 56, ARM Underground storage tanks — petroleum and chemical substances.

Attorney General's Opinions

Delegation of Enforcement Duties to Local Agents — Scope of Letters of Designation: Use of the nonrestrictive term "implementation" in 75-10-405(2)(c)(vi) (now in this section) allows the Department of Health and Environmental Sciences (now Department of Environmental Quality) to delegate to properly designated local agents enforcement of the statutes and rules governing the underground storage tank program, and local agents may use any enforcement methods available to the Department. Letters of designation issued by the Department delegating authority to local agents are an appropriate method for delegation as long as the letters clearly define the rights, duties, and responsibilities of the Department and local agents. 43 A.G. Op. 65 (1990).

75-11-508. Corrective action — petroleum mixing zones.

Compiler's Comments

2021 Amendment: Chapter 324 in (5) near end after "adopted" deleted "by the board"; in (6)(a) substituted "is considered resolved" for "is considered to be resolved"; and made minor changes in style. Amendment effective July 1, 2021.

2015 Amendment: Chapter 107 in (3) near middle inserted "a restrictive covenant, or another institutional control approved by the department"; deleted former (3)(b) that read: "(b) unconfined aquifer"; and made minor changes in style. Amendment effective March 23, 2015.

Effective Date: Section 7, Ch. 189, L. 2011, provided that this section is effective on passage and approval. Approved April 15, 2011.

Administrative Rules

ARM 17.56.1601 UST systems with field constructed tanks and airport hydrant fuel distribution systems.

75-11-509. Inspections — permits.

Compiler's Comments

2005 Amendment: Chapter 20 in (8) at beginning of fourth sentence deleted "Except as provided in subsection (9)"; deleted former (9) that read: "(9) The department may issue and renew permits for tanks that are not in full compliance with the operation and maintenance requirements of this part and rules adopted pursuant to this part only if the department requires, in a compliance order issued pursuant to 75-11-512 or 75-11-525, that the noncompliance be corrected at the earliest practicable time. The department may also take other enforcement actions, including actions for penalties under this chapter, and may pursue any other remedy available to the department to address noncompliance with this part or with rules, permits, or orders issued pursuant to this part"; and made minor changes in style. Amendment effective March 18, 2005.

2003 Amendment: Chapter 137 in (1) near beginning after "operator of an" inserted "active"; inserted (2) requiring an owner or operator of an inactive tank to comply with certain requirements; inserted (3) allowing the department to authorize temporary permits; inserted (4)(b) requiring rules for testing, inspection, recordkeeping, and reporting for inactive tanks; in (8) at beginning of fourth sentence inserted "Except as provided in subsection (9), prior to issuing or renewing a permit, the department shall determine, on the basis of the inspection report and other relevant information, that"; inserted (9) allowing the permitting of noncompliant tanks under certain circumstances; inserted (10) allowing the department to not issue or renew a permit for a tank in cases of significant noncompliance and setting out a process for a contested case hearing on the decision; and made minor changes in style. Amendment effective March 26, 2003.

Saving Clause: Section 5, Ch. 137, L. 2003, was a saving clause.

2001 Amendment: Chapter 244 in (1)(c) near beginning inserted "and for a period of 3 years", near middle inserted "was completed", and at end inserted "and whose name or signature was on the permit required by 75-11-212"; deleted former (1)(c)(ii) through (1)(c)(iv) that read: "(ii) an employee of the installer who installed or modified the tank;

(iii) an employee of the person whose employee installed or modified the tank; or

(iv) if the person that installed or modified the tank through an installer employee is a corporation or other artificial person, a person that owns or is owned by that artificial person"; and made minor changes in style. Amendment effective April 16, 2001.

Effective Date: Section 16(2), Ch. 506, L. 1999, provided that this section is effective January 1, 2000.

Administrative Rules

ARM 17.56.204 Secondary containment, under-dispenser containment, and interstitial monitoring.

ARM 17.56.306 Periodic testing of spill prevention equipment and containment sumps — periodic inspection of overfill prevention equipment.

ARM 17.56.307 Periodic operation and maintenance walkthrough inspections.

ARM 17.56.308 Operating permit required.

ARM 17.56.309 Requirements for compliance inspections.

ARM 17.56.311 Permanent nonexpiring tag.

ARM 17.56.312 Delivery prohibition.

ARM 17.56.1601 UST systems with field constructed tanks and airport hydrant fuel distribution systems.

75-11-512. Administrative enforcement.

Compiler's Comments

2007 Amendment: Chapter 51 in (1) at end of fifth sentence after "date of" substituted "receipt" for "mailing". Amendment effective March 27, 2007.

Saving Clause: Section 4, Ch. 51, L. 2007, was a saving clause.

1999 Amendment: Chapter 506 inserted (5) authorizing department to enter property and temporarily close violating underground storage tank and authorizing permanent tank closure; and made minor changes in style. Amendment effective April 28, 1999.

75-11-516. Civil penalties.

Compiler's Comments

2021 Amendment: Chapter 535 in (2) at end deleted "or, if mutually agreed on by the parties in the action, in the district court of the first judicial district, Lewis and Clark County". Amendment effective October 1, 2021.

2005 Amendment: Chapter 487 inserted (1)(b) relating to penalty factors; in (2) inserted third and fourth sentences relating to recovery of penalties in a district court action and the venue for the action; and made minor changes in style. Amendment effective January 1, 2006.

Saving Clause: Section 29, Ch. 487, L. 2005, was a saving clause.

75-11-517. Lien.

Compiler's Comments

Effective Date: Section 16(1) provided that this section is effective on passage and approval. Approved April 28, 1999.

75-11-518. Venue for legal actions.

Compiler's Comments

2021 Amendment: Chapter 535 at end deleted "or, if mutually agreed upon by the affected parties, in the first judicial district, Lewis and Clark County". Amendment effective October 1, 2021.

75-11-519. Liability — defense and exclusions.

Compiler's Comments

Saving Clause: Section 7, Ch. 159, L. 2013, was a saving clause.

Severability: Section 8, Ch. 159, L. 2013, was a severability clause.

Effective Date: Section 10, Ch. 159, L. 2013, provided: "[This act] is effective on passage and approval." Approved April 5, 2013.

75-11-521. Benchmarks — budget action taken if not met.

Compiler's Comments

2021 Amendment: See 2021 Session Law for amendment made by sec. 104, Ch. 261, L. 2021 Amendment effective April 20, 2021.

Severability: Section 6, Ch. 394, L. 2011, was a severability clause.

Effective Date: Section 8, Ch. 394, L. 2011, provided: "[This act] is effective July 1, 2011."

75-11-525. Administrative penalties for violations — appeals — venue.

Compiler's Comments

2021 Amendment: Chapter 535 in (3) in middle of last sentence after "it must be held in" deleted "Lewis and Clark County or"; and in (4) at end deleted "or, if mutually agreed on by the parties in the action, in the district court of the first judicial district, Lewis and Clark County". Amendment effective October 1, 2021.

2007 Amendment: Chapter 51 in (2)(g) at end after "assessed" deleted "and the time, place, and nature of any hearing"; deleted former (2)(h) that read: "(h) that a formal proceeding may be waived"; in (3) at beginning of first sentence substituted "A" for "The department shall provide each", after "section" substituted "may request" for "an opportunity for", and after "hearing" inserted "before the board" and deleted former fourth and fifth sentences and (3)(a), (3)(b), (3)(c), and (3)(d) that read: "This subsection does not apply until the department gives written notice, served personally or by certified mail, to the alleged violator or the violator's agent. For the purposes of this chapter, service by mail is complete on the day of receipt. The notice must state:

(a) the provision allegedly violated;

(b) the facts that constitute the alleged violation;

(c) the specific nature of any corrective action that the department requires, estimated costs of compliance with the action, and where to receive help to correct the alleged violation; and

(d) a timetable that a reasonable person would consider appropriate for compliance with the alleged violations"; deleted former (4) that read: "(4) The department shall publish a schedule of maximum and minimum penalties for specific violations. In determining appropriate penalties for violations, the department shall consider the gravity of the violations and the potential for significant harm to the public health or the environment. In determining the appropriate amount of penalty, if any, to be suspended upon correction of the condition that caused the penalty assessment, the department shall consider the cooperation and the degree of care exercised by the person assessed the penalty, how expeditiously the violation was corrected, and whether significant harm resulted to the public health or the environment from the violation"; and made minor changes in style. Amendment effective March 27, 2007.

Saving Clause: Section 4, Ch. 51, L. 2007, was a saving clause.

2005 Amendment: Chapter 487 inserted (1)(b) relating to penalty factors; in (5) inserted last sentence relating to the action brought in district court and the venue for the action; and made minor changes in style. Amendment effective January 1, 2006.

Saving Clause: Section 29, Ch. 487, L. 2005, was a saving clause.

1997 Amendment: Chapter 112 in first sentence of (1), in two places before "provisions" and before "rules", deleted "underground storage tank" and in two places substituted "this part" for "this chapter" and in fifth sentence, after "authorized by", deleted "Title 75, chapter 11, or by"; near end of (5) and near beginning of (6), after "under", deleted "Title 75, chapter 11, or"; and made minor changes in style.

Saving Clause: Section 38(1), Ch. 112, L. 1997, was a saving clause.

Applicability: Section 6, Ch. 281, L. 1993, provided: "[This act] applies to all department of health and environmental sciences' [now department of environmental quality] notices served on alleged violators pursuant to [section 3] [this section] beginning October 1, 1993, or on the date of adoption of the department's rules under 75-10-405(2)(c)(vi), whichever is earlier."

Effective Date: Section 7, Ch. 281, L, 1993, provided: "[This act] is effective on passage and approval." Approved April 7, 1993.

75-11-526. Underground storage tank special revenue account.

Compiler's Comments

1993 Amendment: Chapter 281 inserted (2)(c) relating to state's cost of administering the penalty program; and made minor changes in style. Amendment effective April 7, 1993.

Applicability: Section 6, Ch. 281, L. 1993, provided: "[This act] applies to all department of health and environmental sciences' [now department of environmental quality] notices served on alleged violators pursuant to [section 3] [75-11-525] beginning October 1, 1993, or on the date of adoption of the department's rules under 75-10-405(2)(c)(vi), whichever is earlier."

Effective Date: Section 15, Ch. 384, L. 1989, provided that this section is effective March 30, 1989.

Part 6
Contaminated Property Compensation and Restoration

Part Compiler's Comments

Nonseverability: Section 7, Ch. 409, L. 2009, was a nonseverability clause.

Effective Date: Section 8, Ch. 409, L. 2009, provided: "[This act] is effective on passage and approval." Approved April 28, 2009.

Applicability: Section 9, Ch. 409, L. 2009, provided: "[This act] applies to judicial proceedings begun on or after [the effective date of this act]." Effective April 28, 2009.

CHAPTER 15
LANDSCAPE MANAGEMENT

Chapter Attorney General's Opinions

Revenue Department Not Zoning Authority — Designation of Property for Assessment Purposes Only: The Department of Revenue is not a bona fide zoning authority that may designate an area as commercial for outdoor advertising purposes. A property designation made by the Department applies to tax assessment classifications only and may not be extended to zoning restrictions. 42 A.G. Op. 43 (1987).

Part 1
Outdoor Advertising

Part Administrative Rules

Title 18, chapter 6, subchapter 2, ARM Outdoor advertising.

Part Case Notes

Local Billboard Regulations Not Violative of Due Process Right to Notice and Opportunity to Be Heard: Plaintiff contended that city and county billboard regulations violated due process because they did not guarantee a hearing before deprivation of property. The Supreme Court disagreed. The Board of Adjustment was responsible for hearing appeals that allege an error related to enforcement of the ordinances. The Board was bound by known procedures and there was a right to appeal a Board decision to a court of record, so only under exceptional circumstances that did not apply to plaintiff could the city or county deprive someone of property without a hearing. The procedural safeguards provided for in the ordinances were sufficient and did not violate due process. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

Part Collateral References

Highway Beautification Act of 1965, 23 U.S.C. § 131.

75-15-102. Policy.

Compiler's Comments

1971 Title: The title to Ch. 2, 2nd Ex. L. 1971, read: "An act to provide for the control of outdoor advertising adjacent to interstate and primary highway systems in compliance with the Highway Beautification Act of 1965."

75-15-103. Definitions.

Compiler's Comments

2011 Amendment: Chapter 19 in definition of commercial or industrial activities after "means" deleted "for purposes of subsection (14)"; in (2) in second sentence substituted "interim zoning district or interim regulation" for "interim regulation or map". Amendment effective October 1, 2011.

1995 Amendments — Phrase Change: Section 6, Ch. 75, L. 1995, directed the Code Commissioner to change references in the MCA to Highway Commission to Transportation Commission. In this section, the Code Commissioner has made the change in the definition of Commission. Amendment effective July 1, 1995.

Chapter 510 in definition of unzoned commercial or industrial area, at end after "activities", deleted "and those lands directly opposite on the other side of the highway to the extent of the same dimensions and to a maximum depth of 660 feet when measured from the highway right-of-way; provided those lands on the opposite side of the highway are not deemed scenic or having aesthetic value as determined by the commission"; and made minor changes in style. Amendment effective April 21, 1995.

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

Administrative Rules

ARM 18.6.202 Definitions.

Case Notes

Land Designated as "Commercial or Industrial" Activity — Issuance of Billboard Permit Upheld: The plaintiffs sued the Department of Transportation, seeking to remove two billboards from a neighboring 270-acre parcel of land for which the Department had issued a permit under the Outdoor Advertising Act, Title 75, chapter 15, part 1. The plaintiffs argued that the activity was temporary and that the entire 270-acre parcel was not the site of an industrial activity since the parcel owners were allowed to mine only a small portion of the parcel. The District Court upheld the Department's decision, concluding that the issuance of the permit was not arbitrary, capricious, or in violation of the law. The Supreme Court affirmed, concluding that the Department based its decision to issue the permit on sufficient evidence: the business activities near the location of the billboards included both mining and construction operations and therefore constituted "commercial or industrial activities" within the meaning of the Act. Hobble Diamond Ranch, LLC v. Dept. of Transportation, 2012 MT 10, 363 Mont. 310, 268 P.3d 31.

75-15-104. More restrictive regulations preserved.

Case Notes

Commercial Versus Noncommercial Speech — Analysis to Determine Validity of Commercial Speech Restriction — Local Government Billboard Prohibitions Not Overreaching: Plaintiff petitioned for a declaratory judgment requesting that city and county zoning regulations for off-premises signs and billboards be declared unconstitutional and violative of the state Outdoor Advertising Act. The petition was denied and plaintiff appealed. The Supreme Court noted that under Metromedia, Inc. v. San Diego, 453 US 490 (1981), commercial and noncommercial speech enjoy different constitutional free speech protections, and that commercial speech is afforded less constitutional protection than noncommercial speech. Commercial speech may be regulated in situations in which noncommercial speech may not. In determining the validity of a commercial speech restriction, pursuant to Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 US 557 (1980): (1) commercial speech must concern a lawful activity and may not be misleading to be protected; (2) there must be a substantial government interest for adopting a commercial speech regulation; (3) if the speech is protected and a substantial government interest exists, the regulation must directly advance the asserted government objective; and (4) the regulation must reach no further than to achieve that objective. Despite subsequent holdings related to other forms of media, Metromedia remains the controlling law in billboard cases. Here, the first prong of the Metromedia test was not disputed. With regard to the second prong, the parties conceded that aesthetics and safety constituted substantial government interests. Further, the ordinances in question directly advanced the government's goal of reducing visual blight and traffic hazards, meeting the third prong of the test. Last, because the ordinances prohibited billboards only in residential areas and restricted billboard use in commercially zoned areas, speech was restricted no more than necessary to achieve the government objectives, so the fourth prong of the test was also met. Thus, the validity of the zoning ordinances was affirmed. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

Disparate Government Treatment of Outdoor Signs Not Violative of Equal Protection: Plaintiff contended that the disparate treatment of outdoor signs under city and county zoning ordinances was violative of equal protection because the city of Whitefish did not regulate its own "Welcome to Whitefish" sign in the same manner as other off-premises signs. The Supreme Court found no constitutional violation. In contrast to plaintiff's sign, the welcome sign did not advertise an establishment, merchandise, service, or entertainment located elsewhere. Further, the welcome sign fit within the official government sign exemption in the city ordinance. The city's disparate treatment of the signs did not violate equal protection guarantees because the signs in question were not of the same class. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

Local Billboard Regulations Not Violative of Due Process Right to Notice and Opportunity to Be Heard: Plaintiff contended that city and county billboard regulations violated due process because they did not guarantee a hearing before deprivation of property. The Supreme Court disagreed. The Board of Adjustment was responsible for hearing appeals that allege an error related to enforcement of the ordinances. The Board was bound by known procedures and there was a right to appeal a Board decision to a court of record, so only under exceptional circumstances that did not apply to plaintiff could the city or county deprive someone of property without a hearing. The procedural safeguards provided for in the ordinances were sufficient and did not violate due process. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

Local Ordinance Restricting Billboards Not Considered Unconstitutional Prior Restraint on Commercial Speech: Under Desert Outdoor Advertising, Inc. v. Moreno Valley, 103 F3d 814 (9th Cir. 1996), an ordinance or regulation that subjects protected speech to prior restraint without narrow, objective, and definite standards to guide permitting officials violates the federal constitutional right to free speech. The law may not condition the exercise of free speech on the unbridled discretion of permitting officials. In the case at bar, city and county ordinances governing billboards provided objective guidelines for the issuance of billboard permits that allowed permitting officials little discretion in deciding whether to grant a permit and thus did not create an unconstitutional prior restraint on speech. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

Local Ordinances Restricting Billboards Not Unconstitutionally Vague: Plaintiff contended that city and county zoning ordinances regulating billboards were vague and subject to inconsistent and arbitrary application. The Supreme Court cited Broers v. Dept. of Revenue, 237 M 367, 773 P2d 320 (1989), for the holding that a noncriminal statute or regulation is vague if a person of common intelligence must guess at its meaning, but is not vague simply because it can be dissected or subjected to different interpretations. The court went on to analyze the various provisions of the ordinances regarding political signs, holiday signs, and the distinction between offsite signs and billboards, but found that plaintiff failed to demonstrate that any of the definitions were unconstitutionally vague. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

75-15-105. Relaxation of regulations if federal law changed.

Compiler's Comments

1995 Amendment: Chapter 510 at end, after "regulation", deleted "however, in no event shall this part become more restrictive than is indicated herein by said federal action"; and made minor changes in style. Amendment effective April 21, 1995.

75-15-111. Outdoor advertising prohibited in proximity to highway — exceptions.

Compiler's Comments

1995 Amendment: Chapter 510 in (1)(e), in second sentence, inserted "is limited to two signs and"; inserted (4) concerning an outdoor advertising structure in existence as of April 21, 1995; and made minor changes in style. Amendment effective April 21, 1995.

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

1989 Amendment: Inserted (1)(g) creating exception for signs consistent with state and federal policy and designed to provide information as provided in motorist information sign program in Title 60, Ch. 5, part 5. Amendment effective July 1, 1989.

1981 Amendment: Inserted (1)(f) authorizing the erection of outdoor signs advertising cultural exhibits of nonprofit historic or arts organizations if the signs conform with federal regulations.

Case Notes

Land Designated as "Commercial or Industrial" Activity — Issuance of Billboard Permit Upheld: The plaintiffs sued the Department of Transportation, seeking to remove two billboards from a neighboring 270-acre parcel of land for which the Department had issued a permit under the Outdoor Advertising Act, Title 75, chapter 15, part 1. The plaintiffs argued that the activity was temporary and that the entire 270-acre parcel was not the site of an industrial activity since the parcel owners were allowed to mine only a small portion of the parcel. The District Court upheld the Department's decision, concluding that the issuance of the permit was not arbitrary, capricious, or in violation of the law. The Supreme Court affirmed, concluding that the Department based its decision to issue the permit on sufficient evidence: the business activities near the location of the billboards included both mining and construction operations and therefore constituted "commercial or industrial activities" within the meaning of the Act. Hobble Diamond Ranch, LLC v. Dept. of Transportation, 2012 MT 10, 363 Mont. 310, 268 P.3d 31.

Commercial Versus Noncommercial Speech — Analysis to Determine Validity of Commercial Speech Restriction — Local Government Billboard Prohibitions Not Overreaching: Plaintiff petitioned for a declaratory judgment requesting that city and county zoning regulations for off-premises signs and billboards be declared unconstitutional and violative of the state Outdoor Advertising Act. The petition was denied and plaintiff appealed. The Supreme Court noted that under Metromedia, Inc. v. San Diego, 453 US 490 (1981), commercial and noncommercial speech enjoy different constitutional free speech protections, and that commercial speech is afforded less constitutional protection than noncommercial speech. Commercial speech may be regulated in situations in which noncommercial speech may not. In determining the validity of a commercial speech restriction, pursuant to Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 US 557 (1980): (1) commercial speech must concern a lawful activity and may not be misleading to be protected; (2) there must be a substantial government interest for adopting a commercial speech regulation; (3) if the speech is protected and a substantial government interest exists, the regulation must directly advance the asserted government objective; and (4) the regulation must reach no further than to achieve that objective. Despite subsequent holdings related to other forms of media, Metromedia remains the controlling law in billboard cases. Here, the first prong of the Metromedia test was not disputed. With regard to the second prong, the parties conceded that aesthetics and safety constituted substantial government interests. Further, the ordinances in question directly advanced the government's goal of reducing visual blight and traffic hazards, meeting the third prong of the test. Last, because the ordinances prohibited billboards only in residential areas and restricted billboard use in commercially zoned areas, speech was restricted no more than necessary to achieve the government objectives, so the fourth prong of the test was also met. Thus, the validity of the zoning ordinances was affirmed. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

Disparate Government Treatment of Outdoor Signs Not Violative of Equal Protection: Plaintiff contended that the disparate treatment of outdoor signs under city and county zoning ordinances was violative of equal protection because the city of Whitefish did not regulate its own "Welcome to Whitefish" sign in the same manner as other off-premises signs. The Supreme Court found no constitutional violation. In contrast to plaintiff's sign, the welcome sign did not advertise an establishment, merchandise, service, or entertainment located elsewhere. Further, the welcome sign fit within the official government sign exemption in the city ordinance. The city's disparate treatment of the signs did not violate equal protection guarantees because the signs in question were not of the same class. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

Local Ordinance Restricting Billboards Not Considered Unconstitutional Prior Restraint on Commercial Speech: Under Desert Outdoor Advertising, Inc. v. Moreno Valley, 103 F3d 814 (9th Cir. 1996), an ordinance or regulation that subjects protected speech to prior restraint without narrow, objective, and definite standards to guide permitting officials violates the federal constitutional right to free speech. The law may not condition the exercise of free speech on the unbridled discretion of permitting officials. In the case at bar, city and county ordinances governing billboards provided objective guidelines for the issuance of billboard permits that allowed permitting officials little discretion in deciding whether to grant a permit and thus did not create an unconstitutional prior restraint on speech. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

Local Ordinances Restricting Billboards Not Unconstitutionally Vague: Plaintiff contended that city and county zoning ordinances regulating billboards were vague and subject to inconsistent and arbitrary application. The Supreme Court cited Broers v. Dept. of Revenue, 237 M 367, 773 P2d 320 (1989), for the holding that a noncriminal statute or regulation is vague if a person of common intelligence must guess at its meaning, but is not vague simply because it can be dissected or subjected to different interpretations. The court went on to analyze the various provisions of the ordinances regarding political signs, holiday signs, and the distinction between offsite signs and billboards, but found that plaintiff failed to demonstrate that any of the definitions were unconstitutionally vague. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

Attorney General's Opinions

Revenue Department Not Zoning Authority — Designation of Property for Assessment Purposes Only: The Department of Revenue is not a bona fide zoning authority that may designate an area as commercial for outdoor advertising purposes. A property designation made by the Department applies to tax assessment classifications only and may not be extended to zoning restrictions. 42 A.G. Op. 43 (1987).

75-15-112. Unlawful advertising.

Case Notes

Administrative Remedy Exhausted Before Abatement: Fact that nonconforming signs 600 feet from the highway are defined as public nuisances does not per se authorize County Attorney to abate in circumvention of administrative remedies within Department of Highways (now Department of Transportation) because judicial relief may not be sought until administrative remedies provided by statute have first been exhausted. State ex rel. Jones v. Giles, 168 M 130, 541 P2d 355, 32 St. Rep. 983 (1975).

75-15-113. Standards for permitted advertising.

Compiler's Comments

1995 Amendment: Chapter 510 in (1) substituted "672" for "1,200"; in (2) substituted "48" for "60"; in (3) substituted "The maximum height of the sign structure, including the sign face, is 30 feet, measured at a right angle from the surface of the roadway at the centerline of the interstate or primary highway" for "Maximum height, 40 feet as measured from the ground or, if the sign is attached to a structure, as measured from the base of the sign itself"; and made minor changes in style. Amendment effective April 21, 1995.

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

Administrative Rules

ARM 18.6.231 Off-premises sign standards.

Case Notes

Commercial Versus Noncommercial Speech — Analysis to Determine Validity of Commercial Speech Restriction — Local Government Billboard Prohibitions Not Overreaching: Plaintiff petitioned for a declaratory judgment requesting that city and county zoning regulations for off-premises signs and billboards be declared unconstitutional and violative of the state Outdoor Advertising Act. The petition was denied and plaintiff appealed. The Supreme Court noted that under Metromedia, Inc. v. San Diego, 453 US 490 (1981), commercial and noncommercial speech enjoy different constitutional free speech protections, and that commercial speech is afforded less constitutional protection than noncommercial speech. Commercial speech may be regulated in situations in which noncommercial speech may not. In determining the validity of a commercial speech restriction, pursuant to Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 US 557 (1980): (1) commercial speech must concern a lawful activity and may not be misleading to be protected; (2) there must be a substantial government interest for adopting a commercial speech regulation; (3) if the speech is protected and a substantial government interest exists, the regulation must directly advance the asserted government objective; and (4) the regulation must reach no further than to achieve that objective. Despite subsequent holdings related to other forms of media, Metromedia remains the controlling law in billboard cases. Here, the first prong of the Metromedia test was not disputed. With regard to the second prong, the parties conceded that aesthetics and safety constituted substantial government interests. Further, the ordinances in question directly advanced the government's goal of reducing visual blight and traffic hazards, meeting the third prong of the test. Last, because the ordinances prohibited billboards only in residential areas and restricted billboard use in commercially zoned areas, speech was restricted no more than necessary to achieve the government objectives, so the fourth prong of the test was also met. Thus, the validity of the zoning ordinances was affirmed. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

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75-15-121. Commission rules authorized.

Administrative Rules

Title 18, chapter 6, subchapter 2, ARM Outdoor advertising.

75-15-122. Permits required — identification tags — preexisting structures — fees.

Compiler's Comments

1995 Amendment: Chapter 510 in (1)(a), at end, substituted "a nonrefundable, initial fee" for "an initial fee of $6"; in (1)(b), after "payment of", substituted "a fee" for "$3"; inserted (1)(c) concerning establishing fees by rule based on square footage of signs; and made minor changes in style. Amendment effective April 21, 1995.

1995 Statement of Intent: The statement of intent attached to Ch. 510, L. 1995, provided: "A statement of intent is required for this bill because the highway commission [now transportation commission] is directed in 75-15-122 to adopt rules relating to the fees charged for the issuance and renewal of certain permits for outdoor advertising signs. It is anticipated that the department will adopt fees commensurate with the costs of administering and enforcing the issuance and renewal of the sign permits.

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

Administrative Rules

ARM 18.6.211 Permits.
ARM 18.6.212 Permit applications — new sign sites.
ARM 18.6.213 Permit attachment.
ARM 18.6.214 Renewal of permits.

75-15-123. Acquisition of outdoor advertising rights — compensation.

Compiler's Comments

2001 Amendment: Chapter 125 in (1) at end substituted "Title 70, chapter 30" for "the laws of the state"; and made minor changes in style. Amendment effective October 1, 2001.

Section Not Codified: Part of subsection (a) of section 32-4723, R.C.M. 1947, was not codified in the MCA in its entirety; the part which was not codified was considered redundant. The omitted clause has not been repealed and is still valid law. Citation may be made to sec. 9, Ch. 2, 2nd Ex. L. 1971; as amended by sec. 165, Ch. 316, L. 1974; as amended by sec. 6, Ch. 216, L. 1975.

75-15-131. Entry to inspect — notice of unlawful advertising — remedial action.

Case Notes

Administrative Remedy Exhausted Before Abatement: Fact that nonconforming signs 600 feet from the highway are defined as public nuisances does not per se authorize County Attorney to abate in circumvention of administrative remedies within Department of Highways (now Department of Transportation) because judicial relief may not be sought until administrative remedies provided by statute have first been exhausted. State ex rel. Jones v. Giles, 168 M 130, 541 P2d 355, 32 St. Rep. 983 (1975).

75-15-132. False application or disrepair of structure — remedial action.

Administrative Rules

ARM 18.6.251 Repair of nonconforming signs.

Part 2

Junkyards

75-15-203. Definitions.

Compiler's Comments

1995 Amendment — Phrase Change: Section 6, Ch. 75, L. 1995, directed the Code Commissioner to change references in the MCA to Highway Commission to Transportation Commission. In this section, the Code Commissioner has made the change in the definition of interstate system. Amendment effective July 1, 1995.

1983 Amendment: Deleted former (1), which read: "Automobile graveyard means any establishment or place of business which is maintained, used, or operated for storing, keeping, buying, or selling wrecked, scrapped, ruined, or dismantled motor vehicles or motor vehicle parts."; in (2) after "debris or waste" deleted from definition "junked, dismantled, or wrecked automobiles (or parts thereof)"; in (3) after "or selling junk" deleted "or for the maintenance or operation of an automobile graveyard or a garbage dump or sanitary fill"; and inserted final phrase excluding from the definition of junkyard a garbage dump or sanitary landfill regulated under The Montana Solid Waste Management Act.

1983 Saving Clause: Section 6, Ch. 340, L. 1983, was a saving clause. Chapter 340, L. 1983, became effective October 1, 1983.

1983 Severability Clause: Section 7, Ch. 340, L. 1983, was severability clause.

75-15-204. Agreements with the United States.

Compiler's Comments

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

75-15-205. Injunction.

Compiler's Comments

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

75-15-214. License for junkyards.

Compiler's Comments

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

1983 Amendment: In (1) deleted from end "that is not a motor vehicle wrecking facility as defined in chapter 10, part 5, of this title"; in (2) deleted "Nothing in 75-15-212 through 75-15-214 prohibits" from the beginning of sentence; and substituted "may acquire" for "from acquiring" and "may pay" for "paying".

Saving and Severability Clauses: See compiler's comments under 75-15-203 concerning Ch. 340, L. 1983.

75-15-215. Restrictions as to location.

Compiler's Comments

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

Case Notes

License for Junkyard Despite Lack of Shield: Although applicant's facility did not have the required shielding, when this was due to no fault of his own and when the applicant had no legal duty himself to build the shield, the Department of Health and Environmental Sciences (now Department of Environmental Quality) may properly be mandated to issue a license for the facility. Cain v. Dept. of Health & Environmental Sciences, 177 M 448, 582 P2d 332, 35 St. Rep. 1056 (1978).

75-15-222. Rules governing screening.

Compiler's Comments

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

1983 Amendment: Deleted former (1), which read: "The department of health and environmental sciences shall adopt rules governing the screening or shielding of motor vehicle wrecking facilities as provided in chapter 10, part 5, of this title."; in (2) deleted "additional" before "screening"; and inserted "in addition to that required by rules of the department of highways as of July 1, 1979,".

Saving and Severability Clauses: See compiler's comments under 75-15-203 concerning Ch. 340, L. 1983.

75-15-223. Authority to acquire interest in land for screening and removal of junkyards, motor vehicle graveyards, motor vehicle wrecking facilities, garbage dumps, and sanitary landfills.

Compiler's Comments

2001 Amendment: Chapter 125 in (1) at end of last sentence inserted list of facilities that may be screened; in (3) inserted last sentence relating to citations for exercise of condemnation; and made minor changes in style. Amendment effective October 1, 2001.

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

1983 Amendment: In (2), inserted "motor vehicle graveyards, motor vehicle wrecking facilities, garbage dumps, or sanitary landfills" before "which were either lawfully:"; in (3) substituted "facility" for "junkyard"; inserted (4) requiring any site chosen by the Department for relocation of a garbage dump or sanitary landfill to be approved as a solid waste management system site pursuant to The Montana Solid Waste Management Act.

Saving and Severability Clauses: See compiler's comments under 75-15-203 concerning Ch. 340, L. 1983.

CHAPTER 16
TRANSBOUNDARY POLLUTION

Part 1
Uniform Transboundary Pollution Reciprocal Access Act

Part Compiler's Comments

Uniform Law: This part contains the provisions of the Uniform Transboundary Pollution Reciprocal Access Act as promulgated by the National Conference of Commissioners on Uniform State Laws and enacted in Montana.

75-16-101. Short title.

Commissioners' Note

In 1979, the Canadian Bar Association and the American Bar Association each adopted a report prepared by a joint committee of the two Associations on "The Settlement of International Disputes Between Canada and the United States of America." One of the areas on which the report focused was the equalization of rights and remedies of citizens in Canada and the U.S.A. affected by pollution emanating from the other jurisdiction. The Committee drafted enacting legislation on this topic, in treaty form, basing its draft upon the Organization for Economic Co-operation and Development's Recommendation for the Implementation of A Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution.

The ABA-CBA Committee's Report suggested that a liaison group ought to be established between the National Conference of Commissioners on Uniform State Laws and the Uniform Law Conference of Canada, the two organizations in their respective countries dedicated to the promotion of uniformity of law. The group was to have a mandate covering review, co-ordination and drafting of legislation on topics of mutual interest. The liaison committee was established in 1979 and has held five meetings in Canada and the U.S. to discuss the drafting of a Transboundary Pollution Reciprocal Access Act.

Pollution is no respecter of artificial lines on maps. Damage can occur in one jurisdiction from pollution produced in another jurisdiction. Reported caselaw reveals many examples of this phenomenon. A discharge of waste into a river in one jurisdiction can damage property in states downstream: see for example Missouri v. Illinois, 26 S.Ct. 268, 200 U.S. 496, 50 L.Ed.2d 572 (1906). Smoke can blow from one adjoining city to another; see for example Michie et al. v. Great Lakes Steel Division, National Steel Corporation, 495 F.2d 213 (6th Circ.), certiorari denied 95 S.Ct. 310, 419 U.S. 997, 42 L.Ed.2d 270. Metal smelters can generate pollutants that can travel into other jurisdictions: see for example The Trail Smelter Arbitration, 3 U.N.R.I.A.A. 1905 (1941) or Ducktown Sulphur, Copper and Iron Company v. Barnes et al., 60 S.W. 593 (Tenn. 1900). At times, pollution from a number of jurisdictions may contribute to the damage; see for example Ohio v. Wyandotte Chemicals Corp. et al., 91 S.Ct. 1005, 401 U.S. 493, 28 L.Ed.2d 256 (1971). Pollution crossing boundaries may take a variety of forms ranging from simple escapes between adjacent land to immensely difficult problems, such as acid rain and nuclear emissions whose very complexity renders them as intractable to coherent policy or legislative treatment as they are to definitive scientific analysis and explanation.

It is a generally recognized rule of law in the Anglo-American tradition that actions for damages for trespass, nuisance, or negligent injury in respect to lands located in another state are local actions and may be brought only in the state where the land is situated. This rule has been criticized, but most courts still follow it. Its significance is that unless the alleged tortfeasor can be "found" in the state where the injury took place, an action for damages is for all intents and purposes precluded.

When only states of the United States are involved, the increasing number of state long-arm statutes may reduce the significance of this rule because valid in personam jurisdiction over the defendant can be obtained under a long-arm statute and judgment rendered, and that judgment is entitled to full faith and credit within the United States. But even if a long-arm statute is involved, two suits may be necessary—the first to obtain the judgment and a second in another state to enforce the judgment. Furthermore, whether equitable relief will be granted by the second state, is open to question.

If there is no long-arm statute, or it is not as extensive as it might be, and the prospective defendant is not "found" within the jurisdiction where the injury occurred, then the plaintiff, for all practical purposes, is without a forum. The problem can become acute in an international setting. Suppose that on the northern shore of Lake Ontario there is a manufacturing plant that regularly emits highly toxic materials into the air and these are carried by the prevailing winds across Lake Ontario and into the State of New York. A fish hatchery there is severely damaged. Assuming that a person in New York, who is damaged can establish causation, can he bring suit?

The Canadian courts will probably not entertain the action because of the rule in British South Africa Co. v. Companhia de Mozambique, [1893] AC 602 (H.L.). The New York state courts could entertain the action, but would they be able to acquire personal jurisdiction over the Canadian defendant in order to permit the action to proceed? Under the New York State long-arm statute, N.Y.C.P.L.R. § 302, perhaps it could; and perhaps New York would reduce the claim to a money judgment. But no Canadian court would be bound by the doctrine of full faith and credit, and the chances are great that a judgment of a United State court reached upon a long-arm statute would not be honored by a Canadian court.

In British South Africa Company v. Companhia de Mozambique, the House of Lords decided that only the courts of a jurisdiction where an immovable is situated can adjudicate upon its title. An English court thus had no jurisdiction to try a damage action for trespass to land situated abroad. Courts in Canada have extended this rule to an extreme. Dealing with an action in New Brunswick for damages to Quebec land caused by the negligent blocking of an interprovincial river, Chief Justice Baxter of New Brunswick stated:

". . . whether title to land comes into question or not appears to be immaterial. The moment it appears that the controversy relates to land in a foreign country our jurisdiction is excluded:"

Albert v. Fraser Companies Ltd., [1937] 1 D.L.R. 39, 45, 11 M.P.R. 209, 216 [N.B.C.A.]. Applying this rule to transboundary pollution, it would prevent an American citizen from suing in Canadian courts for damage caused by a Canadian polluter, if the controversy relates in any way to land in the United States. The same obstacle for Canadians is created in the United States by the "local action rule," established in Livingston v. Jefferson, 15 Fed.Cas. 660 (No. 8411) (Cir. Ct.D.Va. 1811).

This Act is designed to eliminate this particular problem with respect to pollution. While conceptually the Act could be extended to deal with all unintentional tort actions affecting property, the Committee's mandate, and indeed the earlier work of the Joint ABA/CBA Committee and the OECD, was limited to interjurisdictional pollution problems and the difficulties which the local action rule presented in preventing non-resident litigants getting inside the courthouse door. Whether the pollution originated in Ontario or Ohio, a New Yorker injured in New York thereby, would be entitled to go into a Canadian court or an Ohio court and maintain an action for damages for injury to New York land. In other words, this proposed statute abrogates the rules in Livingston v. Jefferson and British South Africa Co. v. Companhia de Mozambique, which many believe to be anachronisms in any event.

The basic thrust of reform is to change the local action rules and provide equal access for the victims of transfrontier pollution to the courts of the jurisdiction where the contaminant originated.

The proposed statute also provides that in the event suit is brought in the province or state where the alleged pollution actually originated, the local law of that state (as distinguished from its whole law including conflict of laws rule) applies. This means that an alleged polluter sued in the state where the alleged pollution originated is governed by the substantive laws of that jurisdiction. Insofar as the courts of that state are concerned, he has one standard to meet, and he has the opportunity to defend the action on the basis of the substantive and procedural rules with which he is most familiar. Everyone would prefer to be sued in the courts of his own jurisdiction.

Of course, if service of process is achieved in the state where the pollution actually caused harm, then that state would be free, within constitutional restraints, to apply either its own law or the law of the state where the alleged pollution originated. That situation is not changed by this Act. Although total uniformity and predictability are not established, an injured party will know when choosing a particular court what law will be applied. The Act is designed to fill a procedural gap, and is not intended to alter substantive laws or standards, or change the ground rules under which individuals, corporations, or governments conduct their affairs.

75-16-102. Definitions.

Commissioners' Note

The definition of "jurisdiction" performs a number of functions. It enables the Act to be applied in interstate and inter-provincial pollution actions, in addition to actions involving pollution spanning the U.S./Canada International boundary. The Act does not apply to U.S./Mexico transboundary pollution or to pollution from any other nation.

The reciprocal aspect of the Act is achieved by [subsection (2)] providing that both the "polluting" and "polluted" jurisdictions must have "enacted this Act" or "provide substantially equivalent access to the courts and administrative agencies." The requirement of reciprocity applies to access only. This threshold test is applied by the courts in the U.S. on a case by case basis, it being regarded as a question of fact whether a particular jurisdiction is a reciprocating jurisdiction. In Canada, by contrast, it is usual for reciprocity to be formally recognized through provincial governments designating by regulation lists of reciprocating states, where they are satisfied that reciprocity exists. For jurisdictions, such as Minnesota by judicial decision and New York by statute, that already provide access to their courts for non-resident pollution victims by abandoning the rule of Livingston v. Jefferson, the words "provide substantially equivalent access" ensure that these jurisdictions will be recognized as reciprocating jurisdictions without the need to enact formally the Act. Finally, it should be noted that [subsection (2)] concludes with the words "access to the courts and administrative agencies," a specific reference to the fact that it is contemplated that the Act will also apply to proceedings before tribunals.

The definition of "person" derives from standard wording used in many uniform acts adopted by the National Conference of Commissioners on Uniform State Laws. It is designed to include all natural and legal persons within the ambit of the Act. In addition, if the Attorney General, or another public official of the state or province where the injury occurred, is able to bring an action with respect to environmental injury, then the Attorney General of another state harmed by the "originating state's" pollution should also be able to bring an action in the "originating state."

75-16-103. Forum.

Commissioners' Note

Together with [75-16-104], this section forms the main operative provision of the statute. [This section] provides access to the courts in one jurisdiction for pollution victims in another jurisdiction. A question may arise whether the pollution originated in a particular jurisdiction, and this is a question of fact which the courts must decide. It should be noted that the statute is not restricted in its scope to civil trials; it also extends to other proceedings before tribunals concerning environmental injury or threatened injury.

As used in this Act, "injury" includes wrongful death and "property" includes both real and personal property.

It has been suggested that enactment of this proposed statute would cause a rush of litigants from out of state to the state where the alleged pollution originated or where it may originate.

So far as is known states with very extensive long-arm statutes have not experienced this rush of litigation, and this suggests that it would not happen if a new, and less convenient forum was made available to them.

75-16-104. Right to relief.

Commissioners' Note

This section equates the rights of an extra-jurisdictional pollution victim to those of a victim who is a resident of the jurisdiction. It is designed to ensure that the actual or potential victim of transfrontier pollution will have a remedy in the courts of the jurisdiction where the pollution originated, if a victim residing in that jurisdiction would have had a remedy for injury or threatened injury in the case of pollution caused locally. Whether or not particular pollution did originate in a jurisdiction is a question of fact for the court to decide.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

75-16-105. Applicable law.

Commissioners' Note

This section provides that the law of this jurisdiction will apply in actions brought under the Act. In the United States this includes federal, state and local law where applicable. The applicable law is defined to exclude choice of law rules so as to avoid the whole problem of *renvoi*. While the Committee initially considered drafting a definition of "pollution" for inclusion in this Act, it was decided that it would be exceptionally difficult to draft such a definition without it degenerating into an unmanageable "shopping list" and difficult to harmonize such a list in practice with the definitions provided in the substantive law of a particular jurisdiction. Jurisdictions differ markedly in their treatment of matters such as smells, radiation, vibration, and visual pollution. To avoid difficulties in interpretation, it was decided that what constitutes pollution would be decided by reference to the law of an enacting jurisdiction; such a definition might encompass both statutory definitions as well as any applicable judicial decisions under the common law. It is contemplated that it would include but not be limited to discharges and emissions into land, air or water.

75-16-107. Right additional to other rights.

Commissioners' Note

[This section and 75-16-106] clarify that the Act is designed to put non-residents on the same footing as residents with respect to access to courts and tribunals in claims involving transboundary pollution. The rights of non-residents under this Act will be no higher than those of residents, and they must accept any procedural or substantive limitations that may happen to exist under the applicable law of the originating jurisdiction. [This section] ensures that the right of access provided by the Act is supplementary and is not intended in any way to diminish existing rights under the laws of this jurisdiction, which may be enforced independently of this Act.

75-16-108. Application of sovereign immunity.

Commissioners' Note

[This section and a similar section which was drafted for adoption in Canada] are provided to deal with the question of sovereign or crown immunity, and to ensure that extra-jurisdictional actions will be treated under the doctrines in the same way as actions brought by residents.

CHAPTER 20
MAJOR FACILITY SITING

Chapter Compiler's Comments

Reports: Section 10, Ch. 583, L. 1995 provided: "The department of natural resources and conservation [now department of environmental quality] shall prepare and present a report to the 55th legislature with recommendations for improving and modernizing the Montana Major Facility Siting Act. The department shall convene a state dialogue to develop the report and recommendations. The participants in the dialogue shall represent a broad spectrum of interests affected by the siting, construction, and operation of major facilities, including utilities, energy development groups, interested industries, ratepayers, regulators, landowners, and citizen groups. The dialogue is to be designed to seek the involvement of a broad range of affected interest groups in the discussions of reforming the Montana Major Facility Siting Act, with the express intent of eliciting a consensus. The consensus developing process must use a facilitator who is not an employee of the department."

Chapter Administrative Rules

Title 17, chapter 20, ARM Major facility siting.

Chapter Case Notes

Public Utility — Authority for Condemnation: In a condemnation proceeding, the District Court dismissed a public utility's complaint for condemnation on the basis that the utility did not possess the power of eminent domain and had no authority to take private property. The Supreme Court reversed on the basis that the District Court's order conflicted with HB 198 (Ch. 321, L. 2011), which clarified a public utility's eminent domain power, codified that authority into the Major Facility Siting Act, and applied retroactively to the issues in the case. MATL, LLP v. Salois, 2011 MT 126, 360 Mont. 510, 255 P.3d 158.

Montana Major Facility Siting Act — Procedural Satisfaction of Due Process: The procedural requirements of the Montana Major Facility Siting Act meet the requirements of due process under the Montana Constitution. Mont. Power Co. v. Fondren, 226 M 500, 737 P2d 1138, 44 St. Rep. 850 (1987).

Siting Act Decision Not Estoppel for PSC Ratemaking Decision: In 1973, Montana Power Company (MPC) filed an application for a certificate of environmental compatibility and public need for Colstrip Units 3 and 4 under the Montana Major Facility Siting Act. In granting the certificate, the Board of Natural Resources and Conservation (now Board of Environmental Review) found that there was a need for the energy which would be produced and that the units would serve the public interest, convenience, and necessity. After Unit 3 was completed, MPC filed an application with the Public Service Commission (PSC) to increase electric rates to reflect Unit 3 in its rate base. At the rate hearing, the PSC took evidence regarding whether Unit 3 was "used and useful". MPC moved to strike this testimony, contending the PSC was precluded from considering this by the certificate of need issued under the Siting Act. MPC filed an application for original jurisdiction and declaratory judgment or other appropriate relief with the Supreme Court. The PSC later concluded Unit 3 was not used and useful and could not be included in the rate base. MPC argued that the PSC was collaterally estopped from considering whether Unit 3 was "used and useful". The court held that the need issue determined in the siting process was not identical to the used and useful issue, therefore collateral estoppel was not applicable. MPC also argued that because of the certificate of need, the state was promissorily estopped from excluding Unit 3 from the rate base. MPC contended that issuance of a certificate of need under the Siting Act established a contractual relationship between the state and MPC. The court held that issuance of a certificate by a governmental authority to engage in conduct that would be improper without a certificate does not create a contractual relationship between the state and the licensee. Neither the Siting Act nor the certificate of need contemplate a promise that a facility will be included in a utility's rate base. Promissory estoppel was also inapplicable. Mont. Power Co. v. P.S.C., 214 M 82, 692 P2d 432, 41 St. Rep. 2332 (1984).

Siting Act Not Implied Repeal of "Used and Useful" for Ratemaking: In 1973, Montana Power Company (MPC) filed an application for a certificate of environmental compatibility and public need for Colstrip Units 3 and 4 under the Montana Major Facility Siting Act. In granting the certificate, the Board of Natural Resources and Conservation (now Board of Environmental Review) found that there was a need for the energy which would be produced and that the units would serve the public interest, convenience, and necessity. After Unit 3 was completed, MPC filed an application with the Public Service Commission (PSC) to increase electric rates to reflect Unit 3 in its rate base. At the rate hearing, the PSC took evidence regarding whether Unit 3 was "used and useful". MPC moved to strike this testimony, contending the PSC was precluded from considering this by the certificate of need issued under the Siting Act. MPC filed an application for original jurisdiction and declaratory judgment or other appropriate relief with the Supreme Court. The PSC later concluded Unit 3 was not used and useful and could not be included in the rate base. The Supreme Court found that while the Siting Act includes factors which can be associated with the used and useful concept of utility regulation, the primary purposes of the Siting Act are to ensure minimal environmental, natural resource, and social impacts. The need determination is related primarily to environmental protection rather than rate base treatment for the facility. Once the facility is constructed, the PSC has jurisdiction to determine whether the facility is actually used and useful and whether the facility's output is required by the ratepayers. The Siting Act and the utility regulation statutes are reconcilable. The Siting Act did not impliedly repeal the PSC's authority to determine whether a facility is used and useful for ratemaking. Mont. Power Co. v. P.S.C., 214 M 82, 692 P2d 432, 41 St. Rep. 2332 (1984).

Chapter Law Review Articles

The Montana Major Facility Siting Act, Carter, 45 Mont. L. Rev. 113 (1984).

Symposium — The Montana Constitution: Taking New Rights Seriously, Part I, Environmental Rights, 39 Mont. L. Rev. 221 (1978).

A Retrospective: The Golden Years, Meloy, 43 Pub. Land & Resources L. Rev. 193 (2020).

Dual Standards or Double Standard: Does a Finding of Public Need for a Utility Automatically Satisfy the "Used and Useful" Requirement?, Foot, 6 Pub. Land L. Rev. 195 (1985).

Implementing the Northwest Power Plan: Conflicts With Montana's Major Facility Siting Act, McBride, 5 Pub. Land L. Rev. 68 (1984).

Chapter Collateral References

A Guide to the Montana Major Facility Siting Act, Montana Environmental Quality Council (1985).

Part 1
Policy and General Provisions

Part Law Review Articles

The Montana Major Facility Siting Act, Carter, 45 Mont. L. Rev. 113 (1984).

Reforming the Montana Major Facility Siting Act, Ford Foundation Program in Policy Analysis for State Environmental Management, Lopach & Petesch, University of Montana, Missoula, Montana (1978).

75-20-102. Policy and legislative findings.

Compiler's Comments

2011 Amendment: Chapter 224 inserted (5) relating to increasing the capacity of existing transmission lines; and made minor changes in style. Amendment effective April 18, 2011.

Applicability: Section 4, Ch. 224, L. 2011, provided: "[This act] applies to applications for certificates filed after [the effective date of this act]." Effective April 18, 2011.

2003 Amendments — Composite Section: Chapter 217 inserted (3) providing that certain inalienable rights are constitutionally declared in this state and that balancing those rights is necessary to maintain a sustainable quality of life; in (4) at end of first sentence after "products" deleted "and that these facilities have an effect on the environment, an impact on population concentration, and an effect on the welfare of the citizens of this state" and in second sentence near middle after "geothermal facilities" substituted "are in compliance with state law and" for "will not produce unacceptable adverse effects on the environment and upon the citizens of this state by providing" and near end after "certificate of" substituted "compliance" for "environmental compatibility"; and made minor changes in style. Amendment effective April 3, 2003.

Chapter 361 inserted (1) relating to constitutional obligations and legislative intent; and made minor changes in style. Amendment effective April 16, 2003.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Saving Clause: Section 19, Ch. 217, L. 2003, was a saving clause.

Severability: Section 20, Ch. 217, L. 2003, was a severability clause.

Section 39, Ch. 361, L. 2003, was a severability clause.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

2001 Amendment: Chapter 293 in (2) in first sentence after "additional" substituted "electric transmission facilities, pipeline facilities, or geothermal facilities" for "power or energy conversion facilities" and in two places in second sentence substituted reference to electric transmission facilities, pipeline facilities, or geothermal facilities for power or energy conversion facilities. Amendment effective April 20, 2001.

Saving Clause: Section 15, Ch. 293, L. 2001, was a saving clause.

1997 Amendment: Chapter 329 in (2), near beginning of last sentence, substituted "will not produce unacceptable adverse effects" for "will produce minimal adverse effects" and near end, after "environmental compatibility", deleted "and public need"; and inserted (3) concerning purpose of chapter. Amendment effective July 1, 1997.

Applicability: Section 26, Ch. 329, L. 1997 provided: "A person who, prior to January 1, 1997, has filed a correct and complete air quality permit application with the department of environmental quality for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20."

Case Notes

Siting Act Not Implied Repeal of "Used and Useful" for Ratemaking: In 1973, Montana Power Company (MPC) filed an application for a certificate of environmental compatibility and public need for Colstrip Units 3 and 4 under the Montana Major Facility Siting Act. In granting the certificate, the Board of Natural Resources and Conservation (now Board of Environmental Review) found that there was a need for the energy which would be produced and that the units would serve the public interest, convenience, and necessity. After Unit 3 was completed, MPC filed an application with the Public Service Commission (PSC) to increase electric rates to reflect Unit 3 in its rate base. At the rate hearing, the PSC took evidence regarding whether Unit 3 was "used and useful". MPC moved to strike this testimony, contending the PSC was precluded from considering this by the certificate of need issued under the Siting Act. MPC filed an application for original jurisdiction and declaratory judgment or other appropriate relief with the Supreme Court. The PSC later concluded Unit 3 was not used and useful and could not be included in the rate base. The Supreme Court found that while the Siting Act includes factors which can be associated with the used and useful concept of utility regulation, the primary purposes of the Siting Act are to ensure minimal environmental, natural resource, and social impacts. The need determination is related primarily to environmental protection rather than rate base treatment for the facility. Once the facility is constructed, the PSC has jurisdiction to determine whether the facility is actually used and useful and whether the facility's output is required by the ratepayers. The Siting Act and the utility regulation statutes are reconcilable. The Siting Act did not impliedly repeal the PSC's authority to determine whether a facility is used and useful for ratemaking. Mont. Power Co. v. P.S.C., 214 M 82, 692 P2d 432, 41 St. Rep. 2332 (1984).

Natural Gas Pipeline Not a "Facility" Under Siting Act: The Montana Power Company brought a condemnation action to acquire an easement for the construction of a natural gas pipeline. Regarding the issue of whether a natural gas pipeline is a "facility" under the Montana Major Facility Siting Act, the Supreme Court found that the common thread linking the defined facilities is the production by artificial means of an energy product through a conversion process. The key phrase is "conversion facilities". The extraction of natural gas and its transportation to the ultimate consumer do not involve conversion facilities. Mont. Power Co. v. Cremer, 182 M 277, 596 P2d 483, 36 St. Rep. 1158 (1979).

Federal Clean Air Act — Administrative Regulations — Effect — Remedies: In an action to enjoin the Environmental Protection Agency from mandating preconstruction review of electrical power facility, the U.S. District Court discussed many of the major issues involved in this type of case and found that the power companies (plaintiffs) were exempt from such review. Mont. Power Co. v. Environmental Protection Agency, 429 F. Supp. 683, 34 St. Rep. 30 (D.C. Mont. 1977).

75-20-103. Chapter supersedes other laws or rules.

Case Notes

Issuance of Certificate of Environmental Compatibility and Public Need — No District Court Jurisdiction to Determine Public Necessity: Once a certificate of environmental compatibility and public need was issued by the Board of Natural Resources and Conservation (now Board of Environmental Review), the District Court had no jurisdiction to determine the existence of public necessity with respect to a proposed electric transmission line under the Montana Utility Siting Act of 1973 (now the Montana Major Facility Siting Act) since that determination had already been made by the Board pursuant to the Act. Mont. Power Co. v. Fondren, 226 M 500, 737 P2d 1138, 44 St. Rep. 850 (1987).

Limitation of Court Jurisdiction in Centerline Determination and Eminent Domain — Noncontested Case Procedure: The Legislature did not intend the final electric transmission line centerline determination by the Board of Natural Resources and Conservation (now Board of Environmental Review) to be subject to judicial review, and once the Board sets the specific route, no court has jurisdiction to hear challenges to the location. Through enactment of 75-20-205(2) (now repealed) and 75-20-407, court jurisdiction in eminent domain cases was limited to hearing challenges to the necessity of taking private property. The preponderance of the evidence on 70-30-111 findings that must be proven to the court before a preliminary condemnation order is issued is satisfied by appending to the complaint the Board's certificate of environmental compatibility and public need and the Board's findings of fact, opinion, decision, order, and recommendations. In cases where landowners feel conditions of the certificate were breached, proper remedy lies in a mandamus action under 75-20-404. Mont. Power Co. v. Fondren, 226 M 500, 737 P2d 1138, 44 St. Rep. 850 (1987).

75-20-104. Definitions.

Compiler's Comments

2021 Amendments — Composite Section: Chapter 13 inserted definition of electrical generation facility; in definition of facility in (a)(iii) in middle after "electrical generation facility" deleted "as defined in 15-24-3001(4)"; and made minor changes in style. Amendment effective October 1, 2021.

Chapter 291 in (10)(a)(iii) near middle inserted "or for a green hydrogen facility or green hydrogen storage system, as defined in 15-6-163"; inserted (10)(a)(vii) excluding green hydrogen facilities and green hydrogen storage systems; inserted (10)(b)(i)(C) regarding green hydrogen pipelines; in (10)(c) at end inserted "or a green hydrogen facility or green hydrogen storage system, as defined in 15-6-163"; and made minor changes in style. Amendment effective April 28, 2021.

Chapter 409 in definition of facility after ""Facility" means" deleted "subject to 75-20-1202"; and made minor changes in style. Amendment effective May 7, 2021.

Applicability: Section 16, Ch. 291, L. 2021, provided: "[This act] applies to tax years beginning after December 31, 2021."

Severability: Section 14, Ch. 291, L. 2021, was a severability clause.

2019 Amendment: Chapter 447 inserted definition of commencement of acquisition of right-of-way; and made minor changes in style. Amendment effective May 10, 2019.

2011 Amendments — Composite Section: Chapter 19 in definition of facility after "means" inserted "subject to 75-20-1202"; and made minor changes in style. Amendment effective October 1, 2011.

Chapter 224 in definition of facility in (a)(ii) after "69 kilovolts" deleted "but less than 230 kilovolts", in (a)(iii) substituted "lines that are collectively less than 150 miles in length and are required under state or federal regulations and laws, with respect to reliability of service, for" for "line that is less than 150 miles in length and extends from", substituted "to interconnect to a regional transmission grid or secure firm transmission service to use the grid" for "to the point at which the transmission line connects to a regional transmission grid at an existing transmission substation or other facility", after "construct the line" inserted "or lines", and at end inserted "or centerlines", in (a)(iv) inserted "of a design capacity of 50 kilovolts or more", after "line's capacity" deleted "to less than or equal to 230 kilovolts", and at end inserted provision requiring conformance to standards; in definition of upgrade inserted (e) relating to additional circuits; and made minor changes in style. Amendment effective April 18, 2011.

Chapter 309 in definition of facility in (a)(iii) inserted "or energy storage facility", inserted (a)(vi) excluding energy storage facility, and in (c) at end inserted exception clause; and made minor changes in style. Amendment effective October 1, 2011.

Chapter 382 inserted definition of transmission reliability agencies; and made minor changes in style. Amendment effective May 12, 2011.

Applicability: Section 4, Ch. 224, L. 2011, provided: "[This act] applies to applications for certificates filed after [the effective date of this act]." Effective April 18, 2011.

Section 5, Ch. 382, L. 2011, provided: "[This act] applies to applications for a certificate under the Major Facility Siting Act filed on or after [the effective date of this act]." Effective May 12, 2011.

2009 Amendments — Composite Section: Chapter 357 in definition of facility in (a)(iii) near beginning after "facility" inserted "or biomass generation facility". Amendment effective October 1, 2009.

Chapter 469 in definition of facility in (a)(iv) in first sentence substituted "increase that line's capacity to less than or equal to 230 kilovolts, including construction outside the existing easement" for "increase that line's capacity within an existing easement", inserted second sentence providing certain requirements for newly acquired easement or right-of-way; and in (c) near middle substituted "50 megawatts" for "25 million Btu's per hour"; inserted definition of sensitive areas; and made minor changes in style. Amendment effective May 6, 2009.

Applicability: Section 6, Ch. 357, L. 2009, provided: "[This act] applies to tax years beginning after December 31, 2009."

Section 3, Ch. 469, L. 2009, provided: "[This act] applies to applications filed after [the effective date of this act]." Effective May 6, 2009.

2007 Amendment: Chapter 260 in definition of facility in (a)(iii) inserted reference to wind generation facility; and made minor changes in style. Amendment effective October 1, 2007.

2005 Amendment: Chapter 142 in definition of associated facilities in (a) after "pipelines" deleted "transmission substations" and in (b) after "include" inserted "a transmission substation, a switchyard, voltage support, or other control equipment or"; in definition of facility inserted (a)(iv) providing that facility does not include upgrade to existing transmission line to increase line's capacity within existing easement or right-of-way and inserted (a)(v) providing that facility does not include transmission substation, switchyard, voltage support, or control equipment; inserted definition of upgrade; and made minor changes in style. Amendment effective March 30, 2005.

2003 Amendments — Composite Section: Chapter 217 in definition of certificate after "certificate of" substituted "compliance" for "environmental compatibility". Amendment effective April 3, 2003.

Chapter 324 in definition of facility inserted (a)(iii) relating to certain lines connecting an electrical generation facility to a regional transmission grid; and made minor changes in style. Amendment effective April 15, 2003.

Preamble: The preamble attached to Ch. 514, L. 2003, provided: "WHEREAS, prior to 2001, the Montana Major Facility Siting Act applied to pipelines greater than 17 inches in inside diameter; and

WHEREAS, Chapter 293, Laws of 2001, amended the Montana Major Facility Siting Act so as to apply to those pipelines greater than 25 inches in inside diameter; and

WHEREAS, the applicability clause of Chapter 293, Laws of 2001, excluded pipelines 25 inches or less in inside diameter that were subject to a certificate of environmental compatibility on the day before the effective date of Chapter 293, Laws of 2001; and

WHEREAS, there is not any regulatory reason to continue the application of the Montana Major Facility Siting Act with respect to any pipeline 25 inches or less in inside diameter regardless of whether a pipeline was subject to a certificate of environmental compatibility issued under the Montana Major Facility Siting Act on or before April 19, 2001, and to do so would be to discriminate without reason between pipelines of the same or similar diameter; and

WHEREAS, the Legislature finds that it is appropriate to amend the applicability clause of Chapter 293, Laws of 2001, to make the substantive provisions of Chapter 293, Laws of 2001, apply to all pipelines 25 inches or less in inside diameter and to exempt from the Montana Major Facility Siting Act all, rather than some, pipelines 25 inches or less in inside diameter."

Saving Clause: Section 19, Ch. 217, L. 2003, was a saving clause.

Severability: Section 20, Ch. 217, L. 2003, was a severability clause.

Applicability: Section 3, Ch. 514, L. 2003, provided: "Section 17, Chapter 293, Laws of 2001, and [section 1 of this act] [amending sec. 17, Ch. 293, L. 2001] do not apply to reclamation bonds for pipelines and associated facilities held by the board of environmental review or the department of environmental quality until October 30, 2004."

2001 Amendment: Chapter 293 in middle of definition of associated facilities before "delivery" deleted "production or" and near end substituted "25 inches" for "17 inches"; in definition of facility deleted former (a) and (b) that read: "(a) except for crude oil and natural gas refineries and those facilities subject to The Montana Strip and Underground Mine Reclamation Act, each plant, unit, or other facility and associated facilities designed for or capable of:

(i) generating 250 megawatts of electricity or more or any addition thereto, except pollution control facilities approved by the department and added to an existing plant;

(ii) producing 25 million cubic feet or more of gas derived from coal per day or any addition thereto, except pollution control facilities approved by the department and added to an existing plant;

(iii) producing 25,000 barrels of liquid hydrocarbon products per day or more or any addition thereto, except pollution control facilities approved by the department and added to an existing plant;

(iv) enriching uranium minerals or any addition thereto; or

(v) for purposes of 75-20-204 only, generating 50 megawatts of hydroelectric power or more or any addition thereto;

(b) each plant, unit, or other facility and associated facilities generating less than 250 megawatts that would be defined in subsection (8)(a):

(i) emitting 300 tons a year of particulate matter at 10 microns or less;

(ii) that is not employing best available control technology pursuant to 42 U.S.C. 7479 or is not employing lowest achievable emission rates as required by Title 75, chapter 2, or rules adopted under Title 75, chapter 2;

(iii) directly affecting:

(A) a class I airshed as designated pursuant to 42 U.S.C. 7470, et seq.;

(B) a class I river or stream as designated pursuant to 33 U.S.C. 1251, et seq.;

(C) habitat used by a threatened or endangered species of plant or animal as designated pursuant to 16 U.S.C. 1531, et seq.; or

(D) one of the following exclusion areas:

(I) national wilderness areas designated pursuant to 16 U.S.C. 1131, et seq.;

(II) national primitive areas;

(III) national parks as designated pursuant to 16 U.S.C. 1a-1, et seq.;

(IV) rivers in the national wild and scenic river system as designated pursuant to 16 U.S.C. 1271, et seq.; or

(V) national wildlife refuges and ranges as designated pursuant to 16 U.S.C. 668dd, et seq.; or

(iv) that would require a permanent workforce greater than 300 workers", at beginning of (b)(i) deleted "except pipelines within the boundaries of the state that are used exclusively for the irrigation of agricultural crops", in middle substituted "greater than 25 inches" for "greater than 17 inches", substituted "50 miles" for "30 miles", and at end inserted exception clause, inserted (b)(i)(A) and (b)(i)(B) providing that facility does not include pipeline in state used exclusively for crop irrigation or drinking water or pipeline greater than 25 inches in inside diameter and 50 miles long with right-of-way agreements from 75% or more of owners, inserted (b)(ii) providing that facility includes pipeline greater than 17 inches in inside diameter and 30 miles long used to transport water-suspended coal, inserted (d) providing that facility includes plant, unit, or facility, subject to federal energy regulatory commission jurisdiction, capable of generating 50 megawatts of hydroelectric power or more, and deleted former (f) and (g) that read: "(f) any underground in situ gasification of coal; or

(g) an energy-related project for which the department has granted a petition pursuant to 75-20-201(5)"; and made minor changes in style. Amendment effective April 20, 2001.

Saving Clause: Section 15, Ch. 293, L. 2001, was a saving clause.

Applicability: Section 17, Ch. 293, L. 2001, provided: "[This act] does not apply to any facility or associated facility under 75-20-104(8)(a), (8)(b), (8)(d), or (8)(f), as those subsections read on the day before [the effective date of this act] [effective April 20, 2001], that was subject to a certificate of environmental compatibility on [the effective date of this act]."

1999 Amendment: Chapter 13 in definition of facility at beginning of (d) inserted "except pipelines within the boundaries of the state that are used exclusively for the irrigation of agricultural crops". Amendment effective February 16, 1999.

1997 Amendment: Chapter 329 in definition of certificate substituted "compatibility issued by the department" for "compatibility and public need issued by the board"; in definition of facility, in (a)(i), substituted "250 megawatts" for "50 megawatts", inserted (b) relating to plants generating less than 250 megawatts, in (c)(ii), near beginning, substituted "but less than 230 kilovolts" for "and up to and including 115 kilovolts", and inserted (g) relating to energy-related projects; in definition of person inserted reference to limited liability company; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1997.

Applicability: Section 26, Ch. 329, L. 1997 provided: "A person who, prior to January 1, 1997, has filed a correct and complete air quality permit application with the department of environmental quality for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20."

1995 Amendments — Composite Section: Chapter 418 in definition of Board substituted "board of environmental review provided for in 2-15-3502" for "board of natural resources and conservation provided for in 2-15-3302"; deleted former (5) that read: "(5) "Board of health" means the board of health and environmental sciences provided for in 2-15-2104"; in definition of Department substituted "department of environmental quality provided for in 2-15-3501" for "department of natural resources and conservation provided for in Title 2, chapter 15, part 33"; deleted former (9) that read: "(9) "Department of health" means the department of health and environmental sciences provided for in Title 2, chapter 15, part 21"; in definition of facility, in (a)(i) after "department", deleted "of health and environmental sciences"; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 deleted definition of Board of Health that read: ""Board of health" means the board of health and environmental sciences provided for in 2-15-2104"; pursuant to sec. 568, Ch. 546, L. 1995, a coordination section, in definition of Department of Health and definition of facility, in (a)(i), the Code Commissioner substituted "department of environmental quality" for "department of health and environmental sciences"; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 583 in definition of facility, in (a)(i), increased megawatts from 50 to 150 in temporary version, after "health" deleted "and environmental sciences", and at end deleted "having an estimated cost in excess of $10 million", in (a)(ii) and (a)(iii), at end, substituted "except pollution control facilities approved by the department of health and added to an existing plant" for "having an estimated cost in excess of $10 million", in (a)(iv), at end, deleted "having an estimated cost in excess of $10 million", substituted (a)(v) concerning facility generating 50 megawatts of hydroelectric power for purposes of 75-20-204 for facility "utilizing or converting 500,000 tons of coal per year or more or any addition thereto having an estimated cost in excess of $10 million", and at end of (d) substituted "except pollution control facilities approved by the department of health and added to an existing plant" for "having an estimated cost in excess of $750,000"; and made minor changes in style. Amendment effective May 1, 1995.

Because Ch. 418 inserted a reference to the Board of Environmental Review and Ch. 546 deleted a reference to the Board of Health and Environmental Sciences, the codifier has reflected both the insertion and the deletion.

Because Ch. 418 transferred all responsibility for facilities to the Department of Environmental Quality, pursuant to sec. 568 and sec. 569, Ch. 546, the Code Commissioner has deleted the references to the Department "of Health" that was defined as the Department of Health and Environmental Sciences.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

Termination: Section 11, Ch. 583, L. 1995, provided: "The amendment to 75-20-104(10)(a)(i) contained in [section 1] [75-20-104] that increases the megawatts of electricity produced from "50" to "150" terminates on June 30, 1997."

Applicability: Section 12, Ch. 583, L. 1995, provided: "(1) A person who, between [the effective date of this act] [May 1, 1995] and June 30, 1997, has submitted a correct and complete application for all applicable air and water quality permits from the department of health and environmental sciences [now department of environmental quality] or has commenced to construct or commenced or applied to upgrade a power plant that has been designed for or will be capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20.

(2) A person who, between [the effective date of this act] [May 1, 1995] and June 30, 1997, has filed an application for all applicable air and water quality permits from the department of health and environmental sciences [now department of environmental quality] for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20, if the application is correct and complete as of October 1, 1997."

1987 Amendment: Inserted (10)(b)(ii) establishing that facility does not include an electric transmission line with design capacity of greater than 69 kilovolts, including 115 kilovolts for which person planning to construct line has right-of-way agreements or options from more than 75% of owners who collectively own more than 75% of property along centerline.

Applicability: Section 6, Ch. 597, L. 1987, provided: "The provisions of this act do not apply to any transmission lines or associated facilities that have been certified under this chapter prior to the effective date of this act." Effective April 23, 1987.

1985 Amendment: In (3), near beginning after "diversion dams", inserted "pipelines" and at end, after "include a facility", inserted "or a natural gas or crude oil gathering line 17 inches or less in inside diameter"; in (10)(a) after "refineries", deleted "and facilities and associated facilities designed for or capable of producing, gathering, processing, transmitting, transporting, or distributing crude oil or natural gas"; and substituted present language of (10)(c) (see 1985 Session Law) for former (10)(c) that read: "each pipeline and associated facilities designed for or capable of transporting gas (except for natural gas), water, or liquid hydrocarbon products from or to a facility located within or without this state of the size indicated in subsection (10)(a) of this section".

1981 Amendment: Substituted "would significantly change the conditions under which the facility is operated" for "would significantly change the conditions under which the certificate was issued" at the end of (1); added facilities subject to The Montana Strip and Underground Mine Reclamation Act within the exception to the definition of facility in (10)(a); increased $250,000 to $10 million throughout (10)(a); deleted "refining" after "utilizing" in (10)(a)(v); and increased $250,000 to $750,000 at the end of (10)(d).

Case Notes

Natural Gas Pipeline Not a "Facility" Under Siting Act: The Montana Power Company brought a condemnation action to acquire an easement for the construction of a natural gas pipeline. Regarding the issue of whether a natural gas pipeline is a "facility" under the Montana Major Facility Siting Act, the Supreme Court found that the common thread linking the defined facilities is the production by artificial means of an energy product through a conversion process. The key phrase is "conversion facilities". The extraction of natural gas and its transportation to the ultimate consumer do not involve conversion facilities. (See 2001 amendment.) Mont. Power Co. v. Cremer, 182 M 277, 596 P2d 483, 36 St. Rep. 1158 (1979).

75-20-105. Adoption of rules.

Compiler's Comments

2021 Amendment: Chapter 324 near beginning substituted "department" for "board". Amendment effective July 1, 2021.

1987 Amendment: At end of section, after "chapter", deleted "including but not limited to:

(1) rules governing the form and content of applications;

(2) rules further defining the terms used in this chapter;

(3) rules governing the form and content of long-range plans;

(4) any other rules the board considers necessary to accomplish the purposes and objectives of this chapter".

Administrative Rules

Title 17, chapter 20, ARM Major facility siting.

75-20-112. Money to state special revenue fund.

Compiler's Comments

1987 Amendment: Near beginning, after "chapter", inserted "except those collected by a justice's court".

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

75-20-113. Power to exercise eminent domain.

Compiler's Comments

Effective Date: Section 5, Ch. 321, L. 2011, provided: "[This act] is effective on passage and approval." Chapter 321, L. 2011, was enacted into law without the Governor's signature on May 9, 2011.

Retroactive Applicability: Section 6, Ch. 321, L. 2011, provided: "[Section 2] [75-20-113] applies retroactively, within the meaning of 1-2-109, to certificates issued after September 30, 2008."

Part 2
Certification Proceedings

Part Case Notes

Limitation of Court Jurisdiction in Centerline Determination and Eminent Domain — Noncontested Case Procedure: The Legislature did not intend the final electric transmission line centerline determination by the Board of Natural Resources and Conservation (now Board of Environmental Review) to be subject to judicial review, and once the Board sets the specific route, no court has jurisdiction to hear challenges to the location. Through enactment of 75-20-407 and subsection (2) of 75-20-205 (now repealed), court jurisdiction in eminent domain cases was limited to hearing challenges to the necessity of taking private property. The preponderance of the evidence on 70-30-111 findings that must be proven to the court before a preliminary condemnation order is issued is satisfied by appending to the complaint the Board's certificate of environmental compatibility and public need and the Board's findings of fact, opinion, decision, order, and recommendations. In cases where landowners feel conditions of the certificate were breached, proper remedy lies in a mandamus action under 75-20-404. Mont. Power Co. v. Fondren, 226 M 500, 737 P2d 1138, 44 St. Rep. 850 (1987).

Bias of Hearing Officer Alleged to Deny Fair Hearing — No Prejudice Shown: The Board of Natural Resources and Conservation (now Board of Environmental Review) issued a certificate of environmental compatibility and public need under the Montana Utility Siting Act of 1973 (now the Montana Major Facility Siting Act of 1975). The plaintiff environmental association alleged the denial of its constitutional right to fair hearing as a result of the alleged prejudice of attorney Sabol, hearing officer and member of the Board. The Supreme Court found no denial of the plaintiff's constitutional right because: (1) Sabol's connection with another ski resort that might seek a certificate in the future was such as to make the plaintiff's claim of prejudice no more than tenuous; (2) any bias reflected in Sabol's comments to a newspaper reporter about the tactics of the plaintiff was not reflected at a hearing almost 2 months later; (3) directions to the defendant's counsel from Sabol to limit the scope of cross-examination were consistent with the fact that the parties took similar positions on the issue then in question; (4) even if Sabol was prejudiced he had either relinquished his position as hearing officer or was no longer serving on the Board itself when a decision was recommended to the Board and the Board acted on that recommendation; and (5) 75-20-220 (now repealed), specifying that a hearing officer may not be a member of the Board is inapplicable to this case because that section was enacted in 1975 and this case was tried under the law as passed in 1973. Mont. Wilderness Ass'n v. Bd. of Natural Resources and Conserv., 200 M 11, 648 P2d 734, 39 St. Rep. 1238 (1982).

75-20-201. Certificate required — operation in conformance — certificate for nuclear facility — applicability to federal facilities.

Compiler's Comments

2021 Amendments — Composite Section: Chapter 13 in (4) in middle of first sentence substituted "75-20-104(10)" for "75-24-104(9)". Amendment effective October 1, 2021.

Chapter 291 in (4) near middle of second sentence and near middle of third sentence inserted "or a green hydrogen facility, a green hydrogen pipeline, or a green hydrogen storage system, as defined in 15-6-163"; and made minor changes in style. Amendment effective April 28, 2021.

Chapter 409 deleted former (4) that read: "(4) If the department decides to issue a certificate for a nuclear facility, it shall report the recommendation to the applicant and may not issue the certificate until the recommendation is approved by a majority of the voters in a statewide election called by initiative or referendum according to the laws of this state"; and made minor changes in style. Amendment effective May 7, 2021.

Applicability: Section 16, Ch. 291, L. 2021, provided: "[This act] applies to tax years beginning after December 31, 2021."

Severability: Section 14, Ch. 291, L. 2021, was a severability clause.

2019 Amendment: Chapter 447 in (5) substituted "75-20-104(9)" for "75-20-104(8)". Amendment effective May 10, 2019.

2011 Amendment: Chapter 309 in (5) inserted last two sentences relating to construction of energy storage facilities. Amendment effective October 1, 2011.

2005 Amendment: Chapter 337 in (7) near middle of first sentence after "determined" substituted "by the court" for "under 75-1-203". Amendment effective April 21, 2005.

Applicability: Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

2003 Amendments — Composite Section: Chapter 217 in (1) near end after "certificate of" substituted "compliance" for "environmental compatibility". Amendment effective April 3, 2003.

Chapter 361 inserted (7) relating to certain challenges having precedence in court and award of attorney fees and costs for certain challenges. Amendment effective April 16, 2003.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Saving Clause: Section 19, Ch. 217, L. 2003, was a saving clause.

Severability: Section 20, Ch. 217, L. 2003, was a severability clause.

Section 39, Ch. 361, L. 2003, was a severability clause.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

1997 Amendment: Chapter 329 in (1), at beginning, inserted "Except for a facility under diligent onsite physical construction or in operation on January 1, 1973", after "environmental compatibility" deleted "and public need", and at end substituted "department" for "board"; in (4), near beginning, substituted "department" for "board"; inserted (5) concerning energy-related project; and made minor changes in style. Amendment effective July 1, 1997.

Applicability: Section 26, Ch. 329, L. 1997 provided: "A person who, prior to January 1, 1997, has filed a correct and complete air quality permit application with the department of environmental quality for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20."

1983 Amendment: Inserted (5) providing that the Montana Major Facility Siting Act applies to federal facilities pursuant to federal law.

1978 Amendment by Initiative: Initiative No. 80, proposed by initiative petition and approved at the general election held November 7, 1978, amended this section to provide for voter approval of proposed nuclear power facilities. Amendment effective October 1, 1979.

Case Notes

Siting Act Not Implied Repeal of "Used and Useful" for Ratemaking: In 1973, Montana Power Company (MPC) filed an application for a certificate of environmental compatibility and public need for Colstrip Units 3 and 4 under the Montana Major Facility Siting Act. In granting the certificate, the Board of Natural Resources and Conservation (now Board of Environmental Review) found that there was a need for the energy which would be produced and that the units would serve the public interest, convenience, and necessity. After Unit 3 was completed, MPC filed an application with the Public Service Commission (PSC) to increase electric rates to reflect Unit 3 in its rate base. At the rate hearing, the PSC took evidence regarding whether Unit 3 was "used and useful". MPC moved to strike this testimony, contending the PSC was precluded from considering this by the certificate of need issued under the Siting Act. MPC filed an application for original jurisdiction and declaratory judgment or other appropriate relief with the Supreme Court. The PSC later concluded Unit 3 was not used and useful and could not be included in the rate base. The Supreme Court found that while the Siting Act includes factors which can be associated with the used and useful concept of utility regulation, the primary purposes of the Siting Act are to ensure minimal environmental, natural resource, and social impacts. The need determination is related primarily to environmental protection rather than rate base treatment for the facility. Once the facility is constructed, the PSC has jurisdiction to determine whether the facility is actually used and useful and whether the facility's output is required by the ratepayers. The Siting Act and the utility regulation statutes are reconcilable. The Siting Act did not impliedly repeal the PSC's authority to determine whether a facility is used and useful for ratemaking. Mont. Power Co. v. P.S.C., 214 M 82, 692 P2d 432, 41 St. Rep. 2332 (1984).

Constitutionality of Initiative: Initiative 80, amending 75-20-201 to provide for voter approval before issuance of a certificate for a nuclear facility, is not unconstitutional on its face. State ex rel. Wenzel v. Murray, 178 M 441, 585 P2d 633, 35 St. Rep. 1422 (1978).

75-20-203. Certificate transferable.

Compiler's Comments

1995 Amendment: Chapter 583 after "transferred" deleted "subject to the approval of the board"; and made minor changes in style. Amendment effective May 1, 1995.

Applicability: Section 12, Ch. 583, L. 1995, provided: "(1) A person who, between [the effective date of this act] [May 1, 1995] and June 30, 1997, has submitted a correct and complete application for all applicable air and water quality permits from the department of health and environmental sciences [now department of environmental quality] or has commenced to construct or commenced or applied to upgrade a power plant that has been designed for or will be capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20.

(2) A person who, between [the effective date of this act] [May 1, 1995] and June 30, 1997, has filed an application for all applicable air and water quality permits from the department of health and environmental sciences [now department of environmental quality] for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20, if the application is correct and complete as of October 1, 1997."

1978 Amendment by Initiative: Initiative No. 80, proposed by initiative petition and approved at the general election held November 7, 1978, amended this section to provide for voter approval of proposed nuclear power facilities. Amendment effective October 1, 1979.

75-20-204. Facilities subject to federal energy regulatory commission jurisdiction.

Compiler's Comments

1997 Amendment: Chapter 273 in (3), in first sentence after "department", deleted "pursuant to 85-2-124", in second sentence, after "responsibilities", deleted "under Title 85, chapter 2, and", and inserted third sentence limiting the fee that can be assessed; and made minor changes in style. Amendment effective April 16, 1997.

Saving Clause: Section 6, Ch. 273, L. 1997, was a saving clause.

75-20-207. Notice requirement for certain electric transmission lines.

Compiler's Comments

2021 Amendment: Chapter 13 in middle of first sentence substituted "75-20-104(10)(a)(ii)" for "75-20-104(9)(a)(ii)". Amendment effective October 1, 2021.

2019 Amendment: Chapter 447 in (1) substituted "75-20-104(9)(a)(ii)" for "75-20-104(8)(a)(ii)" and after "acquisition of right-of-way" inserted "as defined in 75-20-104". Amendment effective May 10, 2019.

2001 Amendment: Chapter 293 in first sentence substituted "75-20-104(8)(a)(ii)" for "75-20-104(8)(c)(ii)" and in second sentence decreased notice time from 180 days to 60 days. Amendment effective April 20, 2001.

Saving Clause: Section 15, Ch. 293, L. 2001, was a saving clause.

1997 Amendment: Chapter 329 in first sentence substituted "under the provisions of 75-20-104(8)(c)(ii)" for "of a design capacity of more than 69 kilovolts and up to and including 115 kilovolts that is more than 10 miles in length"; and made minor changes in style. Amendment effective July 1, 1997.

Applicability: Section 26, Ch. 329, L. 1997 provided: "A person who, prior to January 1, 1997, has filed a correct and complete air quality permit application with the department of environmental quality for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20."

Applicability: Section 6, Ch. 597, L. 1987, provided: "The provisions of this act do not apply to any transmission lines or associated facilities that have been certified under this chapter prior to the effective date of this act." Effective April 23, 1987.

75-20-208. Certain electric transmission lines — verification of requirements.

Compiler's Comments

2021 Amendment: Chapter 13 in (1) in introductory clause, (1)(b), and (2) substituted "75-20-104(10)(a)(ii)" for "75-20-104(9)(a)(ii)". Amendment effective October 1, 2021.

2019 Amendment: Chapter 447 in (1), (1)(b), and (2) substituted "75-20-104(9)(a)(ii)" for "75-20-104(8)(a)(ii)". Amendment effective May 10, 2019.

2001 Amendment: Chapter 293 in three places substituted "75-20-104(8)(a)(ii)" for "75-20-104(8)(c)(ii)". Amendment effective April 20, 2001.

Saving Clause: Section 15, Ch. 293, L. 2001, was a saving clause.

1997 Amendment: Chapter 329 throughout section substituted "75-20-104(8)(c)(ii)" for "75-20-104(8)(b)(ii)"; at end of (1) substituted "department" for "board"; and in (1)(b), after "verify", deleted "to the board". Amendment effective July 1, 1997.

Applicability: Section 26, Ch. 329, L. 1997 provided: "A person who, prior to January 1, 1997, has filed a correct and complete air quality permit application with the department of environmental quality for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20."

1995 Amendments — Composite Section: Chapter 418 in three places substituted "75-20-104(8)(b)(ii)" for "75-20-104(10)(b)(ii)"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in three places substituted "75-20-104(9)(b)(ii)" for "75-20-104(10)(b)(ii)". Amendment effective July 1, 1995.

The codifier has reflected the correct subsection reference.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

75-20-211. Application — filing and contents — proof of service and notice.

Compiler's Comments

2021 Amendment: Chapter 13 in (1)(a)(iii) and (1)(a)(iv)(A) substituted "75-20-104(10)(a) and (10)(b)" for "75-20-104(9)(a) and (9)(b)"; and in (1)(a)(iv)(B) substituted "75-20-104(10)(c)" for "75-20-104(9)(c)". Amendment effective October 1, 2021.

2019 Amendment: Chapter 447 in (1)(a)(iii) and (1)(a)(iv)(A) substituted "75-20-104(9)(a) and (9)(b)" for "75-20-104(8)(a) and (8)(b)"; and in (1)(a)(iv)(B) substituted "75-20-104(9)(c)" for "75-20-104(8)(c)". Amendment effective May 10, 2019.

2003 Amendment: Chapter 217 in (1)(a)(ii) after "any" inserted "preexisting" and before "impact" deleted "environmental"; in (1)(b) at beginning inserted "If" and near middle after "department" deleted "if ordered"; deleted former (3) that read: "(3) An application must be accompanied by proof of service of a copy of the application on the chief executive officer of each unit of local government, county commissioner, city or county planning boards, and federal agencies charged with the duty of protecting the environment or of planning land use in the area in which any portion of the proposed facility is proposed or is alternatively proposed to be located and on the following state government agencies:

(a) environmental quality council;
(b) department of public service regulation;
(c) department of fish, wildlife, and parks;
(d) department of natural resources and conservation;
(e) department of transportation"; in (4) near middle after "residing in the" substituted "county" for "area"; and made minor changes in style. Amendment effective April 3, 2003.

Saving Clause: Section 19, Ch. 217, L. 2003, was a saving clause.

Severability: Section 20, Ch. 217, L. 2003, was a severability clause.

2001 Amendments — Composite Section: Chapter 293 in (1)(a)(iii) and (1)(a)(iv)(A) substituted "75-20-104(8)(a) and (8)(b)" for "75-20-104(8)(c) and (8)(d)"; and in (1)(a)(iv)(B) substituted "75-20-104(8)(c)" for "75-20-104(8)(a), (8)(b), (8)(e), and (8)(f)". Amendment effective April 20, 2001.

Chapter 483 deleted former (3)(e) that read: "(e) department of commerce"; and made minor changes in style. Amendment effective July 1, 2001.

Saving Clause: Section 15, Ch. 293, L. 2001, was a saving clause.

1997 Amendment: Chapter 329 throughout section substituted references to 75-20-104(8)(c) and (8)(d) for references to 75-20-104(8)(b) and (8)(c); in (1)(a), near end, deleted reference to Board; deleted former (1)(a)(iii) that read: "(iii) a statement explaining the need for the facility"; in (1)(a)(iii), near beginning, inserted "a statement explaining the need for the facility"; in (1)(a)(iv)(B) substituted references to 75-20-104(8)(a), (8)(b), (8)(e), and (8)(f) for references to 75-20-104(8)(a), (8)(d), and (8)(e); in (1)(a)(vi), after "or that", deleted "the board by order or rule or"; and made minor changes in style. Amendments effective July 1, 1997.

Applicability: Section 26, Ch. 329, L. 1997 provided: "A person who, prior to January 1, 1997, has filed a correct and complete air quality permit application with the department of environmental quality for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20."

1995 Amendments — Composite Section: Chapter 418 in (1), after first "department", deleted "and department of health a joint" and after second "department" deleted "of health and the board of health"; in (1)(a)(iv) and (1)(a)(v) substituted "75-20-104(8)(b) and (8)(c)" for "75-20-104(10)(b) and (10)(c)"; in (1)(a)(v)(B) substituted "75-20-104(8)(a), (8)(d), and (8)(e)" for "75-20-104(10)(a), (10(d), and (10)(e)"; in (1)(a)(vii), after "board", deleted "and board of health" and after "department" deleted "and department of health"; in (3)(d) substituted "department of natural resources and conservation" for "department of state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (1)(a)(iv) and (1)(a)(v)(A) substituted "75-20-104(9)(b) and (9)(c)" for "75-20-104(10)(b) and (10)(c)"; in (1)(a)(v)(B) substituted "75-20-104(9)(a), (9)(d), and (9)(e)" for "75-20-104(10)(a), (10)(d), and (10)(e)"; and made minor changes in style. Amendment effective July 1, 1995.

The codifier has reflected the correct subsection reference.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways and Department of Revenue. The reference to the Department of Revenue was changed pursuant to the authority of sec. 62, Ch. 16, L. 1991, which allows the Code Commissioner to correct erroneous references. Amendment effective July 1, 1991.

1987 Amendment: In (1)(a)(i), before "location", inserted "proposed"; in (1)(a)(iv), at beginning of subsection, inserted introductory clause, before "facility" deleted "proposed", and at end of subsection, before "proposed location", deleted "primary"; in (1)(a)(v)(A) inserted introductory clause; inserted (1)(a)(v)(B) requiring baseline data, along with acceptable alternative locations, to be included in application for crude oil and gas refineries, facilities subject to The Montana Strip and Underground Mine Reclamation Act, facility using geothermal resources, and facility designed for situ gasification of coal; in (3), near end of subsection after "facility", substituted "is proposed or is alternatively proposed to be located" for "may be located, both as primarily and as alternatively proposed"; and in (5), after "area", deleted "or alternative areas" and after "facility" substituted "is proposed or is alternatively proposed to be located" for "may be located".

1981 Amendments: Chapter 274 substituted "department of commerce" for "department of community affairs" in (3)(e).

Chapter 539 substituted "for the permits required under the laws administered by the department of health and the board of health" for "for the permits required by state air and water quality laws" in (1)(a); and substituted "as the board and board of health by order or rule or the department and department of health by order or rule may require" for "as the board and board of health by rule or the department and department of health by order require" at the end of (1)(a)(vii).

Composite Section: This section was amended by Ch. 553 and Ch. 676, L. 1979, and a composite section was prepared by the Code Commissioner, 1979. Subsection (3) regarding persons and agencies to be served with a copy of an application was amended by both of the above chapters. Ch. 676 deleted "chief executive officer of each" but the Code Commissioner reinserted this phrase to incorporate the change by Ch. 553 from "municipality" to "unit of local government".

Waiver of Baseline Data Requirement if Existing Contract: Section 26, Ch. 676, L. 1979, provided: "The department may in its discretion waive the requirement that baseline data for the primary and reasonable alternate locations be submitted with an application under 75-20-211(1)(a)(v) in those cases in which the applicant has, prior to July 1, 1979, entered into a contract with the department to compile baseline information."

Administrative Rules

Title 17, chapter 20, ARM Major facility siting.

75-20-212. Cure for failure of service.

Compiler's Comments

1995 Amendment: Chapter 583 deleted reference to subsections (3) and (5) of 75-20-211. Amendment effective May 1, 1995.

Applicability: Section 12, Ch. 583, L. 1995, provided: "(1) A person who, between [the effective date of this act] [May 1, 1995] and June 30, 1997, has submitted a correct and complete application for all applicable air and water quality permits from the department of health and environmental sciences [now department of environmental quality] or has commenced to construct or commenced or applied to upgrade a power plant that has been designed for or will be capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20.

(2) A person who, between [the effective date of this act] [May 1, 1995] and June 30, 1997, has filed an application for all applicable air and water quality permits from the department of health and environmental sciences [now department of environmental quality] for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20, if the application is correct and complete as of October 1, 1997."

75-20-213. Supplemental material — amendments.

Compiler's Comments

2021 Amendment: Chapter 553 in (1) at beginning inserted exception clause; and made minor changes in style. Amendment effective July 1, 2021.

Retroactive Applicability: Section 13, Ch. 553, L. 2021, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to certificates issued on or after January 1, 1976."

Severability: Section 11, Ch. 553, L. 2021, was a severability clause.

2003 Amendment: Chapter 217 in (1) at end of second sentence substituted "75-20-211(3) and (4)" for "75-20-211(3) through (5)"; and in (2) at end of second sentence after "fees" substituted "and additional amendment application review time" for "as the department determines necessary, or the department may require a new application and filing fee" and inserted third sentence providing that the total review time may not exceed 9 months. Amendment effective April 3, 2003.

Saving Clause: Section 19, Ch. 217, L. 2003, was a saving clause.

Severability: Section 20, Ch. 217, L. 2003, was a severability clause.

1997 Amendment: Chapter 329 near middle of (1) substituted "the department by rule or by order prescribes" for "the board by rule or the department by order prescribes"; and in (2) substituted reference to 75-20-216(6) for reference to 75-20-216(5). Amendment effective July 1, 1997.

Applicability: Section 26, Ch. 329, L. 1997 provided: "A person who, prior to January 1, 1997, has filed a correct and complete air quality permit application with the department of environmental quality for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20."

1995 Amendment: Chapter 418 in (2), after "department", deleted "the department of health"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

75-20-215. Filing fee — accountability — refund — use.

Compiler's Comments

2003 Amendment: Chapter 217 in (1)(a)(i) through (1)(a)(viii) substituted current text establishing fee scale based upon the estimated cost of the facility for former text of (1)(a)(i) through (1)(a)(vi) that read: "(i) 4% of any estimated cost up to $1 million; plus

(ii) 1% of any estimated cost over $1 million and up to $20 million; plus

(iii) 0.5% of any estimated cost over $20 million and up to $100 million; plus

(iv) 0.25% of any amount of estimated cost over $100 million and up to $300 million; plus

(v) 0.125% of any amount of estimated cost over $300 million and up to $1 billion; plus

(vi) 0.05% of any amount of estimated cost over $1 billion". Amendment effective April 3, 2003.

Saving Clause: Section 19, Ch. 217, L. 2003, was a saving clause.

Severability: Section 20, Ch. 217, L. 2003, was a severability clause.

1997 Amendment: Chapter 329 near middle of first sentence of (1)(a) inserted "Title 75, chapter 1, and"; near end of first sentence of (1)(b), after "environmental impact statement", inserted "or assessment"; in fourth sentence of (2)(a) substituted reference to 75-20-216(6) for reference to 75-20-216(5); and made minor changes in style. Amendment effective July 1, 1997.

Applicability: Section 26, Ch. 329, L. 1997 provided: "A person who, prior to January 1, 1997, has filed a correct and complete air quality permit application with the department of environmental quality for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20."

1995 Amendment: Chapter 418 in (2)(a), in fourth sentence after "department", deleted "the department of health" and after "board" deleted "the board of health"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1985 Amendment: At beginning of (1)(a)(i) increased fee from 2% to 4% of estimated costs; at end of (1)(a)(v) extended fee to amounts up to $1 billion; and inserted (1)(a)(vi) establishing a filing fee equal to .05% of any amount of estimated cost of a facility over $1 billion.

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

75-20-216. Study, evaluation, and report on proposed facility — assistance by other agencies.

Compiler's Comments

2021 Amendment: Chapter 324 in (3) in middle of last sentence after "adopted by the" substituted "department" for "board". Amendment effective July 1, 2021.

2017 Amendment: Chapter 280 inserted (2)(c) concerning modification of proposed facility; in (3) in last sentence after "decision by the" substituted "department" for "board" and after "adopted by the" substituted "board" for "department"; in (6) in first sentence near end substituted "facility" for "site", and deleted former second sentence that read: "The report may include opinions as to the advisability of granting, denying, or modifying the certificate"; and made minor changes in style. Amendment effective October 1, 2017.

2007 Amendment: Chapter 469 in (4) in first sentence near middle after "recommendations" inserted "customer fiscal impact analysis, if required pursuant to 69-2-216"; in (6) in first sentence after "regulation" and in third sentence after "making reports" inserted reference to consumer counsel; and made minor changes in style. Amendment effective May 8, 2007.

Applicability: Section 10, Ch. 469, L. 2007, provided: "[This act] applies to applications received by the department of environmental quality on or after [the effective date of this act]." Effective May 8, 2007.

2005 Amendment: Chapter 337 near beginning of (3) and (4) in exception clause inserted "75-1-205(4)"; and made minor changes in style. Amendment effective April 21, 2005.

Applicability: Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

2003 Amendment: Chapter 217 in (2) in first sentence near middle before "evaluation" deleted "intensive study and"; in (4) at end of second sentence inserted language authorizing inclusion of an environmental impact statement or analysis under certain circumstances; and made minor changes in style. Amendment effective April 3, 2003.

Saving Clause: Section 19, Ch. 217, L. 2003, was a saving clause.

Severability: Section 20, Ch. 217, L. 2003, was a severability clause.

2001 Amendments — Composite Section: Chapter 293 in (1) decreased notification requirement from 60 days to 30 days; in (1)(b) decreased notification requirement from 30 days to 15 days; in (3) in first sentence and in (4) after "within" substituted "9 months" for "1 year"; and in (3) near end of first sentence substituted "this chapter" for "this part" and in fifth sentence substituted "by the board" for "by the department". Amendment effective April 20, 2001.

Chapter 299 in (3) and (4) at beginning in exception clause inserted "75-1-208(4)(b)"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 483 in (6) near beginning after "transportation" deleted "commerce". Amendment effective July 1, 2001.

Saving Clause: Section 15, Ch. 293, L. 2001, was a saving clause.

Applicability: Section 16, Ch. 299, L. 2001, provided: "[This act] applies to environmental reviews that are begun after [the effective date of this act]." Effective October 1, 2001.

1997 Amendment: Chapter 329 in (1) substituted "60 days" for "90 days"; in (2), near end of first sentence after "75-20-301", deleted "and 75-20-503"; in (3), in first sentence at beginning, inserted exception clause, after "application" deleted "and the board of environmental review, if applicable, within an additional 6 months shall issue", near end inserted "other than those contained in this part", and at end deleted "or the board of environmental review and this chapter", deleted former second sentence that read: "The department and the board shall determine compliance with all standards, permit requirements, and implementation plans under their jurisdiction for the proposed location or any proposed alternate location in their decision, opinion, order, certification, or permit", substituted second sentence concerning items made under laws for "The decision, opinion, order, certification, or permit, with or without conditions, is conclusive on all matters that the department and the board administer, and on any of the criteria specified in 75-20-503(2) through (7) that are a part of the determinations made under the laws administered by the department and the board", at beginning of third sentence substituted "Nevertheless, the department" for "Although the decision, opinion, order, certification, or permit issued under this subsection is conclusive, the board" and substituted "75-20-301(1)(c) or (3)" for "75-20-301(2)(c)", and in last sentence substituted "department" for "board"; in (4), in first sentence at beginning, inserted exception clause and substituted "1 year" for "22 months" and substituted "the department shall issue a report" for "as defined in 75-20-104(8)(a) and (8)(b) and for a facility as defined in 75-20-104(8)(b) and (8)(c) that is more than 30 miles in length and within 1 year for a facility as defined in 75-20-104(8)(b) and (8)(c) that is 30 miles or less in length, the department shall make a report to the board" and in last sentence substituted "issue its report" for "make its report to the board"; inserted (5) relating to projects subject to joint review; and made minor changes in style. Amendment effective July 1, 1997.

Applicability: Section 26, Ch. 329, L. 1997 provided: "A person who, prior to January 1, 1997, has filed a correct and complete air quality permit application with the department of environmental quality for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20."

1995 Amendments — Composite Section: Chapter 418 in (1), (1)(b), and (2), after "department", deleted "and department of health"; in first sentence of (2) substituted "shall issue" for "the department of health shall commence a study to enable it or the board of health to issue"; in (3), in first sentence near beginning after "department", deleted "of health", near middle, after "board", substituted "of environmental review" for "of health or department of health", and near end substituted "department or the board of environmental review" for "department of health or the board of health", in second sentence and in two places in third sentence, after "department" and "board", deleted "of health", deleted former fifth sentence that read: "The decision, opinion, order, certification, or permit of the department of health or the board of health satisfies the review requirements by those agencies and shall be acceptable in lieu of an environmental impact statement under the Montana Environmental Policy Act", at beginning of sixth sentence deleted "A copy of" and near middle, after "permit", substituted "must be used" for "shall be served upon the department and the board and shall be utilized as part of their", and in last sentence, in two places after "department" and after "board", deleted "of health"; in (4) substituted "75-20-104(8)(a) and (8)(d)" for "(a) and (d) of 75-20-104(10)" and in two places substituted "75-20-104(8)(b) and (8)(c)" for "(b) and (c) of 75-20-104(10)"; in (5), in first sentence, substituted "natural resources and conservation" for "state lands"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (2), near end of first sentence, substituted "enable it to issue" for "enable it or the board of health to issue"; in (3), at beginning of second sentence and end of third sentence after "department of health", deleted "and the board of health", near middle of fifth sentence, after "department of health", deleted "or the board of health", and in last sentence, after "rules adopted", deleted "by the board of health"; in (4) substituted "75-20-104(9)(a) and (9)(d)" for "(a) and (d) of 75-20-104(10)" and in two places substituted "75-20-104(9)(b) and (9)(c)" for "(b) and (c) of 75-20-104(10)"; and made minor changes in style. Amendment effective July 1, 1995.

The codifier has reflected the correct subsection reference.

Because Ch. 418 created a Board of Environmental Review and Ch. 546 eliminated the Board of Health and Environmental Sciences, the Code Commissioner has retained the references to the Board that were eliminated by Ch. 546.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

1987 Amendments: Chapter 312 in (3), near end of second sentence, substituted "proposed location or any proposed alternate location" for "primary and reasonable alternate locations".

Chapter 370 near beginning of (2) deleted reference to 75-20-214.

1981 Amendments: Chapter 274 substituted "department of commerce" for "department of community affairs" in (5).

Chapter 539 inserted "or department of health" after "the board of health" in the middle of the first sentence of (3); substituted "permit required under the laws administered by the department of health or board of health and this chapter" for "permit required by state or federal air and water quality laws and this chapter" at the end of the first sentence of (3); substituted "the board of health shall determine compliance with all standards, permit requirements, and implementation plans under their jurisdiction" for "the board of health shall determine compliance with air and water quality standards and implementation plans" in the second sentence of (3); deleted "of air and water quality impacts under the federal and state air and water quality statutes" after "The decision, opinion, order, certification, or permit, with or without conditions, is conclusive on all matters" in the third sentence of (3); substituted "specified in subsections (2) through (7) of 75-20-503" for "specified in 75-20-503(3) and (4)" in the third sentence of (3); substituted "the determinations made under the laws administered by the department of health and the board of health" for "the determinations made under federal and state air and water quality statutes" at the end of the third sentence of (3); and deleted "A decision by the department of health or board of health is subject to appellate review pursuant to the air and water quality statutes administered by the department of health and board of health" at the end of (3).

Case Notes

No Violation of Clear Legal Duty to Consult With County Under MEPA — Writ of Mandamus and Injunction Improper — Action Against DEQ Dismissed: After an exchange of information between the Department of Environmental Quality (DEQ) and Jefferson County about the

Mountain States Transmission Intertie (MSTI), a proposed electric transmission line that would transect Jefferson County, the county filed a petition for a writ of mandamus and injunctive relief seeking to compel DEQ to satisfy its legal duty under the Montana Environmental Protection Act (MEPA) to consult with local government prior to issuing a draft Environmental Impact Statement (EIS) and to enjoin DEQ from issuing the draft EIS until after it had complied with its duty to consult. After a series of evidentiary hearings, the District Court concluded that DEQ had not satisfied its duty to consult with the county under MEPA and enjoined it from issuing a draft EIS on the MSTI project until DEQ had more thoroughly consulted with the county, and DEQ appealed. The Supreme Court concluded that the District Court had erred in issuing a writ of mandamus to compel DEQ to more thoroughly consult with the county because MEPA does not establish a clear legal duty for DEQ to consult with a local government to any specified degree. It also ruled that the writ of mandamus was improper because the county had other remedies available to it once DEQ rendered a final decision on the project. Because neither MEPA nor related regulations define the word "consult," DEQ is afforded some discretion in determining the extent to which it consults with a local government under 75-1-104. Because MEPA allows for some discretion on the part of DEQ on how to consult with local government, the Supreme Court held the requirement to consult was not ministerial and therefore did not establish a clear legal duty under MEPA. Accordingly, the Supreme Court remanded the matter to the District Court with instructions to dismiss without prejudice. Jefferson County v. Dept. of Environmental Quality, 2011 MT 265, 362 Mont. 311, 264 P.3d 715.

75-20-217. Voiding an application.

Compiler's Comments

1995 Amendment: Chapter 583 in introductory clause, after "department", inserted "following notice and an opportunity for hearing"; and made minor changes in style. Amendment effective May 1, 1995.

Applicability: Section 12, Ch. 583, L. 1995, provided: "(1) A person who, between [the effective date of this act] [May 1, 1995] and June 30, 1997, has submitted a correct and complete application for all applicable air and water quality permits from the department of health and environmental sciences [now department of environmental quality] or has commenced to construct or commenced or applied to upgrade a power plant that has been designed for or will be capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20.

(2) A person who, between [the effective date of this act] [May 1, 1995] and June 30, 1997, has filed an application for all applicable air and water quality permits from the department of health and environmental sciences [now department of environmental quality] for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20, if the application is correct and complete as of October 1, 1997."

75-20-219. Amendments to certificate.

Compiler's Comments

2021 Amendment: Chapter 553 in (1)(a), (1)(b), (1)(c), (2), (3), and (4) at beginning inserted exception clause; in (4) in two places after "department" deleted "or board"; and made minor changes in style. Amendment effective July 1, 2021.

Retroactive Applicability: Section 13, Ch. 553, L. 2021, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to certificates issued on or after January 1, 1976."

Severability: Section 11, Ch. 553, L. 2021, was a severability clause.

2017 Amendment: Chapter 280 inserted (1)(c) concerning need for department to consult with applicant; and made minor changes in style. Amendment effective October 1, 2017.

2001 Amendment: Chapter 293 in (1) near end of second sentence before "shall" substituted "department" for "board shall hold a hearing in the same manner as a hearing is held on an application for a certificate. After hearing, the board"; in (2) in two places substituted "department" for "board" and after "appropriate" deleted "unless the department's determination is appealed to the board within 15 days after notice of the department's determination is given"; substituted (3) providing that party requesting hearing has burden to show department's determination unreasonable for former (3) and (4) that read: "(3) If the department or the board, under subsection (4), determines that a hearing is required because the proposed change would result in a material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of the facility, the applicant has the burden of showing by clear and convincing evidence that the amendment should be granted.

(4) If the department determines that the proposed change in the facility would not result in a material increase in any environmental impact or would not be a substantial change in the

location of all or a portion of the facility and a hearing is required because the department's determination is appealed to the board as provided in subsection (2), the appellant has the burden of showing by clear and convincing evidence that the proposed change in the facility would result in a material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of the facility as set forth in the certificate"; and made minor changes in style. Amendment effective April 20, 2001.

Saving Clause: Section 15, Ch. 293, L. 2001, was a saving clause.

1995 Amendment: Chapter 418 in (5), before "permit", inserted "air or water quality" and in two places, after "department" and after "board", deleted "of health"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1987 Amendment: Throughout section, after "would result in", substituted "a material increase" for "any material increase"; in (1), at end of first sentence, and in (4), at end of subsection, after "facility", substituted "as set forth in the certificate" for "other than as provided in the alternates set forth in the original application"; and made minor changes in punctuation.

1981 Amendment: Substituted (3) concerning the applicant's burden of showing that the amendment should be granted for "If a hearing is required, the applicant has the burden of showing by clear and convincing evidence that the amendment should be granted"; and inserted (4) concerning the applicant's burden of showing that the proposed change in the facility would result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of the facility.

Administrative Rules

ARM 17.20.1804 Decisions on certificate amendments.

75-20-223. Board review of department decisions.

Compiler's Comments

2009 Amendment: Chapter 445 in (1)(a) in first sentence at end after "board" deleted "under the contested case procedures of Title 2, chapter 4, part 6" and inserted second sentence referencing exception to application of Title 2, chapter 4, part 6; inserted (1)(b) establishing guidelines for request for hearing and requiring request be made within 30 days of decision; inserted (1)(c) establishing guidelines for election to proceed before board or district court; in (2) at end after "board" substituted "as provided in subsections (1)(b) and (1)(c)" for "under the contested case procedures of Title 2, chapter 4, part 6"; in (3) at end after "decision" substituted "as provided in subsections (1)(b) and (1)(c)" for "to the board under the contested case procedures of Title 2, chapter 4, part 6"; inserted (4) establishing deadlines for board's final decision; and made minor changes in style. Amendment effective May 5, 2009.

Severability: Section 10, Ch. 445, L. 2009, was a severability clause.

Applicability: Section 12, Ch. 445, L. 2009, provided: "[This act] applies to judicial and board of environmental review hearing and appeal proceedings initiated on or after [the effective date of this act]." Effective May 5, 2009.

2007 Amendment: Chapter 469 inserted (4) providing that appeal of a final decision by the department may not be based upon a customer fiscal impact analysis. Amendment effective May 8, 2007.

Applicability: Section 10, Ch. 469, L. 2007, provided: "[This act] applies to applications received by the department of environmental quality on or after [the effective date of this act]." Effective May 8, 2007.

2003 Amendment: Chapter 217 inserted (3) allowing a person aggrieved by the department's decision to not include an environmental impact statement or analysis in its findings to appeal the department's decision to the board. Amendment effective April 3, 2003.

Saving Clause: Section 19, Ch. 217, L. 2003, was a saving clause.

Severability: Section 20, Ch. 217, L. 2003, was a severability clause.

2001 Amendment: Chapter 293 in (1) after "certificate" deleted "the renewal of a certificate"; inserted (2) authorizing appeal by aggrieved person to board within 15 days of final department certificate amendment decision; and made minor changes in style. Amendment effective April 20, 2001.

Saving Clause: Section 15, Ch. 293, L. 2001, was a saving clause.

75-20-228. Electric generating facility fuel source change — notice requirements.

Compiler's Comments

Effective Date: Section 10, Ch. 553, L. 2021, provided: "[This act] is effective July 1, 2021."

Retroactive Applicability: Section 13, Ch. 553, L. 2021, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to certificates issued on or after January 1, 1976."

Severability: Section 11, Ch. 553, L. 2021, was a severability clause.

75-20-231. Expedited review.

Compiler's Comments

2003 Amendment: Chapter 217 in (1) near middle decreased the time for the department to issue a certification decision from 120 days to 90 days. Amendment effective April 3, 2003.

Saving Clause: Section 19, Ch. 217, L. 2003, was a saving clause.

Severability: Section 20, Ch. 217, L. 2003, was a severability clause.

2001 Amendments — Composite Section: Chapter 293 in (1) decreased time of certificate decision from 180 days to 120 days. Amendment effective April 20, 2001.

Chapter 299 in (1) at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2001.

Saving Clause: Section 15, Ch. 293, L. 2001, was a saving clause.

Applicability: Section 16, Ch. 299, L. 2001, provided: "[This act] applies to environmental reviews that are begun after [the effective date of this act]." Effective October 1, 2001.

75-20-232. Criteria for identifying proposed facilities that qualify for expedited review.

Compiler's Comments

2003 Amendment: Chapter 217 inserted (2)(i) providing that the economic importance and benefits of a proposed facility be included in the criteria to be considered by the department; and made minor changes in style. Amendment effective April 3, 2003.

Saving Clause: Section 19, Ch. 217, L. 2003, was a saving clause.

Severability: Section 20, Ch. 217, L. 2003, was a severability clause.

Part 3
Decisions

Part Case Notes

Issuance of Certificate of Environmental Compatibility and Public Need — No District Court Jurisdiction to Determine Public Necessity: Once a certificate of environmental compatibility and public need was issued by the Board of Natural Resources and Conservation (now Board of Environmental Review), the District Court had no jurisdiction to determine the existence of public necessity with respect to a proposed electric transmission line under the Montana Utility Siting Act of 1973 (now the Montana Major Facility Siting Act) since that determination had already been made by the Board pursuant to the Act. Mont. Power Co. v. Fondren, 226 M 500, 737 P2d 1138, 44 St. Rep. 850 (1987).

Limitation of Court Jurisdiction in Centerline Determination and Eminent Domain — Noncontested Case Procedure: The Legislature did not intend the final electric transmission line centerline determination by the Board of Natural Resources and Conservation (now Board of Environmental Review) to be subject to judicial review, and once the Board sets the specific route, no court has jurisdiction to hear challenges to the location. Through enactment of 75-20-205(2) (now repealed) and 75-20-407, court jurisdiction in eminent domain cases was limited to hearing challenges to the necessity of taking private property. The preponderance of the evidence on 70-30-111 findings that must be proven to the court before a preliminary condemnation order is issued is satisfied by appending to the complaint the Board's certificate of environmental compatibility and public need and the Board's findings of fact, opinion, decision, order, and recommendations. In cases where landowners feel conditions of the certificate were breached, proper remedy lies in a mandamus action under 75-20-404. Mont. Power Co. v. Fondren, 226 M 500, 737 P2d 1138, 44 St. Rep. 850 (1987).

75-20-301. Decision of department — findings necessary for certification.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 451, L. 2023. Amendment effective May 8, 2023.

2021 Amendment: Chapter 13 in (1) in introductory clause substituted "75-20-104(10)(a) and (10)(b)" for "75-20-104(9)(a) and (9)(b)"; in (1)(h) substituted "75-20-104(10)(a) or (10)(b)" for "75-20-104(9)(a) or (9)(b)"; in (1)(h)(ii) substituted "75-20-104(10)(a)" for "75-20-104(9)(a)"; and in (3) in introductory clause substituted "75-20-104(10)(c)" for "75-20-104(9)(c)". Amendment effective October 1, 2021.

2019 Amendment: Chapter 447 in (1) substituted "75-20-104(9)(a) and (9)(b)" for "75-20-104(8)(a) and (8)(b)"; in (1)(h) substituted "75-20-104(9)(a) or (9)(b)" for "75-20-104(8)(a) or (8)(b)"; in (1)(h)(ii) substituted "75-20-104(9)(a)" for "75-20-104(8)(a)"; and in (3) substituted "75-20-104(9)(c)" for "75-20-104(8)(c)". Amendment effective May 10, 2019.

2011 Amendment: Chapter 382 in (1)(h) substituted current language for "that the use of public lands for location of the facility was evaluated and public lands were selected whenever their use is as economically practicable as the use of private lands". Amendment effective May 12, 2011.

Applicability: Section 5, Ch. 382, L. 2011, provided: "[This act] applies to applications for a certificate under the Major Facility Siting Act filed on or after [the effective date of this act]." Effective May 12, 2011.

2003 Amendments — Composite Section: Chapter 114 in (4) substituted "75-20-104" for "77-20-104(8)"; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 217 in (3)(a) at end after "impacts;" substituted "and" for "or"; in (3)(b) at end after "terms" substituted "will not result in" for "do not pose any threat of serious injury or damage to"; in (3)(b)(i) at beginning inserted "a violation of a law or standard that protects"; deleted former (3)(b)(ii) that read: "(ii) the social and economic conditions of inhabitants of the affected area"; in (3)(b)(ii) substituted "a violation of a law or standard that protects the public health and safety" for "the health, safety, or welfare of area inhabitants"; in (4) near beginning after "defined in" substituted "75-20-104" for "77-20-104(8)"; and made minor changes in style. Amendment effective April 3, 2003.

Saving Clause: Section 19, Ch. 217, L. 2003, was a saving clause.

Severability: Section 20, Ch. 217, L. 2003, was a severability clause.

2001 Amendment: Chapter 293 in (1) and (3) decreased facility approval time after issuing report from 45 days to 30 days; in (1) substituted "75-20-104(8)(a) and (8)(b)" for "75-20-104(8)(c) and (8)(d)"; in (3) substituted "a facility defined in 75-20-104(8)(c)" for "facilities defined in 75-20-104(8)(a), (8)(b), and (8)(e) through (8)(g)"; deleted former (4) and (5) that read: "(4) To be considered an alternative to a proposed facility defined in 75-20-104(8)(a) and (8)(b), the alternative must:

(a) meet the objective of the applicant's proposal;

(b) be available to the applicant; and

(c) be reasonable and specific to the applicant's proposed site.

(5) Consideration of alternatives for facilities defined in 75-20-104(8)(c) and (8)(d) may not be a basis for requiring considerations of alternative sites for facilities defined in 75-20-104(8)(a) and (8)(b)"; and made minor changes in style. Amendment effective April 20, 2001.

Saving Clause: Section 15, Ch. 293, L. 2001, was a saving clause.

1997 Amendment: Chapter 329 deleted former (1) that read: "Within 60 days after submission of the recommended decision by the hearing examiner, the board shall make complete findings, issue an opinion, and render a decision upon the record, either granting or denying the application as filed or granting it upon the terms, conditions, or modifications of the construction, operation, or maintenance of the facility that the board considers appropriate"; in (1) substituted present language concerning Department approval for "The board may not grant a certificate unless it finds and determines"; deleted former (2)(d) that read: "(d) each of the criteria listed in 75-20-503"; in (1)(e) substituted "department" for "board"; in (1)(h), at end, deleted "and compatible with the environmental criteria listed in 75-20-503"; in (2) substituted "department" for "board"; deleted former (4) that read: "(4) Considerations of need, public need, or public convenience and necessity and demonstration thereof by the applicant apply only to utility facilities described in 75-20-104(8)(a)(i), (8)(b), (8)(c), and (8)(d)"; inserted (3) relating to approval within 45 days; inserted (4) relating to being considered an alternative; inserted (5) relating to consideration of separate alternatives; inserted (6) relating to denial of certificate if findings cannot be made; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1997.

Applicability: Section 26, Ch. 329, L. 1997 provided: "A person who, prior to January 1, 1997, has filed a correct and complete air quality permit application with the department of environmental quality for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20."

1995 Amendments — Composite Section: Chapter 418 in (2)(h) substituted "department or board has issued any necessary air or water quality" for "department of health or board of health have issued a"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 583 in (2), after "certificate", deleted "either as proposed by the applicant or as modified by the board"; in (4), at end, inserted "described in 75-20-104(10)(a)(i), (10)(b), (10)(c), and (10)(d)"; and made minor changes in style. Amendment effective May 1, 1995.

The codifier has reflected the correct subsection reference.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

Applicability: Section 12, Ch. 583, L. 1995, provided: "(1) A person who, between [the effective date of this act] [May 1, 1995] and June 30, 1997, has submitted a correct and complete application for all applicable air and water quality permits from the department of health and environmental sciences [now department of environmental quality] or has commenced to construct or commenced or applied to upgrade a power plant that has been designed for or will be capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20.

(2) A person who, between [the effective date of this act] [May 1, 1995] and June 30, 1997, has filed an application for all applicable air and water quality permits from the department of health and environmental sciences [now department of environmental quality] for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20, if the application is correct and complete as of October 1, 1997."

1987 Amendment: In (2)(c), after "facility", substituted "minimizes" for "represents the minimum".

1987 Statement of Intent: The statement of intent attached to Ch. 312, L. 1987, provided: "A statement of intent is required for this bill in order to provide guidance to the board of natural resources and conservation [now board of environmental review] concerning the board's authority to make rules on the provisions of the Montana Major Facility Siting Act that are affected by this bill.

Section 5 [75-20-301] amends the board's decision standard concerning adverse environmental impact. The term "minimizes" is substituted for the existing qualifying phrase "represents the minimum". This amendment is consistent with the historical practice and interpretation of the board in carrying out its functions under the siting act. It is the intent of the legislature that the board's rules and regulations in effect at the time of the enactment of this bill represent reasonable rules implementing and interpreting the decision standard as amended by this bill."

Administrative Rules

Title 17, chapter 20, subchapter 16, ARM Decision standards.

Title 17, chapter 20, subchapter 19, ARM Facility monitoring.

Case Notes

No Violation of Clear Legal Duty to Consult With County Under MEPA — Writ of Mandamus and Injunction Improper — Action Against DEQ Dismissed: After an exchange of information between the Department of Environmental Quality (DEQ) and Jefferson County about the Mountain States Transmission Intertie (MSTI), a proposed electric transmission line that would transect Jefferson County, the county filed a petition for a writ of mandamus and injunctive relief seeking to compel DEQ to satisfy its legal duty under the Montana Environmental Protection Act (MEPA) to consult with local government prior to issuing a draft Environmental Impact Statement (EIS) and to enjoin DEQ from issuing the draft EIS until after it had complied with its duty to consult. After a series of evidentiary hearings, the District Court concluded that DEQ had not satisfied its duty to consult with the county under MEPA and enjoined it from issuing a draft EIS on the MSTI project until DEQ had more thoroughly consulted with the county, and DEQ appealed. The Supreme Court concluded that the District Court had erred in issuing a writ of mandamus to compel DEQ to more thoroughly consult with the county because MEPA does not establish a clear legal duty for DEQ to consult with a local government to any specified degree. It also ruled that the writ of mandamus was improper because the county had other remedies available to it once DEQ rendered a final decision on the project. Because neither MEPA nor related regulations define the word "consult," DEQ is afforded some discretion in determining the extent to which it consults with a local government under 75-1-104. Because MEPA allows for some discretion on the part of DEQ on how to consult with local government, the Supreme Court held the requirement to consult was not ministerial and therefore did not establish a clear legal duty under MEPA. Accordingly, the Supreme Court remanded the matter to the District Court with instructions to dismiss without prejudice. Jefferson County v. Dept. of Environmental Quality, 2011 MT 265, 362 Mont. 311, 264 P.3d 715.

Siting Act Not Implied Repeal of "Used and Useful" for Ratemaking: In 1973, Montana Power Company (MPC) filed an application for a certificate of environmental compatibility and public need for Colstrip Units 3 and 4 under the Montana Major Facility Siting Act. In granting the certificate, the Board of Natural Resources and Conservation (now Board of Environmental Review) found that there was a need for the energy which would be produced and that the units would serve the public interest, convenience, and necessity. After Unit 3 was completed, MPC filed an application with the Public Service Commission (PSC) to increase electric rates to reflect Unit 3 in its rate base. At the rate hearing, the PSC took evidence regarding whether Unit 3 was "used and useful". MPC moved to strike this testimony, contending the PSC was precluded from considering this by the certificate of need issued under the Siting Act. MPC filed an application for original jurisdiction and declaratory judgment or other appropriate relief with the Supreme Court. The PSC later concluded Unit 3 was not used and useful and could not be included in the rate base. The Supreme Court found that while the Siting Act includes factors which can be associated with the used and useful concept of utility regulation, the primary purposes of the Siting Act are to ensure minimal environmental, natural resource, and social impacts. The need determination is related primarily to environmental protection rather than rate base treatment for the facility. Once the facility is constructed, the PSC has jurisdiction to determine whether the facility is actually used and useful and whether the facility's output is required by the ratepayers. The Siting Act and the utility regulation statutes are reconcilable. The Siting Act did not impliedly repeal the PSC's authority to determine whether a facility is used and useful for ratemaking. Mont. Power Co. v. P.S.C., 214 M 82, 692 P2d 432, 41 St. Rep. 2332 (1984).

Bias of Hearing Officer Alleged to Deny Fair Hearing — No Prejudice Shown: The Board of Natural Resources and Conservation (now Board of Environmental Review) issued a certificate of environmental compatibility and public need under the Montana Utility Siting Act of 1973 (now the Montana Major Facility Siting Act of 1975). The plaintiff environmental association alleged the denial of its constitutional right to fair hearing as a result of the alleged prejudice of attorney Sabol, hearing officer and member of the Board. The Supreme Court found no denial of the plaintiff's constitutional right because: (1) Sabol's connection with another ski resort that might seek a certificate in the future was such as to make the plaintiff's claim of prejudice no more than tenuous; (2) any bias reflected in Sabol's comments to a newspaper reporter about the tactics of the plaintiff was not reflected at a hearing almost 2 months later; (3) directions to the defendant's counsel from Sabol to limit the scope of cross-examination were consistent with the fact that the parties took similar positions on the issue then in question; (4) even if Sabol was prejudiced he had either relinquished his position as hearing officer or was no longer serving on the Board itself when a decision was recommended to the Board and the Board acted on that recommendation; and (5) 75-20-220 (now repealed), specifying that a hearing officer may not be a member of the Board is inapplicable to this case because that section was enacted in 1975 and this case was tried under the law as passed in 1973. Mont. Wilderness Ass'n v. Bd. of Natural Resources and Conserv., 200 M 11, 648 P2d 734, 39 St. Rep. 1238 (1982).

Certificate of Need — Findings and Conclusions in Compliance With Law: After making findings of fact and conclusions of law under this chapter, the Board of Natural Resources and Conservation (now Board of Environmental Review) issued a certificate of environmental compatibility and public need. The Supreme Court upheld the legal sufficiency of those findings and conclusions. In accordance with Mont. Consumer Counsel v. P.S.C. & Mont. Power Co., 168 M 180, 541 P2d 770 (1975), separate, express rulings on each proposed finding of fact are not required by 2-4-623(4) as long as the agency's decision and order are clear. The court also held that there was sufficient compliance with 2-4-623(1) because the findings of fact were factually supported when viewed as a whole and that there was sufficient compliance with 2-4-623(4) because the conclusions of law, while not followed immediately by an authority or opinion, were sufficiently supported by reasoned opinion to render their basis reasonably ascertainable. Mont. Wilderness Ass'n v. Bd. of Natural Resources and Conserv., 200 M 11, 648 P2d 734, 39 St. Rep. 1238 (1982).

Certificate of Need — Findings, Conclusions, and Certificate Supported by Substantial Evidence: Following completion of an environmental impact statement under the Montana

Environmental Policy Act, the Board of Natural Resources and Conservation (now Board of Environmental Review) issued a certificate of environmental compatibility and public need for the construction of a powerline. The Supreme Court upheld the judgment of the District Court that there was substantial evidence supporting the Board's findings that a need for the powerline existed and that conservation measures and alternative energy sources would not reduce the need for the powerline so as to make its construction unnecessary. Mont. Wilderness Ass'n v. Bd. of Natural Resources and Conserv., 200 M 11, 648 P2d 734, 39 St. Rep. 1238 (1982).

Department or Board Determination Final: A Department or Board of Health and Environmental Sciences (now Department of Environmental Quality or Board of Environmental Review) order under this section concerning satisfaction of federal and state air and water quality standards is not interlocutory or preliminary but is final for all purposes and as such is appealable under 2-4-702 of the Montana Administrative Procedure Act and is binding on the Board of Natural Resources (now Board of Environmental Review). N. Plains Resource Council v. Bd. of Natural Resources & Conservation, 181 M 500, 594 P2d 297, 36 St. Rep. 666 (1979).

Specific Findings and Consideration of Clearcut Alternatives Required: The "minimum adverse environmental impact" test required by this section must be accompanied by a "precise and explicit statement of the underlying facts supporting the findings" as provided by 2-4-623 of the Montana Administrative Procedure Act. The Board of Natural Resources and Conservation (now Board of Environmental Review) in determining this impact must also consider clearcut alternatives in the evidence available to the applicant. In this case the Board failed to make adequate findings of fact and conclusions of law regarding which of two types of coal would represent minimum environmental impact and regarding whether mine-mouth generation, as opposed to load-center generation, would represent minimum environmental impact. (See 1987 amendment.) N. Plains Resource Council v. Bd. of Natural Resources & Conservation, 181 M 500, 594 P2d 297, 36 St. Rep. 666 (1979).

Law Review Articles

Dual Standards or Double Standard: Does a Finding of Public Need for a Utility Automatically Satisfy the "Used and Useful" Requirement?, Foot, 6 Pub. Land L. Rev. 195 (1985).

75-20-302. Conditions imposed.

Compiler's Comments

2017 Amendments — Composite Section: Chapter 280 in (1) near middle inserted "the department consulted the applicant and". Amendment effective October 1, 2017.

Chapter 296 inserted (3) requiring the department to condition a certificate upon the confidentiality of the location of heritage properties or paleontological remains; and inserted (4) providing definitions. Amendment effective May 4, 2017.

Applicability: Section 5, Ch. 296, L. 2017, provided: "[This act] applies to certificates issued under the Montana Major Facility Siting Act on or after [the effective date of this act]." Effective May 4, 2017.

1997 Amendment: Chapter 329 at beginning of (1) substituted "department" for "board"; and substituted (2) concerning performance bonds for "In making its findings under 75-20-301(2)(a) for a facility defined in 75-20-104(8)(a)(i), the board may condition a certificate upon actual load growth reaching a specified level or on availability of other planned energy resources." Amendment effective July 1, 1997.

Applicability: Section 26, Ch. 329, L. 1997 provided: "A person who, prior to January 1, 1997, has filed a correct and complete air quality permit application with the department of environmental quality for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20."

1995 Amendments — Composite Section: Chapter 418 in (2) substituted "75-20-104(8)(a)(i)" for "75-20-104(10)(a)(i)"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (2) substituted "75-20-104(9)(a)(i)" for "75-20-104(10)(a)(i)"; and made minor changes in style. Amendment effective July 1, 1995.

The codifier has reflected the correct subsection reference.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1985 Amendment: Inserted (2) authorizing the Board to condition a certificate upon actual load growth reaching a specified level or on availability of other planned energy resources in making findings under the basis of the need for a facility that generates 50 megawatts of electricity or more or any addition (except approved pollution control facilities) costing in excess of $10 million.

Statement of Intent: The statement of intent attached to Ch. 155, L. 1985, provided "(1) It is the intent of the legislature that the board of natural resources and conservation [now board of environmental review] have the authority to condition a certificate of environmental compatibility and public need issued under the Montana Major Facility Siting Act upon actual load growth reaching a specified level or on the availability of other planned resources.

(2) It is the intent of the legislature that the grant of authority to the board referred to in subsection (1) not be construed to limit, alter, or otherwise affect the authority of the Montana public service commission to determine under 69-3-109 whether any facility is "actually used and useful for the convenience of the public"."

75-20-303. Opinion issued with decision — contents.

Compiler's Comments

2021 Amendment: Chapter 13 in (4)(a)(i) and (4)(a)(ii) substituted "75-20-104(10)(a)" for "75-20-104(9)(a)"; in (4)(a)(i) substituted "75-20-104(10)(b)" for "75-20-104(9)(b)"; in (4)(a)(iii) substituted "75-20-104(10)(c)" for "75-20-104(9)(c)"; and in (5)(a)(i) substituted "75-20-104(10)(a) and (10)(b)" for "75-20-104(9)(a) and (9)(b)". Amendment effective October 1, 2021.

2019 Amendment: Chapter 447 in (4)(a)(i) and (4)(a)(ii) substituted "75-20-104(9)(a)" for "75-20-104(8)(a)"; in (4)(a)(i) substituted "75-20-104(9)(b)" for "75-20-104(8)(b)"; in (4)(a)(iii) substituted "75-20-104(9)(c)" for "75-20-104(8)(c)"; and in (5)(a)(i) substituted "75-20-104(9)(a) and (9)(b)" for "75-20-104(8)(a) and (8)(b)". Amendment effective May 10, 2019.

2017 Amendment: Chapter 280 in (5)(a)(i) at beginning inserted exception clause and near end substituted "500-foot-wide" for "1-mile-wide"; inserted (5)(a)(ii) concerning department consultations with applicants and identification of areas in which corridor is considered in environmental review document; in (5)(b) in first sentence substituted "availability of each environmental review document to each owner of property within a corridor" for "availability of the draft environmental review to each owner of property within the 1-mile-wide facility siting corridor identified in the environmental review as the department's preferred alternative facility siting corridor" and in second sentence near middle substituted "availability of each environmental review document" for "availability of the draft environmental review"; in (5)(b)(ii) at end substituted "a corridor" for "the department's preferred alternative 1-mile-wide facility siting corridor"; in (5)(b)(iii) after "environmental review" inserted "document"; deleted former (5)(e) and (5)(f) that read: "(e) The department shall site a corridor of at least 500 feet in width for the facility within the 1-mile-wide corridor in accordance with 75-20-301. If the department determines that it will select a facility siting corridor that is completely or partially different from the preferred alternative facility siting corridor described in the draft environmental review, it shall, before issuing the certificate, provide notice of its intended facility siting corridor and an opportunity to comment to property owners within the 1-mile-wide facility siting corridor that deviates from the preferred alternative. Property owners must be determined and notice must be given in the same manner as provided in subsection (5)(b)";

(f) If the certificate holder complies with subsection (6), a certificate holder may modify the siting of the facility within the 1-mile-wide corridor without complying with the provisions of 75-20-219 if the alternate siting is done in a manner that minimizes the impact on residential areas, crop land, and sensitive sites"; in (6)(a) in first sentence substituted "approved facility siting corridor" for "corridor designated pursuant to subsection (5)", in third sentence substituted "siting corridor" for "location", and at end inserted fourth and fifth sentences concerning publication of legal notice and deadline for public comment; in (6)(b)(i) substituted "siting corridor" for "location"; in (6)(c) at beginning deleted "Siting of a facility within the corridor designated pursuant to subsection (5) or"; inserted (6)(d) concerning maintaining list and notification; and made minor changes in style. Amendment effective October 1, 2017.

2013 Amendment: Chapter 230 inserted (3)(e) concerning statement confirming that notice was provided; inserted (5)(b) through (5)(d) concerning written notice; in (5)(e) inserted second and third sentences concerning notice and comment; and made minor changes in style. Amendment effective April 19, 2013.

Applicability: Section 3, Ch. 230, L. 2013, provided: "[This act] applies to applications for a certificate under the Major Facility Siting Act filed on or after [the effective date of this act]." Effective April 19, 2013.

2011 Amendment: Chapter 382 inserted (5) and (6) pertaining to the designation of a facility siting corridor and siting of facility within corridor. Amendment effective May 12, 2011.

Applicability: Section 5, Ch. 382, L. 2011, provided: "[This act] applies to applications for a certificate under the Major Facility Siting Act filed on or after [the effective date of this act]." Effective May 12, 2011.

2003 Amendment: Chapter 217 inserted (4)(d) providing that construction can commence immediately upon issuance of a certificate unless the department finds there is evidence that a delay in commencing construction is necessary. Amendment effective April 3, 2003.

Saving Clause: Section 19, Ch. 217, L. 2003, was a saving clause.

Severability: Section 20, Ch. 217, L. 2003, was a severability clause.

2001 Amendment: Chapter 293 in (4)(a)(i) and (4)(a)(ii) substituted "75-20-104(8)(a)" for "75-20-104(8)(c) or (8)(d)"; in (4)(a)(i) after "length" inserted "and for a facility defined in 75-20-104(8)(b)"; in (4)(a)(iii) substituted "75-20-104(8)(c)" for "75-20-104(8)(a), (8)(b), and (8)(e) through (8)(g)"; in (4)(b) after "extended" deleted "or renewed"; and in (4)(c) after "(4)(a)(ii)" deleted "or to begin construction under subsection (4)(a)(iii)". Amendment effective April 20, 2001.

Saving Clause: Section 15, Ch. 293, L. 2001, was a saving clause.

1997 Amendment: Chapter 329 in five places substituted "department" for "board"; in (4)(a)(i) and (4)(a)(ii) substituted references to 75-20-104(8)(c) or (8)(d) for references to 75-20-104(8)(b) or (8)(c); in (4)(a)(iii) inserted references to 75-20-104(8)(b) and (8)(e) through (8)(g); and made minor changes in style. Amendment effective July 1, 1997.

Applicability: Section 26, Ch. 329, L. 1997 provided: "A person who, prior to January 1, 1997, has filed a correct and complete air quality permit application with the department of environmental quality for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20."

1995 Amendments — Composite Section: Chapter 418 in (4)(a)(i), (4)(a)(ii), and (4)(a)(iii) substituted references to 75-20-104(8) for references to 75-20-104(10); deleted (5) that read: "(5) The provisions of subsection (4) apply to any facility for which a certificate has not been issued or for which construction is yet to be commenced"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (4)(a)(i) substituted "75-20-104(9)(b) or (9)(c)" for "(b) or (c) of 75-20-104(10)"; in (4)(a)(ii) substituted "75-20-104(9)(b)" for "(b) of 75-20-104(10)"; in (4)(a)(iii) substituted "75-20-104(9)(a)" for "(a) of 75-20-104(10)"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 583 in (2), near middle after "unreasonably restrictive", deleted "pursuant to 75-20-301(2)(f)"; deleted (3)(a)(iii) and (3)(a)(iv) that read: "(iii) problems and objections raised by other federal and state agencies and interested groups; and

(iv) alternatives to the proposed facility"; in (4)(b), after "renewed", deleted "in accordance with subsection (4)(c) or 75-20-225 through 75-20-227"; deleted (5) that read: "(5) The provisions of subsection (4) apply to any facility for which a certificate has not been issued or for which construction is yet to be commenced"; and made minor changes in style. Amendment effective May 1, 1995.

The codifier has reflected the correct subsection reference.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

Applicability: Section 12, Ch. 583, L. 1995, provided: "(1) A person who, between [the effective date of this act] [May 1, 1995] and June 30, 1997, has submitted a correct and complete application for all applicable air and water quality permits from the department of health and environmental sciences [now department of environmental quality] or has commenced to construct or commenced or applied to upgrade a power plant that has been designed for or will be capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20.

(2) A person who, between [the effective date of this act] [May 1, 1995] and June 30, 1997, has filed an application for all applicable air and water quality permits from the department of health and environmental sciences [now department of environmental quality] for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20, if the application is correct and complete as of October 1, 1997."

1985 Amendments: Chapter 155 renumbered (3)(a)(v) as (3)(b), (3)(a)(vi) as (3)(c), and (3)(b) as (3)(d); in (3)(d) after "subsection (4)", deleted "during which construction of the facility must be completed"; in (4)(a) after "time limits", deleted same phrase deleted in (3)(d); made minor phraseology changes in (4)(a)(i) and (4)(a)(ii); inserted (4)(a)(iii) requiring the Board to issue as part of the certificate a provision that for a facility, as defined in 75-20-104(10)(a), construction must begin within 6 years and continue with due diligence pursuant to construction plans established in the certificate; inserted (4)(b) providing that a certificate is void if the facility is not constructed or construction commenced within a specified time limit; and in (4)(c) in first sentence, substituted "may be extended for a reasonable period" for "shall be extended for periods of 2 years each" and after "complete construction", inserted "under subsections (4)(a)(i) and (4)(a)(ii) or to begin construction under subsection (4)(a)(iii)", and in second sentence, after "effort", deleted "to complete construction".

Chapter 573 in (4)(a)(ii) after "in (b)", deleted "or (c)".

Chapter 591 inserted (3)(c) requiring a certificate issued by the Board to include a plan for monitoring the certified facility site between the time of certification and completion of construction; renumbered (3)(a)(v) as (3)(b), (3)(a)(vi) as (3)(d), and (3)(b) as (3)(e).

1983 Amendment: In (4)(a) and (4)(b), substituted "75-20-104(10)" for "75-20-104(7)".

Administrative Rules

ARM 17.20.1902 Linear facilities — monitoring requirements.

Case Notes

Legal Sufficiency of Certificate — Incorporation by Reference of Findings, Conclusions, and Order: The Board of Natural Resources and Conservation (now Board of Environmental Review) issued a certificate not strictly in accordance with the requirements of this section. The Supreme Court held the certificate legally sufficient because the certificate expressly incorporated by reference the findings, conclusions, and order of the Board, which, taken together with the certificate, fulfilled the requirements of this section. Mont. Wilderness Ass'n v. Bd. of Natural Resources and Conserv., 200 M 11, 648 P2d 734, 39 St. Rep. 1238 (1982).

Sufficiency of Environmental Impact Statement — Failure to Consider Alternatives — Failure to Prepare Cost Benefit Analysis: Following the completion of an environmental impact statement under the provisions of the Montana Environmental Policy Act (MEPA), the Board of Natural Resources and Conservation (now Board of Environmental Review) issued a certificate pursuant to this section for the construction of a powerline. The Supreme Court affirmed the holding of the District Court that the impact statement sufficiently considered the alternative of "no action" and that neither the siting act nor MEPA explicitly requires a formal, mathematically expressed cost/benefit analysis. The language of the impact statement makes clear that the "no action" alternative was considered and rejected and that the relative costs and benefits of the proposed powerline were considered in the impact statement. Mont. Wilderness Ass'n v. Bd. of Natural Resources and Conserv., 200 M 11, 648 P2d 734, 39 St. Rep. 1238 (1982).

Meaning of "Construction Commenced": When a power company cleared land, constructed towers and placed steel static wire on them, and ordered and stockpiled poles for the completion of a power transmission line, there was a commencement of construction prior to January 1, 1973. Bd. of Natural Resources & Conservation v. Mont. Power Co., 166 M 522, 536 P2d 758 (1975).

75-20-304. Waiver of provisions of certification proceedings.

Compiler's Comments

2021 Amendment: Chapter 13 in (5) substituted "75-20-104(10)(a) or (10)(b)" for "75-20-104(9)(a) or (9)(b)". Amendment effective October 1, 2021.

2019 Amendment: Chapter 447 in (5) substituted "75-20-104(9)(a) or (9)(b)" for "75-20-104(8)(a) or (8)(b)". Amendment effective May 10, 2019.

2001 Amendment: Chapter 293 in (5) substituted "75-20-104(8)(a) or (8)(b)" for "75-20-104(8)(c), (8)(d), (8)(e), or (8)(f)" and after "75-20-104(3)" deleted "or for any portion of or process in a facility defined in 75-20-104(8)(a) or (8)(b) to the extent that the process or portion of the facility is not subject to an air or water quality permit issued by the department". Amendment effective April 20, 2001.

Saving Clause: Section 15, Ch. 293, L. 2001, was a saving clause.

1997 Amendments: Chapter 42 in (3), after "75-20-216(3)", deleted "and 75-20-303(3)(a)(iv)"; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 329 in (1), (2), (3), (6), and (7) substituted "department" for "board"; in (1), in two places after "75-20-216", deleted "through 75-20-222, 75-20-501"; in (3) substituted references to 75-20-301(1)(c), (2)(b), and (2)(c) for references to 75-20-301(2)(c), (3)(b), and (3)(c) and references to 75-20-211(1)(a)(iii) and (1)(a)(iv) for references to 75-20-211(1)(a)(iv) and (1)(a)(v) and after "75-20-216(3)" deleted "and 75-20-303(3)(a)(iv)"; in (5), in first reference to 75-20-104, substituted "(8)(c), (8)(d), (8)(e), or (8)(f)" for "(8)(b), (8)(c), (8)(d), or (8)(e)", after "75-20-104(8)(a)" inserted "or

(8)(b)", and at end deleted "or board"; and made minor changes in style. Amendment effective July 1, 1997.

Applicability: Section 26, Ch. 329, L. 1997 provided: "A person who, prior to January 1, 1997, has filed a correct and complete air quality permit application with the department of environmental quality for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20."

1995 Amendments — Composite Section: Chapter 418 in (5) substituted references to 75-20-104(8) for references to 75-20-104(10) and after "subject to" substituted "an air or water quality permit issued by the department or board" for "a permit issued by the department of health or board of health"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (5) substituted "75-20-104(9)(b), (9)(c), (9)(d), or (9)(e)" for "subsections (10)(b), (c), (d), or (e) of 75-20-104", substituted "75-20-104(9)(a)" for subsection (10)(a) of 75-20-104", and at end, after "department of health", deleted "or board of health"; and made minor changes in style. Amendment effective July 1, 1995.

The codifier has reflected the correct subsection reference.

Because Ch. 418 created a Board of Environmental Review and Ch. 546 eliminated the Board of Health and Environmental Sciences, the Code Commissioner has retained the reference to the Board of Environmental Review.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 157 in (3), near beginning after "75-20-301", deleted "and 75-20-501(5)". Amendment effective July 1, 1993.

1993 Statement of Intent: The statement of intent attached to Ch. 157, L. 1993, provided: "A statement of intent is required for this bill because [section 4] [69-3-1204] grants the public service commission rulemaking authority to adopt guidelines for an electric or natural gas utility to follow in compiling an integrated least-cost resource plan. It is the intent of the legislature that the rules not apply to rural electric cooperatives. It is also the intent of the legislature that the rules preserve the "used and useful" ratemaking standard. The rules are not intended to allow the commission to preapprove any resource use proposed in a plan. [Section 5] [69-3-1205] does not require coordination between the commission and the department of natural resources and conservation regarding their respective planning requirements. However, it is the intent of the legislature that the department and other state agencies share with the commission their expertise on environmental impacts of a utility's planned resource acquisitions. [Section 6] [69-3-1206] addresses commission rate treatment. The commission may include costs resulting from an integrated least-cost resource plan in a utility's rates."

1987 Amendment: In (5), near middle of subsection, substituted "75-20-104(3)" for "subsection (3) of 75-20-104".

1981 Amendment: Added (3) through (7) relating to a required waiver of certification proceedings upon a showing by the applicant that the proposed facility will be constructed in a county where a single employer has permanently ceased operations causing a loss of 250 or more permanent jobs within 2 years within the preceding 10-year period, a showing of beneficial economic effects of the proposed facility, and payment of all expenses by the applicant.

Administrative Rules

Title 17, chapter 20, subchapter 6, ARM Waiver of provisions of certification proceedings.

Part 4
Postcertification and Legal Responsibilities

75-20-401. Additional requirements by other governmental agencies not permitted after issuance of certificate — exceptions — venue for challenging certificate issuance.

Compiler's Comments

2005 Amendment: Chapter 337 in (3) near middle of second sentence after "determined" substituted "by the court" for "under 75-1-203". Amendment effective April 21, 2005.

Applicability: Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

2003 Amendment: Chapter 361 inserted (3) and (4) relating to challenges to issuance of a certificate; and made minor changes in style. Amendment effective April 16, 2003.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Severability: Section 39, Ch. 361, L. 2003, was a severability clause.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

1995 Amendment: Chapter 418 in (1), near end in exception clause, substituted "the department and board" for "state air and water quality agency or agencies"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

75-20-402. Monitoring.

Compiler's Comments

1997 Amendment: Chapter 329 at beginning of first sentence deleted "board and the". Amendment effective July 1, 1997.

Applicability: Section 26, Ch. 329, L. 1997 provided: "A person who, prior to January 1, 1997, has filed a correct and complete air quality permit application with the department of environmental quality for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20."

1995 Amendment: Chapter 418 in first sentence, near beginning after "department", deleted "the department of health, and the board of health"; in second sentence, near end after "department", deleted "of health"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1985 Amendment: Near end substituted "(3)(b) or (3)(c) of 75-20-303" for "(3)(a)(v) of 75-20-303".

Administrative Rules

ARM 17.20.1902 Linear facilities — monitoring requirements.

75-20-403. Revocation or suspension of certificate.

Compiler's Comments

1997 Amendment: Chapter 329 throughout section substituted reference to Department for reference to Board; and made minor changes in style. Amendment effective July 1, 1997.

Applicability: Section 26, Ch. 329, L. 1997 provided: "A person who, prior to January 1, 1997, has filed a correct and complete air quality permit application with the department of environmental quality for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20."

1985 Amendment: At beginning of introductory phrase inserted "Following notice and an opportunity for a hearing".

75-20-404. Enforcement of chapter by residents.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Limitation of Court Jurisdiction in Centerline Determination and Eminent Domain — Noncontested Case Procedure: The Legislature did not intend the final electric transmission line centerline determination by the Board of Natural Resources and Conservation (now Board of Environmental Review) to be subject to judicial review, and once the Board sets the specific route, no court has jurisdiction to hear challenges to the location. Through enactment of 75-20-205(2) (now repealed) and 75-20-407, court jurisdiction in eminent domain cases was limited to hearing challenges to the necessity of taking private property. The preponderance of the evidence on 70-30-111 findings that must be proven to the court before a preliminary condemnation order is issued is satisfied by appending to the complaint the Board's certificate of environmental compatibility and public need and the Board's findings of fact, opinion, decision, order, and recommendations. In cases where landowners feel conditions of the certificate were breached, proper remedy lies in a mandamus action under this section. Mont. Power Co. v. Fondren, 226 M 500, 737 P2d 1138, 44 St. Rep. 850 (1987).

Law Review Articles

Attorney Fees: Slipping From the American Rule Strait Jacket, 40 Mont. L. Rev. 308 (1979).

75-20-405. Action to recover damages to water supply.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

75-20-406. Judicial review of decisions.

Compiler's Comments

2021 Amendment: Chapter 324 in (1) in middle of first sentence substituted "department or board" for "board". Amendment effective July 1, 2021.

2005 Amendment: Chapter 337 in (3) near middle of second sentence after "determined" substituted "by the court" for "under 75-1-203". Amendment effective April 21, 2005.

Applicability: Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

2003 Amendment: Chapter 361 in (1) inserted second and third sentences relating to venue; and inserted (3) relating to judicial challenges to a certificate. Amendment effective April 16, 2003.

Preamble: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

Severability: Section 39, Ch. 361, L. 2003, was a severability clause.

Retroactive Applicability: Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

2001 Amendment: Chapter 293 deleted former (3) and (4) that read: "(3) When the applicant is granted a permit or certification, with or without conditions, pursuant to the laws administered by the department and the board and this chapter, the decision may be appealed only in conjunction with the final decision of the board as provided in 75-20-232 and subsections (1) and (2) of this section. If an air or water quality permit or certification is denied by the department or the board, the applicant may:

(a) appeal the denial under the appellate review procedures provided in the air and water quality laws administered by the department and the board; or

(b) reserve the right to appeal the denial by the department or the board until after the board has issued a final decision as provided in 75-20-232.

(4) This section may not be construed to prohibit the board from holding a hearing as provided in this section on all matters that are not the subject of a pending appeal by the applicant under subsection (3)(a)." Amendment effective April 20, 2001.

Saving Clause: Section 15, Ch. 293, L. 2001, was a saving clause.

1997 Amendment: Chapter 329 in (1), at beginning, substituted "A person" for "Any active party, as defined in 75-20-221"; near beginning of (3), after "when the", deleted "board or department conducts hearings pursuant to 75-20-216(3) and 75-20-218 and the" and inserted reference to 75-20-232; in (3)(b) inserted reference to 75-20-232; and made minor changes in style. Amendment effective July 1, 1997.

Applicability: Section 26, Ch. 329, L. 1997 provided: "A person who, prior to January 1, 1997, has filed a correct and complete air quality permit application with the department of environmental quality for a power plant capable of generating less than 150 megawatts is not subject to the provisions of Title 75, chapter 20."

1995 Amendment: Chapter 418 throughout section, after "board" and "department", deleted "of health"; in (3) and (3)(a) inserted "air and water quality"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clause: Section 503, Ch. 418, L. 1995, was a saving clause.

1981 Amendment: Added (3) relating to the applicant's right to appeal a Department of Health or Board of Health final decision denying a certificate; and inserted (4) allowing the Board of Health to hold a hearing on matters not the subject of a pending appeal.

75-20-407. Jurisdiction of courts restricted.

Compiler's Comments

2021 Amendment: Chapter 324 in middle before "under this chapter" substituted "board or department" for "board"; and made minor changes in style. Amendment effective July 1, 2021.

Case Notes

Issuance of Certificate of Environmental Compatibility and Public Need — No District Court Jurisdiction to Determine Public Necessity: Once a certificate of environmental compatibility and public need was issued by the Board of Natural Resources and Conservation (now Board of Environmental Review), the District Court had no jurisdiction to determine the existence of public necessity with respect to a proposed electric transmission line under the Montana Utility Siting Act of 1973 (now the Montana Major Facility Siting Act) since that determination had already been made by the Board pursuant to the Act. Mont. Power Co. v. Fondren, 226 M 500, 737 P2d 1138, 44 St. Rep. 850 (1987).

Limitation of Court Jurisdiction in Centerline Determination and Eminent Domain — Noncontested Case Procedure: The Legislature did not intend the final electric transmission line centerline determination by the Board of Natural Resources and Conservation (now Board of Environmental Review) to be subject to judicial review, and once the Board sets the specific route, no court has jurisdiction to hear challenges to the location. Through enactment of 75-20-205(2) (now repealed) and this section, court jurisdiction in eminent domain cases was limited to hearing challenges to the necessity of taking private property. The preponderance of the evidence on 70-30-111 findings that must be proven to the court before a preliminary condemnation order is issued is satisfied by appending to the complaint the Board's certificate of environmental compatibility and public need and the Board's findings of fact, opinion, decision, order, and recommendations. In cases where landowners feel conditions of the certificate were breached, proper remedy lies in a mandamus action under 75-20-404. Mont. Power Co. v. Fondren, 226 M 500, 737 P2d 1138, 44 St. Rep. 850 (1987).

75-20-408. Penalties for violation of chapter — civil actions to enforce.

Compiler's Comments

2005 Amendment: Chapter 487 in (1) inserted last sentence relating to penalty factors; substituted (1)(c) concerning penalty actions and venue for former (1)(c) that read: "(c) the penalty is recoverable in a civil suit brought by the attorney general on behalf of the state in the district court of the first judicial district of Montana"; in (2) near beginning substituted "purposely or knowingly" for "knowingly and willfully"; in (3) near middle of first sentence after "provisions of this section, it" deleted "may refer the matter to the attorney general who" and in middle after "Montana" inserted "if mutually agreed on by the parties in the action, or in the district court of the county in which the violation occurred or imminent violation will occur"; deleted former (4) that read: "(4) The department shall also enforce this chapter and bring legal actions to accomplish the enforcement through its own legal counsel"; and made minor changes in style. Amendment effective January 1, 2006.

Saving Clause: Section 29, Ch. 487, L. 2005, was a saving clause.

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

75-20-409. Optional annual installments for location of facility on landowner's property.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

75-20-411. Surety bond — other security.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Part 10
Geothermal Exploration

75-20-1001. Geothermal exploration — notification of department.

Compiler's Comments

2021 Amendment: Chapter 324 at beginning of introductory clause and in (5) substituted "department" for "board". Amendment effective July 1, 2021.

Administrative Rules

Title 17, chapter 20, subchapter 2, ARM Geothermal investigation reports.

CHAPTER 25
ALTERNATIVE ENERGY LOANS

Part 1
General Provisions

Part Compiler's Comments

Severability: Section 28, Ch. 591, L. 2001, was a severability clause.

Effective Date: Section 29(2), Ch. 591, L. 2001, provided that this part is effective May 5, 2001.

Part Administrative Rules

Title 17, chapter 85, ARM Alternative energy revolving loan program.

75-25-101. Alternative energy revolving loan account.

Compiler's Comments

2017 Special Session Amendment: Chapter 6 in (2) inserted last sentence providing for legislative fund transfer. Amendment effective December 15, 2017, and terminates June 30, 2019.

Severability: Section 26, Ch. 6, Sp. L. November 2017, was a severability clause.

2009 Amendment: Chapter 489 in (4)(a) at beginning inserted exception clause; inserted (4)(b) concerning loans made with money obtained under the American Recovery and Reinvestment Act of 2009; and made minor changes in style. Amendment effective May 14, 2009, and terminates June 30, 2011.

2005 Amendment: Chapter 110 in (3) in introductory clause near middle after "businesses" inserted "units of local government, units of the university system, and nonprofit organizations" and at end after "15-32-102" deleted "for residences and small businesses"; inserted (3)(c) providing for capital investments for energy conservation purposes; in (4) near middle increased maximum loan amount from $10,000 to $40,000 and at end increased loan repayment period from 5 years to 10 years; and made minor changes in style. Amendment effective March 24, 2005.

75-25-102. Administration of revolving loan account — rulemaking authority.

Compiler's Comments

2009 Amendment: Chapter 489 in (4) deleted former first sentence that read: "The loan repayment period may not exceed 10 years." Amendment effective May 14, 2009, and terminates June 30, 2011.

2005 Amendment: Chapter 110 in (1)(a) near beginning after "businesses" inserted "and nonprofit organizations, criteria for defining capital investments for energy conservation purposes" and near middle after "alternative energy" inserted "and energy conservation"; in (3) in first sentence near beginning after "costs" inserted "charged to the account" and at end after "loans" inserted "or $23,000 a year, whichever is greater" and in second sentence at end substituted "costs" for "fees"; in (4) at end of first sentence increased loan repayment period from 5 years to 10 years; and made minor changes in style. Amendment effective March 24, 2005.

CHAPTER 26
WIND GENERATION AND SOLAR FACILITIES

Chapter Administrative Rules

Title 17, chapter 86, subchapter 1, ARM Solar and wind generation facility decommissioning and bonding.

Part 3
Decommissioning

Part Compiler's Comments

Effective Date: Section 10, Ch. 247, L. 2017, provided: "[This act] is effective on passage and approval." Approved May 3, 2017.

Saving Clause: Section 9, Ch. 247, L. 2017, was a saving clause.

75-26-301. Definitions.

Compiler's Comments

2019 Amendment: Chapter 304 in definition of decommission deleted former (a) that read: "(a) the removal of an aboveground wind turbine tower after the end of a wind generation facility's useful life or abandonment", in current (a) at end substituted "facilities associated with a wind generation or solar facility" for "associated facilities", and inserted (c) regarding removal of a solar facility or aboveground wind turbine tower after the end of the facility's useful life or abandonment; in definition of owner after "wind generation" inserted "or solar"; in definition of repurposed after "wind generation" inserted "or solar"; inserted definition of solar facility; and made minor changes in style. Amendment effective May 7, 2019.

Saving Clause: Section 7, Ch. 304, L. 2019, was a saving clause.

75-26-304. Bond — penalty for failure to submit.

Compiler's Comments

2019 Amendment: Chapter 304 throughout section substituted "wind generation facility or solar facility" for "wind generation facility"; in (1)(a) at beginning substituted "Within 12 months of a wind generation facility or solar facility commencing commercial operation" for "On or before July 1, 2018" and after "owner of a wind generation facility" inserted "or solar facility"; inserted (1)(b) requiring certain facility owners to submit required information on or before July 1, 2020; inserted (1)(c) excusing certain facility owners from resubmitting certain information that had already been submitted; in (2) near beginning after "wind generation" inserted "facility or solar" and near middle after "reclamation of surface lands, or both," deleted "alternative restoration and alternative plans for reclamation"; inserted (3)(b) requiring the department to notify the owner of the facility of any modification and authorizing the owner to appeal a modification by the department; inserted (8)(b) exempting the owner from the requirements of (6) if the owner furnishes certain documents regarding private bonding to the department; in (8)(d) at beginning substituted "the facility" for "the wind generation facility"; in (8)(d)(i) after "January 1, 2018," inserted "is a wind generation facility"; inserted (8)(d)(ii) regarding a solar facility that has less than 2 megawatts in nameplate capacity; in (9)(a) near middle inserted "shall provide notice to the facility owner. If after 30 days the owner of a wind generation facility or solar facility has not submitted a decommissioning bond, the department"; in (11) substituted first and second sentences for former text that read: "Once every 5 years, the owner of a wind generation facility may apply to the department for a reduction in the amount of the decommissioning bond applicable to the wind energy facility"; and made minor changes in style. Amendment effective May 7, 2019.

Saving Clause: Section 7, Ch. 304, L. 2019, was a saving clause.

75-26-308. Wind and solar decommissioning account — use of existing resources.

Compiler's Comments

2019 Amendment: Chapter 304 in (1) and (2) substituted "wind and solar decommissioning account" for "wind decommissioning account"; and made minor changes in style. Amendment effective May 7, 2019.

Saving Clause: Section 7, Ch. 304, L. 2019, was a saving clause.

75-26-309. Release of bond — use of bond by department.

Compiler's Comments

2019 Amendment: Chapter 304 throughout section after "wind generation facility" inserted "or solar facility"; and in (1)(a) at end inserted "in accordance with the plan required in 75-26-304". Amendment effective May 7, 2019.

Saving Clause: Section 7, Ch. 304, L. 2019, was a saving clause.

75-26-310. Rulemaking.

Compiler's Comments

2019 Amendment: Chapter 304 at beginning deleted "On or before January 1, 2018"; in (1) after "the owners of wind generation facilities" inserted "and solar facilities"; in (4) in two places after "owner of a wind generation facility" inserted "or solar facility"; and made minor changes in style. Amendment effective May 7, 2019.

Saving Clause: Section 7, Ch. 304, L. 2019, was a saving clause.

75-26-308. Release of bond — use of bond by department.

Compiler's Comments

2019 Amendment: Chapter 304 throughout section after "wind generation facility" inserted "or solar facility"; and in (4)(a) at end inserted "in accordance with the plan required in 75-26-304". Amendment effective May 7, 2019.

Saving Clause: Section 7, Ch. 304, L. 2019, was a saving clause.

75-26-310. Rulemaking.

Compiler's Comments

2019 Amendment: Chapter 304 at beginning deleted "On or before January 1, 2018"; in (1) after "the owners of wind generation facilities" inserted "and solar facilities"; in (4) in two places after "owner of a wind generation facility" inserted "or solar facility"; and made minor changes in style. Amendment effective May 7, 2019.

Saving Clause: Section 7, Ch. 304, L. 2019, was a saving clause.